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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-4	2
II. Draft provisions to enable the use of framework agreements in public procurement under the Model Law	5-40	2
A. Terminology	5	2
B. Scope of the draft provisions and approach to drafting	6-8	3
C. Location of the draft provisions.	9	4
D. Proposed draft text for the revised Model Law – Models 1 and 2 framework agreements.	10-36	4
Commentary		
E. Alternative approach to drafting	37-40	16



I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 65 of document A/CN.9/WG.I/WP.49, which is before the Working Group at its eleventh session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of framework agreements, in public procurement.

2. Such use was included in the topics before the Working Group at its sixth to tenth sessions. At its tenth session, the Working Group requested the Secretariat to prepare drafting materials for consideration at the eleventh session, in the form of broad enabling provisions that would accommodate any type of framework agreements. This note has been prepared pursuant to that request.¹

3. This note and addendum thereto draw on the consideration of framework agreements and dynamic purchasing systems set out in A/CN.9/WG.I/WP.44 and Add.1, and should be read together with those documents. Section II of this note sets out draft provisions for the use of framework agreements. Section III sets out draft provisions for the use of dynamic purchasing systems. Section IV sets out some considerations for consequential changes to the existing provisions of the Model Law to accommodate the use of framework agreements and dynamic purchasing systems. For sections III and IV, see the addendum A/CN.9/WG.I/WP.52/Add.1.

4. It is recalled that a framework agreement is a transaction to secure the supply of a product or service over a period of time. Further details are set out in paragraphs 3-6 of A/CN.9/WG.I/WP.44. It is also recalled that a dynamic purchasing system, as referred to in the European Union procurement directives,² is a totally electronic process permitted for making commonly used purchases. Further details are set out in paragraph 35 of A/CN.9/WG.I/WP.44/Add.1.

II. Draft provisions to enable the use of framework agreements in public procurement under the Model Law

A. Terminology

5. Questions of terminology and interpretation of terms are addressed in paragraphs 7-9 of A/CN.9/WG.I/WP.44. The Working Group is requested to consider

¹ A/CN.9/615, paras. 11 and 79 to 81. The Working Group noted in addition that the main issues of substance to be considered include whether specifications can be altered within the operation of the framework agreements, and whether suppliers not parties to the original framework agreement could join it after the conclusion of the master contract.

² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, both available as of the date of this note at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

the name that the Model Law should use to refer to “framework agreements” (that is the term used in the English language version of the European Union Procurement Directives,³ and in some domestic systems). Alternatives considered in the paragraphs referred to above include terms that are not closely identified with any particular system such as “periodic purchase arrangement”, “recurrent purchase arrangement”, “periodic requirements arrangement” or “periodic supply vehicle”. Pending a decision on this question, and consistent with previous notes on the topic, this note will refer to “framework agreements”.

B. Scope of the draft provisions and approach to drafting

6. This section addresses two models of framework agreements:

(a) “Model 1” framework agreements, which are very similar to traditional procurement contracts. They can be concluded with one or more suppliers or contractors, and establish the specification for the procurement and all the terms and conditions of the procurement. Purchase orders are placed under them on the basis of those specifications and fixed terms and conditions of the procurement without any further evaluation or competition. Thus the only difference of this type of framework agreements as compared with traditional procurement contracts is that the items are procured in batches, under purchase orders, over a period of time; and

(b) “Model 2” framework agreements are agreements concluded with more than one supplier or contractor (the first stage of the procurement), which set out the specification for the procurement, and the main terms of the procurement. They may leave some terms of the procurement undecided or subject them to further evaluation (these terms could include price, and normally include quantities and delivery times). A further evaluation or competition among the suppliers or contractors that are parties to the framework agreement is required to select the suppliers or contractors to fulfil each purchase order placed under the framework agreement (the second stage of the procurement). Although in theory framework agreements of this type could also be concluded with one supplier that would be invited to improve its offer for a particular purchase order, commentators have indicated that the risk of abuse is significant and therefore single-supplier framework agreements of this type have not been provided for in this note.

7. In the draft provisions contained in this section, it is the purchase orders issued under both Models of framework agreements, and not the framework agreements themselves, that constitute procurement contracts.^{4,5} This approach allows the

³ Ibid.

⁴ The requirements for the formation of a binding contract are outside the scope of the Model Law. Nevertheless, article 2 (g) of the Model Law provides the following definition of the procurement contract: “‘Procurement contract’ means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings.” Other provisions of the Model Law (see in particular articles 34 and 36) indicate that only when all terms and conditions are set and the suppliers are selected can a procurement contract come into force. Therefore, Model 1 framework agreements could (and perhaps should) be construed as procurement contracts as defined in article 2 (g) of the Model Law and within the terms of current article 36 (1) and (4). As regards Model 2 framework agreements, although it is not precluded in some jurisdictions that an agreement without all terms fixed could be construed as a contract, under the Model Law, Model 2 framework agreements, which subject some or all

regulation of both Models in a single set of provisions (see subsection D below) and thus achieves:

(a) Consistency in regulation and avoidance of repetitive listing of some considerations that are applicable to both Models; and

(b) The continuing application of the Model Law's transparency and objectivity provisions, and of other safeguards, until the placement of the purchase orders, i.e., for all phases up to the award of procurement contracts based on the framework agreement.

8. This approach also alleviates the need to amend a number of provisions throughout the Model Law so as to accommodate framework agreements within existing procurement methods. The relevant provisions of the existing Model Law are made applicable to framework agreements through cross-references. Where necessary, derogations from those provisions are provided for. For an alternative approach to drafting, see subsection E below.

C. Location of the draft provisions

9. Pending the Working Group's consideration of the structure of the revised Model Law, and as to whether framework agreements could result from procurement proceedings by means of any procurement method envisaged under the Model Law, the provisions for framework agreements are presented in this note as three draft articles to be included in a composite draft section on framework agreements, located in Chapter V (following the procedures for the conduct of electronic reverse auctions).⁶ The draft articles will be finally numbered once the structure of Chapter V is finalized.

D. Proposed draft text for the revised Model Law – Models 1 and 2 framework agreements

10. The Working Group may wish to recall its request to the Secretariat that the provisions be drafted so as to provide appropriate safeguards including as against collusion and anti-competitiveness.⁷ The Working Group may also wish to consider the observations of commentators that true competition when issuing purchase orders under a Model 2 framework agreement may be difficult to achieve.⁸ Therefore, the draft provisions below draw on systems for Model 2 framework

terms and conditions to further evaluation, are not procurement contracts *strictu sensu*.

⁵ If framework agreements are treated as procurement contracts, the issue of purchase orders would fall under the contract administration stage and thus outside the scope of the Model Law. The Working Group, at its previous sessions, considered whether the scope of the Model Law should be expanded to cover also contract administration stage. No consensus has been reached on that issue; however, the prevailing view has been so far that such an expansion would be undesirable. See A/CN.9/590, para. 13, and A/CN.9/595, paras. 80-86.

⁶ The Working Group may consider that framework agreements are techniques that can be applied in various procurement methods, rather than a procurement method per se. This consideration applies also to electronic reverse auctions (see A/CN.9/WG.I/WP.51, paras. 3-5).

⁷ A/CN.9/615, para. 81.

⁸ See, further, A/CN.9/WG.I/WP.44/Add.1, paras. 41 and 42.

agreements that envisage the competition at both stages of the procurement proceedings, i.e. for the conclusion of the framework agreement and for the award of procurement contracts under the framework agreement,⁹ rather than on systems that envisage the main competition at the second stage, without any meaningful competition at the first stage (i.e. for conclusion of a framework agreement itself). Also recalling that there may be risks to competition in operating a framework agreement for an extended period of time, the provisions draw on systems that limit their duration.¹⁰ The main sources are therefore the European Union public procurement directive 2004/18/EC (articles 1 (5) and 32) (hereinafter “the EU Procurement Directive”), and the applicable provisions of the current Model Law:

“Section [...]. Framework agreements

Article [51 octies]. General provisions

(1) A procuring entity may enter into a framework agreement with one or more suppliers or contractors [, the aggregate value of which is anticipated to exceed [*the enacting State includes a minimum amount*] [but not to exceed [*the enacting State includes a maximum amount*] [the amount set out in the procurement regulations]].

(2) A framework agreement shall set out the terms and conditions upon which suppliers or contractors are to supply the goods, construction and services, and the procedures for the award of procurement contracts under the framework agreement. A framework agreement is not a procurement contract within the meaning of article 2 (g) of this Law.

(3) If the terms and conditions of the framework agreement provide for a competitive procedure for the award of procurement contracts under the framework agreement, the procuring entity shall ensure that the number of suppliers or contractors that are parties to the framework agreement is sufficient to secure effective competition when procurement contracts under the framework agreement are awarded.

(4) A framework agreement shall be concluded for a given duration, which is not to exceed [...] years [, save in exceptional cases, by reference to the goods, services or construction procured under the framework agreement, for no longer than [...] years. The procuring entity shall include in the record required under article 11 of this Law a statement of the grounds and circumstances on which it relied to justify [the extension of the duration of the framework agreement] [the longer duration of the framework agreement.]]

⁹ In Model 1 framework agreements, there is no further competition after the first stage between the suppliers or contractors, but the procuring entity is obliged to select the tender or other submission that is the lowest price or lowest evaluated tender or equivalent at the second stage.

¹⁰ See, further, A/CN.9/WG.I/WP.44, paras. 16 and 17.

Commentary and issues for discussion in the Guide to Enactment

Paragraph (1)

Joint purchasing

11. To enable a procuring entity to group its procurement requirements to take advantage of bulk purchasing discounts, either by procuring together with other procuring entities or through a central purchasing entity,¹¹ the definition of a procuring entity in article 2 (b) of the Model Law needs to be amended. The amended wording is suggested below:

“‘*Procuring entity*’ means:

Option I

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, either alone, together with other procuring entities [or through [an enacting State may insert a reference here to a central purchasing entity]], except ...;

(and)

Option II

Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, either alone, together with other procuring entities [or through [an enacting State may insert a reference here to a centralized purchasing entity]], except ...;”

Conditions for the use of framework agreements

12. Paragraph (1) includes optional text for the enacting State to specify the minimum and maximum anticipated size of procurement for which framework agreements may be suitable, either in the Model Law text or in regulations. Alternatively, the issue could be addressed in the Guide to Enactment. The Working Group may wish to consider whether such a provision is desirable (to promote cost-effectiveness and avoid over- or inappropriate use of the procedure) together with the question of which procurement methods should be permitted to lead to a framework agreement, as discussed in paragraphs 18 and 19 below.¹²

13. The Working Group may also wish to consider that the Guide should elaborate on the effective and appropriate use of framework agreements, perhaps including a list of generic procurement that would be suitable for procurement in this fashion and some case studies. Framework agreements may be less suitable for large

¹¹ This would also allow for the entity concluding a framework agreement not to be the procuring entity awarding the procurement contracts based on that framework agreement (for example, in the case of the purchase of school books from publishers selected by an education ministry, followed by purchases made by the schools districts or schools themselves, or a similar structure for pharmaceutical products for hospitals).

¹² If the Working Group considers that a minimum and maximum estimated amount for purchases for the use of a framework agreement should be included, the question of price inflation could also be addressed, through the provision of an index or similar calculation mechanism.

investment or capital contracts, for very technical or complex items, and more complex services procurement, topics that could also be discussed in the Guide.

Paragraph (2)

14. The wording complies with the approach to drafting explained in paragraph 7 above.¹³ The provisions in this and subsequent articles according to the context refer to the award of procurement contracts under both Model 1 and Model 2 framework agreements.

Paragraph (3)

15. The text reflects the practice that framework agreements are commonly concluded with more than one supplier. To ensure effective competition, the Working Group may consider that a Model 2 framework agreement should be awarded to a minimum number of suppliers. The EU Procurement Directive requires the equivalent minimum number to be three. Alternatively, and considering that the risk of collusion among low numbers of suppliers may exist, the Working Group may wish to consider a more general requirement set out in the draft article above to ensure effective competition, consistent with the approach taken in drafting similar provisions related to electronic reverse auctions.¹⁴

Paragraph (4)

16. Framework agreements are closed systems, meaning that no supplier or contractor may be awarded a procurement contract under the framework agreement without being party to the framework agreement. They are closed to other suppliers for the period of their duration. Paragraph (4) seeks to address the concerns that have been voiced about this potentially anti-competitive feature of framework agreements by limiting their duration (see, further, paragraphs 16-18 of A/CN.9/WG.I/WP.44 for a discussion of those concerns). The Working Group's attention is drawn to provisions of the EU Procurement Directive that limit the duration of frameworks to four years in normal circumstances (exceptions are permitted with appropriate justification). The Working Group may wish to consider inserting the maximum length of framework agreements in the text of the Model Law, rather than leaving the matter to procurement regulations or other rules. The Working Group may also wish to consider whether an explicit reference to an extension in the text may be seen as inviting exceptions by legislation.

17. The issue of the duration of framework agreements is closely linked to the issue of the procuring entity's ability to purchase outside the framework agreement, discussed in paragraphs 24-26 below in conjunction with draft article 56 decies (1). The Working Group may therefore wish to consider both issues together.

Article [51 novies]. Conclusion of framework agreements

(1) Where a procuring entity intends to enter into a framework agreement, it shall follow the procedures of this Law applicable to the procurement method chosen for solicitation of tenders, proposals, offers or quotations (collectively

¹³ See also footnote 4, *supra*.

¹⁴ See in document A/CN.9/WG.I/WP.51, articles 22 bis and 51 quinquies and commentaries thereto.

referred to as “submissions” in this section), so as to select the supplier(s) or contractor(s) with which it will conclude the framework agreement.

(2) When first soliciting the participation of suppliers or contractors in the procurement proceedings, the procuring entity shall specify all information required for the chosen procurement method under this Law, except to the extent that those provisions are derogated from in this article, together with the following information:

- (a) A statement that the procurement will involve a framework agreement;
- (b) The nature, estimated quantity and desired place and time of delivery, of the purchases envisaged under the framework agreement;
- (c) The number or the minimum and maximum number of supplier(s) or contractor(s) to be parties to the framework agreement;
- (d) The criteria to be used by the procuring entity in the selection of the supplier(s) or contractor(s) with which it will enter a framework agreement, including their relative weight and the manner in which they will be applied in the selection, and whether the selection will be based on lowest price or lowest evaluated submission;
- (e) If the procuring entity intends to enter into a framework agreement with more than one supplier or contractor, that the supplier(s) or contractor(s) selected for the framework agreement will be ranked according to the selection criteria specified;
- (f) The terms and conditions of the framework agreement upon which supplier(s) or contractor(s) are to supply the goods, construction and services, including the duration of the framework agreement and:
 - (i) The procedure for the award of procurement contracts on the basis of the framework agreement, in particular whether a further competition will be held;
 - (ii) If further competition for the award of procurement contracts is to be held among suppliers or contractors parties to the framework agreement, the criteria for evaluating the submissions during that competition, their relative weight, the manner in which they will be applied in the evaluation of the submissions, and whether the award of procurement contracts will be based on lowest price or lowest evaluated submission; and
 - (iii) If an electronic reverse auction will take place, in addition information referred to in article [cross-reference to the relevant provisions on electronic reverse auctions];
- (g) Whether a written framework agreement will be required and the manner of entry into force of the framework agreement.

(3) Unless the procuring entity rejects some or all submissions under articles [12, 12 bis, other cross-references] of this Law, the procuring entity

shall select the supplier(s) or contractor(s) with whom to enter into the framework agreement on the basis of the selection criteria to be specified under paragraph (2) (d) above, and shall promptly notify the selected supplier(s) or contractor(s) of their selection and, where relevant, their ranking.

(4) The framework agreement, on the terms and conditions of the selected submission(s) comes into force as specified in accordance with the requirements of paragraph (2) (g) above.

(5) The procuring entity shall promptly publish notice of the award of the framework agreement, in any manner that has been specified for the publication of contract awards under article 14 of this Law.

Commentary and issues for discussion in the Guide to Enactment

Paragraph (1)

18. Paragraph (1) permits framework agreements to be concluded with one or more suppliers or contractors following the procurement methods specified in the Model Law. Since one concern that arises in framework agreements is the possible restriction of competition during their operation, the Working Group may consider that a framework should normally be concluded only after fully open procurement proceedings, so as to ensure rigorous competition at that first stage of the procurement proceedings. On the other hand, oft-cited beneficial use of framework agreements include the ability to protect sources of supply in limited markets, and the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services, for which open tendering procurements may not be cost-effective.¹⁵

19. If the Working Group considers that framework agreements may result from procurement proceedings by means of any procurement methods specified in the Model Law (including the principal method for procurement of services, two-stage-tendering, restricted tendering, request for proposals, competitive negotiation, and request for quotations, though perhaps excluding single-source procurement), the Working Group may wish to provide guidance in the Guide regarding the types of procurement that are suitable for each procurement method, and that the Guide should stress the need for the most competitive process in the circumstances. The Working Group may also wish to consider whether two-stage tendering, which is normally used for very complex or large capital procurement, would be suitable.

Paragraph (2)

Transparency provisions

20. The paragraph intends to achieve the following objectives: first, to apply the main transparency requirements for the procurement method chosen to select the suppliers or contractors for the framework agreement (such as those set out in articles 25, 27, 37 and in various articles in Chapter V, and the provisions of proposed article on communications in procurement proceedings being considered

¹⁵ Other examples include purchase of coal, crude oil, drugs and textbooks, in each case with appropriate safeguards (including quality and competition requirements).

by the Working Group);¹⁶ secondly, to set out deviations from those requirements in the light of the specific requirements of the framework agreements (see, for example, draft article 51 novies 2 (b) that refers to estimated quantities as compared to article 27 (d), and draft article 51 novies 2 (d), (f) and (g) that supersede articles 27 (e), (f) and (y)); and thirdly, to add other transparency-related requirements specific to framework agreements. The Working Group may consider this a more efficient method of drafting rather than amending other provisions of the Model Law that may be applicable (see also the drafting approach in this note explained in paragraph 8 above).

Selection criteria

21. Subparagraphs (d) and (f)(ii) draw on article 27 (e) of the Model Law that requires the solicitation documents for tendering proceedings to specify: “The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34 (4)(b), (c) or (d) and the relative weight of such criteria”. Equivalents to this requirement are found for other procurement methods. Requirements for selection criteria in tendering proceedings are found in article 34 (4)(b), which *inter alia* states that the “criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable”. There is no equivalent to these requirements for other procurement methods. The Working Group may wish to consider whether (to enhance objectivity and transparency) some or all of the objectivity requirements contained in article 34 (4)(b) should be set out in subparagraphs (d) and (f)(ii) for framework agreements above, by adding the following or similar text: “the criteria, which, to the extent practicable, shall be objective and quantifiable, and shall be given a relative weight or be expressed in monetary terms wherever practicable”. Alternatively, or additionally, the Working Group may consider that there should be transparency and objectivity requirements in the Model Law regarding selection criteria for all procurement methods (including framework agreements), in addition to the requirements for the solicitation documents or their equivalent as regards selection criteria. Finally, the Working Group may wish to consider whether the use of a margin of preference for framework purchasing would be suitable.

Paragraph (3)

22. The paragraph draws on articles 34 (4)(b) and 36 (1) of the Model Law. The cross-references currently in square brackets will be to provisions of the Model Law that allow procuring entity to reject tenders, proposals, offers, quotations or bids (see, for example, articles 12 and 15). The reference to article 12 bis is a reference to the draft article on rejection of tenders, proposals, offers, quotations or bids on the basis that they are abnormally low, proposed for consideration by the Working Group at its eleventh session.¹⁷

¹⁶ See A/CN.9/WG.I/WP.50, draft article 5 bis, following para. 4.

¹⁷ *Ibid.*, paras. 43-49.

Paragraph (4)

23. Paragraph (4) should be read together with paragraph (2) (g) of the draft article above. The paragraph draws on the approach taken in article 13 (2) of the Model Law as regards the manner of entry into force of procurement contracts in procurement methods other than tendering proceedings. While in tendering proceedings the matter is regulated in article 36 (which also requires the prior “acceptance” of the successful tender), in other procurement methods, under article 13, the manner of entry into force of procurement contracts must be notified to the suppliers or contractors in the beginning of the procurement proceedings. The Working Group may wish to consider at a later date whether the provisions regarding acceptance of the successful tender or other submission and the entry into force of the procurement contract should be conformed.

Article [51 decies]. Award of procurement contracts under the framework agreement

- (1) The procuring entity may award one or more procurement contracts under the framework agreement in accordance with the terms and conditions of the framework agreement, subject to the provisions of this article.
- (2) No procurement contract under the framework agreement may be awarded to suppliers or contractors that were not originally party to the framework agreement.
- (3) In the process of awarding procurement contracts under the framework agreement, the parties to the framework agreement may not materially amend or vary any term or condition of the framework agreement.
- (4) If the framework agreement is entered into with one supplier or contractor, the procuring entity may award a procurement contract on the basis of the terms and conditions of the framework agreement to the supplier or contractor party to that agreement by the issue of a purchase order [in writing] to that supplier or contractor. The procurement contract, on the terms and conditions of the framework agreement, comes into force when this purchase order is dispatched.
- (5) If the framework agreement entered into with more than one supplier or contractor establishes all the terms and conditions necessary for the procurement to be effected [, and does not provide for a competitive procedure for the award of procurement contracts under it], the procuring entity may award a procurement contract by the issue of a purchase order [in writing] to the highest-ranked supplier(s) or contractor(s) capable of fulfilling the contract. The procurement contract, on the terms and conditions of the framework agreement, comes into force when this purchase order is dispatched. The procuring entity shall notify [in writing] all other suppliers and contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) to whom the purchase order has been dispatched.
- (6) If the framework agreement entered into with more than one supplier or contractor [does not establish all the terms and conditions necessary for the procurement to be effected] [provides for a competitive procedure for the award of procurement contracts under the framework agreement], the

procuring entity may award a procurement contract under the framework agreement in accordance with the following procedures:

(a) The procuring entity shall invite [in writing] all suppliers or contractors that are parties to the framework agreement to present their submissions for the supply of the items to be procured;

(b) The invitation shall restate the terms and conditions of the framework agreement, and shall set out the terms and conditions of the procurement contract that were not specified in the terms and conditions of the framework agreement, and shall set out instructions for preparing submissions;

(c) The procuring entity shall fix the place for, and a specific date and time as the deadline for presenting the submissions. The deadline shall afford suppliers or contractors sufficient time to prepare and present their submissions;

(d) The successful submission shall be determined in accordance with the criteria set out in the framework agreement;

(e) Where an electronic reverse auction is held, the procuring entity shall comply with requirements during auction in article [cross-references to the relevant provisions];

(f) Without prejudice to the provisions of article [proper cross-reference to the provisions on award of contracts through electronic reverse auction] and subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful submission(s), and shall promptly notify [in writing] the successful supplier(s) or contractor(s) that it has accepted their submission(s). The procuring entity shall also notify [in writing] all other suppliers and contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) whose submission(s) was or were accepted and the contract price;

(g) The procurement contract(s), on the terms and conditions of the successful submission(s), comes into force when the notice of acceptance to the successful supplier(s) or contractor(s) is dispatched.

(7) Where the price payable pursuant to a procurement contract concluded under the provisions of this section exceeds [*the enacting State includes a minimum amount* [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s) in any manner that has been specified for the publication of contract awards under article 14 of this Law. The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement.

Commentary and issues for discussion in the Guide to Enactment

Paragraph (1)

24. The Working Group may wish to consider whether the procuring entity must effect all purchases of the items concerned under the framework agreement through

that framework agreement. In practice, it is common that no such obligation is imposed on the procuring entity, even under a Model 1 framework agreement, to enable the procuring entity to obtain the best value for money if, for example, market circumstances change and better offers exist outside the framework agreement.¹⁸ Paragraph (1) as drafted provides such flexibility to the procuring entity.

25. On the other hand, whether suppliers will discount their prices to give the maximum commercial benefit to procuring entities may in many cases depend on whether suppliers are confident that they will receive sufficient orders under the framework agreement, at least within the estimated quantities (minima and maxima) indicated in the agreement, to justify such discounts.¹⁹ If procuring entities are freely able to and regularly do procure the items concerned outside the framework agreement, suppliers' confidence may be eroded.

26. Accordingly, there may be actual and potential costs and benefits incurred in permitting or not permitting procuring entities to purchase outside the framework agreement. The Working Group may wish to formulate its position on the matter taking into account possible costs and benefits and the type of procurement at issue.

Paragraph (3)

27. This paragraph and those following have been drafted on the understanding that no material change to the terms and conditions of the framework agreement as set out in the beginning of the procurement proceedings is allowed at the subsequent stage. This restrictive approach reflects a closed framework agreement system. Allowing changes in evaluation criteria or specifications at the stage of the award of procurement contracts under a framework agreement may lead to abuse, such as favouritism through procuring entity adapting criteria to the needs of any particular party to the framework agreement, and further exacerbates any anti-competitive effect of a framework agreement.²⁰

Paragraphs (4), (5) and (6)

[in writing]

28. The Working Group may wish to consider whether the provisions should require that the procuring entity must perform the referred actions, such as issue of purchase orders or invitation of, or notification to, suppliers of contractors, in writing (that is, on paper or electronically) as opposed by phone or otherwise verbally. Such an explicit requirement appears for example in the EU Procurement Directive. The issue may be considered in conjunction with article 5 bis on

¹⁸ Another way is to allow technology-refreshing provisions, but such provisions may not be compatible with the requirement of fixed specifications under traditional framework agreements. Where generic specifications are used, for example, in certain types of standing qualification lists, such provisions may be considered.

¹⁹ See A/CN.9/WG.I/WP.44, paras. 11-15, for a discussion of the potential benefits of framework agreements, including efficiency and security of supply.

²⁰ These risks may be considered to be considerably higher in closed framework agreements than in open dynamic purchasing systems, where an unlimited number of potential suppliers are allowed to compete for the award of any particular procurement contract. See A/CN.9/WG.I/WP.52/Add.1.

communications in procurement, set out in document A/CN.9/WG.I/WP.50 (the text following paragraph 4) (also before the Working Group at its eleventh session).

Acceptance of successful submission and entry into force of the procurement contract

29. The Working Group may note that the provisions mirror the equivalent provisions for tendering proceedings, rather than the more flexible approach for other procurement methods envisaged under article 13. Paragraph (6) (g) tracks the wording of article 36 (4), which refers to the procurement contract coming into force in accordance with the terms and conditions of the accepted tender. Whether this may be an accurate statement about the source of the terms and conditions of the procurement contract may be a further issue for the Working Group to consider when reviewing article 36 and the equivalent provisions for other procurement methods at a later date. (See also paragraph 23 above about possible need to conform the provisions regarding acceptance of the successful tender or other submission and the entry into force of the procurement contract throughout the Model Law).

Paragraphs (5) and (6)

Requirement for decision at the outset as to whether the multi-supplier framework agreement will be a Model 1 or Model 2 framework agreement

30. The paragraphs are drafted in such a way that the procuring entity cannot invite further competition at the second stage of the procurement proceedings unless the terms and conditions of the framework agreement disclosed in a solicitation notice in accordance with draft article 51 novies (2)(f) above advised that this would be the award procedure, and, conversely, that the procuring entity cannot award a procurement contract without competition if the terms and conditions of the framework agreement provided for second-stage competition. An alternative formulation would be to allow the procuring entity to decide subsequently after the first stage whether or not to hold a second-stage competition (provided that such a possibility has been reserved at the outset of the procurement proceedings in the terms and conditions of the framework agreement as disclosed in a solicitation notice). The Working Group may wish to consider whether the advantages of additional flexibility would be outweighed by a possible risk of abuse.

Possibility of competition on the same terms

31. The Working Group may wish to consider (i) whether the opening phrase in paragraph (5) of the draft article should contain the text in square brackets and (ii) which of the square bracketed texts or both (with the appropriate connector) should remain in the chapeau of paragraph (6). The decision would depend on the Working Group's position as regards possibility of holding second-stage competition even if all terms and conditions have been set out in the multi-supplier framework agreement, provided that such a possibility has been reserved at the outset of the procurement proceedings (see paragraph 30 above). In this regard, the attention of the Working Group is drawn to the provisions of the EU Procurement Directive that provide for such a possibility (see article 32 (4), the second indent).

Paragraph (6)

32. Paragraph (6) sets out procedures that will have to be followed at the second stage of competition. This latter procedure resembles tendering proceedings with the exception that no open solicitation is held; only suppliers that are parties to the framework agreement are notified about forthcoming awards. If an electronic reverse auction is held, additional provisions on electronic reverse auctions will be applicable and cross-references to those provisions have therefore been inserted.

33. The approach taken in drafting the provisions, which does not allow at the subsequent stage to change substantially the terms and conditions of the framework agreement as set out in the beginning of the procurement proceedings (see paragraph 27 above), would prevent the procuring entity from holding procedures at the second stage of competition that resemble two-stage tendering (article 46 (4)) or competitive negotiations proceedings (article 49), both of which permit material variations in specifications and evaluation criteria.

34. It is implicit under provisions of paragraph (6), which require inviting all suppliers or contractors that are parties to the framework agreement to present submissions at the second stage, that all suppliers admitted to the framework should be capable of carrying out the entire procurement concerned, so that the framework is effectively restricted in scope to a type or group of item(s) that all suppliers or contractors parties to the framework agreement are able to provide. In some jurisdictions, framework agreements broader in scope are concluded, so that the framework agreement may provide for a list of items that not all suppliers or contractors would be able to provide, or it may be evident that no one supplier could meet all the procuring entity's requirements. The procuring entity may therefore benefit from the flexibility to select the item(s) required and to invite only those suppliers to compete who can supply the items or combination. The Working Group may wish to consider whether the Model Law should provide for framework agreements of broad or narrow scope, bearing in mind the need to ensure effective competition and that one of the main goals and benefits of the framework agreements is to secure supplies. If the Working Group considers that only narrow-scope framework agreements should be permitted, it may wish to consider whether article 27 (h) (which envisages partial tendering) should be excluded in the case of frameworks agreements, and whether tender securities may be required. If it wishes to provide for broader-scope agreements, the Working Group may wish to consider how the procuring entity could limit the numbers of suppliers or contractors invited to compete at the second stage.

Paragraph (7)

35. The Working Group may wish to consider in which cases the publication of notice of procurement contract awards under the framework agreement should be required, by reference in particular to the amount payable under the procurement contract in question.

36. The Working Group may also wish to consider whether requiring in addition the publication of advance public notices of intended procurement contracts may enhance proper oversight and review, and lead to better value for money procurement contracts (for example, by enabling procuring entities to be advised of better opportunities, and purchase, outside the framework agreement. See, however,

paragraphs 24-26 above for issues regarding purchases outside the framework agreement).

E. Alternative approach to drafting

37. The Working Group may wish to consider an alternative approach to drafting, for example by regulating Model 1 framework contracts separately from Model 2 framework agreements, so as to reflect the more straightforward nature of the former. While Model 1 single-supplier framework contracts are sufficiently covered by the existing provisions of the Model Law, regulating Model 1 multi-supplier framework agreements separately would require amendments to a number of the Model Law provisions.

38. First, amendments would have to be made to article 2 (g) of the Model Law, which defines a procurement contract, to provide for a possibility of concluding procurement contracts with more than one suppliers or contractors. The provisions may read:

“*Procurement contract*’ means a contract between one or more procuring entities and one or more suppliers or contractors resulting from procurement proceedings”.²¹

39. In addition and as linked thereto, to enable procuring entities to accept more than one tender or its equivalent, references throughout the Model Law to successful or accepted tender or proposal, best and final offer and lowest-priced quotation or to the supplier or contractor submitting them would have to be put in plural in a number of articles, such as in articles 11, 27 (e), 34 (4)(b), 36, 38-44 and 46-50, according to the context.

40. Second, revisions throughout the current text of the Model Law would have to be made to provide for appropriate transparency, oversight and review procedures. Appropriate safeguards would need to be built in the Model Law to ensure: first, that procedures for allocation of purchase orders under the multi-supplier framework contracts are disclosed to suppliers in the beginning of the procurement proceedings; and second, that the suppliers parties to the framework agreement will have means to verify that such procedures were indeed followed (by requiring, for example, that, once purchase orders are allocated, the suppliers parties to the framework agreement must be notified of allocated purchase orders and to whom they were allocated). While there would be no difficulty in incorporating in the Model Law the requirement to disclose in the beginning of the procurement proceedings the procedures on allocation of purchase orders under the framework contract (through additions to article 27 and equivalent articles regulating other procurement methods), there may be greater difficulty in providing for effective oversight and review, as such provisions would then be applied to the contract

²¹ This amended definition would enable a procurement contract to be concluded with more than one supplier not only in the case of framework contracts. If the Working Group considers that procuring entities should not have the flexibility to accept more than one tender and conclude multiple party procurement contracts as a general proposition other than in the context of framework agreements, the words “in the case of framework agreements” can be inserted in the definition where appropriate.

administration stage.²² Furthermore, the question would be raised as to why other long-term or large-scale procurement would also not be subject to similar provisions at the contract administration phase. The Working Group has not yet decided whether the Model Law should regulate this phase of procurement.²³

²² See footnote 5, *supra*.

²³ *Ibid*.