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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law*

Note by the Secretariat

Addendum

This note sets out a proposal for chapter VII (Framework agreements procedures) of the revised Model Law, comprising articles 53 to 57.

The Secretariat's comments are set out in the accompanying footnotes.

* This document was submitted less than ten weeks before the opening of the session because of the Commission's request for intersession informal consultations on the entire text (A/64/17, para. 281).



CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES¹

Article 52. Award of a closed framework agreement

- (1) The procuring entity shall award a closed framework agreement:
- (a) By means of open tendering proceedings, in accordance with provisions of chapter III of this Law, except to the extent that those provisions are derogated from in this chapter; or
 - (b) By means of other procurement methods in accordance with the relevant provisions of chapters II, IV and V except to the extent that those provisions are derogated from in this chapter;²
 - (c) In the case of a framework agreement concluded with one supplier or contractor only, by means of single-source procurement under the conditions set out in article [29].³
- (2) The provisions of this Law regulating the contents of the solicitation in the context of the procurement methods referred to in paragraph (1) (a) and (b) of this article shall apply mutatis mutandis to the information to be provided to suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:
- (a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;
 - (b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;
 - (c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties thereto;
 - (d) Other terms and conditions of the framework agreement, including the form, terms and conditions of the framework agreement in accordance with article [53].
- (2) The provisions of article 20 shall apply mutatis mutandis to the award of a closed framework agreement.

¹ The entire chapter has been revised in the light of the changes agreed to be made to the Model Law so far particularly as regards the location of definitions and conditions for use.

² The Working Group may wish to consider whether the use of any procurement methods should be excluded.

³ The accompanying Guide will cross-refer to the definition of the closed framework agreement in article 2 that specifies that in this type of agreement no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party.

Article 53. Requirements of closed framework agreements

- (1) A closed framework agreement may be concluded between [one or more]⁴ procuring entities and one or more suppliers or contractors as selected in accordance with the criteria and procedures specified when first soliciting their participation in the framework agreement procedure.
- (2) A closed framework agreement shall be concluded in writing and shall set out:
- (a) The duration of the framework agreement, which shall not exceed [the enacting State specifies a maximum] years;⁵
 - (b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;
 - (c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;
 - (d) Whether in a closed framework agreement concluded with more than one supplier or contractor there will be a second stage competition to award a procurement contract under the framework agreement and, if so:
 - (i) A statement of the terms and conditions that are to be established or refined through second stage competition;
 - (ii) The procedures for and the [anticipated][possible] frequency⁶ of any second stage competition and envisaged deadlines for presenting second stage submissions;⁷
 - (iii) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or to the [lowest evaluated submission] [best evaluated submission] [most advantageous submission];
 - (iv) The procedures and criteria to be applied during the second stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles [10 and 11] of this Law. The framework agreement may specify a range within which the relative

⁴ The Working Group may wish to consider whether this addition is necessary or the issue may be discussed only in the Guide text that would accompany the definition of the procuring entity as proposed in the current draft.

⁵ The accompanying Guide text will highlight the danger of closed framework agreements of long duration, in the light of their potentially anticompetitive nature (A/CN.9/668, para. 244).

⁶ At the Working Group's fifteenth session, it was agreed that the reference to the "envisaged frequency" should be replaced with a reference to the "possible frequency" (A/CN.9/668, para. 240).

⁷ At the Working Group's fifteenth session, the view was expressed that information about tentative deadlines within which second stage submissions would have to be presented was to be disclosed to suppliers or contractors in advance. That information was considered to be important for suppliers or contractors to decide whether to become parties to the framework agreement. The suggestion was made that the Guide will explain that information provided was intended to be indicative rather than binding on the procuring entity (A/CN.9/668, para. 248).

weights of the evaluation criteria may be varied during second stage competition.⁸

(3) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:

(a) The procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded;⁹ and

[(b) The procuring entity includes in the record required under article [23] a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements]; and

(c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.

(4) If the procuring entity is to maintain a closed framework agreement electronically, the framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the electronic framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts there under, the [electronic] equipment being used, and technical specifications for connection.

Article 54. Establishment of an open framework agreement

(1) The procuring entity shall establish and maintain an open framework agreement in electronic form.¹⁰

(2) The procuring entity shall solicit participation in the open framework agreement by issuing an invitation to become a party to the open framework agreement in accordance with articles 29 quater of this Law.

(3) The invitation to become a party to the open framework agreement shall include the following information:

(a) The name and address of the procuring entity [that establishes and maintains the open framework agreement and the name and address of any other procuring entities that will have the right to award procurement contracts under the framework agreement];¹¹

⁸ The Guide to Enactment would cross-refer to the provisions of article 55 prohibiting material change to the procurement during the operation of the framework agreement.

⁹ The Working Group may wish to consider whether this provision should be retained here or, as suggested at the Working Group's seventeenth session, appear only in the article on the documentary record of the procurement proceedings.

¹⁰ A/CN.9/664, para. 91.

¹¹ Proposed wording by the informal drafting party, July 2009. It was explained that the proposed language was offered so that framework agreements can be used by other agencies, and not only by the procuring entity that entered into the framework agreement. This approach — centralized procurement facilitated by framework agreements — makes it easier to consolidate government demand, and thus to increase the government's negotiating leverage in the marketplace. However, the Working Group may wish to consider whether so doing would be inconsistent with

- (b) That the procurement will be conducted as a framework agreement procedure leading to an open framework agreement;
- (c) That it is an open framework agreement that is to be concluded;
- (d) The language or languages of the open framework agreement and all information about the operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts under the agreement can be assessed, the electronic equipment being used and the technical specifications for connection;
- (e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:
- (i) A declaration pursuant to article [8];
- (ii) If any limitation on a number of suppliers or contractors that are parties to the open framework agreement is imposed in accordance with paragraph (7) of this article, the maximum number of suppliers or contractors that may be parties to the open framework agreement;
- (iii) Instructions for preparing and presenting indicative submissions necessary to become a party to the open framework agreement, including the currency(ies) and the language(s) to be used [unless the procuring entity decides that this information is not necessary in domestic procurement],¹² as well as the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article [9];
- (iv) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation by presenting indicative submissions, subject to any maximum number of suppliers, if any, and any declaration made pursuant to article [8];
- (f) Other terms and conditions of the open framework agreement, including all information required to be set out in the open framework agreement in accordance with article [55];
- (g) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;
- (h) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary.

the notion of a defined procuring entity under the Model Law.

¹² Corresponds to article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

- (4) Suppliers and contractors may apply to become a party or parties to the framework agreement at any time during its operation by presenting indicative submissions to the procuring entity in compliance with the requirements of the invitation to become a party to the framework agreement.
- (5) The procuring entity shall examine all indicative submissions received during the period of operation of the framework agreement within a maximum of [...] days in accordance with the procedures set out in the invitation to become a party to the framework agreement.
- (6) The framework agreement shall be concluded with all suppliers or contractors that presented submissions unless their submissions have been rejected on the grounds specified in the invitation to become a party to the framework agreement.
- (7) The procuring entity may impose a maximum number of parties to the open framework agreement for technical reasons or capacity limitations. The procuring entity shall set out any such maximum number in the invitation to become a party to the framework agreement. [The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law].¹³
- (8) The procuring entity shall promptly notify the suppliers or contractors whether they have become parties to the framework agreement and of the reasons for the rejection of their indicative submissions if they have not.

Article 55. Requirements of open framework agreements

- (1) An open framework agreement shall provide for second stage competition for the award of a procurement contract under the agreement and shall include:
- (a) The duration of the framework agreement;
 - (b) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;
 - (c) Any terms and conditions that may be refined through second stage competition;
 - (d) The procedures and the [anticipated][possible] frequency¹⁴ of second stage competition;
 - (e) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or the most advantageous submission;
 - (f) The procedures and criteria to be applied during the second stage competition, including the relative weight of the evaluation criteria and the manner

¹³ The Working Group may wish to consider whether this provision should be retained here or, as suggested at the Working Group's seventeenth session, appear only in the article on the documentary record of the procurement proceedings.

¹⁴ At the Working Group's fifteenth session, it was agreed that the reference to the "envisaged frequency" should be replaced with a reference to the "possible frequency" (A/CN.9/668, para. 240).

in which they will be applied, in accordance with articles [10 and 11] of this Law. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second stage competition.¹⁵

(2) The procuring entity shall, during the entire period of operation of the open framework agreement, republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.¹⁶

Article 56. Second stage of a framework agreement procedure

(1) Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.

(2) A procurement contract under a framework agreement may only be awarded to a supplier or contractor that is a party to the framework agreement.

(3) The provisions of article 20 of this Law, except for its paragraph (2),¹⁷ shall apply to the acceptance of the successful submission under framework agreements without second stage competition.

(4) In a closed framework agreement with second stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity [for the procurement contract]¹⁸ shall issue a written invitation to present submissions individually and simultaneously to all suppliers or contractors that are parties to the framework agreement, or only those then capable of meeting the needs of that procuring entity in the subject matter of the procurement;

(b) The invitation to present submissions shall include the following information:

(i) A restatement of the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, set out the terms and conditions that are to be subject to the second stage competition and provide further detail of the terms and conditions where necessary;

¹⁵ The Guide to Enactment would cross-refer to the provision of article 55 prohibiting material change to the procurement during the operation of the framework agreement.

¹⁶ The accompanying Guide text will explain that republication and maintenance of the relevant information shall be at the place where the original invitation was published or at the place (website or other electronic address) set out in the original invitation (article 53 (3) (d)).

¹⁷ The accompanying Guide text will explain reasons why provisions on the standstill period of article 20 do not apply to framework agreements without second stage competition.

¹⁸ Amendment proposed by the informal drafting party, July 2009, to be considered in conjunction with the changes proposed by that informal drafting party to articles 53 (3) (a) and 54 (1) (a) above, to allow a centralized procurement entity or more than one procuring entities to become a party to the framework agreement and conclude procurement contracts under it.

- (ii) A restatement of the procedures and criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application);
 - (iii) Instructions for preparing submissions;
 - (iv) The manner, place and deadline for presenting submissions;¹⁹
 - (v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;
 - (vi) The manner in which the submission price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
 - (vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;
 - (viii) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the second stage competition, without the intervention of an intermediary;
 - (ix) Any commitments to be made by the supplier or contractor outside the procurement contract;
 - (x) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefore;
 - (xi) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;
 - (xii) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second stage competition;
- (c) The procuring entity [for the procurement contract] shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;

¹⁹ Amendment proposed by the informal drafting party, July 2009.

(d) The procuring entity shall accept the successful submission in accordance with article 20.

Article 57. No material change during the operation of a framework agreement²⁰

During the operation of a framework agreement, no material change to the procurement shall be permitted.

[Articles 58-60 are not used]

²⁰ The Working Group, at its fifteenth session, agreed to remove to article 2 the definition of “material change” proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 235-237 and 273 (f)). The Working Group deferred the consideration of the revised draft article (A/CN.9/668, paras. 235-237).