



# General Assembly

Distr.: Limited  
28 October 2009

Original: English

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**United Nations Commission  
on International Trade Law**  
Working Group I (Procurement)  
Seventeenth session  
Vienna, 7-11 December 2009

## **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 60.

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

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

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## CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES<sup>1</sup>

### Article 53. Conditions for use of a framework agreement procedure<sup>2</sup>

(1) A procuring entity may engage in a framework agreement procedure in accordance with this chapter where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on a [repeated or indefinite]<sup>3</sup> basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time; or

[(c) Other grounds and circumstances that justify recourse to a framework agreement procedure.]<sup>4</sup>

(2) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.<sup>5</sup>

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<sup>1</sup> At the Working Group's fifteenth session, the view was expressed that it might be necessary to allow for negotiated procedures subsequent to the conclusion of the framework agreements. It was suggested that drafting of the provisions allowing for negotiations in the context of framework agreements should be undertaken together with chapter V. The Working Group agreed with these suggestions (A/CN.9/668, para. 224).

<sup>2</sup> The Working Group, at its fifteenth session, agreed to remove to article 2 the definitions 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. 229 and 273 (f)). The Working Group deferred the consideration of other revisions proposed to be made to the draft article to a later stage (A/CN.9/668, para. 229).

<sup>3</sup> One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term "indefinite" indicates unknown timing and/or unknown quantities. The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, recommended that the Guide to Enactment should explain that a procuring entity should offer estimates of future quantities in the solicitation documents, in part to guide prospective vendors as to the government's likely requirements. The Guide to Enactment should also explain why the Model Law refers to indefinite quantities, e.g., because it is possible that an item may be ordered only once.

<sup>4</sup> At the Working Group's fifteenth session, it was alternatively suggested that an additional open-ended subparagraph (c) could be included, which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the record of the procurement proceedings (A/CN.9/668, para. 228). The informal drafting party, July 2009, recommended that the Guide to Enactment should give examples of what these circumstances might be.

<sup>5</sup> At the Working Group's fifteenth session, it was suggested that all provisions in this chapter referring to the record of procurement proceedings should be consolidated for further consideration at a later date (A/CN.9/668, para. 229). The Secretariat consolidated as many of the provisions in this paragraph that the context would allow. The understanding is that their

## **Article 54. Information to be specified when first soliciting participation in a framework agreement procedure<sup>6</sup>**

When first soliciting the participation of suppliers or contractors in a framework agreement procedure, the procuring entity shall specify:

(a) The name and address of the procuring entity [that will award the 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];<sup>7</sup>

(b) That the procurement will be conducted as a framework agreement procedure;

(c) The type of the framework agreement to be concluded – a closed or open framework agreement; if closed, whether it is with or without second-stage competition; and, if closed without second-stage competition, whether it is to be concluded with one or more than one supplier or contractor;

(d) All minimum information required to be included in the framework agreement in accordance with article [57] or [59], as applicable;

(e) In framework agreements with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties to the framework agreement;

(f) The procedures and criteria to be used by the procuring entity in the selection of the parties to the framework agreement; in the case of closed framework agreements, in addition any evaluation criteria, their relative weight and the manner in which they will be applied in the selection and whether the selection will be based on the lowest price or [lowest] [best]<sup>8</sup> evaluated submission;

(g) In closed framework agreements procedures, the information referred to in article 31 (e)-(j) and article 33 (a)-(c) and (g)-(z), unless such information will be established in a second-stage competition.

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content will eventually be also reflected in an article on the record of procurement proceedings (article 23 of the proposed revised Model Law).

<sup>6</sup> The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 233).

<sup>7</sup> 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.

<sup>8</sup> The informal drafting party, July 2009, recommended referring to the “best evaluated submission”.

### **Article 55. No material change during the operation of the framework agreement<sup>9</sup>**

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

### **Article 56. Selection of the party or parties to a closed framework agreement**

(1) The procuring entity shall select the party or parties to a closed framework agreement with a procuring entity:

(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 article and article [57]; or

(b) By means of a method of procurement of chapter IV under the conditions of article [26] of this Law and in accordance with the relevant provisions of chapter IV except to the extent that those provisions are derogated from in this article and article [57];

(c) In the case of a framework agreement concluded with one supplier or contractor, in addition to the methods of procurement specified in subparagraphs (a) and (b) of this paragraph, by means of single-source procurement under the conditions set out in article [29 (a) and (c) to (e)].

(2) The procuring entity shall include in the record required under article 23 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of any method of procurement other than tendering for the selection of the party or parties to a closed framework agreement with the procuring entity.

(3) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, including the relative weights of such criteria and the manner of their application. The procuring entity shall promptly notify the selected supplier(s) or contractor(s) of their selection.<sup>10</sup>

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<sup>9</sup> 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).

<sup>10</sup> The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H. The informal drafting party, July 2009, recommended that the Guide to Enactment should state that debriefing is a best practice, and that debriefings are a best practice at both stages of frameworks agreements procedures (at the time the framework agreement is awarded, and at the time contracts are awarded under an existing framework agreement).

## **Article 57. Minimum requirements of closed framework agreements<sup>11</sup>**

- (1) A closed framework agreement may be concluded between the procuring entity and one supplier or contractor or more than one supplier or contractor.<sup>12</sup>
- (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;<sup>13</sup>
  - (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<sup>14</sup> 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 possible frequency<sup>15</sup> of any second-stage competition and envisaged deadlines for submission of second-stage tenders;<sup>16</sup>

<sup>11</sup> The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 245).

<sup>12</sup> The paragraph was revised further to a suggestion at the Working Group's fifteenth session that the reference to a defined number should be deleted, and a decision on any required number left to an enacting State (A/CN.9/668, para. 243).

<sup>13</sup> At the Working Group's fifteenth session, it was agreed that this provision should be accompanied with the provisions in the Guide highlighting the danger of closed framework agreements of long duration, in the light of their potentially anticompetitive nature (A/CN.9/668, para. 244).

<sup>14</sup> The provision has been redrafted to avoid giving the impression that all multi-supplier agreements must involve second-stage competition.

<sup>15</sup> 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).

<sup>16</sup> 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 issue should be addressed in the context of proposed article 54 (g) to the extent it was not already covered, with explanation in the Guide that information provided was intended to be indicative rather than binding on the procuring entity (A/CN.9/668, para. 248). The Working Group may wish to consider that this type of information would most likely in practice be included in the framework agreement itself rather than in the solicitation notice. Since in accordance with the proposed article 54 (d), the minimum content of the framework agreement is to be disclosed at the outset of the procurement proceedings, the Working Group may wish to include the relevant information in the present subparagraph rather than in proposed article 54 (g).

(iii) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [lowest] [best] evaluated tender [...];

(iv) Evaluation procedures and criteria, including the relative weight of such criteria and the manner in which they will be applied, in accordance with article [11] of this Law, during any second-stage competition. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to the material change in the procurement.

(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; 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, of a non-material nature 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 electronic framework agreement and notifications of forthcoming procurement contracts under the framework agreement can be accessed, the electronic equipment being used, and technical specifications for connection.

### **Article 58. Selection of parties to an open framework agreement procedure<sup>17</sup>**

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

(2) An open framework agreement shall be established by means of open solicitation. For the first solicitation of participation in the open framework agreement, the procuring entity shall issue a notice of the open framework agreement procedure that shall contain the information specified in article [54].

(3) The procuring entity shall, during the period of operation of the open framework agreement, either:

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<sup>17</sup> The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 250-253).

(a) Republish as frequently as practicable, but at least once annually, the initial notice of the open framework agreement procedure, a notice of the award of a framework agreement and an invitation to present further submissions to become a party to the framework agreement, in the publication or publications in which the initial notice of the open framework agreement procedure was published; or

(b) Maintain a copy of the published information at the website or other electronic address set out in the initial notice of the open framework agreement procedure.

(4) Suppliers and contractors may apply to become a party or parties to the open framework agreement at any time during its operation by presenting their submissions to the procuring entity in compliance with the requirements of the notice of the open framework agreement procedure.

(5) The procuring entity shall examine all such submissions to become a party to the framework agreement received during the period of its operation within a maximum of [...] days in accordance with the procedures set out in the notice of the open framework agreement procedure.

(6) The framework agreement shall be concluded with all suppliers or contractors unless their submissions were rejected in accordance with article [37 (3)] of this Law.

(7) The procuring entity may set out a maximum number of parties to the open framework agreement because of technical or other capacity limitations. The procuring entity shall provide information about the imposition of such a maximum and the maximum number in accordance with article 54 of this Law. 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.

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have been selected to be parties to the framework agreement.<sup>18</sup>

### **Article 59. Minimum requirements as regards open framework agreements<sup>19</sup>**

(1) An open framework agreement shall provide for second-stage competition for the award of a procurement contract under the agreement and shall in addition contain at a minimum:

(a) 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;

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<sup>18</sup> The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

<sup>19</sup> The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 254).

(b) Any terms and conditions that may be refined through second-stage competition;

(c) The language or languages of the open framework agreement and all information about the electronic operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts under the agreement can be assessed, electronic equipment used and the technical arrangements and specifications;

(d) If any limitation on a number of suppliers or contractors that are parties to the agreement is imposed, a maximum number of suppliers or contractors that may enter into the framework agreement;

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) 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, subject to any maximum number of suppliers, if any;

(ii) The information specified in article 31 (e), and article 33 (b), (c), (t), (u), (w) and (z); and

(iii) Instructions for preparing and submitting indicative tenders, including the information referred to in article 33 (i) to (k);

(f) The procedures and the possible frequency of second-stage competition;

(g) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [best] [lowest] evaluated tender;

(h) The evaluation procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with article [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, provided that any such variation does not lead to the material change in the procurement;

(i) The duration of the framework agreement.<sup>20</sup>

(2) The procuring entity shall, during the entire period of operation of the open framework agreement, ensure unrestricted, direct and full access to the specifications and terms and conditions of the open framework agreement and to any other necessary information relevant to its operation.

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<sup>20</sup> The Working Group, at its fifteenth session, agreed to add the reference to the duration of the framework agreement in this article (A/CN.9/668, para. 254).

## Article 60. Second stage of a framework agreement procedure<sup>21</sup>

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions and the provisions of this article.

(2) No procurement contract under the closed framework agreement shall be awarded to suppliers or contractors that were not originally parties to the closed framework agreement.

(3) (a) Each anticipated procurement contract under a closed framework agreement with the second-stage competition and an open framework agreement shall be the subject of a written invitation to tender;

(b) The procuring entity [for the procurement contract]<sup>22</sup> shall invite 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, to present their tenders;

(c) The invitation to tender shall:

(i) Restate 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;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application), and include the information referred to in article 33 (q) to (s) and (x) to (z) of this Law;

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 33 (g) to (p) of this Law;

(iv) Fix the manner, [modalities] and deadline for the submission of tenders. The deadline for the submission of tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and submit their tenders, taking into account the reasonable needs of the procuring entity [for the procurement contract];<sup>23, 24</sup>

(d) The procuring entity [for the procurement contract] shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;

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<sup>21</sup> The Working Group, at its fifteenth session, agreed to merge draft articles addressing second-stage procedures in closed and open framework agreements. With this change, it approved the substance of the draft article (A/CN.9/668, paras. 247 and 255).

<sup>22</sup> Amendment proposed by the informal drafting party, July 2009, to ensure consistency with the changes proposed for article 54 (a) above, to allow a centralized procurement entity to enter into a framework agreement that can be used by other agencies to enter into procurement contracts.

<sup>23</sup> Amendment proposed by the informal drafting party, July 2009.

<sup>24</sup> The provisions of the paragraph were revised to make them technologically neutral and consistent with similar provisions in other articles of this proposed revised Model Law.

(e) The procuring entity [for the procurement contract] shall accept the successful tender in accordance with article 20.<sup>25</sup>

(4) The procuring entity [for the procurement contract] shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price.<sup>26</sup>

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<sup>25</sup> To be reviewed in the light of the pending decision of the Working Group with respect to draft article 20 (11), in particular as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144).

<sup>26</sup> Ibid.