United Nations A/CN.9/745

General Assembly

Distr.: General
27 April 2012

Original: English

United Nations Commission on International Trade Law
Forty-fifth session
New York, 25 June-6 July 2012

Report of Working Group I (Procurement) on the work of its twenty-first session (New York, 16-20 April 2012)

Contents

V.12-52975 (E) 020512 030512

I. Introduction

1. At its forty-fourth session, the Commission adopted the UNCITRAL Model Law on Public Procurement (A/66/17, para. 192) and instructed the Secretariat to finalize a draft Guide to Enactment for consideration by the Commission in 2012 (A/66/17, para. 181). It gave guidance to the Secretariat for this task (A/66/17, paras. 181-187).

2. At its nineteenth session, the Working Group recalled that it had deferred a number of issues for discussion in the revised Guide and that decisions on them should be maintained, unless they were superseded by subsequent discussion in the Working Group or Commission. It was also recalled that additional sections addressing issues of procurement planning and contract administration, a glossary of terms and table of correlation with the Model Law were agreed to be included in the revised Guide. The understanding was that, for lack of time, it was unlikely to be feasible to prepare an expanded Guide for implementers or end-users, and thus the revised Guide would primarily be addressed to legislators (A/CN.9/713, para. 139).

3. At that session, the Working Group requested the Secretariat to follow the following guidelines in preparing the revised Guide: (a) to produce an initial draft of the general introductory part of the revised Guide, which would ultimately be used by legislators in deciding whether the Model Law on Public Procurement should be enacted in their jurisdictions; (b) in preparing that general part, to highlight changes that had been made to the Model Law and reasons therefor; (c) to issue a draft text for the revised Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) to ensure that the text of the revised Guide was user-friendly and easily understandable by parliamentarians who were not procurement experts; (e) to address sensitive policy issues, such as best value for money, with caution; and (f) to minimize to the extent possible repetitions between the general part of the revised Guide and article-by-article commentary; where they were unavoidable, consistency ought to be ensured. It was agreed that the relative emphasis between the general part of the revised Guide and article-by-article commentary of the revised Guide should be carefully considered (A/CN.9/713, para. 140).

4. At its twentieth session, the Working Group commenced its work on the elaboration of proposals for the Guide. It confirmed its understanding that the Guide should consist of two parts: the first describing the general approach to drafting the revised Model Law and the second part containing article-by-article commentary, and instructed the Secretariat to revise the proposals relating to the general approach section, and those relating to the provisions of the revised Model Law on challenges and appeals, restricted tendering, request for quotations, request for proposals without negotiation, request for proposals with consecutive negotiations, two-stage tendering, request for proposals with dialogue, competitive negotiations and single-source procurement. The Working Group deferred its consideration of the remaining proposals (A/CN.9/718, paras. 17-136).

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its twenty-first session in New York, from 16 to 20 April 2012. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Brazil, Canada, Chile, China, Colombia, El Salvador, France, Germany, India, Israel, Japan, Kenya, Malaysia, Mexico, Morocco, Nigeria, Philippines, Poland, Republic of Korea, Russian Federation, Senegal, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Angola, Bangladesh, Croatia, Indonesia, Iraq, Kuwait, Panama, Qatar, Samoa, Sweden and Togo.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: European Space Agency (ESA), International Development Law Organization (IDLO) and World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Working Group*: Forum for International Conciliation and Arbitration (FICACIC), New York State Bar Association (NYSBA), the European Law Students' Association (ELSA) and the New York City Bar Association.

9. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)[1]

Rapporteur: Mr. Seung Woo SON (Republic of Korea)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.78);

(b) Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.79 and Add.1-19).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement.
5. Other business.

[1] Elected in his personal capacity.

6. Adoption of the report of the Working Group.

III. Deliberations and decisions

12. At its twenty-first session, the Working Group continued and completed its work on the elaboration of proposals for the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement.

IV. Consideration of proposals for the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

A. Review of provisions for the revised Guide to Enactment (A/CN.9/WG.I/WP.79 and Add.1-19)

13. As a general drafting instruction, it was agreed that the Guide should not cross-refer to any further explanatory materials to facilitate the implementation of the Model Law (which might subsequently be issued by the UNCITRAL secretariat), but that it should be self-contained.

14. As regards document A/CN.9/WG.I/WP.79, it was agreed to replace in the last sentence of paragraph 22 the word "can" with the word "may in some circumstances" and to revise the second sentence of paragraph 52 to note that the economic benefits of e-procurement might exceed 5 per cent.

15. No comments were made as regards document A/CN.9/WG.I/WP.79/Add.1.

16. As regards document A/CN.9/WG.I/WP.79/Add.2, the Working Group agreed:

(a) To delete the discussion of "collusion" in paragraph 16. The discussion of collusion elsewhere in the Guide would explain that collusion was not limited to the absence of competition but also encompassed competition on agreed terms, for example;

(b) To reorder the discussion of competition in paragraphs 16-18 (the general discussion in paragraph 18 would follow the remainder of paragraph 16 to set the explanation of the requirement to "maximize competition" in article 28 (2) of the Model Law into context, in particular noting that this provision constituted a key application of the principle of competition set out in the Preamble); to explain in that section of the Guide and in the commentary to article 28 that in both cases the Model Law promoted the broadest and most rigorous competition appropriate in the circumstances concerned; and to add the words "among other things" in the second sentence of paragraph 17, to emphasize that the reference was to one example of promoting competition only;

(c) To explain in paragraph 20 the historical grounds for referring to "fair, equal and equitable treatment", and to explain that the term conveyed one generic concept.

17. As regards document A/CN.9/WG.I/WP.79/Add.3, the Working Group agreed:

(a) (With reference to footnote 1) To delete the last two sentences in paragraph 8 and to address issues arising from groupings of procuring entities in a new section of the General remarks part of the Guide, to be called "International procurement cooperation" (to be located as part of the Introduction to the Model Law, before or after the discussion of the scope of the Model Law); to discuss in that new section groupings of procuring entities that might be formed not only in the international but also in the national context; to avoid the term consortium as it implied groupings of suppliers; to alert States that issues such as choice of law and applicable law, power of administration, legal responsibility and legal representation, among others, would need to be addressed for such international cooperation to succeed; in drafting such a new section, to cross-refer to article 3; to avoid exceeding the scope of the Model Law but instead to emphasize that its provisions, including the definition of the procuring entity, were included to accommodate procurement by more than one procuring entity;

(b) With respect to paragraph 29 and footnote 2, to delete the reference to "ensure the accuracy" in the last sentence; to focus on the major differences between the two paragraphs of article 5 of the Model Law rather than between the terms "accessible" and "available" (emphasizing that they revolved around the promptness of publication, and the nature and the author of information to be published. In this regard, decisions with precedent value and thus falling within the scope of paragraph 2 of the article might include judicial as well as executive publications, and the executive branch of government would and should not have control over the judicial publications).

18. As regards document A/CN.9/WG.I/WP.79/Add.4, the Working Group agreed:

(a) (With reference to footnote 1) To delete the references to "information systems" in this commentary, which were considered to be outdated; to provide in paragraphs 2-3 of the commentary an updated explanation of the requirement in article 7 (4) for tools for such communications to be "in common use", using the substantive provisions in those paragraphs for that purpose;

(b) In paragraph 6, to replace the phrase "the system has to guarantee" with "the system should guarantee" (i.e. to emphasize that this was a matter of good practice rather than a requirement);

(c) (With reference to footnote 2) That paragraph 12 would refer only to measures that were permissible under the procurement regulations or other laws, and that a cross-reference would be made to the discussion in A/CN.9/WG.I/WP.79 of the benefits and negative economic costs to be taken into account when regulating the socio-economic policies that could be pursued through procurement; and to state that, in formulating these exceptional policies, the State must also consider its obligations under applicable treaties and all consequences, whether intentional or inadvertent (it was suggested that further material, discussing how to explain and justify any discriminatory effect, for example, and some points raised in footnote 2, might be considered at a later date);

(d) In paragraph 19, to delete the words "and should therefore be used by the procuring entity only when necessary"; and to emphasize that while there was no rule limiting the use of pre-qualification or pre-selection under article 49 of the

Model Law, good practice would be not to use either tool absent a reason for doing so;

(e) (With reference to the Guiding Principles on Business and Human Rights (A/HRC/17/31)) In paragraph 22, to include a generic reference to human rights standards as appropriate examples of other standards that enacting States may list in the law or specify in the procurement regulations as a requirement against which the procuring entity would ascertain qualifications of suppliers or contractors;

(f) (With reference to footnotes 3 and 4) To explain in the commentary to article 9 (8)(a)-(c) that "materiality" was a threshold concept; to add an explanation that it referred to omissions or inaccuracies that might affect the integrity of the competition in the circumstances of the procurement concerned; in paragraph 30, to delete the phrase "while conferring an element of flexibility as regards insignificant inaccuracies"; and to ensure that the discussion of materiality in the commentary to article 15 (3) and of this concept in the commentary to article 9 (8)(a)-(c) were not inconsistent;

(g) (With reference to footnote 5) In paragraph 34, to add a cross-reference to the commentary to chapter VII on framework agreements, which would clarify how the requirement for a detailed description would operate in such agreements; and to delete the reference to two-stage tendering;

(h) (With reference to footnote 6) Not to add any further explanation in paragraph 36 on how socio-economic factors are to be addressed in the rules on descriptions;

(i) To revise the drafting of paragraph 38 to make it less obscure, deleting all unnecessary text;

(j) (With reference to footnote 9) In paragraph 41, to delete the second sentence and to reword the third and fourth sentences to read along the following lines: "Accordingly, the Model Law enables the procuring entity to select the successful submission on the basis of the criteria that the procuring entity considers appropriate in the context of the procurement concerned. Paragraphs 2(a)-(c) provide illustrations for such criteria, noting that paragraph 5 requires price to be an evaluation criterion for all procurement";

(k) (With reference to footnote 10) To add a reference in paragraph 46 to the provisions of the revised WTO Government Procurement Agreement (the revised WTO GPA)[2] on offsets and price preference programmes, available as negotiated transitional measures to developing countries, which might assist in understanding how the concepts of "domestic" suppliers and "local content" have been applied in practice;

(l) (With reference to footnote 11) To revise paragraph 46 to make it easier to follow; to include a statement that there were various ways in which margins of preference were applied in practice; and to include cross-references to publicly-available information (such as that annexed to the World Bank

[2] Document GPA/113 of 2 April 2012, available at the date of this report from www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

Procurement Guidelines),[3] but without indicating that any particular approach was preferred by the Model Law or Guide; and to alert enacting States about the risk of inadvertent duplication of measures aimed at achieving the same goal, such as a margin of preference and socio-economic evaluation policies favouring domestic suppliers.

19. As regards document A/CN.9/WG.I/WP.79/Add.5, the Working Group agreed:

(a) (With reference to footnotes 1 and 2) To delete the second and last sentences from paragraph 21; and to emphasize in the paragraph that article 16 required purely arithmetical errors to be corrected;

(b) To delete paragraphs 22 to 27 except for (i) the first two sentences of paragraph 26 and (ii) the first sentence of paragraph 27, which addressed paragraphs (3) and (4) of article 16 respectively;

(c) To focus in paragraphs 21 onwards on the provisions of article 16 rather than on other provisions of the Model Law, such as article 43 (1)(b) and chapter VIII (but to raise relevant issues in the commentary to those parts of the Model Law); to analyse the provisions of the article and their application to various types of procurement and procurement methods (e.g. tendering and other procurement methods); to address various categories of errors (those by suppliers and those of procuring entities, and omissions); to cross refer to the relevant provisions of the WTO GPA to assist in understanding; to clarify the relationship between articles 16 and article 43 (1)(b) of the Model Law; and to alert States that the Model Law and the Guide did not seek to address exhaustively all issues of clarification, errors, omissions and corrections and that some such issues might be regulated in contract law;

(d) To address the issues raised in footnotes 3 and 4 in the context of the commentary to article 43 (1)(b) (see further paragraph 22 below);

(e) (With reference to footnote 6) To retain the commentary to article 17 as drafted, without adding any reference to the form of tender securities (electronic, paper-based, etc.) as suggested in the footnote;

(f) To reformulate the first sentence in paragraph 30 in more neutral terms, and in particular to avoid giving any message that tender securities were necessary or recommended for some types of procurement;

(g) (With reference to footnote 7) To revise the fourth sentence of paragraph 30 to state that a tender security in the context of a framework agreement should be considered as an exceptional measure and might not be advisable, and to note that, in any event, it might not be possible to obtain such a security in framework agreements because of their nature;

(h) To redraft paragraph 33 to state that the law should not discriminate among tender securities on the basis of their issuer and to explain the practical reasons for including provisions in the Model Law on confirming the acceptability of a proposed issuer of a tender security (e.g. to address difficulties in enforcing

---

[3] Available at the date of this report from http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html.

securities issued abroad and uncertainty as to the creditworthiness of foreign issuers);

(i) (With reference to footnote 8) To add in the end of paragraph 34 a sentence addressing the issues raised in the footnote;

(j) (With reference to footnote 9) To provide balanced commentary to article 17 as regards the advantages and disadvantages of tender securities, in particular in the context of participation by small and medium enterprises (SMEs) (for example, in some jurisdictions, tender securities might facilitate SMEs' participation in public procurement by removing any concerns of the procuring entity as regards their qualifications and capacities; in others, the costs of such securities might discourage SME participation); to discuss situations in which tender securities could be considered an excessive safeguard by the procuring entity and, conversely, where they might be justified; and to note that the procuring entity should consider the costs and benefits of requiring a security for each procurement, rather than requiring a tender security as standard practice;

(k) (With reference to footnote 10) Not to add further commentary in paragraph 37 to discourage the use of pre-qualification in open tendering proceedings;

(l) To redraft paragraph 42 and other relevant provisions of the Guide to reflect that the Guide would not contain a glossary, but that a glossary would be issued separately (see further paragraph 36 below);

(m) (With reference to footnote 12) Not to make any changes in paragraph 43;

(n) (With reference to footnote 13) To delete the last two sentences in paragraph 50 and to refer to "reasons" for decisions, rather than to "justifications", throughout the Guide.

20. As regards document A/CN.9/WG.I/WP.79/Add.6, the Working Group agreed:

(a) (With reference to footnote 1) To delete the last sentence in paragraph 3, as suggested in the footnote;

(b) (With reference to footnote 2) To rephrase paragraphs 6 and 7 to avoid referring to the assessment of costs, and to underscore that procedures of the article were aimed at investigating prices, not underlying costs; in this connection to consider deleting the last three sentences in paragraph 7 of the commentary;

(c) To emphasize in paragraphs 6 and 7 that the provisions of the article allowed the investigation of abnormally low submissions on the basis that the procuring entity held concerns as to the ability of the supplier or contractor that presented that submission to perform the procurement contract;

(d) (With reference to footnote 3) To reword the last sentence in paragraph 9 to alert enacting States that they might wish to provide in their procurement law that the procuring entity must reject an abnormally low submission, or to retain flexibility in this regard, as in the Model Law, particularly given that the assessment of whether there was a performance risk was highly subjective;

(e) To update the commentary to article 20 of the Model Law to reflect changes made to that article at the forty-fourth session of the Commission;

(f) (With reference to footnote 4) To add in the commentary to article 21 a reference to the practice in some jurisdictions of defining what would constitute an inducement by reference to a *de minimums* threshold;

(g) (With reference to footnote 5) Not to add any further text in paragraph 16, as suggested in the footnote;

(h) (With reference to footnote 6) To delete the example provided in paragraph 18; to alert enacting States that an unfair competitive advantage was an open-ended concept difficult to define (involving issues of fairness, anti-monopoly legislation and market conditions); to note in particular that the scope of relevant existing definitions varied (e.g. the situation where a supplier employed a former procurement official with specialist knowledge of procedures and organizational structures might be classed as a conflict, as conferring an unfair competitive advantage or both, depending on the definitions involved); in this regard, to acknowledge that an unfair competitive advantage might stem from a conflict of interest but that they were two distinct concepts; to add that the essence of an unfair competitive advantage was that a supplier was in possession of information to which other suppliers had not been given access, or that suppliers might have been treated unfairly by the procuring entity (e.g. a threshold or terms of reference could be set out to favour a particular supplier); to explain in the paragraph that where there were relevant legal definitions of the concepts concerned in an enacting State, they should be disseminated as part of the legal texts governing procurement; to state that where there was no definition, examples of what did and did not constitute practices intended to be covered by the article should be provided (for example, exclusion of a supplier that was involved by the procuring entity in preparing the specifications for a particular procurement as a consultant from the procurement proceedings concerned would be appropriate in most cases while in highly concentrated markets some flexibility might be needed to allow for competition and to avoid a monopolistic situation);

(i) (With reference to footnote 7) Not to add in paragraph 20 a reference to dialogue between the procuring entity and the supplier or contractor concerned in the situations suggested in the footnote;

(j) In paragraph 20, to refer to the "supplier concerned" in the first sentence, rather than to the "alleged wrongdoer";

(k) (With reference to footnote 8) To explain in paragraph 35 that no standstill period was applicable in the context of framework agreements without second-stage competition because the award of contracts under this type of agreement was supposed to be straightforward (since all terms and conditions were agreed upon at the time of the award of the framework agreement);

(l) (With reference to footnote 9) To retain the example in question in paragraph 53; and to redraft the second sentence along the following lines: "Security interests of the enacting State can be broader than national defence. They can include security related to the protection of health and welfare of the State's citizens, for example ...".

21. No changes were made in document A/CN.9/WG.I/WP.79/Add.7.

22. As regards document A/CN.9/WG.I/WP.79/Add.8, the Working Group agreed:

(a) (With reference to footnotes 1 and 2) Not to add further language to paragraphs 19 and 40, as suggested in footnotes 1 and 2, and to delete the example included in paragraph 19, which was considered unnecessary;

(b) In paragraph 40, to clarify that the procuring entity was permitted to take these steps for the purposes of evaluating tenders; as regards terminology, to ensure that the commentary closely tracked the language of the Model Law;

(c) To update the commentary to article 43 in the light of changes made to the article at the forty-fourth session of the Commission;

(d) To align the last sentence in paragraph 41 more closely with the wording in article 43 (1)(b) (as regards the qualifier "to the extent possible");

(e) (With reference to footnote 3) In paragraph 41, to adapt the explanation of the concept of materiality and its impact on the integrity of the competition included in the commentary to article 9 (see paragraph 18 (f) above) to explain minor deviations addressed in article 43 (1)(b); to align the text of paragraph 41 generally with that of article 43 (1)(b); to insert a cross-reference to the commentary to article 16 regarding errors; to ensure consistency in the discussion of related concepts throughout the Guide (articles 9 (8)(b) and 15 (3) as regards materially inaccurate or materially incomplete information, article 16 as regards corrections and substantive changes and article 43 as regards minor deviations, material alterations or departures and corrections to the substance of the tender).

23. As regards document A/CN.9/WG.I/WP.79/Add.9, the Working Group agreed:

(a) (With reference to the issue of objectivity in selection, raised in paragraph 3 (e) of A/CN.9/WG.I/WP.79) To add at the beginning of paragraph 20 that selection on the basis of rotation could also be a relevant method for selecting suppliers; to clarify the reference to "non-selection per se" in that paragraph; to follow the same approach in paragraphs 30 and 59;

(b) To delete the penultimate sentence in paragraph 53;

(c) (With reference to footnote 1) To add the first sentence of the footnote to paragraph 56, and to enhance the clarity of the paragraph as a whole.

24. As regards document A/CN.9/WG.I/WP.79/Add.10, the Working Group agreed:

(a) To note in paragraph 11 that some participants were reluctant to use this method because of elevated risks of corruption and that putting in place the institutional frameworks and safeguards were required to ensure the proper use of this procurement method;

(b) (With reference to footnote 1) To relate the capacity issues discussed in paragraph 17 to all chapter V procurement methods, as suggested in the footnote; and to delete the last sentence in paragraph 17;

(c) (With reference to footnote 2) To delete the reference to favoured suppliers in paragraph 18; to add a reference to the effect that the presence of an independent observer during the proceedings might be a further tool to assist in avoiding corruption and abuse, particularly where delicate issues or highly competitive contracts were involved, but without implying any particular powers; to distinguish such observers from auditors or other oversight personnel, which

considered the procedure after the award of the contract; and to emphasize in this context considerations of confidentiality and that observers should be from outside the procuring entity's structure.

25. As regards document A/CN.9/WG.I/WP.79/Add.11, the Working Group, with reference to footnote 2, agreed to add the first sentence of the footnote to paragraph 20, and not to add any additional points raised in the footnote to the text in that paragraph.

26. As regards document A/CN.9/WG.I/WP.79/Add.12, the Working Group agreed to redraft paragraph 3 (where it referred to the practices of the multilateral development banks (MDBs)) along the lines of a similar comment included in paragraph 53 of document A/CN.9/WG.I/WP.79/Add.9, to highlight that this method had historically been used for the procurement of advisory services, and to avoid giving the impression that the MDBs recommended or required the use of this method.

27. As regards document A/CN.9/WG.I/WP.79/Add.13, the Working Group agreed:

(a) (With reference to footnote 2) To replace the word "permitted" with the word "required" in the first sentence of paragraph 12; and to include in that paragraph a discussion of the potential disadvantages and limited benefits of requiring tender securities in electronic reverse auctions (ERAs), including ERAs as complex auctions and those used as a phase in other procurement methods; to add a cross-reference to the general discussion in the commentary to article 17; to add that the combination of participating bidders and the type of market in which ERAs were appropriate themselves offered an element of security to the procuring entity; and to encourage in the commentary the procuring entity to apply other measures to achieve the desired discipline in bidding;

(b) (With reference to footnote 3) To include in paragraph 35 a cross-reference to the commentary on ensuring objectivity in direct solicitation contained in section A of A/CN.9/WG.I/WP.79/Add.9, but not to summarize that commentary in that paragraph, and to ensure consistency where examples of methods for doing so were set out.

28. As regards document A/CN.9/WG.I/WP.79/Add.14, the Working Group agreed:

(a) (With reference to footnote 1) To delete the last sentence in paragraph 8, and to make any necessary consequential amendments to the rest of that paragraph;

(b) (With reference to footnote 2) To delete the text in square brackets in paragraph 9;

(c) (With reference to footnote 3) To delete paragraph 19, and to add a final sentence into paragraph 18 explaining the consequences of suspension and the differences between suspension and termination of the auction;

(d) (With reference to footnote 4) To retain the text of the commentary in paragraph 20 onwards as drafted, without reflecting any of the additional points raised in the footnote.

29. As regards document A/CN.9/WG.I/WP.79/Add.15, the Working Group agreed:

(a) To add in the commentary to article 62 (4)(a)(ii) that there might be exceptional situations in which only one supplier was capable of meeting the needs of the procuring entity, and in such a case, there would be no second-stage competition;

(b) To ensure consistency in drafting paragraph 8 among the various language versions;

(c) To clarify in paragraph 8 (c) the reference to "equivalent", for example by replacing the existing references to "most advantageous submission, or lowest-priced submission, or equivalent" with a reference to the "successful submission";

(d) To revise the second sentence of paragraph 30, and to emphasize that the notion of a maximum duration was aimed in particular at avoiding repeated extensions of closed framework agreements and that a maximum duration was to be interpreted to include both the initial duration and any extensions, excluding however extensions that might arise as a result of suspension of the operation of a framework agreement;

(e) To include a discussion in the introductory commentary to framework agreements of how the Model Law's provisions in chapter VII could operate to mitigate the risks of creating oligopolies; and to include a cross-reference to the discussion in the General remarks section of the Guide on ensuring appropriate coordination between the competition and procurement authorities in enacting States.

30. As regards document A/CN.9/WG.I/WP.79/Add.16, the Working Group agreed:

(a) (With reference to the commentary to article 58) To ensure that the text made it clear that the commentary addressed the first phase of the procurement procedure, i.e. the award of the framework agreement, and not the award of procurement contracts under it, and to ensure that this distinction was respected throughout the commentary to provisions of the Model Law on framework agreements;

(b) (With reference to footnote 1) To delete the first part of the penultimate sentence of paragraph 3, to avoid confusing the rationale for awarding framework agreements (e.g. security of supply) with the rationale for holding dialogue-based procurement methods (the need to handle complex procurement); to include examples provided to the Working Group of awarding framework agreements using dialogue-based approaches, such as for procurement of satellite equipment and specialized communication devices for law enforcement agencies; and to replace the final sentence of paragraph 3 with a cross-reference to the detailed discussion of the issues raised in that sentence located in document A/CN.9/WG.I/WP.79/Add.15;

(c) To delete the second sentence of paragraph 8 and to make consequential changes throughout that paragraph; to replace the words "should" with "may" in the final sentence of the paragraph, to reflect that estimates would not always be available at the outset of the procurement proceedings; and to explain that the policy

goal was to ensure the maximum accuracy of the information provided to suppliers, in order to elicit their best offers;

(d) (With reference to footnote 2) To add a comment at the beginning of paragraph 10 to encourage procuring entities at the outset of the procedure to consider whether or not setting a minimum number of parties to the framework agreement was appropriate; in order to balance the need for certainty where a minimum number was imposed with the operational needs of the procuring entity, to revise the final sentence to provide that where the procuring entity envisaged the possibility that a stated minimum number of parties might not be achieved, it should specify in the solicitation document the steps it would then take, which might include the possibility to conclude the agreement with a lower number of suppliers or to cancel the procurement;

(e) (With reference to footnote 3) Not to add any further discussion in paragraph 18, as suggested in the footnote, and to remove the words "minimum or" from the final sentence of that paragraph;

(f) (With reference to footnote 4) Not to add any further discussion in paragraph 35, as suggested in the footnote; to move the discussion of changes other than to the relative weights in the evaluation criteria to the commentary to article 63, which addressed changes during the operation of the framework agreement; as article 63 appeared to confer a greater flexibility to make changes in framework agreements generally than article 59 (1)(d)(iii) did as regards relative weights of evaluation criteria, to address the issues in each article separately.

31. As regards document A/CN.9/WG.I/WP.79/Add.17, the Working Group agreed:

(a) (With reference to footnote 1) To include a discussion of electronic catalogues (e-catalogues) in the Guide commentary to article 60, as suggested in the footnote (the topics to be addressed in that discussion could include whether e-catalogues would operate under open and closed framework agreements, or only under open framework agreements, how the e-catalogues would operate as initial or indicative submissions, who should manage the content of the e-catalogues (a third party service provider, the procuring entity or a supplier), how changes to initial or indicative submissions should be addressed, how the second stage of the procedure would operate, and the duration of the arrangement);

(b) (With reference to footnote 2) To simplify the first sentence of paragraph 5 to refer to all procuring entities that could use a framework agreement, noting that the manner in which the transparency requirements in article 60 (3)(a) were implemented was a matter for the procuring entity to decide, taking the approach that was the most appropriate in the circumstances concerned (e.g. via a website containing relevant names and addresses); where there was a centralized purchasing agency, that agency might be authorized to undertake the procurements concerned in its own name (as a principal), without therefore needing to publish details of its own client entities; were the agency operating as an agent, however, the details would nonetheless be required to be published;

(c) (With reference to footnote 3) To include in paragraph 7 a cross-reference to the commentary on ensuring objectivity in direct solicitation contained in section A of A/CN.9/WG.I/WP.79/Add.9, but not to summarize that

commentary in that paragraph, and to ensure consistency where examples of methods for doing so were set out;

(d) In paragraphs 7 and 8, to explain that the Model Law did not require an evaluation of indicative submissions (though an examination was required), but that the procuring entity could engage in such an evaluation if it so desired; to delete the second part of the second sentence in paragraph 8, starting with the words "so that the initial submissions …"; and to ensure consistency among language versions;

(e) (With reference to footnote 4) Not to add in paragraph 21 a reference to paper-based publication, as raised in the footnote;

(f) To revise the penultimate sentence of paragraph 21 to reflect the requirement of the Model Law that all procuring entities that might use the framework agreement must be listed in the invitation to become a party to the open framework agreement (article 60 (3)(a)), by introducing a cross-reference to the relevant paragraph of the Guide (see paragraph 31 (b) above), while noting that there is no such requirement as regards suppliers parties to the framework agreement; to analyse nevertheless the provisions of article 23 (1) in the context of open framework agreements;

(g) (With reference to footnote 5) To align the commentary in paragraph 26 with the discussion of standstill periods in framework agreements under article 22 (see paragraph 20 (k) above);

(h) In paragraph 36, to replace the words "will commonly be framed" with "may be framed" in the first sentence, and to add the words "where appropriate" after the words "with minimum technical requirements" in that sentence.

32. As regards document A/CN.9/WG.I/WP.79/Add.18 the Working Group agreed:

(a) (With reference to footnote 1) Not to add in paragraphs 29-32 any further discussion of the different approaches to suspension in proceedings before a procuring entity and before an independent body;

(b) To clarify the language in paragraphs 14, 23 and 30, in particular by referring in the end of paragraph 23 to post-contract formation disputes and by aligning the wording in paragraph 30 as regards wasting costs with the relevant wording found in paragraph 32 of document A/CN.9/WG.I/WP.79/Add.18 ("from continuing down a non-compliant path, risking wasting time and probably costs").

33. As regards document A/CN.9/WG.I/WP.79/Add.19, the Working Group agreed:

(a) (With reference to footnote 1) To describe in the Guide various options available under the Model Law as regards sequencing applications and appeals and explain which option triggers which steps (reference in this regard was made to article XVIII of the revised WTO GPA);

(b) To clarify in the end of paragraph 29, with reference to paragraphs 4, 5 and 7 of article 66, that although the competence of the procuring entity to entertain the application ceased where a subsequent application was filed with an independent body, the procuring entity might be able to continue with corrective action in the procurement proceedings concerned, provided that such action did not contravene any order of the independent body or other provisions of

domestic law; and to explain that where an application to an independent body was limited in scope, the precise implications of that submission for the pre-existing application before the procuring entity would be a matter of domestic law;

(c) (With reference to footnote 3) To explain in paragraph 41 that paragraph 2 (c) of article 67 gave an option to an enacting State to allow the independent body to hear a challenge of a decision to cancel the procurement out of time where public interest considerations so justified, and that, in some jurisdictions, this type of challenge was restricted to applications before a court, precisely because the issues raised were likely to concern questions of the public interest; to note that where the enacting State conferred such a right on the independent body, the text in square brackets referring to a decision to cancel the procurement in paragraphs 2 (b)(ii) and 2 (c) of the article would need to be retained;

(d) (With reference to footnote 4) To explain in paragraph 59 that the reason for conferring an option to permit the independent body to hear disputes arising after the procurement contract had entered into force, in paragraphs 9 (c) to (f) of article 67, was to allow enacting States to reflect their legal tradition regarding competence in such matters; as there were many square brackets in this part of the text, to explain the reason for each pair of square brackets (such as that the actions described in the text in square brackets might be reserved for applications before a court in some jurisdictions); and to cross-refer to the explanation in the Guide on the general use of square brackets in the Model Law;

(e) (With reference to footnote 5) To retain paragraph 61 as drafted, with the addition of a statement that issues of quantification were matters of the applicable domestic law, but that regulations might also address issues specific to the procurement context;

(f) (With reference to footnote 6) To note that a "governmental authority" as described in paragraph 65 included entities that were entitled to operate and/or use a framework agreement, as suggested in the footnote, subject to the requirement in article 68 (1) for those entities to have an interest in the challenge proceedings at the relevant time; to include a cross-reference to the commentary on users of framework agreements in chapter VII; and to add that a party to the framework agreement whose interests would or could be affected by the challenge proceedings would most probably be the lead purchasing entity rather than other entities that were parties to the framework agreement at the outset of the procurement proceedings;

(g) To clarify throughout the commentary to the chapter the provisions of the Model Law to which the commentary in the Guide related;

(h) To revise the commentary to the provisions of chapter VIII in the light of changes made at the forty-fourth session of the Commission.

34. The Working Group requested the Secretariat to ensure consistency in the use of terminology throughout the Guide (for example, as regards "consultancy services" and "advisory services") and replace prescriptive wording in the Guide with a discussion of the main issues arising and policy options to address them.

B. Concluding remarks

35. The Working Group recommended that the Commission adopt the substance of those sections of the Guide discussed above and as set out in document A/CN.9/WG.I/WP.79 and its addenda, with the amendments proposed and recorded in this report. The Working Group noted that the Commission would not further consider the text of the Model Law itself, since that text had been adopted at its forty-fourth session.

36. It was further noted that a chapter of the Guide discussing revisions from the 1994 text would be made available for the forty-fifth session of the Commission (New York, 25 June-6 July 2012). The Secretariat was instructed, in preparing that chapter, to bear in mind that the decision of the Commission and General Assembly resolution adopting the Model Law encouraged enacting States to use the 2011 Model Law, but that some States might choose to make more limited amendments to existing laws, drawing, among other things, on the commentary on the revisions to the 1994 Model Law in that chapter. The Working Group also noted that the Guide would not contain a glossary of terms, but that such a document would be produced by the Secretariat in due course; it was intended that the glossary and any other materials produced to assist in the enactment and use of the Model Law would be reviewed periodically and, should amendments be merited, they would be presented to the Commission for its consideration from time to time.

37. The Working Group heard presentation by a representative of WTO as regards the revised WTO GPA, and a summary of the main principles and provisions addressed in that text.

V. Other business: future work in the area of public procurement

38. The Working Group recalled the discussion at the forty-fourth session of the Commission as regards measures to be taken to ensure regular monitoring of developments in the area of public procurement (A/66/17, paras. 186-187). Developments as regards such issues as sustainable procurement and the use of environmental standards, and rules of origin, were highlighted as having a significant potential implication on the use of the Model Law.

39. The Working Group considered areas and topics for future work in the light of the mandate of the Commission. While it was understood that it was for the Commission to decide which areas of work and topics required attention by UNCITRAL and to set their relative priority, delegations shared the view that the work on harmonizing the provisions governing the procurement-related aspects of the UNCITRAL instruments on privately financed infrastructure projects[4] (PFIPs) with the Model Law was necessary. The point was made that during that work, the Working Group might: (i) consolidate the UNCITRAL PFIPs instruments; (ii) identify other topics that needed to be addressed in those instruments (such as natural resource concessions, which were sometimes granted as reimbursement or

[4] Available at the date of this report from www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

compensation for private infrastructure development, oversight, promoting domestic dispute resolution measures rather than using international dispute resolution bodies as the first port of call, and defining the public interest for the purposes of such transactions); (iii) recommend to the Commission broadening the scope of the instruments by covering forms of public-private partnerships not currently covered; (iv) recommend to the Commission that UNCITRAL might prepare a model law in that area; and/or (v) recommend to the Commission addressing aspects of public procurement that were not addressed in the Model Law, such as the contract administration phase of procurement, suspension and debarment, rules on corporate compliance and the sustainability and environmental issues mentioned above. In this regard, it was pointed out that the PFIP Legislative Guide contained discussion on a number of important issues that were not reflected in the recommendations of that Guide or in any of the PFIP model legislative provisions.

40. It was considered that the mandate to be given to the Working Group would need to be sufficiently delineated, especially if it were decided that work was needed in the area of public-private partnerships, which was considered to be a broad topic. For example, work on concessions might be considered feasible in the light of their narrower scope as compared with public-private partnerships as a whole, of the widespread use of concessions and because UNCITRAL might be able to benefit from work already undertaken on this subject at the regional level.

41. The possibility of convening a colloquium in the area of public procurement and related areas was highlighted through which topics and issues surrounding each topic for future work by UNCITRAL could be identified and the scope of any such future work clarified.