

Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement

I. Introduction

1. The 2011 UNCITRAL Model Law on Public Procurement¹ (article 4) envisages that enacting States will promulgate procurement regulations to fulfil the objectives and to implement the provisions of the Model Law. The purpose of the procurement regulations is to complete the legislative framework for the procurement system, both to fill in the details of procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State.

2. Various provisions of the Model Law expressly indicate that they should be supplemented by procurement regulations. Furthermore, the enacting State may decide to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the procurement regulations should not contradict the Model Law or undermine the effectiveness of its provisions.

3. The main examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: the manner of publication of various types of information (articles 5, 6, 18 (2), 23, 33 (1) and 34 (5)); measures to secure authenticity, integrity and confidentiality of information communicated during the procurement proceedings (article 7 (5)); grounds for limiting participation in procurement (article 8); calculation of margins of preference and application of socioeconomic policies in evaluation of submissions (article 11); estimation of the value of the procurement (article 12); requirements as regards the duration of a standstill period (article 22 (2) (c)); requirements as regards the documentary record of procurement proceedings (article 25 (1) (w) and (5)); the maximum duration of closed framework agreements (article 59 (1) (a)); code of conduct (article 26); and limitation of the quantity of procurement carried out in cases of urgency using competitive negotiations or single-source procurement (that is, the quantity is limited to that required to deal with the urgent circumstances) (see the commentary to the relevant provisions of article 30 (4) and (5) in the Guide).

4. In addition to the use of regulations as a matter of best practice, failure to issue procurement regulations as envisaged in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: limitation of participation in procurement proceedings (article 8); authority and procedures for application of a margin of preference in favour of domestic suppliers or contractors (article 11); and use of request for quotations, since that method of

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I.*

procurement may be used only for procurement whose value is below threshold levels set out in the procurement regulations (article 29 (2)).

5. As noted in the Guide to Enactment of the Model Law, adopted by the Commission at its forty-fifth session, in 2012,² reference to the “procurement regulations” should be interpreted in accordance with the legal traditions of the enacting State; the notion may encompass any tool used in the enacting State to implement its statutes. Those legal traditions may also delineate issues that are more commonly addressed through guidance.³ This document does not purport to address these issues. It consolidates all provisions of the Model Law and the Guide that highlight the main issues that should be considered for the procurement regulations in order to fulfil the objectives and to implement the provisions of the Model Law.

6. The relevant provisions are grouped per subject. First, general subjects are discussed that are relevant to several articles of the Model Law (such as socioeconomic policies, classified information). This is followed by the discussion of subjects relevant to specific articles of Chapter I of the Model Law, in the order of articles of that Chapter. The discussion of issues relevant to various methods and techniques of procurement is grouped per a method and technique of procurement. The document is finalized by issues highlighted for the procurement or other applicable regulations in the context of challenge proceedings.

7. Since the document addresses only main issues, it is not intended to be exhaustive as regards issues to be addressed in the procurement regulations. In particular, consistent with the scope of the Model Law and the Guide to Enactment, this document does not address issues of procurement planning and contract management other than those directly relevant to the pertinent provisions of the Model Law. Detailed regulation of these phases of the procurement cycle in the procurement regulations of the enacting States may be warranted.

8. In addition, as noted in the Guide,⁴ the Model Law and the procurement regulations to be promulgated in accordance with its article 4 alone are not sufficient to ensure the effective functioning of the procurement system of the enacting State. Some measures are to be taken in other branches of law while others are of an institutional and administrative nature. The Guide notes measures that are to be taken outside the procurement law framework in order to ensure effective implementation of the Model Law.⁵ These measures are not discussed in this document.

² Ibid., *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 46. The text of the Guide is available at the date of this document from www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html.

³ Para. 2 of the commentary to article 4.

⁴ Paras. 58-81 of Part I.

⁵ Ibid.

II. General subjects

A. Socioeconomic policies in procurement

9. Socioeconomic policies that can or must be pursued through procurement are to be set out in the procurement regulations or other provisions of the law of the enacting State (see article 2 (o) of the Model Law [[*hyperlink*](#)] and the commentary in the Introduction to Chapter I, and in the commentary to articles 2 (o) and 8-11, in the Guide).

10. Where they are to be set out in the procurement regulations, the latter must address, inter alia, and as applicable:

(a) Situations in which the procuring entity may or must limit the participation of certain categories of suppliers or contractors in procurement proceedings (e.g. declare procurement domestic only) (see article 8 and the relevant commentary);

(b) Any margin of preference that can be applied for the benefit of domestic suppliers or contractors or for domestically produced goods or any other preference when evaluating submissions, and the method of its calculation and application (see article 11 and the relevant commentary);

(c) Any socioeconomic policies that can or must be factored in qualification requirements (e.g. environmental, ethical and other standards), in the description of the subject matter of the procurement, and in the design of evaluation criteria (i.e. to give credit for compliance with socioeconomic policies beyond any required minimum) (see articles 9-11 and the relevant commentary);

(d) A particular socioeconomic policy that will justify the use of single-source procurement (see article 30 (5) (e) and the relevant commentary);

(e) Constraints on procuring entities, in particular by prohibiting the ad hoc adoption of policies at the discretion of the procuring entity.

11. Where these policies are not set out in the procurement regulations, the procurement regulations should at least direct readers to other relevant laws and rules, so that the procuring entities are aware of any mandatory socioeconomic criteria to be applied and of the extent of their discretion in applying other socioeconomic criteria while suppliers or contractors are assured that application of socioeconomic policies in the procurement of the enacting State is taking place on a transparent and objective basis.

12. The Guide alerts enacting States about implications of pursuing socioeconomic policies in procurement and cautions against providing a broad list of socioeconomic criteria or circumstances in which a margin of preference may be applied.⁶

⁶ Paras. 9-27 of Part I, paras. 26-33 of the Introduction to Chapter I, and paras. 7-13 of the commentary to article 11.

B. Classified information

13. The authority granted to procuring entities to take special measures and impose special requirements for the protection of classified information, including granting public disclosure exemptions, applies only to the extent permitted by the procurement regulations or by other provisions of law of the enacting State (see article 2 (1) and the relevant commentary).

14. When the procurement regulations address these issues, they must identify types of procurement in which the procuring entity may or must take measures and impose requirements for the protection of classified information. In addition, the procurement regulations must address, *inter alia*:

(a) Measures that may be taken. Examples of the measures that may be invoked include the protection of certain parts of the record from disclosure, exemptions from a public notice of the procurement and contract award, and the use of direct solicitation (see articles 7 (3) (b), 24, 25 (4) and 35 (2) and the relevant commentary); and

(b) Requirements that may be imposed to protect classified information on suppliers and contractors and subcontractors, such as certain methods and tools for transmission of information (e.g. encryption) (see articles 7 (3) (b) and 24 (4) and the relevant commentary).

C. Low-value procurement

15. Article 22 (3) (b) exempts low-value procurement from the mandatory application of a standstill period and article 23 (2) exempts such procurement from the requirement for public notice of the contract award. (Chapter II also contains an upper threshold for the use of request for quotations under article 29 (2).) In all these cases, the Model Law defers to the procurement regulations the identification of the threshold to be applied. This is because it is not possible for the Model Law to set out a single threshold for low-value procurement that will be appropriate for all enacting States, and the appropriate thresholds for each State may change with inflation and as other economic circumstances also change. It is for the body that issues the procurement regulations to consider the appropriate value or values for all such thresholds.

16. In other instances where references to low-value procurement are found, the Model Law does not require explicit thresholds in the procurement regulations. For example, invitations to pre-qualification and tendering proceedings need not be published internationally where the procuring entity decides that, in view of the low value of the subject matter of the procurement, only domestic suppliers or contractors will be interested in presenting submissions (articles 18 (2) and 33 (4)). In addition, one of the grounds justifying the use of one type of restricted tendering and direct solicitation in request for proposals procedures is that the time and cost required to examine and evaluate a large number of submissions would be disproportionate to the value of the subject matter of the procurement (see articles 29 (1) (b) and 35 (2) (b) and the relevant commentary).

17. The agency or body issuing the procurement regulations should consider the appropriate approach to what is treated as “low-value” procurement, notably as to whether there can and should be one amount below which procurement is treated as low-value. For example, should the procurement regulations fix one threshold for all instances where the procurement law refers to a low-value threshold (including the upper limit for the use of request for quotations), whether that value should apply to all instances of “low-value procurement” references found in the law (even those that do not contain explicit references to a low-value threshold, as explained above), or whether circumstances indicate that different thresholds and amounts are appropriate.

D. Fees charged for participating in the procurement proceedings

18. As noted in the Guide,⁷ ideally, no fees should be charged for access to, and use of, the procuring entity’s communications systems. The procurement regulations should therefore discourage such fees as a disincentive to participate in the procurement proceedings, contrary to the principles and objectives of the Model Law. Where the decision is to charge fees for the use of the communications system, the procurement regulations should require that the fee must be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings. The procurement regulations may require publicizing the amount of the applicable fee and justifications for charging it, and identify it as a temporary measures (e.g. until costs of introducing the new communications system are recovered).

19. The related issue is charging fees for obtaining the pre-qualification and/or solicitation documents. When a price is charged for obtaining those documents, the procurement regulations must contain provisions preventing the procuring entity from applying excessively high charges for the documents. They could do so by requiring that the price to be charged for the documents is to enable the procuring entity to recover its costs incurred in fact in providing the documents, for example, by printing and mailing them. The procurement regulations should illustrate what should not be attempted to be recovered through the price charged for the documents, such as development costs (including consultancy fees and advertising costs).

E. Issues of outsourcing and centralized purchasing

20. The procurement regulations should address measures in the design and the use of the procurement system that may produce discriminatory impact and other undesirable consequences. Approaches to the design and the use of the procurement system, such as any involvement of third parties in the design of the communication system and the use of proprietary systems, would have a direct impact on the participation of suppliers or contractors in the procurement proceedings. They would also affect such decisions across the procurement system as charging fees for the use of the procurement system as well as decisions of the procuring entities on their procurement strategies generally and in individual procurement.

⁷ Para. 12 of the commentary to article 7.

21. The procurement regulations must specifically address the issues of outsourcing of procurement functions, in particular risks of organizational conflicts of interest if third-party IT and service providers are remunerated on a fee-per-use basis for the maintenance and operation of e-purchasing platforms, such as electronic reverse auctions (ERAs) or open framework agreements, outsiders' influence on procurement strategies and problems with building and retaining sufficient skills and expertise in the procuring entity, needed among others for supervision of the activities of such third-party providers.

22. Where centralized purchasing agencies act as agents for one or more procuring entities and centralized purchasing is encouraged to allow for the economies of scale, the procurement regulations must ensure that such arrangements can operate in a transparent and an effective fashion. The procurement regulations should put measures for assessing the relative merits of such purchasing, standardization and accommodating different needs for individual procurements and across sectors of the overall government procurement market. They should address issues of organizational conflicts of interest (centralized purchasing entities may have an interest in increasing their fee earnings by keeping prices high and promoting purchases that go beyond the needs of the procuring entity). Where the centralized purchasing agency undertakes planning for future procurement, the procurement regulations must call for a closer interaction between the agency with the likely end-users before the procedure commences to allow for a better decision on the appropriate extent of standardization and accommodating varying needs (the quality of information from the end-users will be critical. The needs of individual ministries or agencies may themselves not be identical, with the result that some obtain better value for money than others if those needs are standardized without sufficient analysis.)

III. Subjects to be addressed in procurement regulations in the context of specific articles of Chapter I of the Model Law (General provisions), in the order of articles

Article 5. Publication of legal texts

1. The procurement regulations must specify the manner and medium of publication of legal texts covered by paragraph (1) of article 5 or refer to legal sources that address publicity of statutes, regulations and other public acts. If the manner and the medium are to be specified in the procurement regulations, the latter must also:

(a) Provide for a centralized medium and manner of publication at a common place, readily and widely accessible (the "official gazette" or equivalent);

(b) Specify that information posted in a single centralized medium must be authentic and authoritative and have primacy over information that may appear in other media. It must also remain readable, comprehensible and capable of interpretation and retention;

(c) Establish rules to define the relationship of that single centralized medium with other media where such information may appear and provide for rules of publication in other official media (e.g. prohibition of publication in different

media before information is published in the centralized medium, and the requirement that the same information published in different media must contain the same data);

(d) Address the subject of fees (as in section II.D above, ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by the procurement law, and all amendments thereto).

2. The procurement regulations must also spell out the meaning of the requirements for documents promptly to be made “accessible” and “systematically maintained”. In practical terms, the requirement for the information to be “accessible” means that the information must be capable of being accessed, and read without having to request access. It implies proactive actions from designated State authorities (such as publication in official media) to ensure that the intended information reaches the public. The requirement for “systematic maintenance” means that the designated State authority must ensure that the information is in fact up-to-date and so reliable: the manner in which this obligation is discharged should be itself documented so that compliance can be monitored.

3. If the enacting State wishes to encourage the publication of other texts of relevance and practical use and importance to suppliers and contractors (such as procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect the general rights and obligations of suppliers and contractors), the procurement regulations should specify such additional texts and conditions of publication that should apply to them.

4. Unless this is already addressed in other provisions of law of the enacting State, the procurement regulations must specify which State organs are responsible for fulfilling the obligations under this article.

Article 6. Information on possible forthcoming procurement

1. The procurement regulations should address the desirable content of information intended to be published under the article. The Guide notes in this respect that making available abundant, irrelevant or misleading information, rather than carefully planned, useful and relevant information, may compromise the purpose of issuing this type of information.⁸ Examples of information to be included are: a time frame that information regarding planned procurement should cover, which may be a half-year or a year or other period; the content of an advance notice of possible future procurement; and difference between this type of notice and other types of advance notices of the procurement, such as a notice seeking expressions of interest that is usually published in conjunction with request-for-proposals proceedings or an advance notice of the procurement required in most cases of direct solicitation under articles 34 and 35 of the Model Law.

2. The procurement regulations should also address other conditions for publication, such as the place and means of publishing information, taking into account issues highlighted for the procurement regulations under article 5 above.

⁸ Para. 2 of the commentary to article 6.

3. Consistently with what is said in the Guide on this point,⁹ the procurement regulations should avoid imposing a requirement to publish this type of information. The procurement regulations should instead stipulate the default rule to publish this type of information, unless there are considerations indicating to the contrary: it should be left to the procuring entity to decide on a case-by-case basis on whether such information should be published.

4. The procurement regulations may provide incentives for publication of such information, such as a possibility of shortening a period for presenting submissions in pre-advertised procurements. The procurement regulations may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold.

Article 7. Communications in procurement

1. The procurement regulations are to explain the notions “in common use” and “fully and contemporaneously” in the requirements of the article that means of communication must be in common use by suppliers or contractors concerned (e.g. that allow efficient and affordable connectivity and interoperability) and that the means of communication used in meetings must in addition be capable of ensuring full and contemporaneous participation in meetings, i.e. ability to follow all proceedings of the meeting and to interact with other participants when necessary (see article 7 (4)). The procurement regulations must address characteristics of means of communication that can be used by the procuring entity in particular types of procurement to satisfy those requirements. Alternatively, the procurement regulations may illustrate by practical examples and references which technological solutions existing in the enacting State at a given time would meet those requirements and how. Another approach would be for the procurement regulations to require, where the decision is made by the procuring entity to use non-paper-based means of communication, the use of specific means of communication that would meet these requirements of the Model Law, in the light of prevailing conditions in the enacting State at any certain point of time.

2. The procurement regulations should establish clear rules as regards requirements for “writing”, “signature”, “authenticity”, “security”, “integrity” and “confidentiality” of submissions and when necessary develop functional equivalents for the non-paper-based environment. They should also address legal solutions aimed at achieving adequate usability, reliability, traceability and verification of information generated in the procurement proceedings and securing the authenticity, integrity and confidentiality of such information as appropriate. Caution should be exercised not to tie legal requirements to a given state of technological development and not to impose higher security measures than otherwise would be applicable in the paper-based environment since these measures can discourage the participation of suppliers or contractors in non-paper-based procurement.

3. Other specific issues to be addressed in the procurement regulations are: (a) the scope of the exceptions in paragraph (2) of the article to the form requirement and the practical implementation of the provisions; and (b) issues

⁹ Para. 7 of the commentary to article 6.

arising from the use of more than one form and means of communication in any given procurement proceedings.

4. As the Guide notes,¹⁰ other aspects and relevant branches of law are relevant to article 7, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel, management and administration issues in the procuring entity and the public sector as a whole.

Article 8. Participation by suppliers or contractors

1. The procurement regulations or other provisions of law of the enacting State must set out the exceptional conditions under which the procuring entity may limit the participation of certain categories of suppliers or contractors in procurement proceedings.

2. As noted in the Guide,¹¹ a decision to impose a limitation on participation in procurement proceedings may be taken in different situations. Such a situation may arise because of socioeconomic policies of the State (e.g. set-aside programmes for small and medium-sized enterprises (SMEs) or entities from disadvantaged areas) as noted in section II.A above. Other issues of concern to the State, such as safety and security, may justify the limitation of participation, for example because of the implementation of United Nations Security Council's sanctions regimes. The application of the article would therefore not necessarily lead to the limitation of participation on the basis of nationality (such as to the domestic procurement). The procurement regulations should address the variety of situations intended to be covered by this article as explained in the Guide.

3. As further noted in the Guide,¹² an enacting State, when formulating policies involving exceptional measures under article 8, must consider their consequences in the light of the State's international obligations, taking into account that any limitation of participation of suppliers or contractors in procurement proceedings risks violating free-trade commitments of States under relevant international instruments, such as the Agreement on Government Procurement of the World Trade Organization (WTO GPA).¹³

4. The procurement regulations may provide for a sample of a declaration to be issued by the procuring entity under paragraph (3) of the article. They may also specify the time frame within which the procuring entity must provide its reasons for limiting the participation of suppliers or contractors in the procurement

¹⁰ Para. 13 of the commentary to article 7.

¹¹ Para. 2 of the commentary to article 8.

¹² Para. 7 of the commentary to article 8.

¹³ The plurilateral Agreement on Government Procurement of the World Trade Organization (the GPA), negotiated in parallel with the Uruguay Round in 1994, and entered into force on 1 January 1996. On 15 December 2011, negotiators reached an agreement on the outcomes of the renegotiation of the GPA. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113). Both texts are available at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

proceedings to a person upon his/her request, as required under paragraph (5) of the article.

5. In the context of paragraphs (4) and (5) of the article, the procurement regulations may impose on the procuring entity a requirement to substantiate the reasons and circumstances on which it relied in making its decision to limit participation with legal justifications.

Article 9. Qualifications of suppliers and contractors

1. Unless other provisions of law of the enacting State already do so, the procurement regulations must specify ethical and other standards applicable in the enacting State that are appropriate and relevant in the circumstances of various types of procurement (see paragraph (2) (b) of the article and the relevant commentary).

2. They should also specify appropriate documentary evidence or other information that may be requested by the procuring entity for ascertainment of qualifications of suppliers or contractors (see paragraph (3) of the article and the relevant commentary). Such documentary evidence may comprise audited annual reports (to demonstrate financial resources), inventories of equipment and other physical facilities, licences to engage in certain types of activities and certificates of compliance with applicable standards and confirming legal standing.

3. The procurement regulations may also specifically authorize a self-declaration from suppliers or contractors that they are qualified to participate in the given procurement proceedings. In such case, the procurement regulations should specify situations when such self-declaration would be sufficient. For example, it may be sufficient to rely on this type of declaration at the opening of simple stand-alone ERAs as long as it is envisaged that a proper verification of compliance of the winning supplier or contractor with the applicable qualification criteria will take place after the auction.

4. In some jurisdictions, standard qualification requirements are found in procurement regulations, and the pre-qualification/pre-selection/solicitation documents may simply cross-refer to those regulations. For reasons of transparency and fair, equal and equitable treatment, the Model Law requires all requirements to be set out in the relevant documents (see paragraph (4) of the article and the relevant commentary); however, the policy goals of paragraph (4) may be satisfied where the documents refer to the qualification requirements in legal sources that are transparent and readily available (such as by using hyperlinks). The procurement regulations must authorize this approach if it is appropriate in the enacting State.

5. The procurement regulations must authorize or require the use of any qualification criteria, requirement or procedures that are not objectively justifiable and discriminate against or among suppliers or contractor for the procuring entity to be able to use such criteria, requirement or procedures in the ascertainment of qualifications of suppliers or contractor (see paragraph (6) of the article in conjunction with article 8 (see above for the latter) and the relevant commentary). They could also provide examples of other requirements imposed by the procuring entities in practice that may intentionally or inadvertently distort or restrict participation by suppliers or contractors in the procurement proceedings, and should therefore be avoided.

6. The procurement regulations may provide examples of materially inaccurate or materially incomplete information that would permit the procuring entity to disqualify the supplier or contractor submitting such information (see paragraph (8) (b) of the article and the relevant commentary).

7. The procurement regulations may restrict the application of paragraph (8) (d) by specifying that in most procurement (with the exception perhaps of complex and time-consuming multi-stage procurement), the reconfirmation of the qualifications of suppliers or contractors that have been pre-qualified at a later stage of the procurement proceedings should take place only with respect to the supplier or contractor presenting the successful submission (see paragraph (8) (d) of the article and the relevant commentary).

8. Other branches of law are relevant to the implementation of article 9, in particular those related to insolvency, taxation and legalization as well as corporate and criminal law. Compliance with other standards applicable in an enacting State referred to in paragraph (2) (b) of the article may involve security clearances, environmental considerations, international labour law and human rights standards and sustainability issues outside the procurement law framework. Coherence between the procurement regulations and regulations that may exist in such other branches of law must therefore be ensured.

Article 10. Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement

1. The procurement regulations must specify situations where a detailed description of the subject matter of procurement at the outset of the procurement proceedings would not be possible and the procuring entity would therefore be permitted to provide the minimum requirements instead (for example, in request-for-proposals-with-dialogue proceedings and framework agreement procedures) (see paragraph (1) (b) and the relevant commentary).

2. The procurement regulations must authorize or require the use of any criteria, requirement or procedures that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings for the procuring entity to be able to use such criteria, requirement or procedures in the description of the subject matter of the procurement and/or examination of submissions (see paragraph (2) of the article in conjunction with article 8 (see above for the latter) and the relevant commentary). They could also provide examples of other requirements imposed by the procuring entities in practice that may intentionally or inadvertently distort or restrict participation by suppliers or contractors in the procurement proceedings, and should therefore be avoided.

3. The procurement regulations may usefully discuss the extent of the procuring entity's discretion to use trademark or trade name, patent, design or type, specific origin or producer in the description of the subject matter of the procurement (see paragraph (4) of the article and the relevant commentary). They should: (a) address very narrow circumstances described in paragraph (4) of the article that authorize such use (where there is no other sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement); (b) call for output-based description as a general rule; (c) emphasize the need to describe the

salient features of the subject matter being sought where the input-based description must be used; and (d) require to include the words “or equivalent” in the description of the subject matter of procurement where reference to trademark or trade name, patent, design or type, specific origin or producer is unavoidable or desirable in order to improve suppliers’ or contractors’ understanding of the procuring entity’s needs. As the Guide notes, where there is a generally used industry standard (which may be reflected in standardized trade terms), permitting the use of a brand name or a trademark instead of a very long and technical description may improve suppliers’ or contractors’ understanding of the procuring entity’s needs. However, in such cases, monitoring of the procuring entity’s willingness to accept equivalents will be a necessary safeguard, and guidance on how suppliers or contractors are to demonstrate equivalence, and objectivity in this regard, will be required.¹⁴ The procurement regulations should therefore address ways of demonstrating and assessing equivalence and require the procuring entity to accept equivalents.

4. The procurement regulations shall set out standardized features, requirements, symbols and terminology to be used by the procuring entity in formulating the description of the subject matter of the procurement or refer to the source where such standardized features, requirements, symbols and terminology could be found. The same applies to standardized trade terms and standardized conditions to be used by the procuring entity in formulating the terms and conditions of the procurement and the procurement contract or the framework agreement and in formulating other relevant aspects of various procurement documents: they should be set out in the procurement regulations or the latter should refer to the source where they could be found. (See paragraph (5) of the article and the relevant commentary.)

Article 11. Rules concerning evaluation criteria and procedures

1. The procurement regulations may expand or detail the illustrative list of evaluation criteria provided for in paragraph (2) of the article. They should however avoid setting an exhaustive list of evaluation criteria or requiring the use of a specific criterion or a group of criteria, other than price, since not all evaluation criteria would be applicable in all situations and it would not be possible to provide for an exhaustive list of evaluation criteria for all types of procurement, regardless of how broadly they are drafted. The approach of the Model Law, as stated in the Guide, is that procuring entity can apply evaluation criteria even if they do not fall under the broad categories listed in paragraph (2) of the article as long as the evaluation criteria meet the requirement set out in paragraph (1) of the article — they must relate to the subject matter of the procurement.¹⁵ The procurement regulations may however call for issuance by designated authorities of rules and/or guidance to assist procuring entities in designing appropriate and relevant evaluation criteria.

2. The procurement regulations should address situations where evaluating the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement will be relevant (see paragraph (2) (c) of the article and the relevant commentary). This would be typically in request-for-proposals proceedings

¹⁴ Para. 5 of the commentary to article 10.

¹⁵ Para. 3 of the commentary to article 11.

because the latter have traditionally been used for procurement of “intellectual type of services” (such as architectural, legal, medical, engineering). In this type of procurement, the cost is not a significant evaluation criterion. Instead, the emphasis will be placed on the service-provider’s experience and reliability for the specific assignment, the quality of the understanding of the assignment under consideration and of the methodology proposed, the qualifications, professional and managerial competence of the key staff delivering the service, transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the terms and conditions of the procurement, and when applicable, the extent of participation by nationals among key staff in the performance of the services.

3. The procurement regulations should clarify that these evaluation criteria may be in addition to a minimum requirement for skills and experience expressed as qualification criteria under article 9. Whereas by virtue of article 9 the procuring entity will reject proposals of suppliers or contractors that do not meet a minimum requirement for skills and experience, the procuring entity will evaluate skills and experience of qualified suppliers or contractors admitted to the dialogue stage: the procuring entity will be able to weigh, for example, the required experience of one service provider against experience of others and on the basis of such a comparison, it may be more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the project. The procurement regulations should therefore explain the use of these criteria as minimum standards in ascertainment of qualifications of suppliers or contractors under article 9 of the Model Law and the use of these criteria under for example articles 11 and 49 that would lead to the assessment by the procuring entity of these criteria on a competitive basis.

4. Unless this is done in other provisions of law of the enacting States, the procurement regulations must set out any exceptional criteria that procuring entity is authorized or required to take into account in evaluating submissions, which will ordinarily not relate to the subject matter of the procurement and will thus unlikely be permitted as evaluation criteria under paragraph (2) of the article (see paragraph (3) (a) of the article and the relevant commentary. See also under “Socioeconomic policies in procurement” in section II.A above). In specifying such criteria, references to broad categories, such as environmental considerations, should be avoided since an overlap with criteria covered by paragraph (2) of the article may occur. For example, the environmental requirements for the production of the subject matter of the procurement relates to that subject matter, and can therefore be included as an evaluation criterion under paragraph (2): no authorization under the procurement regulations or other laws is required. Some other environmental considerations are not so related but may need to be considered if this is required or authorized by law of the enacting State

5. The procurement regulations should also regulate how the criteria under paragraph (3) (a) may be used in individual procurements to ensure that they are applied in an objective and transparent manner. Since environmental standards in particular may have the effect of excluding foreign suppliers or contractors (where, for example, national standards are higher than those prevailing in other States), the procurement regulations should address, or call for issuance of specific guidance on, the use of environmental standards to ensure that procuring entities may apply such standards without risk of disruptive challenge procedures.

6. Unless addressed in other provisions of law of the enacting States, the procurement regulations must authorize or require the use of any margin of preference that can be applied for the benefit of domestic suppliers or contractors or for domestically produced goods or any other preference when evaluating submissions (see paragraph (3) (b) of the article and the relevant commentary. See also under “Socioeconomic policies in procurement” in section II.A above). The procurement regulations should establish criteria for identifying a “domestic” supplier or contractor and for qualifying goods as “domestically produced” (e.g., that they contain a minimum domestic content or value added). In this regard, the provisions of the WTO GPA on offsets and price preference programmes, available as negotiated transitional measures to developing countries, may assist States in understanding how the concepts of “domestic” suppliers or contractors and “local content” have been applied in practice.

7. Furthermore, the procurement regulations should fix the amount of the margin of preference, which might be different for different subject matter of procurement (goods, construction and services). They must also provide for a method and rules concerning the calculation and application of a margin of preference. (Various publicly-available sources, including those of the World Bank, provide examples of applying margins of preference in practice.) That method of calculation and application may envisage applying a margin of preference to price or the quality factors alone or to the overall ranking of the submission when applicable; the enacting State will wish to decide how to balance quality considerations and the pursuit of socioeconomic policies. As noted in the Guide,¹⁶ the cumulative effect of application of socioeconomic criteria and margins of preference and the risks of inadvertent duplication should be considered carefully.

8. The procurement regulations must provide an illustrative list of situations where expressing all non-price evaluation criteria in monetary terms would not be practicable or appropriate, such as in request for proposals with dialogue (article 49 of the Model Law). The procurement regulations must also spell out ways of quantifying non-price evaluation criteria in monetary terms where to do so is practicable. (See paragraph (4) of the article and the relevant commentary.) They should also address situations where the procuring entity may list evaluation criteria in descending order of importance (see paragraph (5) (c) of the article and the relevant commentary), such as in request-for-proposals-with-dialogue proceedings under article 49 of the Model Law.

¹⁶ Para. 9 of the commentary to article 11.

Article 12. Rules concerning estimation of the value of procurement

The procurement regulations should elaborate on the rules on estimation of the value of the procurement. They should in particular clarify how a series of repeated low-value procurements over a given period should be aggregated for the purposes of applicable thresholds. They should also provide essential safeguards against the artificial division of the subject matter of the procurement for the purpose, for example, of justifying the use of restricted tendering on the ground set out in article 29 (1) (b), i.e. that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

Article 13. Rules concerning the language of documents

1. In States in which solicitation documents are issued as a rule in more than one language, the procurement regulations should include a rule, unless the procurement law of the enacting State already does so, to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring entity may also be called upon to make it clear in the solicitation documents that both or all language versions are of equal weight, or whether any language is to prevail in cases of inconsistency.

2. Where the text in square brackets in the first paragraph of the article is retained, the procurement regulations should specify exemptions to the general rule to publish documents issued by the procuring entity in the procurement proceedings in a language customarily used in international trade. Those exemptions encompass the circumstances referred to in article 33 (4): domestic procurement (see the commentary to article 8) and low-value procurement where, in the view of the procuring entity, only domestic suppliers or contractors are likely to be interested in presenting submissions. (See section II.C of this document for the discussion of issues to be addressed in procurement regulations in the context of low-value procurement.)

Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions

1. The procurement regulations may address legal consequences that may arise out of non-compliance by suppliers or contractors with the procuring entity's requirements concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions (for example, the procuring entity must return a submission presented late or that otherwise does not comply with the applicable requirements (see for example article 40 (3) and the commentary thereto)).

2. The procurement regulations must require the procuring entity to ensure that any changes to information covered by the article are to be brought to the attention of suppliers or contractors to which the pre-qualification, pre-selection or solicitation documents were originally provided (see paragraph (5) of the article and articles 15 (2) and 18 (6) and the commentary thereto). If those documents were made available to an unknown group of suppliers or contractors (e.g. through a download from a website), the procurement regulations must require that

information on the changes made must, at a minimum, appear in the same place at which they could be downloaded.

3. The procurement regulations should establish minimum periods of time that the procuring entity must allow (particularly where its international commitments may so require) for suppliers or contractors to prepare their applications or submissions. These minimum periods should be established in the light of each procurement method, the means of communication used and whether the procurement is domestic or international. Such a period must be sufficiently long in international and complex procurement to allow suppliers or contractors reasonable time to prepare their applications or submissions. The establishment of the ultimate period in the context of each procurement is left up to the procuring entity, taking into account the circumstances of the given procurement, such as the complexity of the procurement, the extent of subcontracting anticipated, and the time needed for transmitting applications or submissions.

4. The procurement regulations should address situations when the extension of the originally stipulated deadline is mandatory under the law and where it is permitted and would be desirable. The Model Law requires the procuring entity to extend the deadline: (a) where clarifications or modifications, or minutes of a meeting of suppliers or contractors are provided shortly before the submission deadline; and (b) where any amendment to the information about procurement published at the outset of the procurement renders that information materially inaccurate (see article 15 (3) and the commentary thereto). In other cases, the extension of the deadline is optional. To mitigate the risks of abuse in the exercise of the discretion by the procuring entity, the procurement regulations should establish some measures of control. For example, in the context of paragraph (4) of the article, they could address “circumstances beyond [the supplier’s or contractor’s] control” that would prevent one or more suppliers or contractors from presenting their applications or submissions on time, how those circumstances should be demonstrated, and the default response from the procuring entity in such situations. While flexibility should be preserved, such minimum measures of control would help mitigate risks of favouritism.

5. The procurement regulations may specify that the extension of the deadline is in particular desirable in situations where the procuring entity faces risks of numerous challenges if it fails to extend the deadline, for example in cases of failures in the procuring entity’s communication system. The procurement regulations should regulate other aspects of failures in communication systems and the allocation of risks.

Article 15. Clarifications and modifications of solicitation documents

1. The procurement regulations must address the application of the article in situations where the solicitation documents were provided to an unidentified group of suppliers or contractors (e.g. through the download of documents from a publicly-available website). They should specify that the obligation of the procuring entity to inform individual suppliers or contractors of all clarifications and modifications of solicitation documents applies to the extent that the identities of the suppliers or contractors are known to the procuring entity. Where they are not known, the clarifications and modification must at a minimum appear where downloads were offered. The procurement regulations must therefore be clear that

proactive actions are required from the side of the procuring entity — permitting suppliers or contractors to have access to clarifications or modifications upon request would be inadequate: suppliers or contractors would have no way of discovering that a clarification or modification had been made.

2. The procurement regulations must call for prompt actions by the procuring entity under this article so that clarifications and modifications could be taken into account by suppliers or contractors in time before the deadline for presenting submissions.

3. The procurement regulations must also address the concept of information becoming “materially inaccurate”, referred to in paragraph (3) of the article, and differentiate it from the concept of “material change” occurring in the procurement. While the former requires the publication of amended information in the same place where the original information appeared and the extension of the deadline for presenting submissions, the latter would require the cancellation of the proceedings and beginning of the new procurement. Both are threshold concepts. If the information as a result of changes made became sufficiently inaccurate to compromise the integrity of the competition and the procurement process, one may say that the information became materially inaccurate. If as a result of such changes, the pool of potential suppliers or contractors is affected (for example, as a result of changing the manner of presenting submissions from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a “material change” in the procurement has taken place. A “material change” in the procurement is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, the subject matter of the procurement has changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity.

4. The procurement regulations, in the context of paragraph (4) of the article, should clarify that the provisions do not prevent the procuring entity from addressing at the meeting with suppliers or contractors any requests for clarification of the solicitation documents submitted to it either before or at the meeting, and its responses thereto. The obligation to preserve the anonymity of the source of the request will apply to all such requests.

Article 16. Clarification of qualification information and of submissions

1. The procurement regulations must draw difference between this article and the preceding article: whereas clarifications under the preceding article are triggered by suppliers or contractors, clarifications under this article are triggered by the procuring entity. They should also clarify how a clarifications procedure under this article is different from negotiations (the article explicitly prohibits negotiations between the procuring entity and a supplier or contractor with respect to qualification information or submissions except for proposals submitted under articles 49, 50, 51 and 52 of the Model Law (see paragraphs (4) and (5) of the article)).

2. The procurement regulations should address points in time when the need for clarification of qualification information or submissions may arise in various methods of procurement. They should also specify to which methods of

procurement some provisions of the article would not apply. For example, paragraph (2) requires the procuring entity to correct purely arithmetical errors that are discovered during the examination of submissions. They however are not applicable to some procurement methods, such as to request for quotations where correction of arithmetical errors would be prohibited under article 46 (2), and to request for proposals with consecutive negotiations where they would simply be irrelevant since the financial aspects of proposals are crystallized during negotiations. They would not apply either to the auction stage of ERAs where purely arithmetical errors may lead to the automatic rejection by the system of the bid containing such an error or to suspension or termination of an auction under article 56 (5).

3. The procurement regulations should provide for an illustration of clarifications permissible under the article. In particular, they should address risks of substantive changes that may occur as a result of seeking clarifications or correcting arithmetical errors, which is prohibited under the article. Provision of an illustrative list of prohibited changes would be desirable (the article refers in this context to changes that would make an unqualified supplier or contractor qualified or unresponsive submission responsive and to changes in price).

4. The procurement regulations should build procedural safeguards to mitigate the risks of discriminatory practices, for example by requiring the procuring entity to put on the record any arithmetical errors discovered during the examination and evaluation process and steps taken in connection with them.

5. The procurement regulations should address the manner of seeking clarifications under the article, drawing on the procedures for investigating abnormally low submissions under article 20. The use of a written procedure must be required pursuant to article 7 of the Model Law.

Article 17. Tender securities

1. The procurement regulations should stipulate cases justifying request for tender securities and illustrate cases where a tender security could be considered an excessive safeguard by the procuring entity.¹⁷ They should explain that circumstances of some procurement may themselves offer the required security to the procuring entity, such as in ERAs. The relative value of the procurement may also indicate that encouraging other measures to achieve the desired discipline in bidding may be the more appropriate course. The procurement regulations may provide examples where alternatives to a tender security, such as a bid securing declaration should be considered¹⁸ and where benefits of requesting tender securities may be illusory, for example in request for proposals with dialogue or ERAs where suppliers or contractors cannot be forced to stay in the process of dialogue or bidding (e.g. in ERAs, bidders cannot be obliged to change any aspects of their bids and can simply abstain from the bidding), so the tender security may in fact be worthless, or at best, not cost-effective.

2. Where requesting tender securities may be justified, the procurement regulations should address how the requirements will work in practice and its

¹⁷ For the guidance on this point, see paras. 4 and 5 of the commentary to article 17 in the Guide.

¹⁸ See para. 12 of the commentary to article 17 in the Guide.

implications on the bidding process, in particular the price of the tender. The procurement regulations should also explain that in some procurement methods there could be a particular point in time when requesting tender securities may be appropriate, for example, in two-stage tendering this will be in the context of presentation of final tenders rather than of initial tenders.

3. Where applicable, the procurement regulations should refer to any law of the enacting State that prohibits the acceptance by the procuring entity of the tender security that is not issued by an issuer in the enacting State. The procurement regulations must call for prompt actions by the procuring entity under this article.

Article 18. Pre-qualification proceedings

The procurement regulations are to stipulate the place where the invitation to pre-qualification is to be published (the official gazette or website). As explained in section II.C above in the context of low-value procurement, the procurement regulations are to provide detail of how to interpret “low-value” procurement for the purpose of exempting it from the publication of an invitation to pre-qualification internationally. The procurement regulations should also explain in this context that low value alone is not a justification for excluding international participation of suppliers or contractors per se (by contrast with domestic procurement set out in article 8): international suppliers or contractors can participate in a procurement that has not been advertised internationally if they so choose, for example, if they respond to a domestic advertisement or one on the Internet.¹⁹

Article 19. Cancellation of the procurement

The procurement regulations should provide detailed guidance to procuring entities on the scope of their discretion to cancel the procurement proceedings and potential liability both under the procurement law and any other provisions of law of the enacting State that may confer liability for administrative acts.

Article 20. Rejection of abnormally low submissions

1. The procurement regulations must refer to applicable law that may require the procuring entity to reject the submission, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations or collusion) are involved, and in doing so differentiate those cases from those covered by the article. They should also explain the notion of abnormally low submission, in particular in the context of international bidding.

2. The procurement regulations must also regulate which type of information the procuring entity may require for the price explanation procedure referred to in the article and in paragraphs 4 to 8 of the commentary to the article in the Guide. The procurement regulations may retain the flexibility to reject or accept the abnormally low submission, which recognizes that the assessment of performance risk is inherently highly subjective, or they may alternatively decide to circumscribe the discretion to accept or reject such submissions.

¹⁹ In this context, see paras. 5 and 6 of the commentary to article 18 in the Guide.

Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

1. The procurement regulations should assist the procuring entity in assessing whether or not a factual basis for exclusion of a supplier or contractor from the procurement proceedings on the basis of an inducement, an unfair competitive advantage or conflicts of interest has arisen, to guard against any abusive application of the article.

2. The Model Law does not require definitions of the concepts covered by the article. If an enacting State decides to define them, it may wish to take into account the considerations raised in the commentary to the article in the Guide. Where there are relevant legal definitions of these concepts in an enacting State, the procurement regulations should call for their dissemination as part of the legal texts governing procurement in accordance with article 5 of the Model Law. Where there are no definitions, examples of what will and will not constitute practices intended to be covered by the article should be provided in the procurement regulations. For example, the procurement regulations should prohibit consultants involved in drafting the solicitation documents from participating in the procurement proceedings where those documents are used. They should also regulate participation of subsidiaries in the same procurement proceedings. In some jurisdictions, practice is to define an inducement by reference to a *de minimis* threshold; enacting States that wish to take this approach are encouraged to ensure that the threshold is appropriate in the prevailing circumstances.

3. References in the procurement regulations to other branches of law of the enacting State, such as anti-monopoly legislation, most likely will be necessary to avoid unnecessary confusion, inconsistencies and incorrect perceptions about anti-corruption policies of the State.

Article 22. Acceptance of the successful submission and entry into force of the procurement contract

1. The procurement regulations must establish the minimum duration of the standstill period. A number of general considerations should be taken into account in establishing this minimum duration, including the impact that the duration of the standstill period would have on the overall objectives of the Model Law. Although the impact of a lengthy standstill period on costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the period should be sufficiently long to enable any challenge to the proceedings to be filed. Enacting States may wish to set more than one standstill period for different types of procurement, reflecting the complexity of assessing whether or not the applicable rules and procedures have been followed, but should note that excessively long periods of time may be inappropriate in the context of ERAs and open framework agreements, which presuppose speedy awards and in which the number and complexity of issues that can be challenged are limited. On the other hand, the situation in infrastructure procurement may require a longer period of consideration. The length of the standstill period may appropriately be reflected in working or calendar days, depending on the length and likely intervention of non-working days. It should be borne in mind that the primary aim of the standstill period is to allow suppliers or contractors sufficient time to decide

whether to challenge the procuring entity's intended decision to accept the successful submission. The standstill period is, therefore, expected to be as short as the circumstances allow, so as not to interfere unduly with the procurement itself. If a challenge is submitted, the provisions in Chapter VIII of the Model Law would address any suspension of the procurement procedure and other appropriate remedies.

2. The procurement regulations should illustrate urgent public interest considerations that may justify non-application of the standstill period and ensure consistency in this regard with justifications for lifting the prohibition against bringing the procurement contract into force under article 65 and justifications for lifting automatic suspension under article 67 (see section X below for the discussion of these issues). As noted in connection with low-value procurement in section II.C above, the procurement regulations should also consider aligning the low-value threshold that would exempt low-value procurement from application of the standstill period under paragraph (3) (b) of article 22 with other thresholds, such as those justifying an exemption from public notices of contract awards (under article 23 (2)) and the use of request-for-quotations proceedings (under article 29 (2)).

3. The procurement regulations should indicate the type of circumstances in which a written procurement contract may be required, taking into account that such a requirement may be particularly burdensome for foreign suppliers or contractors, and where the enacting State imposes measures for proving the authenticity of the signature. Similarly, the procurement regulations should identify the type of circumstances in which the approval by another authority of the procurement contract before its entry into force would be required (e.g. only for procurement contracts above a specified value).

4. The procurement regulations should guide the decision on the appropriate course of action when the winning supplier or contractor fails to enter into a procurement contract when required, and discuss avoiding abuse of the discretion conferred to the procuring entity to cancel the procurement or to award the contract to the next successful submission. The considerations raised in the similar context under articles 43 and 57 below are relevant here.

5. The procurement regulations may usefully discuss issues of debriefing: while maintaining it as an option for the procuring entity, the procurement regulations may emphasize the value of debriefing in particular in the context of framework agreements where repeated procurements can benefit from improved submissions. They should provide for the minimum safeguards of due process and transparency and address those safeguards in particular in the context of the need to preserve confidentiality of commercially sensitive information during the debriefing.²⁰

²⁰ For the guidance on the issues of debriefing, see paras. 23 to 27 of the commentary to article 22 in the Guide.

Article 23. Public notice of the award of a procurement contract or framework agreement

1. The procurement regulations are to provide for the manner of publication of information covered by the article²¹ and regulate in detail the manner of periodic publication of cumulative notices of awards under the framework agreement.

2. The procurement regulations will set out a monetary value threshold below which the publication requirement would not apply. In doing so, as noted in section II.C above, the procurement regulations must ensure consistency in treating low-value procurement in the enacting State. The procurement regulations could usefully explain in this context that, while the exemption from publication in paragraph (2) covers low-value procurement contracts awarded under a framework agreement, it is most unlikely to cover framework agreements themselves, as the cumulative value of procurement contracts envisaged to be awarded under a framework agreement would probably exceed any low-value threshold.

Article 24. Confidentiality

1. The procurement regulations must set out, if not an exhaustive list of information covered by paragraph (1) of the article, at least its legal sources, in particular of such notions as information whose non-disclosure is necessary for the protection of the essential security interests of the enacting State and information whose disclosure may “impede fair competition”. These notions, if not regulated, may be construed very broadly by the procuring entity for the purpose of exempting certain information from disclosure on the ground of confidentiality. Other branches of law may identify certain information as classified and the procurement regulations must cross-refer to them; in other cases, the procurement regulations themselves should clearly limit the scope of the relevant notions referred to in paragraph (1) of the article.

2. As noted in section II.B above, the procurement regulations may discuss measures to be taken by the procuring entity with respect to suppliers or contractors and their subcontractors to protect classified information in the context of a specific procurement additional to the general legal protection under paragraph (1). The procurement regulations should also explain situations when such measures may be justified or required by law because of the sensitive nature of the subject matter of the procurement or by the existence of classified information even if the subject matter itself is not sensitive (for example, when the need arises to ensure confidentiality of information about a delivery schedule or the location of delivery), or both. Cross-references in the procurement regulations to other branches of law may be required.

Article 25. Documentary record of procurement proceedings

1. The procurement regulations should provide for robust record requirements to ensure accuracy and comprehensiveness of the record in order to make the use of

²¹ For the minimum standards for publication of this type of information, see the commentary to article 5 in the Guide.

the records by aggrieved suppliers or contractors and other competent bodies for the purpose of challenge, audit, control and oversight meaningful and effective. They must address such issues as the form and means in which the record must be maintained, the time of putting information and documents on the record and the scope of disclosure of the relevant information in the record to various groups of persons interested in gaining access thereto.

2. The procurement regulations should require the procuring entity to grant prompt access to the relevant parts of the records to authorized persons since delaying disclosure until, for example, the entry into force of the procurement contract might deprive suppliers and contractors of a meaningful remedy. Since the disclosure of some information (e.g. more detailed information concerning the conduct of the procurement proceedings) may be challenged by suppliers or contractors on the ground that its disclosure impedes fair competition and legitimate commercial interests of those suppliers or contractors, the procurement regulations may require the procuring entity in some particularly sensitive procurement to notify suppliers or contractors in the solicitation documents of its intention to disclose portions of the record concerning the conduct of the procurement proceeding relevant to suppliers or contractors.

3. As discussed in the context of article 24 above, the procurement regulations must set out, if not an exhaustive list of information covered by paragraph (4) of the article, at least its legal sources, in particular of such notions as information whose non-disclosure is necessary for the protection of the essential security interests of the enacting State and information whose disclosure may “impede fair competition”. They may be construed very broadly by the procuring entity for the purpose of not disclosing certain information from the record on the basis of confidentiality. Other branches of law may identify certain information as classified and the procurement regulations must cross-refer to them, in other cases, the procurement regulations themselves should clearly limit the scope of the relevant notions referred in paragraph (4) of the article.

4. The procurement regulations must set out all information to be included in the record of procurement proceedings in addition to that explicitly listed in the law itself (see in this context article 25 (1) (w)). For example, the procurement regulations may require recording the submission of late tenders in the documentary record of procurement proceedings and putting on the record any minor deviations and errors and oversights discovered during the examination and evaluation of tenders and steps taken in connection with them.

5. If the enacting State considers that applicable internal rules and guidance should also be stored with the record and documents for a particular procurement, the procurement regulations or rules or guidance from the public procurement agency or other body may so require.

Article 26. Code of conduct

1. Depending on the legal traditions of enacting States, a code of conduct specifically for the procurement personnel may be enacted as part of the administrative law framework of the State, at the level and as part of the procurement regulations.

2. When they are enacted separately from the procurement regulations and if appropriate, the procurement regulations must provide for the manner of the code of conduct to be promptly made accessible to the public and systematically maintained.²²

IV. Subjects to be addressed in procurement regulations in the context of general issues raised by provisions of Chapter II of the Model Law (Methods of procurement and their conditions for use; solicitation and notices of the procurement)

1. The procurement regulations are to identify a publication where the invitation to tender or to present other submissions are to be advertised or where an advance notice of the procurement is to appear. The procurement regulations are also to determine the means and manner of the publication of those invitations and notices. There may be paper or electronic media or combination of both, as further explained in the commentary to article 5 in the Guide.

2. The procurement regulations are to provide for rules of publication of the invitation to tender or to present other submissions internationally, i.e. in the media with international circulation and in the manner and language which will ensure that the invitation will reach and be understood by an international audience of suppliers and contractors.

3. The procurement regulations may additionally require procuring entities to publish the invitation to tender or to present other submissions by additional means that would promote widespread awareness by suppliers and contractors of procurement proceedings. These might include, for example, posting the invitation on official notice boards, a contracts bulletin and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity. Where the procuring entity uses electronic means of advertisement and communication, the procurement regulation may allow including in the invitation a web link to the solicitation documents themselves.

4. The procurement regulations must address in detail exceptions to the general rule on publication of the invitation internationally — domestic procurement or where procurement in view of its low value, in the judgement of the procuring entity, is unlikely to be interest on the part of foreign suppliers or contractors. The issues to be addressed in the context of low-value procurement are discussed in section II.C above. As noted there, the procurement regulations must ensure consistency in determining what constitutes low-value procurement for the purpose of applying relevant exemptions of the Model Law. It is important for the procurement regulations to explain in this regard that in both cases in which the exemption from international publication applies, the procuring entity may still solicit internationally; where it does not solicit internationally but foreign suppliers

²² See in this context the commentary in the Guide to article 5 (1) of the Model Law, in which a similar requirement applies to legal texts of general application.

or contractors wish to participate (if they have seen an advertisement on the Internet, for example), they must be permitted to do so.

5. As noted in the context of article 8 above, the procurement regulations must specify any grounds for the use of domestic procurement; if those grounds are found in other provisions of law of the enacting State, the procurement regulations must cross-refer to them.

V. Subjects to be addressed in procurement regulations in the context of specific articles of Chapter III of the Model Law (Open tendering), in the order of the articles

Article 38. Provision of solicitation documents

The considerations as regards the fee that may be charged for the solicitation documents are addressed in section II.D above and relevant in the context of this article.

Article 39. Contents of solicitation documents

1. If the solicitation documents must contain at a minimum information in addition to that listed in the law, the procurement regulations must specify it or refer to other provisions of law of the enacting State where such information may be listed.

2. In the context of paragraph (g) of the article, where SME promotion is a socioeconomic policy of the government concerned, the procurement regulations may encourage procuring entities to consider whether to allow in the solicitation documents for partial submissions.

Article 40. Presentation of tenders

1. The procurement regulations should provide for guidance or call for issuance of guidance as regards various aspects of submission of tenders in non-paper-based environment. They need to require that the procuring entity's system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to presented tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved by various commercial technologies that are available at any given time but this will not be appropriate for

low-risk small-value procurement. The choice should therefore be based on the cost-benefit analysis.²³

2. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders presented would be recorded. However, the procurement regulations should regulate this element of discretion by reference to the applicable legal norms in electronic commerce, in order to prevent abuse and ensure objectivity.

3. It is recognized that failures in automatic systems, which may prevent suppliers or contractors from presenting their tenders before the deadline, may inevitably occur. The procurement regulations must address these situations and provide options for the procuring entity to address them. For example, as the commentary to article 40 in the Guide states, where a failure occurs, the procuring entity has to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting tenders would be necessary. If, however, the procuring entity determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, can give rise to a challenge by aggrieved suppliers and contractors under Chapter VIII of the Model Law.²⁴

Article 42. Opening of tenders

1. The procurement regulations must address in detail the means and manner of presence of suppliers and contractors at the opening of tenders, either in person or virtually. The procurement regulations must require the procuring entity in situations where it decides to use non-paper-based means of communication in the procurement proceedings exclusively or in combination with paper-based means, to set up modalities for the opening of tenders (the place, manner, time and procedures for the opening of tenders) that would allow for the physical and virtual presence of suppliers or contractors. The procurement regulations may list factors that must be taken into account in those situations, such as time difference, the need to supplement any physical location for opening of tenders with any means of ensuring presence of those who cannot be present at the physical location or opting for a virtual location.²⁵

2. As noted in the context of article 7 above, the procurement regulations must address such notions as means of communication being “in common use” and ensuring “full and contemporaneous participation in the meetings”. In addressing the latter notion, the procurement regulations may draw on the explanation found in paragraph 3 of the commentary to article 42 in the Guide: “fully and

²³ Para. 3 of the commentary to article 40 in the Guide.

²⁴ Para. 6 of the commentary to article 40 in the Guide.

²⁵ For a further discussion of the relevant requirements, see the commentary to article 7 (4) in the Guide.

contemporaneously” means that suppliers or contractors must be given a contemporaneous opportunity to receive all and the same information given out during the opening. The information concerned includes the announcements made in accordance with paragraph (3) of the article. Suppliers or contractors must also be able to intervene where any improprieties or inaccuracies are observed, to the extent that they would be able to do so if they were physically present. Regardless of the method used, all pertinent information must be communicated to suppliers or contractors sufficiently in advance to enable them, in accordance with the provisions of article 7 (4), to participate in the opening of tenders.

3. The procurement regulations must also set out specific safeguards for automated opening of tenders, such as: (a) that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with paragraph (1) of the article, without compromising the security, integrity and confidentiality of tenders; (b) only such persons will have the right to open tenders at the set time. The procurement regulations may require that at least two authorized persons should by simultaneous action perform opening of tenders. “Simultaneous action” in this context means that the designated authorized persons within almost the same time span shall open the same components of a tender and produce logs of what components have been opened and when; (c) before the tenders are opened, the system should confirm the security of tenders by verifying that no unauthorized access has been detected; (d) the authorized persons should be equipped with appropriate means to verify the authenticity and integrity of tenders and their timely presentation without the capability of making any changes; (e) measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them, such as through virus or similar infection; (f) the system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened; and (g) the system must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings).²⁶

Article 43. Examination and evaluation of tenders

1. The procurement regulations should explain such notions as minor deviations, errors and oversights as compared to arithmetical errors which correction is addressed in article 16 of the Model Law. The procurement regulations must emphasize that any deviations or errors or oversights that can be corrected without touching on the substance of the tender should be acceptable, such as those that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents. In no case, however, can there be a correction of errors or oversights that involves a substantive change to the submissions concerned, such as changes that would make an unqualified supplier or contractor qualified or unresponsive submission responsive. The procurement regulations should provide practical examples of acceptable and unacceptable deviations, errors and oversights.

²⁶ Paras. 6 and 7 of the commentary to article 42 in the Guide.

2. The procurement regulations should provide for the rules for quantification of minor deviations and errors and oversights and for taking them into account appropriately in the examination and evaluation of tenders so that tenders may be compared objectively and fairly.
3. The procurement regulations need to build procedural safeguards to mitigate the risks of discriminatory practices in applications of provisions on correction and quantification of minor deviations and errors and oversights, for example by requiring the procuring entity to put on the record any minor deviations and errors and oversights discovered during the examination and evaluation process and steps taken in connection with them.
4. To address exhaustively all issues of errors or omissions in submissions and possible clarification and corrections either by the procuring entity or a supplier or contractor, the procurement regulations may need to refer to contract law and other branches of law of an enacting State as well as reflect the provisions of an international agreement to which the enacting State may be a party, such as the WTO GPA.
5. With reference to paragraphs (5) and (6) of the article, the procurement regulations must guide the procuring entity as regards the options available under the article if the winner fails to demonstrate its qualifications again: either to cancel the procurement proceedings or award the procurement contract to the next successful tender. The procuring entity should be required to assess the consequences of cancelling the procurement, in particular the costs of an alternative procurement method. The procuring entity should not be encouraged always to opt for the next successful tender. The cancellation of the procurement may be required for example where collusion between the supplier or contractor presenting the successful tender and the supplier or contractor presenting the next successful tender is suspected since this may lead to the acceptance of the tender with the abnormally high price. The procurement regulations must require the procuring entity to put on the record details of the procedures envisaged in paragraphs (5) and (6) of the article if they have taken place and the decisions taken by the procuring entity and reasons therefor.

VI. Subjects to be addressed in procurement regulations in the context of methods of procurement referred to in Chapter IV of the Model Law (Procedures for restricted tendering, request for quotations and request for proposals without negotiation)

Restricted tendering and direct solicitation in request for proposals

1. In the context of the use of restricted tendering or request for proposals for procurement of items available from only a limited number of suppliers or contractors, the procurement regulations must address the question of market definition and the safeguard that the procuring entity must invite all potential suppliers or contractors capable to deliver the procured items. In this context they

should regulate the requirement of an advance notice of the procurement and its implications on the procurement, in particular that if previously unknown suppliers or contractors respond to the advance notice they must be permitted to submit a tender or proposal unless they are disqualified or otherwise do not comply with the terms of the notice. The procurement regulations must require open tendering with public and unrestricted solicitation or pre-qualification where the extent of the market is not fully known or understood, in particular as regards the pool of overseas suppliers or contractors and the extent of their interest in procurement proceedings of the enacting State.

2. The procurement regulations should address measures to mitigate the risks of an additional administrative burden and delays in the procurement should an additional supplier or contractor emerge, in the light of articles 14 and 15 that require providing sufficient time for suppliers or contractors to present their submissions. The procurement regulations may require including in the advance notice a statement requesting interested suppliers or contractors to identify themselves to the procuring entity before the date upon which the solicitation documents will be issued and provided to the suppliers or contractors known to the procuring entity.

3. As regards direct solicitation used to avoid the disproportionate costs of examining a large number of tenders or proposals as against the value of the procurement, the procurement regulations must address both a reasonable minimum of suppliers or contractors, such as five, to ensure effective competition, and the objective manner of selection of the suppliers or contractors to be invited to participate, such as “first-come, first-served”, the drawing of lots, rotation or other random choice in a commodity-type market.

Request for quotations

1. The procurement regulations must elaborate on conditions and rules for the use of this procurement method taking into account that ensuring adequate transparency is a key issue, given that procurement under this method is not required to be preceded by a notice of the procurement and may fall below the threshold for an individual public announcement of the contract award under article 23. The procurement regulations should spell out the type of the items to be procured through this procurement method. They could require using recognized trade terms, in particular INCOTERMS, or other standard trade descriptions in common use — such as those in the information technology and communications markets — so that the off-the-shelf items for which the method is designed can be defined by reference to industry standards.

2. The procurement regulations should require the procuring entity always to consider alternatives to request for quotations, especially where e-purchasing became the norm. Electronic methods of requesting quotations may generally be particularly cost-effective for low-value procurement and ensuring also more transparent selection.

3. Where no alternatives are available, the procurement regulations must regulate the manner in which the participants are to be identified, to ensure that the selection of participants in request-for-quotations proceedings is not carried out in a way so

as to restrict market access or to allow abuse of the procedures. Examples of abuse include the selection of two suppliers or contractors whose prices are known to be high, or two suppliers or contractors that are geographically remote, so as to direct the procurement towards a third, chosen supplier or contractor, or suppliers or contractors belonging to a corporate group or that are otherwise under some form of common financial and managerial control. The procurement regulations may require the comparison of historical offers and rotation among suppliers or contractors, where the same items may be procured occasionally. The use of electronic catalogues as a source of quotations may in particular be considered to offer better opportunity for transparency in the selection of suppliers or contractors from which to request quotations, in that such selection can be evaluated against those suppliers or contractors offering relevant items in catalogues. Although not required in the Model Law, the procurement regulations may also require publication of an advance notice of the procurement as in other cases of direct solicitation. The procurement regulations may put in place special oversight procedures that should identify the winning suppliers or contractors under this method, so that repeat awards can be evaluated.

Request for proposals without negotiation

1. In addition to those issues highlighted in connection with restricted tendering and direct solicitation in request for proposals above, the procurement regulations should explain the purpose of this procurement method and with reference to examples illustrate the situations when it could usefully be used. They should also delineate clearly the scope of “technical, quality and performance” characteristics of the proposals from their “financial aspects”. Practical examples of elements of proposals that might fall into one or other category are provided in the commentary to request for proposals without negotiation in the Guide.²⁷
2. The procurement regulations must specify which minimum information not listed in the law must be included by the procuring entity in the solicitation documents. Where such information is specified in other provisions of law of the enacting State, the procurement regulations must cross-refer to them.
3. The considerations as regards the price charged for the solicitation documents are addressed in section II.D above and relevant in the context of article 47 (2) (h) and (i). The procurement regulations should therefore address them in the context of this procurement method as well.
4. If the procurement law of the enacting State allows that, the procurement regulations may provide for a variation of this procurement method that may be appropriate for the procurement of a simpler subject matter: the procuring entity may select the successful proposal on the basis of the price of the proposals that meet or exceed the minimum technical, quality and performance requirements, provided that the statement of the evaluation criteria in the invitation and request for proposals have so provided. This approach may be appropriate in situations where the procuring entity does not need to evaluate technical, quality and performance characteristics of proposals and assign any scores but rather establishes a threshold

²⁷ Para. 2 of the commentary in the Guide to General description and main policy issues of request for proposals without negotiation.

by which to measure technical, quality and performance characteristics of proposals at such a high level that all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability perform the procurement contract at a more or less equivalent level of competence. There should also be no need in such cases to evaluate any financial aspects of proposals other than price.

VII. Subjects to be addressed in procurement regulations in the context of methods of procurement referred to in Chapter V of the Model Law (Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)

General

1. The procurement regulations can assist in enhancing objectivity in the assessment of the circumstances that necessitate the use of a Chapter V procurement method. Since this assessment will take place at the procurement planning stage, the procurement regulations should build in appropriate safeguards at that stage, including by requiring that the procurement planning stage is to be fully documented and recorded.
2. The procurement regulations should address external expert assistance that can be provided centrally or from other sources to the procuring entity in building capacity to engage successfully in discussions, dialogue or negotiations with the private sector, to explain the procuring entity's needs in a way that can be fully and equally understood by all participants, and to assess the resulting tenders and offers such that its needs are properly met.
3. The procurement regulations should also provide for managerial tools, structures and procedural safeguards for the use of procurement methods involving interaction with the market, in particular those aimed at avoiding the possibility of abuse and corruption. In particular, in procurement involving delicate issues or highly competitive contracts, the procurement regulations should provide for oversight measures, including post-procedure audit, and the presence of observers coming from outside the procuring entity's structure during the procedures, to assess the use of the methods in practice. These measures should aim at preventing favouring certain suppliers or contractors, for example by providing different information to each of them during the discussions, dialogue or negotiations, and at mitigating the risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors.

Two-stage tendering

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that necessitate the use of this procurement method. They could usefully provide examples of its successful use, such as in procurement of high-technology items, such as large passenger aircraft or

communication systems, technical equipment and infrastructure procurement, including large complex facilities or construction of a specialized nature. More generally, the procurement regulations may instruct the procuring entity to consider the use of this method where it is evident at the procurement planning stage that obtaining best value for money is unlikely if the procuring entity draws up a complete description of the procurement setting out all the technical specifications, all quality and performance characteristics of the subject matter, all relevant competencies of the suppliers or contractors, and all terms and conditions of the procurement, without examining what the market can offer.

2. The procurement regulations should guide the procuring entity on all exceptions that should be made in applying general provisions of open tendering contained in Chapter III of the Model Law to two-stage tendering. Examples of such exceptions are provided in paragraphs 1 to 3 of the commentary to the procedures of two-stage tendering in the Guide.

3. The procurement regulations may elaborate on the provisions of the Model Law as regards presentation, examination and rejection of initial tenders. They in particular may list grounds for rejection of initial tenders, drawing on the list in article 43 (2) of the Model Law as appropriate (noting that the grounds touching upon prices of the tenders would not be applicable since initial tenders do not include price).

4. The procurement regulations should explain the purpose for and nature of the discussion held in this procurement method, in particular that discussion does not involve binding negotiations or bargaining of any type and may concern any aspect of initial tenders that were not rejected but price. The procurement regulations may usefully emphasize that holding the discussions is an option, not an obligation: the procuring entity may be able to refine and finalize the terms and conditions of the procurement without holding the discussion, on the basis of the initial tenders received.

5. The procurement regulations should explain the notion of extending an equal opportunity to discuss to all suppliers or contractors concerned. An “equal opportunity” in this context means that the suppliers or contractors are treated as equally as the requirement to avoid disclosure of confidential information and the need to avoid collusion allow. The procurement regulations must build measures that would allow the monitoring of the compliance of the procuring entity with this requirement of the law, for example the requirement to record and preserve the details of the discussions with each supplier or contractor.

6. The procurement regulations must alert that the risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors may arise not only at the stage of discussions but also in the formulation of the revised set of the terms and conditions of the procurement. In conformity with the requirements of article 24, the procuring entity must respect the confidentiality of the suppliers’ or contractors’ technical proposals throughout the process. The procurement regulations must provide practical guidance for achieving that, such as by prohibiting the procuring entity from revealing the source of information used in formulating the revised technical, quality and performance characteristics of the subject matter and by requiring them to avoid using in the

revised terms and conditions of the procurement requirements, symbols and terminology peculiar to only one supplier or contractor.

Request for proposals with dialogue

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that necessitate the use of this procurement method. They could usefully provide examples of its successful use, such as in procurement aimed at seeking different, often innovative, solutions to technical issues. The method may be appropriate for example in the procurement of architectural, construction and infrastructure works where achieving energy-saving and other sustainable procurement goals are sought. In those cases, there could be many possible solutions to the procuring entity's needs: the material may vary, and may involve the use of one source of energy as opposed to another (wind vs. solar vs. fossil fuels). The complexity need not be at the technical level: in infrastructure projects, for example, there may be different locations and types of construction as the main variables. A tailor-made solution may be needed in less complex projects, for example, a communication system for the archiving of legal records, which may need particular features such as long-term accessibility, and where technical excellence is an issue. In all these cases, the attractiveness of solutions and personal skill and expertise of the suppliers or contractors can be evaluated only through dialogue; the dialogue is essential in order to identify and obtain the best solution to the procurement needs. The opportunity cost of not engaging in dialogue with suppliers or contractors is therefore high, while the economic gains of engaging in the process are evident.

2. The procurement regulations must clarify in which cases this method is not to be used. Since the dialogue normally involves complex and time-consuming procedures, the method should not be used for simple items that are usually procured through procurement methods not involving interaction with suppliers or contractors. The procurement method is, for example, not intended to apply to cases where negotiations are required because of urgency or because there is an insufficient competitive base (in such cases, the use of competitive negotiations or single-source procurement is authorized under the Model Law). It does not address the type of negotiations that seek only price reductions as in request for proposals with consecutive negotiations. Nor it is intended to apply in situations when the procuring entity needs to refine its procurement needs and envisages formulating a single set of terms and conditions (including specifications) of the procurement, against which tenders can be presented, in which two-stage tendering proceedings should be used.

3. In view of many similarities in conditions for use and features of two-stage tendering and request for proposals with dialogue, the procurement regulations should pay particular attention to clarifying the purpose of the use of this method as opposed to two-stage tendering. One of the main distinct features of this procurement method — the absence of any complete single set of terms and conditions of the procurement beyond the minimum requirements against which final submissions are evaluated. In order to use request-for-proposals-with-dialogue proceedings, the procuring entity would have to conclude therefore that formulating a complete single set of terms and conditions of the procurement would not be

possible or would not be appropriate, and therefore dialogue with suppliers or contractors is necessary for the procurement to succeed.

4. While it is not intended that the procedure will involve the procuring entity in setting out a full technical description of the subject matter of the procurement, the method is not to be used as an alternative to appropriate preparation for the procurement. The procurement regulations must therefore list issues to be addressed at the procurement planning stage for the method to be successfully used, such as identifying minimum technical and other requirements for the project and parameters of the project that cannot be varied during the dialogue.

5. The procurement regulations should explain the purpose for and nature of the dialogue held in this procurement method, in particular that the dialogue may concern any aspect of proposals, including price. While the primary focus of dialogue typically may be on technical, quality and performance aspects or legal or other supporting issues, the subject matter of the procurement and market conditions may allow and even encourage the procuring entity to use price as an aspect of dialogue. In addition, in some cases, it is not possible to separate price and non-price criteria.

6. The procurement regulations are also to explain that the dialogue is not intended to involve binding negotiations or bargaining from any party to the dialogue. The procurement regulations should list requirements for a concurrent dialogue, such as that all suppliers and contractors identified for dialogue by the procuring entity in accordance with the terms and conditions of the solicitation are entitled to an equal opportunity to participate in the dialogue, there are no consecutive discussions, and the dialogue is to be conducted at different times with different suppliers or contractors, by the same procurement officials or negotiating committees composed of the same procurement officials.

7. If the provisions calling for an ex ante approval mechanism for the use of this procurement method are enacted,²⁸ the procurement regulations must regulate prerogatives in the procurement proceedings of an approving authority designated by the enacting State in the law, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision of the way proceedings are handled. In addressing these issues, the procurement regulations should pay special attention to the need to avoid conflict of interest at this and subsequent stages in the procurement proceedings if for example the same entity grants the approval for the use of the method and subsequently approves the entry into force of the procurement contract or is engaged in reviewing claims arising from the procurement proceedings.

8. Considerations raised in connection with methods of solicitation in section IV above and particular aspects of direct solicitation raised in section VI above in the context of restricted tendering and request for proposals are relevant to request-for-proposals-with-dialogue proceedings. The procurement regulations should therefore address them in the context of this procurement method as well.

²⁸ As to which see para. 5 of the commentary to Conditions for use of request for proposals with dialogue (article 30 (2)) in the Guide.

9. The procurement regulations should recommend the minimum three suppliers or contractors with whom to hold the dialogue and where the maximum number of suppliers or contractors from which proposals will be requested is established, that maximum number should be higher than the maximum to be admitted to the dialogue stage, in order to allow the procuring entity to select from a bigger pool the most suitable candidates for the dialogue stage.
10. At the same time, the procurement regulations should address situations when only one or two responsive proposals are presented: the procuring entity should not be precluded from continuing with the procurement proceedings in such cases because the procuring entity in any event has no means of ensuring that the competitive base remains until the end of the dialogue stage: suppliers or contractors are not prevented from withdrawing at any time from the dialogue.
11. The procurement regulations should list or cross-refer to all grounds under the law of the enacting State under which suppliers or contractors may be excluded from further dialogue by the procuring entity, taking into account that the Model Law does not give an unconditional right to the procuring entity to terminate competitive dialogue with a supplier or contractor, for example, only because in the view of the procuring entity that supplier or contractor would not have a realistic chance of being awarded the contract. On the other hand, they must be excluded on the basis of article 21 (inducement, unfair competitive advantage or conflicts of interest), or if they are no longer qualified (for example in the case of bankruptcy), or if they materially deviate during the dialogue stage from the essential requirements of the procurement (such as the subject matter of the procurement, the minimum requirements or the requirements identified as not being the subject of dialogue at the outset of the procurement).
12. The procurement regulations may require in all those cases the procuring entity to notify promptly suppliers or contractors of the procuring entity's decision to terminate the dialogue and to provide reasons for that decision. They may also require the procuring entity to provide suppliers or contractors at the outset of the procurement proceedings with information about the grounds on which the procuring entity will be required under law to exclude them from the procurement.
13. The procurement regulations should encourage better procurement planning that would make the process more predictable, in particular by requiring the procuring entity to specify in the request for proposals an estimated timetable envisaged for the procedure to give both sides a better idea as regards the timing of various stages and which resources (personnel, experts, documents, designs and so forth) would be relevant, and should be made available, at which stage. The procurement regulations may also require the procuring entity specifying the maximum period of time during which suppliers or contractors should be expected to commit their time and resources.
14. The procurement regulations should explain limits on the extent of modification of the terms and conditions of the procurement as set out at the outset of the procurement proceedings during the dialogue, taking into account that flexibility in making modifications is an inherent feature of this method and imposing excessive restrictions will defeat the purpose of the procedure. The need for modifications may be justified in the light of dialogue but also in the light of circumstances not related to dialogue (such as administrative measures).

15. The procurement regulations must illustrate with practical examples which modifications would be acceptable and which will not in the light of the requirements of article 49 (9). In general terms, any modifications should be permitted unless they are made to such essential terms and conditions of the procurement whose modification would have to lead to the new procurement (the subject matter of the procurement, qualification and evaluation criteria, the minimum requirements and any elements that the procuring entity explicitly excludes from the dialogue at the outset of the procurement).

16. The procurement regulations must list practical measures aimed at achieving fair, equal and equitable treatment of all participants during the dialogue. In addition to those identified in the Model Law itself (e.g. that the dialogue is to be held on a concurrent basis by the same representatives of the procuring entity and those related to circulation of pertinent documents and information to participating suppliers or contractors), the procurement regulations should identify other measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, and the rules for establishing the sequence of meetings held with different participants.

17. The procurement regulations should explain that the prohibition to negotiate after the best and final offers (BAFOs) are presented does not cover the possibility to seek clarifications under article 16 subject to limitations imposed by that article, such as prohibition to alter price or other significant information as part of the clarification process.

18. The procurement regulations must require the procuring entity to record and preserve in writing details of dialogue with each supplier or contractor.

Request for proposals with consecutive negotiations

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that necessitate the use of this procurement method. They could usefully provide examples of its successful use, such as in procurement of more complex subject matter where the examination and evaluation of technical, quality and performance characteristics of the proposals separately from consideration of financial aspects of proposals is possible and needed and where holding negotiations on commercial or financial aspects of proposals is indispensable — there may be so many variables in these aspects of proposals that they cannot be all foreseen and specified at the outset of the procurement and must be refined and agreed upon during negotiations. When the need exists to negotiate on other aspects of proposals, this procurement method may not be used. Examples of the use of this method in practice include consulting (e.g. advisory) services.

2. Considerations raised in connection with methods of solicitation in section IV above and particular aspects of direct solicitation raised in section VI above in the context of restricted tendering and request for proposals are relevant to request-for-proposals-with-consecutive-negotiations proceedings. The procurement regulations should therefore address them in the context of this procurement method as well.

3. All stages in this procurement method preceding the stage of negotiations are the same as in request for proposals without negotiation. The procurement

regulations should therefore address issues raised in the relevant context in section VI above in the context of this procurement method as well.

4. The procurement regulations should explain the purpose for and nature of the negotiations held in this procurement method, in particular that they may concern only commercial or financial aspects of proposals and that they are held consecutively as opposed to concurrently as for example in competitive negotiations. As is the case with request for proposals without negotiation, the procurement regulations should delineate clearly the scope of “technical, quality and performance” characteristics of the proposals from their “financial aspects”. Practical examples of elements of proposals that might fall into one or other category are provided in the commentary to request for proposals without negotiation and to this procurement method in the Guide.²⁹

5. The procurement regulations must emphasize the requirement of the law that no procurement contract can be awarded to the supplier(s) or contractor(s) with which the negotiations have been terminated. The commentary to this procurement method in the Guide sets out considerations that the procuring entity should take into consideration while deciding to terminate negotiations with the best, or a better-ranked, supplier or contractor.³⁰

6. The procurement regulations may need to provide for practical measures that encourage discipline on both suppliers or contractors and procuring entities to negotiate in good faith. The procurement regulations may also include measures aimed at increasing the bargaining position of the procuring entity. Such measures may include requiring the procuring entity to fix a period for the negotiations in the solicitation documents.

Competitive negotiations

1. The procurement regulations must emphasize the exceptional nature of this procurement method, which could be considered in preference to single-source procurement whenever possible in the case of urgency, catastrophic events and the protection of essential security interests of the enacting State. It cannot be considered as an alternative to any other method of procurement available under the Model Law.

2. The procurement regulations must require the procuring entity even in cases of urgency, catastrophic events and the protection of essential security interests of the enacting State first to consider the use of open tendering or any other competitive method of procurement. Where the procuring entity concludes that the use of other competitive methods is impractical, it must always consider the use of competitive negotiations in preference to single-source procurement unless it concludes that there is extreme urgency or another distinct ground justifying the use of

²⁹ Para. 2 of the commentary in the Guide to General description and main policy issues of request for proposals without negotiation and para. 3 of the commentary to Procedures for request for proposals with consecutive negotiations (article 50).

³⁰ Paras. 4 to 7 of the commentary to Procedures for request for proposals with consecutive negotiations (article 50).

single-source procurement under paragraph (5) of article 30 of the Model Law (for example, the absence of a competitive base or exclusive rights involved).

3. The procurement regulations should illustrate examples that would necessitate the use of this procurement method, such as the need for urgent medical or other supplies after a natural disaster or the need to replace an item of equipment in regular use that has malfunctioned. They should explain that the method is not available if the urgency is due to a lack of procurement planning or other (in)action on the part of the procuring entity. The procurement regulations must elaborate that the extent of the procurement through this method must be directly derived from the urgency itself. In other words, if there is an urgent need for one item of equipment and an anticipated need for several more of the same type, competitive negotiations can be used only for the item needed immediately.

4. The procurement regulations may impose additional requirements for the use of competitive negotiations. They may require that the procuring entity take steps such as: establishing basic rules and procedures for the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; preparing various documents to serve as the basis for the negotiations, including documents setting out the description of the subject matter to be procured, and the desired contractual terms and conditions; and requesting the suppliers or contractors with which it negotiates to itemize their prices so as to assist the procuring entity in comparing offers.

5. Direct solicitation is an inherent feature of this procurement method since the solicitation in this procurement method is addressed to a limited number of suppliers or contractors identified by the procuring entity. It raises identical issues to those discussed in section VI above in the context of restricted tendering and request for proposals, such as consequences of the publication of an advance notice of the procurement, notably the emergence of unknown suppliers or contractors requesting participation in competitive negotiations, and mechanisms for ensuring a non-discriminatory manner of selecting the suppliers or contractors. Those issues must be addressed in the procurement regulations in the context of this procurement method as well.

6. The procurement regulations must in particular discuss exceptions to the requirement to publish an advance notice of the procurement in the case of direct solicitation since they are pertinent to the conditions of use of competitive negotiations. The procuring entity will not be required to publish such a notice, but may still choose to do so, when competitive negotiations are used in situations of urgency. When competitive negotiations are used in procurement for the protection of essential security interests of the State, the advance notice of the procurement is required subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized or required (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. The procurement regulations must set out such authority or requirement or cross-refer to other provisions of law of the enacting State where such authority or requirement is set out.

7. The procurement regulations may recommend engaging in negotiations with at least three suppliers or contractors to ensure effective competition.
8. The procurement regulations should explain the purpose for and nature of the negotiations held in this procurement method, in particular that they may concern any aspects of proposals and that they involve bargaining and are to be held concurrently, not consecutively as in request for proposals with consecutive negotiations.
9. The procurement regulations could usefully cross-refer to all safeguards in the Model Law aimed at ensuring transparency and the fair, equal and equitable treatment of participants in procurement by means of this procurement method. In addition to those identified in the Model Law itself specifically in the context of this procurement method (e.g. those related to circulation of pertinent documents and information to participating suppliers or contractors), they include the requirement to maintain a detailed record of the procurement proceedings, including details of negotiations with each participating supplier or contractor, and to provide access by suppliers or contractors to the record, as provided for in article 25. The procurement regulations should identify other safeguards, such as providing equal opportunity to participate in negotiations to all invited to competitive negotiations. They could also provide for practical measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, and that the rules for establishing the sequence of meetings held with different participants, the maximum duration of the negotiations stage, and the time frame for negotiations with each supplier or contractor, are made known in the solicitation documents. The procurement regulations could also require oversight measures such as the presence during negotiations of persons outside the procuring entity's structure to oversee the process. They could also require the establishment of a negotiating committee and define rules for its composition and operation.
10. The procurement regulations must contain measures aimed at ensuring that all participating suppliers or contractors are treated by the procuring entity on an equal footing. Such measures include the requirement on the procuring entity to issue the request for BAFOs in writing and communicate it simultaneously to all participating suppliers or contractors so that all of them could receive information about termination of negotiations and available time to prepare their BAFO.
11. As with other procurement methods involving the BAFO stage, the procurement regulations must address differences between the prohibition of post-BAFO negotiations and the possibility to request clarifications and explanations as regards the terms and conditions of BAFOs under article 16 of the Model Law.

Single-source procurement

1. The procurement regulations must include measures that would prevent the procuring entity from using single-source procurement where other methods of procurement are available.
2. The procurement regulations should address different situations that lead to the use of single-source procurement, such as: (a) where no alternatives to single-source

procurement may objectively exist, such as where there is only one supplier or contractor capable of providing the subject matter, either because that supplier or contractor has exclusive rights with respect to the subject matter of the procurement or for other reasons that confirm the exclusivity; and (b) where the use of single-source procurement is authorized or required by law of the enacting State on other grounds, for example for implementing its socioeconomic policies or protecting essential security interests of the State. Apart from those objective and authorized reasons for the use of single-source procurement, the absence of the proper procurement planning or the capacity on the side of the procuring entity to consider and use alternative methods or tools may be the reason for the use of single-source procurement.

3. Where single-source procurement is used because of the absence of any alternative, the procurement regulations must establish or elaborate on measures of verifying whether the reason invoked by the procuring entity for the use of single-source procurement is indeed objectively justifiable. Among them is the requirement of giving a timely advance public notice of single-source procurement as an essential safeguard: it tests the procuring entity's assumption that there is an exclusive supplier or contractor and so enhances transparency and accountability in this aspect of procurement practice. The procurement regulations may establish a minimum period for the publication of such notice before the procurement proceedings may begin and call for the widest dissemination of the notice. The procurement regulations must require holding another procurement using another method of procurement where additional suppliers or contractors emerge, since the justification for single-source procurement in such case falls away. Other measures include verifying practices of formulating descriptions of the subject matter of the procurement (they could be formulated in such a narrow way so as to artificially limit the market concerned to a single source; this may encourage monopolies and corruption, whether inadvertently or intentionally). For this reason, the procurement regulations could encourage the use of functional descriptions (performance/output specifications).

4. Where the use of single-source procurement is authorized or required by law of the enacting State on other grounds, the procurement regulations should explain the application of the relevant condition for use and its limits, such as:

(a) In the context of the condition for use set out in article 30 (5) (b) of the Model Law, extreme urgency, the procurement regulations may explain that the urgency must be so extreme that holding negotiations with more than one supplier or contractor and thus the use of competitive negotiations would be impractical. As is the case in competitive negotiations, the need to link the extent of the procurement with the extreme urgency will limit the amount that can be procured using this method: the amount procured using emergency procedures should be strictly limited to the needs arising from that emergency situation. For example, following a catastrophic event, there may be immediate needs for clean water and medical supplies; a need for semi-permanent shelter may arise out of the same catastrophe but is perhaps not so urgent and could be procured by other methods;

(b) In the context of the condition for use set out in article 30 (5) (c), the need for standardization or compatibility with existing goods, equipment, technology or services, the procurement regulations must provide for the rule that procurement in such situations should be limited both in size and in time. They

should also emphasize that this reason must be truly exceptional: otherwise needs may be cited that are in reality due to poor procurement planning on the part of the procuring entity;

(c) In the context of the condition for use set out in article 30 (5) (d), the use of single-source procurement for the protection of essential security interests of the State, the procurement regulations must explain that the use of single-source procurement instead of another method of procurement, would be appropriate only if the procurement involves classified information and the procuring entity concludes that the information concerned will be insufficiently protected if any other method of procurement, including another exceptional method of procurement such as competitive negotiations, is used. As stated in section II.B above, the authority granted to procuring entities to take special measures and impose special requirements for the protection of classified information applies only to the extent permitted by the procurement regulations or by other provisions of law of the enacting State;

(d) In the context of the condition for use set out in article 30 (5) (e), the use of single-source procurement to implement socioeconomic policies of the enacting State, the procurement regulations must address in detail the stage of seeking and receiving comments, to make the opportunity to comment meaningful. They should provide for the minimum content of the notice, in particular to encourage on the question of whether there is only one available supplier or contractor, so as to avoid the abuse of this type of single-source procurement to favour a particular supplier or contractor. They should also regulate further aspects of these provisions: in particular, whose comments should specifically be sought (for example, of local communities), the purpose or the effect of comments, especially negative, if received. They should require the procuring entity to allow sufficient time to elapse between the public notice of the procurement and the start of the procurement proceedings, to analyse and record comments from any member of the public and to provide explanations upon request. If the provisions calling for an ex ante approval mechanism for the use of single-source procurement on this ground are enacted,³¹ the procurement regulations must regulate prerogatives of an approving authority, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision of the way proceedings are handled. In addressing these issues, the procurement regulations should pay special attention to the need to avoid conflict of interest at this and subsequent stages in the procurement proceedings if for example the same entity grants the approval for the use of the method and subsequently approves the entry into force of the procurement contract or is engaged in reviewing claims arising from the procurement proceedings.

5. Where the absence of the proper procurement planning or the capacity on the side of the procuring entity to consider and use alternative methods or tools is the reason for the use of single-source procurement, the procurement regulations must address those reasons by establishing measures towards the proper procurement planning and building the required capacity to consider and use alternatives to single-source procurement. For example, a closed framework agreement without

³¹ As to which see para. 8 of the commentary to Conditions for use of single-source procurement (article 30 (5)) in the Guide.

second-stage competition may effectively address situations of extreme urgency, where it has been concluded in advance against a background of an identified and probable need occurring on a periodic basis or within a given time frame. Open framework agreements could be established for the simple standardized items while closed framework agreements for more complex items, in anticipation of urgent needs or additional supplies from the same source for reasons of standardization and compatibility. Request for quotations and ERAs could be used instead of single-source procurement where the need for off-the-shelf items arose in situations of urgency, emergency and the protection of essential security interests of the enacting State. Where negotiations are necessary but the use of other more structured and transparent methods of procurement is not possible, the competitive negotiations are to be used. This is because competitive negotiations are inherently more competitive than single-source procurement and more safeguards are built in the provisions of the Model Law regulating procedures in competitive negotiations, making the latter more structured and transparent than single-source procurement.

6. Direct solicitation is an inherent feature of this procurement method since the solicitation in this procurement method is addressed to a single supplier or contractor identified by the procuring entity. It raises identical issues to those discussed in section VI above in the context of restricted tendering and request for proposals, such as consequences of the publication of an advance notice of the procurement, notably the emergence of suppliers or contractors challenging the use of single-source procurement, discussed also in paragraph 3 above. Those issues must be addressed in the procurement regulations in the context of this procurement method as well.

7. The procurement regulations must in particular discuss exceptions to the requirement to publish an advance notice of the procurement in the case of direct solicitation since they are pertinent to some conditions for use of single-source procurement. The procuring entity will not be required to publish such a notice, but may still choose to do so, when single-source procurement is used in situations of extreme urgency. When single-source procurement is used in procurement for the protection of essential security interests of the State, the advance notice of the procurement is required subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized or required (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. The procurement regulations must set out such authority or requirement or cross-refer to other provisions of law of the enacting State where such authority or requirement is set out.

8. The procurement regulations could usefully cross-refer to all safeguards in the Model Law aimed at ensuring transparency in procurement by means of this procurement method, such as the requirements for an advance notice of the procurement, on publication of notices of procurement contract awards and on keeping the comprehensive record of the procurement proceedings, including justifications for the use of single-source procurement.

VIII. Subjects to be addressed in procurement regulations in the context of ERAs (article 31 and Chapter VI of the Model Law (Electronic reverse auctions))

General

1. The procurement regulations must explain the main features of ERAs and highlight their main differences from traditional auctions (such as that they are online auctions with automatic evaluation, where the anonymity of the bidders and the confidentiality and traceability of the proceedings can be preserved, and they are always to be used as the final stage in the procurement proceeding before the award of the procurement contract). In this respect they should draw on the definition of the ERA in article 2 of the Model Law and the general commentary to Chapter VI in the Guide. To avoid confusion and undesirable interpretations, the procurement regulations should explain in particular the meaning of the term “successively lowered bids” used in the definition of the ERA as referring to successive reductions in the price or improvements in overall offers to the procuring entity.

2. The issues of authenticity, integrity of data, security and related topics in the use of e-procurement highlighted in the context of articles 7 and 40 above and in the Guide are in particular relevant in the context of ERAs since they are by default held online under the Model Law. The procurement regulations should therefore address technical issues, such as ensuring adequate infrastructure, that the relevant Internet sites are available and supported by adequate bandwidth, and appropriate security measures to avoid the elevated risk of bidders’ gaining unauthorized access to competitors’ commercially sensitive information.

3. The procurement regulations must address the technical aspects of the auction that must be provided in the solicitation documents to accommodate its online features and to ensure transparency and predictability in the process (such as specifications for connection, the equipment being used, the website, any particular software, technical features and, if relevant, capacity). The procurement regulations must require the procuring entity to prepare for each ERA rules for conducting the auction. The procurement regulations may provide for or call for formulating standard rules for conducting auctions that may be used by the procuring entities for adapting to the requirements of any given procurement. The rules for conducting the auction must specify at a minimum:

(a) The type of information that is to be disclosed to the bidders during the auction and how and when it will be made available to the bidders (at a minimum, and to ensure fair, equal and equitable treatment, the same information should be provided simultaneously to all bidders);

(b) The criteria and procedures for any extension of the deadline for submission of bids;

(c) Circumstances that would require suspension or termination of the auction;

(d) Procedural safeguards to protect the interests of bidders in case of the suspension or termination of the auction, such as immediate and simultaneous notification of all bidders about suspension or termination and in the case of

suspension, the time for the reopening of the auction and the new deadline for its closure. Where a stand-alone ERA is terminated, the rules should specify whether the termination necessarily cancels the ERA, or whether the contract can be awarded based on the results at the time of termination;

(e) Permissible criteria governing the closing of the auction, such as: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no further new and valid prices or values that improve on the top-ranked bid; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The procurement regulations should also make it clear that each of these criteria may entail the prior provision of additional specific information; guidance should expand on the types of information concerned. Examples include that item (ii) above would require the specification of the time that will be allowed to elapse after receiving the last bid before the auction closes. Item (iii) above would require the prior provision of information on whether there will be only a single stage of the auction, or multiple stages (in the latter case, the information provided should cover the number of stages and the duration of each stage, and what the end of each stage entails, such as whether the exclusion of bidders at the end of each stage is envisaged);

(f) The procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process;

(g) As regards the conditions under which the bidders will be able to bid, any minimum improvements in price or other values in any new bid during the auction or limits on such improvements. In the latter case, the information must explain the limits (which may be inherent in the technical characteristics of the items to be procured).

4. The procurement regulations must call for more detailed planning than in other procurement methods, in view of the need to establish a mathematical formula to select the winner and prepare detailed rules for conducting the auction.

5. The procurement regulations should put in place or call for mechanisms in the procuring entity for monitoring competition in markets where techniques such as ERAs are used. The procurement regulations should require the procuring entity to possess good intelligence on past similar transactions, the relevant marketplace and market structure. The procurement regulations should call for modifications of procurement procedures in repeated procurement where the same small group of bidders take part in ERAs and if there is any evidence of manipulation of results of ERAs by bidders.

Article 31. Conditions for use of the electronic reverse auctions

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that would make the use of an ERA desirable and appropriate. They should guide the procuring entity in considering the market concerned before a procurement procedure commences, to identify the relative risks and benefits of an ERA, and should encourage the use of a common procurement vocabulary to identify the subject matter of the procurement by codes or by reference to general market-defined standards. They must highlight that ERAs are most suitable for commonly used goods and services which generally involve a

highly competitive, wide market, where the procuring entity can issue a detailed description or one referring to industry standards, and where the offers from bidders offer the same quality and technical characteristics. Those include office supplies, commodities, standard communication technology equipment, primary building products and simple services. A complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. Types of procurement where non-quantifiable factors prevail over price and quantity considerations including the procurement of construction or consulting services (e.g. advisory services) and other quality-based procurement are not suitable for ERAs.

2. The procurement regulations may restrict — perhaps on a temporary basis and to the extent allowed by the procurement law — the use of ERAs to markets that are known to be competitive (e.g. where there is a sufficient number of bidders to ensure competition and to preserve the anonymity of bidders) or through qualitative restrictions such as limiting their use to the procurement of goods only, where costs structures may be easier to discern. They may include illustrative lists of items suitable for acquisition through ERAs or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique.

3. The procurement regulations may establish additional conditions for the use of ERAs permissible under the law, such as consolidating purchases to amortize the costs of setting up the system for holding ERAs, including those of third-party IT and service providers, and guidance on the concept of “price” criteria drawing on the provisions of article 11 and the commentary thereto. In the latter context, the procurement regulations should explain that when non-price criteria are involved in the determination of the successful submission, such criteria must be quantifiable and capable of expression in monetary terms (e.g. figures, percentages): this provision overrides the caveat in article 11 that the expression in monetary terms should be made “where practicable”. While all criteria can in theory be expressed in such terms, as noted in the Introduction to Chapter I in the Guide, an optimal result will arise where the evaluation criteria are objectively and demonstrably capable of expression in such terms.

Article 53. Electronic reverse auction as a stand-alone method of procurement

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that would necessitate the pre-auction ascertainment of qualifications of bidders or examination and/or evaluation of initial bids. For example, for the procurement of off-the-shelf subject matter, there is almost no risk that bids will turn out to be unresponsive and little risk of bidders being unqualified. Hence the need for pre-auction checks is correspondingly low. In such cases, a simple declaration from suppliers or contractors before the auction may be sufficient (for example, that they possess the required qualifications and they understand the nature of, and can provide, the subject matter of the procurement). In other cases, assessing responsiveness before the auction may be necessary (for example, when only those suppliers or contractors capable of delivering cars with a pre-determined maximum level of emissions are to be admitted to the auction), and initial bids will therefore be required. In some such cases, the procuring entity may wish to rank suppliers or contractors submitting

responsive initial bids before the auction (in the given example, suppliers or contractors whose initial bids pass the established threshold will be ranked on the basis of the emissions levels), so as to indicate their relative position and the extent of improvement that their bids may need during the auction in order to increase a chance to win the auction. In such cases, the auction must be preceded by an evaluation of the initial bids.

2. The procurement regulations should establish any requirements that must be included in the solicitation documents in addition to those listed in the article. Where those requirements are found in other provisions of law of the enacting State, the procurement regulations should refer to them.

3. As was highlighted in section IV above, the procurement regulations must specify the media and means of publication of the invitation to the auction, including internationally that will ensure effective access by suppliers and contractors located overseas.

4. With reference to article 53 (4), the procurement regulations should list for ease of reference all grounds for the rejection of initial bids, such as those under article 9 setting reasons for disqualification, article 10 that sets out responsiveness criteria, article 20 on the rejection of abnormally low submissions, and article 21 on the exclusion of a supplier or contractor on the ground of inducements, an unfair competitive advantage or conflicts of interest.

Article 54. Electronic reverse auction as a phase preceding the award of the procurement contract

The procurement regulations should list all instances when the ERA announced as the method of selecting the successful supplier or contractor at the outset of the procurement proceedings may be cancelled, such as when the number of suppliers or contractors participating in proceedings is insufficient to ensure effective competition (article 55 (2)) or when there is a risk of collusion, for example if the anonymity of bidders has been compromised at an earlier stage of the procurement proceedings (article 19 allows the procuring entity to cancel the procurement proceedings and the risk of collusion could be invoked as a reason for cancelling the ERA and the entire procurement proceedings).

Article 55. Registration for the electronic reverse auction and the timing of the holding of the auction

1. The procurement regulations are to provide an exhaustive list of circumstances that would justify the ERA to proceed if the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition. The provisions of the article are not prescriptive in this respect: they give discretion to the procuring entity to decide on whether the auction in such circumstances should be cancelled. Since the decision not to cancel may be inconsistent with the general thrust of competition and avoiding collusion, it should be justified only in the truly exceptional cases where the procurement must continue despite the lack of effective competition.

2. With respect to ERAs used as a phase in other procurement methods or technique, the procurement regulations may provide for an option for the procuring entity to stipulate in the solicitation documents that the award the procurement

contract may take place on the basis of the initial bids. This option may be considered as an alternative to cancellation of the procurement where the number of remaining participants in the procurement proceedings is insufficient to ensure effective competition in the ERA or where collusion may occur.

Article 56. Requirements during the electronic reverse auction

1. The procurement regulations must prohibit disclosure of identity of bidders during and after the auction, including where the auction is terminated or suspended. Both the explicit and indirect disclosure in whatever form must be prohibited, and the procurement regulations must illustrate ways of indirect disclosure intended to be covered by this prohibition.
2. The procurement regulations must require that any operators of the auction system on behalf of the procuring entity must be bound by the rules for conducting the auction, in particular as regards non-disclosure by any means of the identity of bidders before, during and after the auction.

Article 57. Requirements after the electronic reverse auction

1. The procurement regulations must guide the procuring entity as regards the options available under the article if the winner turns out to be unqualified or its bid unresponsive or rejected as abnormally low: either to cancel the procurement proceedings or award the procurement contract to the next winning bidder. The procuring entity should be required to assess the consequences of cancelling the ERA, in particular whether holding a second auction in the same procurement proceedings would be possible and the costs of an alternative procurement method. In particular, the anonymity of the bidders may have been compromised and any re-opening of competition may also be jeopardized. This risk, however, should not encourage the procuring entity always to opt for the next winning bid. The cancellation of the auction may be required for example where collusion between the winning bidder and the next winning bidder is suspected since this may lead to the acceptance of the bid with the abnormally high price.
2. The procurement regulations must require prompt action after the auction, in strict compliance with the applicable provisions of the Model Law, so as to ensure that the final outcome should be determined as soon as reasonably practicable. The steps described in the article should not be treated as an opportunity to undermine the automatic identification of the winning bid. The procurement regulations must therefore require the procuring entity to put on the record details of the procedures envisaged in the article if they have taken place and the decisions taken and reasons therefor.

IX. Subjects to be addressed in procurement regulations in the context of framework agreement procedures (article 32 and Chapter VII of the Model Law (Framework agreement procedures))

General

1. The procurement regulations must clarify the nature of the framework agreement in the enacting State. Under the Model Law, it is not a procurement contract as defined in the Model Law, but the framework agreement may be an enforceable contract in the enacting State. The procurement regulations or other provisions of law of the enacting States will therefore need to address such issues as the enforceability of the agreement in terms of contract law. The procurement regulations must in particular clarify whether the Government is to be bound to use the framework agreement, and the extent to which suppliers' or contractors' submissions at the first stage may be binding under the law of the enacting State. In the case of an open framework agreement, the procurement regulations must make it clear that suppliers or contractors that join the agreement after its initial conclusion will need to be bound by its terms upon joining.

2. The procurement regulations must explain the link between the circumstances of the procurement and various decisions to be taken in connection with the use of framework agreement procedures, in particular whether such use is appropriate, the type of framework agreement to be concluded, the scope of the framework agreement, the number of suppliers or contractors parties, the role of a centralized purchasing body, if any, and so forth.

3. As regards the type of framework agreement to be concluded, the procurement regulations must explain how to choose among the three types of framework agreements identified above, given the different ways in which competition operates in each type. How narrowly the procurement need can and should be defined at the first stage will dictate the extent of competition that is possible and appropriate at the second stage. If precise specification of the procurement needs is possible and if they will not vary during the life of the framework agreement, a framework agreement without second-stage competition, in which the winning supplier(s) or contractor(s) for all or some items is or are identified at the first stage, will maximize competition at the first stage and should produce the best offers. However, this approach is inflexible and requires precise planning: rigid standardization may be difficult or inappropriate, especially in the context of centralized purchasing where the needs of individual purchasing entities may vary, where refinement of the requirements may be appropriate so needs are expressed with lesser precision at the first stage, and in uncertain markets (such as future emergency procurement). If the procuring entity's needs may not vary, but the market is dynamic or volatile, second-stage competition will be appropriate unless the volatility is addressed in the framework agreement (such as through a price adjustment mechanism). The greater the extent of second-stage competition, the more administratively complex and lengthy the second-stage competition will be, and the less predictable the first-stage offers will be of the final result; this can make effective budgeting more difficult. Where there will be extensive second-stage

competition, there may also be little benefit of engaging in rigorous competition at the first stage; assessing qualifications and responsiveness may be sufficient.

4. A related issue that the procurement regulations must address is the selection between a single-supplier or multi-supplier framework agreement. The administrative efficiencies of framework agreements tend to indicate that multiple-supplier framework agreements are more commonly appropriate, but the nature of the market concerned may indicate that a single-supplier framework agreement is beneficial (for example, where confidentiality or security of supply is an important consideration, or where there is only one supplier or contractor in the market). In addition, a single-supplier closed framework agreement has the potential to maximize aggregated purchase discounts given the likely extent of potential business for a supplier or contractor, particularly where the procuring entity's needs constitute a significant proportion of the entire market, and provided that there is sufficient certainty as to future purchase quantities (through binding commitments from the procuring entity, for example). This type of agreement can also enhance security of supply to the extent that the supplier or contractor concerned is likely to be able to fulfil the total need. Multi-supplier framework agreements, which are more common, are appropriate where it is not known at outset who will be the best supplier or contractor at the second stage, especially where the needs are expected to vary or to be refined at the second stage during the life of the framework agreement, and for volatile and dynamic markets. They also allow for centralized purchasing, and can also enhance security of supply where there are doubts about the capacity of a single supplier to meet all needs.

5. The procurement regulations should emphasize that good procurement planning is vital to set up an effective framework agreement: framework agreements are not alternatives to procurement planning. Effective planning is required for both stages of a framework agreement procedure. Without it, no correct type of the framework agreement can be selected, not effective framework agreement may be concluded and its effective operation ensured. The procurement regulations should emphasize that the agreement itself should be complete in recording all terms and conditions, the description of the subject matter of the procurement (including specifications), and the evaluation criteria, both to enhance participation and transparency, and because of the restrictions on changing the terms and conditions during the operation of the framework agreement.

6. The procurement regulations may call for measures to ensure that appropriate capacity-building is in place in order to allow for optimal decision-making, taking into account that the capacity required to operate framework agreements effectively can be higher than for some procurement methods and techniques envisaged in the Model Law, and training and other capacity-building measures will be key to ensuring successful and appropriate use.

7. The procurement regulations should also address such issues as monitoring the operation of framework agreements to assess their effectiveness in the context of each procurement as well as the procurement market as a whole (whether the anticipated benefits in terms of administrative efficiency and value for money in fact materialize), the effect of the framework agreement on competition in the market concerned, particularly where there is a risk of a monopolistic or oligopolistic market, and compliance with safeguards built in the Model Law to ensure transparency, competition and objectivity in their operation. The

performance of individual procuring entities using the framework agreement and the performance of the framework agreement in terms of prices as compared with market prices for single procurements are also to be monitored. Increased prices or reductions in the quality of offers may arise from inappropriate or poor use of the framework agreement by one or two procuring entities.

8. Where the enacting State requires or encourages (or intends to encourage) that all framework agreements be operated electronically, the procurement regulations may require that all of them be maintained in a central location, which further increases transparency and efficiency in their operation and facilitates monitoring.

Article 32. Conditions for use of a framework agreement procedure

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that would make the use of a framework agreement procedure desirable and appropriate. They should set out measures that will enhance objectivity in taking decisions on the use of a framework agreement procedure and its type, and so facilitate the monitoring of whether decisions are reasonable in the circumstances of a given framework agreement.

2. The first circumstance that would make the use of a framework agreement procedure appropriate arises where the procuring entity's need is "expected" to arise on an "indefinite or repeated basis". The procurement regulations should explain that these latter conditions need not be cumulative, though in practice they will commonly overlap. The second circumstance arises where the need for the subject matter of the procurement "may arise on an urgent basis". The reference to an indefinite need, meaning that the time, quantity or even the need for the subject matter itself is or are not certain, can allow the framework agreement to be used to ensure security of supply, and in anticipation of repeat procurements. The regulations should also address the term "expectation", and how to assess in an objective manner the extent of likelihood of the anticipated need. The administrative costs of the two-stage procedure will be amortized over a greater number of purchases; i.e. the more the framework agreement is used in the case of repeat procedures. For indefinite purchases, those costs must be set against the likelihood of the need arising and the security that the framework agreement offers (for example, setting prices and other conditions in advance).

3. The procurement regulations may illustrate examples of products for which the use of framework agreement procedures could be considered: commodity-type purchases, such as stationery, spare parts, information technology supplies and maintenance, where the market may be highly competitive and where there will normally be regular or repeat purchases for which quantities may vary. They are also suitable for the purchase of items from more than one source, such as electricity, and for that of items for which the need is expected to arise in the future on an urgent or emergency basis, such as medicines (where a significant objective is to avoid the excessively high prices and poor quality that may result from the use of single-source procurement in urgent and emergency situations). These types of procurement may require security of supply, as may also be the case for specialized items requiring a dedicated production line, for which framework agreements are also suitable tools.

4. The procurement regulations may illustrate examples of procurement for which the use of framework agreement procedures should not be considered: complex procurement for which the terms and conditions (including specifications) vary for each purchase or may be expected to change before the procurement contract is awarded, such as procurement involving large investment or capital contracts, highly technical or specialized items, and more complex services, would not generally be appropriate for procurement through a framework agreement procedure.

Award of and requirements for a closed framework agreement (articles 58 and 59)

Award of the framework agreement

1. The procurement regulations are to provide guidance to the procuring entity in selection of a method of procurement for the award of a closed framework agreement taking into account the provisions of article 28 of the Model Law. The importance of rigorous competition at the first stage of closed framework agreements means that the procurement regulations must refer to open tendering as default method for the award of a closed framework agreement. They should provide clear guidance as regards the application of exceptions to open tendering and provide for a mechanism to carefully scrutinize the application of those exceptions, particularly in the light of the competition risks in framework agreements procedures and types of purchases for which framework agreements are appropriate. The procurement regulations should provide examples of when procurement methods alternative to open tendering may be appropriate: for example, in the use of framework agreements for 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), and specialized items such as drugs, energy supplies and textbooks, for which the procedure can protect sources of supply in limited markets. The use of competitive negotiations or single-source procurement may be appropriate for the award of a closed framework agreement in situations of urgency. There are examples in practice of effective procurement of complex subject matter using framework agreements combined with dialogue-based request-for-proposals methods, such as for the procurement of satellite equipment and specialized communications devices for law enforcement agencies.

2. The procurement regulations may need to explain the possible derogations from the procedures for the procurement method chosen for the award of a framework agreement to reflect specifics of a framework agreement procedure. The extent of the derogations will vary from case to case depending on the type of a closed framework agreement to be concluded (e.g. a closed framework agreement with and without second-stage competition and with one or more supplier or contractor parties). The procurement regulations may therefore provide for an illustrative rather than exhaustive list of expected derogations.

3. In the context of a multi-supplier closed framework agreement, the procurement regulations must guide the procuring entity on whether setting either a minimum or a maximum number of suppliers or contractors parties to a framework agreement or both would be appropriate and, if so, what to consider in doing so. For example, a minimum number may be required to ensure security of supply; where

second-stage competition is envisaged, there need to be sufficient suppliers or contractors to ensure effective competition, and the terms of solicitation may require a minimum number, or a sufficient number to ensure such effective competition. A maximum number may be appropriate, for example, where the procuring entity envisages that there will be more qualified suppliers or contractors presenting responsive submissions than can be accommodated. This situation may reflect the administrative capacity of the procuring entity, notably in that more participants may defeat the administrative efficiency of the procedure. An alternative reason for limiting the number of participants is to ensure that each has a realistic chance of being awarded a contract under the framework agreement, and to encourage it to price its offer and to offer the best possible quality accordingly. The procurement regulations must address situations where the stated minimum may not be achieved by requiring the procuring entity to specify in the solicitation documents the steps that it will then take, which might involve the cancellation of the procurement or the conclusion of the framework agreement with a lower number of suppliers or contractors.

4. The award of the closed framework agreement may be made subject to external approval; where framework agreements are being used across government ministries and agencies, ex ante approval mechanisms of this type may be considered appropriate. If so, the procurement regulations must require such approval and provide a mechanism for it. Alternatively, the enacting State may include the requirement for an ex ante approval in the procurement law itself and call for the procurement regulations to elaborate on the mechanism of its operation.

5. The procurement regulations must guide the procuring entity as regards the need in some cases to conclude separate agreements with individual suppliers or contractors that are parties to the framework agreement. The procurement regulations must set out the default rule that each supplier or contractor should be subject to the same terms and conditions of the framework agreement. Exceptions to this rule may allow only minor variations that concern only those provisions that justify the conclusion of separate agreements. The procurement regulations should illustrate possible justifications for concluding separate agreements. An example may be the need to execute separate agreements to protect intangible or intellectual property rights or where different licensing terms need to be accommodated or where suppliers or contractors have presented submissions for only part of the procurement. The procurement regulations must require putting on the record reasons for concluding separate agreements and variations made in each of the agreements concluded separately.

Duration of the agreement

6. The procurement regulations are to set out the maximum duration of a closed framework agreement. Practical experience in those jurisdictions that operate closed framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a series of procurements to be made, such as a period of 3-5 years. Thereafter, greater anti-competitive potential may arise, and the terms and conditions of the closed framework agreement may no longer reflect current market conditions.

7. The procurement regulations must explain that different duration of framework agreement within the established maximum might be appropriate depending on the

circumstances of the procurement, in particular items covered, the market involved and needs of the procuring entity. As some procurement markets may change more rapidly, especially where technological developments are likely, for example in IT and telecommunications procurement, or the procuring entity's needs may not remain the same for a sustained period, the appropriate period for each procurement may be significantly shorter than the maximum established in the procurement regulations. For some highly changeable items, the appropriate period may be measured in months. For more stable items, markets and needs, a framework agreement may be long-lasting to enable a series of procurements to be made to derive most benefits of the technique.

8. The procurement regulations should therefore guide the procuring entity in selecting the maximum duration of a particular framework agreement within the maximum established in the procurement regulations or alternatively they may themselves establish different maximums for different types of procurement. The guidance provided in the procurement regulations should also address any external limitations on the duration of framework agreements (such as State budgeting requirements).

9. They should also explain that the maximum duration set out by the procuring entity for a particular framework agreement within the maximum established in the procurement regulations includes all possible extensions to the initially established duration for the framework agreement concerned. Any suspension of the operation of a framework agreement resulting from challenge proceedings would extend the framework agreement for the period of suspension, but the overall duration of the framework agreement remains unchanged.

10. If enacting States wish to provide for extensions of the duration of the framework agreement in exceptional circumstances, the procurement regulations must allow for that, specify such limited circumstances and ensure that any extensions are of short duration and limited scope. For example, new procurements may not be justified in cases of a natural disaster or restricted sources of supply, when the public may be able to benefit from the terms and conditions of the existing framework agreement.

11. The procurement regulations must establish internal controls in order to avoid abuse in extensions and exceptions to the initially established duration, in particular as regards the award of a lengthy or sizeable procurement contract towards the end of the validity of the framework agreement.

Estimates

12. The procurement regulations should guide the procuring entity when the contract price should or should not be established at the first stage. For example, where the subject matter is subject to price or currency fluctuations, or the combination of service-providers may vary, it may be counter-productive to try to set a contract price at the outset. A common criticism of closed framework agreements is that there is a tendency towards contract prices at hourly rates that are generally relatively expensive. The procurement regulations should encourage instead task-based or project-based pricing, where appropriate.

13. The terms of the framework agreement may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, or if the framework

agreement operates as an exclusive purchasing agreement, though this flexibility should be set against the better pricing from suppliers or contractors. The procurement regulations should call therefore for: (a) using estimated (non-binding) quantities in the solicitation documents so that the framework agreement can facilitate realistic offers based on a clear understanding of the extent of the procuring entity's needs, and so that the procuring entity will be able to purchase outside the framework agreement if market conditions change; and (b) using binding quantities, which could be expressed as minima or maxima. There may be markets in which one solution appears to be better than the other; the monitoring mechanism can inform appropriate guidance, or can use examples from practice where the choice needs to be made by the procuring entity.

14. The procurement regulations must explain that maximum or minimum aggregate values for the framework agreement may be known; if so, they should be disclosed in the agreement itself, failing which an estimate should be set out. An alternative approach is, where there are multiple procuring entities that will use the framework agreement, to allow each procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured; in such cases, the relevant values for each procuring entity should be included. The maximum values or annual values may be limited by budgetary procedures in individual States; if so, the procurement regulations should set out other sources of regulation in detail.

15. The procurement regulations must require setting out in the framework agreement all estimates to the extent they are known, recording the limitations on estimates, or a statement that accurate estimates are not possible (for example, where emergency procurement is concerned); providing the best available estimates, where firm commitments are not possible, will encourage participation.

Permissible variations to the framework agreement during its operation

16. In the context of articles 59 (1)(d)(iii) and 63, the procurement regulations must prohibit setting out in the framework agreement the range of permissible variation to evaluation criteria and their relative weight so wide as to make the safeguards contained in article 63 of the Model Law meaningless in practice. Those safeguards establish limits to the permissible range of changes to terms and conditions of the procurement during the operation of a framework agreement so that to ensure that no change to the description of the subject matter of the procurement occur and other changes are made in a transparent and predictable manner.

17. The procurement regulations should establish mechanisms for oversight of the application of those safeguards. Flexibility in varying evaluation criteria and their relative weight within the parameters and range set out in the framework agreement should not become a substitute for adequate procurement planning, distort purchasing decisions in favour of administrative ease, encourage the use of broad terms of reference that are not based on a careful identification of needs, and facilitate the abusive direction of procurement contracts to favoured suppliers or contractors. These latter points may be of increased significance where procurement is outsourced to a fee-earning centralized purchasing agency, which may use framework agreements to generate income. Oversight processes may assist in avoiding the use of relatively flexible evaluation criteria in framework agreements

to hide the use of inappropriate criteria based on agreements or connections between procuring entities and suppliers or contractors, and to detect abuse in pre-determining the second-stage results that would negate first-stage competition, the risks of which are elevated with recurrent purchases. Transparency in the application of the flexibility, and the use of a pre-determined and pre-disclosed range both facilitates such oversight.

Operation and monitoring of the closed framework agreement

18. The procurement regulations should explain that the basis for the award of procurement contracts under the framework agreement (the lowest-priced or most advantageous submission) will normally, but need not necessarily, be the same as that for the first stage; for example, the procuring entity may decide that among the highest-ranked suppliers or contractors at the first stage (chosen using the most advantageous submission), the lowest-priced responsive submission to the precise terms of the second-stage invitation to participate will be appropriate. Where variations and different options are envisaged, the procurement regulations must call for setting them all out in the framework agreement.

19. Where the procuring entity is not required to operate a closed framework agreement online, the procurement regulations should emphasize the advantages of an online procedure in terms of increased efficiency and transparency (for example, the terms and conditions can be publicized using a hyperlink; a paper-based invitation to the second-stage competition could be unwieldy and user-unfriendly). The procurement regulations should require the procuring entity to set out in the framework agreement all information specific to the online operation of the framework agreement, such as the requirements for connection to a website, particular software, technical features and, if relevant, capacity.

20. The procurement regulations should explain how to derive the major benefit and avoid the pitfalls of framework agreements. They should in particular address practical realities with the use of framework agreements reported in many jurisdictions that prices tend to remain fixed rather than varying with the market and procuring entities tend to procure through an existing framework agreement even though its terms and conditions do not quite meet their needs or reflect the current market conditions, to avoid having to commence new procurement proceedings. As a result, procuring entities may fail to assess price and quality sufficiently when placing a particular purchase order. They may overemphasize specifications over price.

21. To address these pitfalls, the procurement regulations should require procuring entities to assess on a periodic basis during the currency of a closed framework agreement whether a framework agreement continues to offer value for money and continues to allow access to the best that the market can offer at that time (e.g. whether its prices, and terms and conditions remain current and competitive). They should also consider the totality of the purchases under the framework agreement to assess whether their benefits exceed their costs. Ways of assessing whether the technical solution or product proposed remains the best that the market offers may include market research, publicizing the scope of the framework agreement and so forth. Where the framework agreement no longer offers good commercial terms to the procuring entity, the procurement regulations should require holding a new procurement procedure (classical or a new framework

agreement procedure). The procurement regulations should specifically discourage the award of a lengthy or sizeable procurement contract towards the end of the validity of the framework agreement, which increases risks of purchasing outdated or excessively priced items.

22. In multi-supplier framework agreements, each supplier or contractor party will wish to know the extent of its commitment both at the outset and periodically during operation of the framework agreement (such as after a purchase is made under the framework agreement). The procurement regulations should therefore require the procuring entities to inform periodically or upon request the suppliers or contractors about the extent of their commitments.

Establishment of and requirements for an open framework agreement (articles 60 and 61)

1. The procurement regulations may recommend that the invitation to become a party to the open framework agreement should be made permanently available on the website at which the framework agreement will be maintained. They could also require that all information related to the operation of the open framework agreement must continuously be made available on the website. The procurement regulations may list information that should at a minimum appear there, such as:

(a) The names and addresses of all procuring entities that can use the framework agreement (where the framework agreement allows for several potential purchasers at the second stage);

(b) The agency responsible for establishing and maintaining the framework agreement where more than one purchaser are involved;

(c) Prerogatives of the central purchasing agency if any (e.g. whether it is authorized to undertake the procurements concerned in its own name (as a principal), without therefore needing to publish details of its own client entities; if the agency operates as an agent, however, these details must then be published);

(d) A maximum number of suppliers or contractors parties to the framework agreement, if any, and the procedure and criteria for the selection of that maximum. The procurement regulations must emphasize that establishing the maximum may be justified because of capacity limitations in its communications system, not on any other ground. They must specify techniques that can be used by the procuring entity to achieve the selection of the maximum number in a non-discriminatory manner, such as “first-come, first-served”, the drawing of lots, rotation or other random choice in a commodity-type market, and alert suppliers or contractors about the possibility of a challenge;

(e) The duration of the framework agreement. The procurement regulations may require in this context that the duration of an open framework agreement should not be excessive, and should be assessed by reference to the type of subject matter being procured, in order to allow for new technologies and solutions, and to avoid obsolescence. In addition, suppliers or contractors may be reluctant to participate in an agreement of unlimited duration;

(f) Requirements that must be fulfilled by suppliers or contractors in order to join the agreement;

- (g) All other main terms and conditions of the framework agreement;
- (h) The list of suppliers or contractors parties to the framework agreement (the procurement regulations may explain that posting the list in such a way could be effective implementation of the requirement on the public notice of the award of the framework agreement, contained in article 23 (1) of the Model Law);
- (i) The names of suppliers or contractors to whom procurement contracts were awarded under the framework agreement and prices of the awarded contracts (the procurement regulations may explain that posting this information could be effective implementation of the requirement on the public notice of the award of procurement contracts awarded under the framework agreement, contained in article 23 of the Model Law);
- (j) Announcements and all terms and conditions of second-stage competitions;
- (k) A copy of an invitation to the second-stage competition.

2. In the context of paragraph (5) of article 60, the procurement regulations must emphasize the importance of swift examination of applications to join the open framework agreement. The interaction between final submission deadlines, the time needed to assess indicative submissions and the frequency and size of second-stage competitions should be carefully assessed when operating the open framework agreement. The procurement regulations may emphasize the utility of relatively frequent and reasonable-sized second-stage competitions to take advantage of a competitive and dynamic market.

Article 62. Second stage of a framework agreement procedure

1. The procurement regulations must explain how the option to issue an invitation to the second-stage competition to only those parties of the framework agreement then capable of meeting the needs of the procuring entity in the subject matter of the procurement will operate in practice without jeopardizing the principles of transparency and fair and equal treatment of suppliers and contractors. They need to emphasize that the purpose of the provision is to enhance efficiency, not to limit competition. The procurement regulations must set out the default rule that all suppliers or contractors parties to the agreement must be presumed to be capable of meeting the needs of the procuring entity in the subject matter of the procurement unless the framework agreement or initial or indicative submissions of some suppliers or contractors provide to the contrary. The procurement regulations should therefore require the procuring entity to interpret the term “then capable of meeting the needs” in a very narrow sense, in the light of the terms and conditions of the framework agreement and of the initial or indicative submissions. They may provide examples when issuing an invitation to a limited group of suppliers or contractors then capable of meeting the needs of the procuring entity in the subject matter of the procurement will be justified. For example, the framework agreement may permit suppliers or contractors to supply up to certain quantities (at each second-stage competition or generally) or initial or indicative submissions may state that certain suppliers or contractors cannot fulfil particular combinations or certain quality requirements.

2. The important safeguard against the abuse or misuse of this option, for example using it for the award of contracts to favoured suppliers or contractors, is the requirement on the procuring entity to give a notice of the second-stage competition to all parties to the framework agreement at the same time when the invitation to the second-stage competition is issued. Giving such notice in this manner will allow any excluded supplier or contractor to challenge the procuring entity's decision not to invite that supplier or contractor to the second-stage competition. The procurement regulations may provide for the minimum period of the notice before the second-stage competition may commence.
3. The procurement regulations must emphasize the negative impact of possible challenges on the efficiency that the framework agreement procedures try to achieve: exceptions to the default rule to invite all suppliers or contractors to the second-stage competition must be carefully considered and used when truly justified for the procuring entity to avoid being confronted by many aggrieved suppliers or contractors that challenge the procuring entity's assessment of their capability to meet the procuring entity's needs at a particular time. The procurement regulations must require the procuring entity to include in the record of the procurement an explanation of the exclusion of any suppliers or contractors parties to the agreement from the second-stage competition.
4. The procurement regulations should regulate the manner of issuing an invitation and notice of second-stage competition: e.g. that they must be in writing, issued simultaneously and automatically by the system to each supplier or contractor concerned. Although there is no requirement to issue a general notice of the second-stage competition, placing a notice on the publicly accessible page of the website where the framework agreement is maintained would bring such result and the procurement regulations may require the procuring entities to do so.
5. Paragraph (4) (b) regulates the content of the invitation to the second-stage competition. The procurement regulations must specify any other requirements relating to the preparation and presentation of submissions and to other aspects of the second-stage competition not listed in paragraph (4) (b) of the article that the procuring entity must specify in the invitation to present submissions at the second-stage competition. Where such requirements are found in other provisions of law of the enacting State, the procurement regulations should refer to them. The procurement regulations must also clarify whether suppliers or contractors may vary their first-stage (initial) submissions at the second stage with a result less favourable to the procuring entity (e.g. by increasing prices if market conditions change).
6. As noted in the context of the closed framework agreements above, the procurement regulations are to explain the operation of the permissible range of refinements to the terms and conditions of the procurement, including the relative weights of the evaluation criteria and subcriteria, through second-stage competition. The flexibility to engage in such refinement is limited by application of article 63 which provides that there may be no change to the description of the subject matter of the procurement, and that other changes may be made only to the extent permitted in the framework agreement. Where modifications to the products, or technical substitutions, may be necessary, they should be foreshadowed in the framework agreement itself, which should also express needs on a sufficiently flexible and functional basis (within the parameters of article 10) to allow for such modifications. Other terms and conditions that may be refined include combinations

of components (within the overall description), warranties, delivery times and so forth. The balance of allowing sufficient flexibility to permit the maximization of value for money and the need for sufficient transparency and limitations to avoid abuse should form the basis of guidance to procuring entities in this aspect of the use of framework agreements.

7. With reference to paragraph (4) (b) (iv), the procurement regulations must emphasize the importance of setting out a suitable deadline for presenting submissions, in order to preserve the efficiency without jeopardizing legitimate interests of suppliers or contractors parties to the framework agreement: in the context of open framework agreements, for example, the deadline may be expressed in hours or a day or so. Otherwise, the administrative efficiency of the procedure will be compromised, and procuring entities will not avail themselves of the technique. The period of time between the issue of the invitation to present second-stage submissions and the deadline for presenting them should be determined by reference to what sufficient time to prepare second-stage submissions will be in the circumstances (the simpler the subject matter being procured, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The procurement regulations may explain that the time requirement will be in any event qualified by the reasonable needs of the procuring entity, as explicitly stipulated in article 14 (2) of the Model Law, which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events.

8. The procurement regulations must explain the operation of a standstill period in the context of various types of framework agreements, noting that shorter duration of a standstill period will be justified in the context of open framework agreement in the light of simple standardized items intended to be procured through such systems. The procurement regulations should explain reasons for not requiring a standstill period in the context of award of procurement contract under closed framework agreements without second-stage competition.

Article 63. Changes during the operation of a framework agreement

As noted in the context of closed framework agreements and article 62 above, the procurement regulations are to explain limits on changes to the terms and conditions of the procurement during the operation of a framework agreement. The procurement regulations would also need to explain when framing the description of the subject matter of the procurement in a functional or output-based way, with minimum technical requirements where appropriate, would be appropriate so as to allow for subject-matter modifications or technical substitutions. Whether this approach is appropriate will depend on the nature of the procurement itself. There is a risk of abuse in both allowing broad and generic specifications, and in permitting changes; the framework agreement may be used for administrative convenience beyond its intended scope, allowing non-transparent and non-competitive awards of procurement contracts. Furthermore, this lack of transparency and competition will also have the potential significantly to compromise value for money in those awards. The procurement regulations should therefore address in some detail these risks and appropriate measures to mitigate them.

X. Subjects to be addressed in procurement regulations in the context of Chapter VIII of the Model Law (Challenge proceedings), in the order of the articles

General

1. The provisions of the Chapter are intended to be supplemented by regulations and detailed rules of procedure to ensure that the challenge mechanisms operate effectively, expeditiously and in a cost-effective manner. Depending on legal traditions of the enacting State, such supplementing provisions will be included in the procurement regulations or regulations in other branches of law.

2. In addition, other branches of law and other bodies in the enacting State may have an impact on the challenge mechanism envisaged under Chapter VIII if for example a challenge is triggered by allegations of fraud or corruption, or breaches of competition law. In such cases, the procurement or other applicable regulations should require that the information about such allegations be made publicly available, to ensure that relevant authorities are alerted and so that appropriate action is taken.

3. The procurement or other applicable regulations should elaborate on all issues having implications on achieving the appropriate balance between the interests of suppliers or contractors and the needs of the procuring entity, such as the group of persons entitled to challenge the acts or decisions of the procuring entity (as discussed in the context of article 64 below) and on considerations relating to when suspension may or may not be appropriate and when the prohibition of article 65 should be lifted, such as in case of natural disasters, emergencies, and situations where disproportionate harm might otherwise be caused to the procuring entity or other interested parties. In this context, the procurement regulations must explain in detail the interaction of all relevant time limits in connection with challenge proceedings (such as duration of a standstill period, submission deadlines, the period in the end of which the prohibition covered by article 65 would lapse, the duration of suspension and deadlines for taking decisions on applications and for serving notices).

4. The procurement or other applicable regulations may discourage commencing parallel proceedings and establish a clear sequencing of applications to administrative and judicial review bodies existing in the enacting State. They may contain provisions addressing the sequence of applications, if desired. Sequencing may be different depending on legal traditions of enacting States. Some States are more flexible by not requiring the supplier or contractor to exhaust the challenge mechanism at the procuring entity before filing an application before the independent body or the court. Equally they may allow the aggrieved supplier or contractor not satisfied with the decision taken by the procuring entity in the challenge proceedings to appeal that decision in the independent body or the court. Where the application was filed directly to the independent body, the appeal of the decision of the independent body may be filed to any appeal authority within that body, if such option exists, or to the court. Some States may however require exhausting some or all measures before filing application to the court. The procurement or other applicable regulations may require the aggrieved supplier or

contractor to file an application for reconsideration first before the procuring entity and appeal any decision it wishes to appeal from that challenge proceedings within the independent body structure before applying to the court. Alternatively, they may allow to bypass the procuring entity but require to exhaust all remedies within the independent body structure before applying to the court. In this respect, the procurement regulations must be compliant with the international obligations of the enacting State, including under the United Nations Convention against Corruption (New York, 31 October 2003)³² and the WTO GPA, which may require them to ensure effective appeal to an independent body and that decisions of any review body that is not a court be open to judicial review.

Article 64. Right to challenge and appeal

1. The procurement or other applicable regulations must provide or call for issuance of detailed guidance on operation of the provisions of article 64 consistent with the legal and administrative structure of the enacting State. In particular, they must specify the group of persons having the right to challenge decisions and actions taken by the procuring entity in the procurement proceedings. Unlike other systems, the Model Law gives this right only to suppliers and contractors (the term includes potential suppliers or contractors covered by the definition of article 2, such as those excluded through pre-qualification or pre-selection), and not to members of the general public or subcontractors. This is because the right is based on a supplier's or contractor's claim that it has sustained loss or injury from non-compliance by the procuring entity with the procurement law. These limitations are designed to ensure that challenges relate to the decisions or actions of the procuring entity in a particular procurement procedure, and to avoid an excessive degree of disruption to the procurement process through challenges that are based on policy or speculative issues, or based on nominal breaches, and also reflecting that the challenge mechanism is not the only oversight mechanism available.

2. The procurement or other applicable regulations must in addition address the ability of a supplier or contractor to present a challenge and of various State bodies to pursue challenge applications, with reference to other provisions of law of the enacting State, such as those setting out the requirements under domestic law that a supplier or contractor must satisfy in order to be able to proceed with a challenge or obtain a remedy.

3. A challenge filed with the court — often termed a judicial review — is outside the scope of regulation by the procurement legal framework but has implications on it. It would be appropriate therefore for the procurement or other applicable regulations to refer to other provisions of law of the enacting State that set out the relevant authority and court procedures, so that both the procuring entities and suppliers and contractor has the complete picture as regards available remedies. In particular, this applies to the appeal mechanism, which under the Model Law is envisaged only through court proceedings and following the court procedures concerned. The procurement or other applicable regulations should provide for the

³² United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed January 2011).

guidance to users of the procurement system on whether the appeal exists in courts or elsewhere in the enacting States and how it operates.

Article 65. Effect of a challenge

1. The procurement or other applicable regulations should explain to procuring entities the operation of the prohibition covered by the article, in particular differences between the prohibition covered by article 65 and suspension that may be applied by the procuring entity or ordered by an independent body, court or other competent authority. Although article 65 prohibits the entry into force of the procurement contract until the challenge or appeal has been disposed of, a suspension of the procurement proceedings may also be necessary. Suspension of the procurement proceedings is a broader notion than the prohibition under article 65: it stops all actions in those proceedings.

2. The procurement or other applicable regulations should explain what is intended to be covered by the term “any step to bring a procurement contract (or framework agreement) into force” and that the prohibition is not absolute (urgent public interest considerations may be invoked as the ground for lifting it). “Any step to bring a procurement contract (or framework agreement) into force” would encompass for example the dispatch of the notice of acceptance to successful supplier or contractor, or where this is envisaged, any steps towards signing a written procurement contract or receiving approval of another body for entry into force of the procurement contract (or framework agreement).

3. The procurement or other applicable regulations must explain the term the “participants in the challenge proceedings” as compared to “participants in the procurement proceedings”. The former term covers first the procuring entity and the supplier(s) or contractor(s) presenting the challenge (and, where relevant, any governmental authority whose interests are or could be affected by the application, such as an approving authority). They are generally a narrower group than the participants in the procurement proceedings, but under the right conferred by article 68 more suppliers or contractors may seek to join the challenge proceedings, or to launch their own challenge, where they assert loss or damage arising from the same circumstances. In this context, the “participants in challenge proceedings” can include a varying pool of participants, depending on the timing of the challenge proceedings and subject of the challenge. Any supplier or contractor participating in the procurement proceedings to which the application relates can join the challenge proceedings. The “participants in challenge proceedings” can include other governmental authorities. In this regard, the term “governmental authority” means any entity that may fall within the definition of the procuring entity under article 2, including entities that are entitled to operate and/or use a framework agreement, subject to the requirement in article 68 (1) for those entities to have an interest in the challenge proceedings at the relevant time. In this regard, it should be noted that a party to a framework agreement whose interests would or could be affected by the challenge proceedings is most probably the lead purchasing entity rather than other entities that became parties to the framework agreement at the outset of the procurement proceedings. The term would also include any approving authority in the context of the procurement concerned (see for example articles 22 (7) and 30 (2) and (5) (e) where the role of the approving authority is envisaged).

4. The procurement or other applicable regulations must clarify whether an independent body may take a decision on lifting the prohibition without a request from a procuring entity. This option may be appropriate in systems that operate on an inquisitorial, rather than an adversarial, basis, but in other States, it may be less so.

Article 66. Application for reconsideration before the procuring entity

1. The procurement or other applicable regulations may contain measures aimed at promoting the early resolution of disputes by encouraging the use of the optional challenge mechanism envisaged by this article. The procurement or other applicable regulations may also call for the wide dissemination and explanation to the public of the benefits of the reconsideration mechanism before the procuring entity and its manner of operation, so that effective use can be made of it. In addition, they should establish monitoring and oversight mechanisms to oversee the response to applications submitted, so as to ensure that they are treated seriously and the potential benefits are obtained.

2. The procurement or other applicable regulations are to elaborate on differences between the debriefing discussed in the context of article 22 above and a formal request for reconsideration before the procuring entity. In order to avoid confusion, they should highlight the key differences in terms of the objectives, procedures and possible outcomes of both procedures.

3. The procurement or other applicable regulations are to emphasize that filing the application for reconsideration to the procuring entity is not available where the procurement contract has entered into force; after the contract formation period, the challenge will fall instead within the purview of independent or judicial review bodies — that is, the independent body or the court. They should also explain that, where proceedings before an independent body or court are commenced, the competence of the procuring entity to entertain the application ceases. The procuring entity may nevertheless be able to continue with corrective action in the procurement proceedings concerned, provided that such action does not contravene any order of the independent body or court or other provisions of domestic law. Where such an application to an independent body or court is limited in scope, the precise implications of that application for the pre-existing application before the procuring entity will be a matter of domestic law and the procurement regulations must contain appropriate cross-references in this regard.

4. In connection with the deadlines for submitting applications for reconsideration, the procurement or other applicable regulations should explain:

(a) The meaning of the “terms of solicitation, pre-qualification or pre-selection” as encompassing all issues arising from the procurement proceedings before the deadline for presenting applications to pre-qualify or applications for pre-selection or submissions, such as the selection of a method of procurement or a method of solicitation where the choice between open and direct solicitation exists, and the limitation of participation in the procurement proceedings in accordance with article 8. It thus excludes issues arising from pre-qualification or pre-selection, which are covered by the second part of paragraph (2) (a) of the article, or from examination and evaluation of submissions, which are covered by paragraph (2) (b) of the article;

(b) The term “prior to” the submission deadline in the context of paragraph (2) (a) and may establish the absolute maximum when the applications may be filed to prevent highly disruptive (and perhaps vexatious) challenges being filed immediately before the submission deadline. The aim should be to encourage filing any challenges to the terms of solicitation, pre-qualification or pre-selection and to the decisions taken by the procuring entity in the pre-qualification or pre-selection proceedings as early as is practicable;

(c) Which applications would be considered as filed out of time and must be dismissed by the procuring entity. For example, where a standstill period has been applied and approval of another authority is required for the entry into force of the procurement contract (or framework agreement), a challenge initiated after the expiry of the standstill period but before approval is granted is out of time; and

(d) That the alternative deadline provided for in paragraph (2) (b) is intended for all situations when the standstill period was not applied (e.g. because the legitimate exception was invoked or for illegal grounds).

5. The procurement or other applicable regulations may provide or call for issuance of procedural rules that would be applicable to the applications for reconsideration proceedings. Those rules may, inter alia, address the following issues:

(a) Supporting evidence to be presented by the applicant to demonstrate why a reconsideration or corrective action is the appropriate course. How that may be done will vary from case to case and preserving flexibility in this regard is necessary. The default rule should however be that the application for reconsideration should be accompanied by all available evidence; filing any supporting evidence later may defeat the aim of requiring prompt action on the application by the procuring entity;

(b) Time limits for serving prompt notices to all concerned and manner and means of doing so. The aim is to ensure that all interested persons, including participants in the procurement proceedings (whose contact details may or may not be known to the procuring entity), are timely informed that the application has been filed. In the electronic environment, for example, the most effective manner, means and place for serving notices is the website where the initial notice of the procurement was published, and the procurement regulations should encourage or require the procuring entity to do so;

(c) Sequence of issues to be considered and decisions to be taken by the procuring entity (whether the application has been filed within the prescribed time limits; whether or not the applicant has standing to file its application, whether the application is based on an obviously erroneous understanding of the facts or applicable law and regulations; or whether the application is frivolous or vexatious, whether the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue justify suspending the proceedings and if so, for how long; which corrective measures are to take and so forth);

(d) The form, manner and place of recording all decisions by the procuring entity taken in the application-for-reconsideration proceedings and their minimum content (e.g. that the decision must be in writing, state action(s) taken and include reasons, both to enhance understanding and thereby assist in the prevention of

further disputes, and to facilitate any further challenge or appeal, and must become part of the documentary record of the procurement proceedings). In this context it should be noted that, although in some systems the silence can be deemed to be a rejection of an application, the Model Law provisions require a written decision on rejection. The procurement or other applicable regulations must therefore clarify the effect of silence by the procuring entity to an application within the periods allocated by law for taking actions and decisions on the application (including on serving notices under paragraph (3) of the article), in particular that the silence or absence of actions may trigger the application for review, to a court or to another competent authority of the enacting State;

(e) In the context of article 67 (8), means and manner of providing by the procuring entity of effective access by the independent body to all documents in the procuring entity's possession relevant to the procurement proceedings under review. Such means and manner must satisfy the requirement of law for prompt access upon receipt of a notice of the application. IT tools may facilitate that;

(f) The rights of persons joining the reconsideration proceedings, including the right to submit a request to lift a suspension that has been applied;

(g) Treatment of confidential information, including in the context of issuing decisions and notices and granting access to records by participants in challenge proceedings and by the independent body. In this context, the procurement or other applicable regulations may in particular explain the aim of provisions requiring servicing a notice of the substance of the application: it permits the procuring entity to avoid the disclosure of potentially confidential information without the need to redact confidential information from the application.

6. The procurement or other applicable regulations must explain the legal effects of a decision on dismissal, in particular that the dismissal constitutes a decision on the application and can thus be challenged and if it is not challenged, it lifts the prohibition against entry into force of the procurement contract or framework agreement after the time period allocated under article 65 for possible challenge or appeal has lapsed.

7. The procurement or other applicable regulations should guide procuring entities as regards corrective actions that they may take: for example, rectifying the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rules; if a decision has been made to accept a particular submission and it is shown that another should be accepted, refraining from issuing the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other submission; or cancelling the procurement proceedings and commencing new proceedings.

8. To minimize the risks of abuse of the discretion on the side of the procuring entity as regards imposition of suspension, the procurement or other applicable regulations may provide examples when the suspension would be needed. An alternative approach would be to regulate the exercise of the procuring entity's discretion in deciding whether or not to suspend the procurement proceedings. Such approach may be particularly appropriate where the procuring entity might lack experience in challenge proceedings, where decisions in the procurement proceedings concerned have been taken by another body, or where it is desired to promote the early resolution of disputes by strongly encouraging any challenge to

be presented to the procuring entity in the first instance. If such an approach is preferred, more prescriptive regulation should be included in the procurement or other applicable regulations, taking into account the need to strike a balance between the right of the supplier or contractor to have a challenge or appeal properly reviewed and the need of the procuring entity to conclude a procurement contract (or a framework agreement) in an economic and efficient way, without undue disruption and delay of the procurement process.

Article 67. Application for review before an independent body

1. In an enacting State that wishes to set up a mechanism for independent review, the procurement or other applicable regulations would need to identify the appropriate body in which to vest the review function, whether in an existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State, a relevant body whose competence is not restricted to procurement matters (e.g. the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters.

2. The procurement or other applicable regulations should regulate the composition and operation of this body; the importance of independence and specialist expertise of individuals that will hear challenges in that body should be emphasized. They should attach particular importance to the question of evidence, confidentiality and hearings, so as to ensure that all parties to the proceedings are fully aware of their rights and obligations in this regard, to ensure that there is consistency in all proceedings, and to allow an effective and efficient appeal from a decision of an independent body. The regulations could allow civil society representatives or others to observe challenge proceedings, and provide for the required facility, in accordance with the legal tradition in the enacting State concerned.

3. There will be a need for robust procedural rules in order to ensure that the proceedings examine the issues in each case in the appropriate level of detail and in a timely fashion. The procurement or other applicable regulations must provide or call for issuance of rules of procedure and guidance for the operation of the independent body, including:

(a) The manner in which applications are to be filed, including applications to permit the procurement to continue on the ground of urgent public interest considerations (e.g. whether the application is to be made by the procuring entity ex parte, or inter parts);

(b) Questions of evidence and its examination, including clear rules and procedures as regards the elements and supporting evidence that a procuring entity would need to adduce as regards urgent public interest considerations;

(c) The conduct of review proceedings (such as whether public hearings are to take place);

(d) Issues of observers;

(e) Means of serving prompt notices by the independent body to all concerned, and means, manner and place of publication of such notices where required by law;

(f) Authority to make enquiry of the procuring entity if its decision on suspension must be taken before the independent body has a chance to review documents relating to the procurement proceedings, such as the full record of the procurement proceedings;

(g) Rights of entities whose interests might be affected by the application (such as other government entities), including intervention in the challenge proceedings or a request to lift a suspension that has been applied;

(h) Corrective actions that the independent body may order immediately in cases that trigger automatic suspension of the procurement proceedings under paragraph (4) of the article, such as ordering the procuring entity to extend the deadline for presenting submissions, or correcting the terms of solicitation, pre-qualification or pre-selection;

(i) Competence as regards applications submitted to the independent body out of time (the discretionary element of paragraph (2) (c) of the article allows the independent body to dismiss the application even where it was established that the application involves significant public interest considerations; it also does not bar the independent body from considering late applications where no significant public interest considerations are involved). The rules may illustrate the type of issues that should permit entertaining applications after the standstill period, such as the discovery of fraudulent irregularities or instances of corruption;

(j) The manner of access to all documents relating to the procurement proceedings in the possession of the procuring entity (e.g. physical or virtual), envisaging for example the provision of the relevant documents in steps (for example, a list of all documents could be provided to the independent body first so that the independent body could identify those documents relevant to the proceedings before it). The goal should be to avoid excessive disruption of both procurement and review proceedings by providing secure and efficient means of transfer of such documents, noting that the use of IT tools may facilitate this task. The rules must address in this context procedures of lifting any restrictions on the disclosure of confidential information covered by articles 24 and 25 (4) of the Model Law, in particular whether the independent body is the competent organ of the enacting State to lift such restriction or it has to apply to a court or another relevant organ of the enacting State for the order to lift such restriction;

(k) Rules for access by participants in the challenge proceedings to the record of the challenge proceedings (which will, under the provisions of article 67 (8), include the record of the procurement proceedings), including for example the requirement that participants in the challenge proceedings will need to demonstrate their interest in the documents to which access is sought: this measure is intended to allow the independent body to keep effective control of the proceedings and to avoid suppliers or contractors conducting exhaustive searches of the documents in case they may discover issues of relevance;

(1) Treatment of confidential information, including in the context of issuing decisions and notices and granting access to records by participants in challenge proceedings.

4. In the context of paragraph (9) (i), the procurement or other applicable regulations of the enacting State should address issues of quantification of losses specific to the procurement context. In addressing these issues, the regulations should consider how purely economic loss is addressed in the domestic legal system, so as to ensure consistency in the measure of financial compensation throughout the jurisdiction concerned (including the extent to which financial compensation is contingent on the applicant proving that it would have won the procurement contract concerned but for the non-compliance of the procuring entity with the provisions of the law). The possibility of receiving financial compensation can raise the risk of encouraging speculative applications and disrupting the procurement process. It may also increase the risk of abuse if the power to award financial compensation lies in a small entity or the hands of a few individuals. The applicable regulations may therefore call for oversight of the operation of the mechanism of financial compensation in challenge proceedings, especially where a quasi-judicial system is in its infancy. This should be coupled with a regular review of the entire challenge mechanism to ensure that it is operating effectively in allowing, and encouraging where appropriate, suppliers or contractors to bring applications.

Article 68. Rights of participants in challenge proceedings

1. The procurement or other applicable regulations should explain that paragraph (1) aims to permit all suppliers or contractors “participating in the procurement proceedings” to join the challenge proceedings as long as they remain in the proceedings concerned at the time of the challenge. Thus the provisions intend to exclude those that have been eliminated through pre-qualification or a similar step earlier in the proceedings, unless that step is the action or decision of the procuring entity to which the challenge relates. This is predicated, as noted in the context of article 64 above, on the notion that participation is granted to the extent that the supplier or contractor, or other potential participant, can demonstrate that its interests may be affected by the challenge proceedings. The possibility of broader participation in the challenge proceedings should be provided for since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible. The procurement or other applicable regulations may provide for suitable nomenclature to identify the various participants more accurately.

2. The rules of the conduct of challenge proceedings applicable to the procuring entity and the independent body, respectively, discussed in the context of articles 66 and 67 above, should provide for due process during the challenge proceedings and set out the rights of all participants in the challenge proceedings, differentiating the broader rights of the applicant and the procuring entity from the rights of other interested persons and the rights of those two groups from the rights of anyone else that may be present during public hearings (such as members of the press). The goal is to ensure that the proceedings can continue with appropriate dispatch and that suppliers or contractors can participate effectively.

Article 69. Confidentiality in challenge proceedings

The issues for applicable regulations are those touched upon in the context of articles 24, 25 (4), 66 and 67 above.
