



General Assembly

Distr.: Limited
14 January 2007

Original: English

**United Nations Commission
on International Trade Law
Working Group I (Procurement)
Thirteenth session
New York, 7-11 April 2008**

Annotated provisional agenda for the thirteenth session of Working Group I (Procurement)

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

II. Composition of the Working Group

1. The Working Group is composed of the following States: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Gabon, Germany, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Latvia, Lebanon, Madagascar, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.



2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The thirteenth session of Working Group I (Procurement) is scheduled to be held at the United Nations headquarters in New York, from 7 to 11 April 2008. Meeting hours will be from 10 a.m. to 1 p.m., and from 3 p.m. to 6 p.m., except on Monday, 7 April 2008, when the session will commence at 10.30 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

1. Previous deliberations

5. At its thirty-seventh session, in 2004, the Commission decided that the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law")¹ would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform. However, it was pointed out that in updating the Model Law care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven. The Commission decided to entrust the elaboration of proposals for the revision of the Model Law to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations (A/59/17, paras. 80-82).

6. The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004). At that session, it decided that at its future sessions it would proceed with the in depth consideration of the topics listed in paragraph 8 below in sequence (A/CN.9/568, para. 10). The Working Group continued the work at six subsequent sessions at which it added topics of abnormally low tenders (ALTs) and conflict of interests to the list of topics to be considered in its work.

¹ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law*, vol. XXV: 1994) (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website <http://www.uncitral.org/pdf/english/texts/procure/ml-procurement/ml-procure.pdf>.

7. At its thirty-eighth to fortieth sessions, in 2005 to 2007, respectively, the Commission took note of the reports of the sixth (Vienna, 30 August-3 September 2004), seventh (New York, 4-8 April 2005), eighth (Vienna, 7-11 November 2005), ninth (New York, 24-28 April 2006), tenth (Vienna, 25-29 September 2006) and eleventh (New York, 21-25 May 2007) sessions of the Working Group (A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615 and A/CN.9/623, respectively). It commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, paras. 170-172, A/61/17, paras. 190-192, and A/62/17 (Part I), paras. 166-170). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide to Enactment of the Model Law (the "Guide"),² should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192) (for the Working Group's decision in this regard, see para. 62 below). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part I), para. 170) (for the Working Group's decision in this regard, see para. 76 below).

**(a) Summary of conclusions at the Working Group's sixth session
(Vienna, 30 August-3 September 2004)**

8. The Working Group considered the following topics: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions (ERAs); (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents.

9. With respect to electronic publication of procurement-related information, the Working Group expressed the view that the Model Law should encourage the electronic publication of information that the Model Law currently required States to publish. Furthermore, it was felt that it might be desirable to provide guidance in the Guide as to the value of electronic publication (A/CN.9/568, para. 21). The Working Group was of the view that the use of electronic publication under the Model Law should remain optional (A/CN.9/568, para. 27). The Working Group noted that it should further consider whether additional information relevant to potential suppliers, which the Model Law did not currently require to be published, might be brought within the scope of any new provision or guidance given (A/CN.9/568, para. 28).

² For the text of the Guide to Enactment of the Model Law, see document A/CN.9/403, reproduced in: United Nations Commission on International Trade Law, *Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II. The Guide is available in electronic form at the UNCITRAL website: <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>.

10. With respect to the use of electronic communications in the procurement process, it was generally agreed that it would be useful to formulate provisions that expressly enabled and, in appropriate circumstances, promoted the use of electronic communications, possibly subject to a general requirement that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement (A/CN.9/568, para. 39).

11. With respect to controls over the use of electronic communications in the procurement process, the Working Group recognized that efficient and reliable electronic procurement systems required appropriate controls as regards security, confidentiality and authenticity of submissions, and integrity of data, for which special rules and standards might need to be formulated (A/CN.9/568, para. 41).

12. With respect to ERAs, the Working Group recognized the reality of ERAs and confirmed its willingness to consider the appropriateness of enabling provisions for the optional use of ERAs in the Model Law. However, before making a final decision on the matter, the Working Group agreed that it would be useful to have more information on the practical use of ERAs in the countries that had introduced them, including as regards existing approaches for handling the risk of abnormally low prices (A/CN.9/568, para. 54).

13. With respect to the use of suppliers' lists, recognizing that, whether or not they were viewed as consistent with the aims and objectives of the Model Law, suppliers' lists were in use in various States, it was agreed that it would be appropriate to acknowledge their existence and use (A/CN.9/568, para. 61). There was strong support in the Working Group for the use of optional rather than mandatory suppliers' lists (A/CN.9/568, para. 63).

14. With respect to framework agreements, there was general agreement that the Commission should acknowledge the fact that framework agreements, even if not currently mentioned in the Model Law, were used in practice. However, the views differed on how to deal with framework agreements (A/CN.9/568, para. 74). It was agreed that the Working Group should first examine whether and to what extent the Model Law, in its current form, created obstacles to the use of framework agreements (A/CN.9/568, para. 78).

15. With respect to procurement of services, the Working Group agreed that the Model Law should retain all the various options in methods for the procurement of services currently provided, and that therefore there was no need to revise it in that respect. However, the Working Group also agreed on the need to formulate guidelines in the Guide for the use of each method, depending on the type of services at issue and the relevant circumstances (A/CN.9/568, para. 93).

16. With respect to evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies, the Working Group recognized that existing provisions of the Model Law provided sufficient balance between the need for economy and efficiency and possibility for an enacting State to address other policy goals through the procurement. However, some of those other policy goals listed in the Model Law seemed to be outdated and the Working Group could consider at a later stage the desirability or otherwise of retaining them. It was agreed that the Working Group might consider formulating additional guidance on means to enhance transparency and objectivity in the use of other policy goals within evaluation criteria (A/CN.9/568, para. 101).

17. With respect to remedies and enforcement, the Working Group agreed that: (a) it would be useful to provide further guidance on review provisions that national laws could incorporate; (b) recognizing the fact that there were different systems, some of which favoured review through the courts while others favoured independent administrative review, the Working Group should leave various options open for States; (c) provisions related to the judicial review process should be left for enacting States; and (d) the list of exceptions in article 52 (2) should be deleted. However, the Guide should indicate that enacting States might wish to exclude some matters from the review process (A/CN.9/568, para. 112).

18. With respect to alternative methods of procurement, the Working Group generally agreed that it should in due course consider the need for and desirability of circumscribing more clearly the conditions under which the so-called alternative methods of procurement could be resorted to, with a view to reducing the risk of abuse in their use. The Working Group agreed that it might further consider in the future eliminating some of those methods and presenting them in a manner that stressed their exceptional, rather than alternative, nature within the system of the Model Law (A/CN.9/568, para. 116).

19. With respect to community participation in procurement, it was felt that most issues raised by community participation related primarily to the planning and implementation phases of a project, more than to the procurement process. Being aware, however, of the growing importance of community participation and the possible need for enabling legislation in many jurisdictions, the Working Group agreed that it should review the provisions of the Model Law with a view to ensuring that they did not pose obstacles to the use of community participation as a requirement in project-related procurement. The Guide, it was further agreed, might provide additional guidance on the matter (A/CN.9/568, para. 122).

20. With respect to simplification and standardization of the Model Law, the Working Group agreed that there was some room for improving the Model Law's structure and for simplifying its contents, by some reordering or by eliminating unnecessarily detailed provisions or moving them to the Guide. It was generally felt that the desired result should be a more user-friendly Model Law where all essential elements would be preserved and presented in an improved structure and in a simpler way (A/CN.9/568, para. 126).

21. With respect to the legalization of documents, the Working Group generally agreed that it would be desirable to limit the power of procuring entities to require legalization of documentation from a successful supplier alone. In doing so, the Working Group agreed that it could consider in due course whether article 10 could be combined with article 6 (5) (A/CN.9/568, para. 128).

**(b) Summary of conclusions at the Working Group's seventh session
(New York, 4-8 April 2005)**

22. The Working Group proceeded with the in-depth consideration of issues arising from the use of electronic communications in the procurement process, including in the course of ERAs, and issues related to ALTs, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.34 and 35 and their addenda and A/CN.9/WG.I/WP.36 and Corr.1). It requested the Secretariat to prepare drafting suggestions for its eighth session, reflecting the relevant deliberations of the

Working Group at the session. The Working Group decided, time permitting, to take up the topic of framework agreements at its eighth session (A/CN.9/575, para. 9).

(i) *The use of electronic communications in the procurement process*

23. The Working Group agreed to continue its consideration of new provisions to be incorporated in the Model Law, as a new article 4 bis, which would promulgate the general principles of functional equivalence and technological neutrality to be observed in communicating during the procurement process. These provisions, it was agreed, would not stipulate the conditions for functional equivalence between electronic and written tenders, which fall to be treated in general law on electronic commerce. It was agreed that provisions regarding electronic communications would be included in the Model Law if the procurement context strictly required such provision and that the Guide would provide guidance for enacting States on relevant requirements (A/CN.9/575, paras. 12 and 34).

24. The Working Group decided to continue at a future session its deliberations on whether definitions of the terms “writing” and “electronic means [of communication]” should be included in the Model Law and, if so, whether such definitions should be based on the definitions of these notions in the European Union procurement directives of 31 March 2004 (Directives 2004/17/EC and 2004/18/EC) (A/CN.9/575, para. 23).

25. As regards the form of communications, the Working Group agreed that the procuring entity should be able to select any form of communication, without being required to justify its choice, provided that the chosen form (i) should not represent an obstacle to access to the procurement process, (ii) would be justified to promote economy and efficiency in the procurement process and (iii) would not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition. The Working Group also agreed that the supplier should not be able to select the means of communication to be used, and that the principles regarding the use of communications should apply, *mutatis mutandis*, to their form of communications as set out in article 9 of the Model Law (A/CN.9/575, paras. 32-33).

(ii) *The electronic publication of procurement-related information*

26. The Working Group agreed that the scope of article 5 of the Model Law should be expanded to cover all procurement-related information that the Model Law required to be published, including legal texts. The Working Group also agreed to consider whether further procurement-related information that the Model Law did not currently require to be published should fall within the scope of article 5. The Working Group decided to continue its deliberations on this question taking into account the results of a study of relevant publication practices in national and international systems to be presented to the Working Group at its eighth session. As regards the means of publication, the Working Group agreed that the main principle would be that any means of publication could be selected as long as the chosen means complied with the “accessibility standards” referred to in paragraph 25 above and that such principle would apply to all procurement-related information that the Model Law would require or permit to be published under expanded article 5 (A/CN.9/575, paras. 25-27).

(iii) *Electronic opening and acceptance of tenders*

27. The Working Group requested the Secretariat to provide drafting material for its consideration with respect to article 33 to accommodate any system for opening tenders, whether electronic or traditional (A/CN.9/575, para. 42).

28. As regards the acceptance of tenders and entry into force of a procurement contract, the Working Group concluded that no specific provision to enable these matters to be handled electronically was needed in the Model Law. However, the Guide would provide guidance for enacting States on relevant requirements (A/CN.9/575, para. 50).

(iv) *Record of procurement proceedings*

29. The Working Group agreed to continue its consideration of an expanded article 11 to be incorporated in the Model Law, based on the broader concepts of dissemination of information and accessibility standards, and that the Model Law should also provide that procurement regulations may establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and, where appropriate, confidentiality of information (A/CN.9/575, paras. 45-47).

(v) *Electronic reverse auctions*

30. Taking account of the increasing use of ERAs and the twin aims of harmonization and promotion of best practice, the Working Group concluded that the revised Model Law should contain provisions on ERAs. Those provisions could take the form of a general enabling provision providing the key principles for the use of ERAs, notably the conditions for and limitations to the use of ERAs. Further, the Working Group agreed to confine ERAs under the Model Law to the procurement of clearly specified goods, works and services whose non-price criteria could be quantified and decided that the Guide would address the use of ERAs in detail. The Working Group agreed to continue its deliberations in the consideration of new provisions to be incorporated in the Model Law, taking into account, first, that goods, services or construction to be procured by ERAs should be capable of clear specification, that the types of purchases may need to be restricted and that there be a requirement for a competitive market. Secondly, the provisions would enable the use of ERAs as a procurement method rather than an optional phase in other procurement methods. Thirdly, account should be taken of the approach on the same subject by the parties currently revising the multilateral Government Procurement Agreement of the World Trade Organization as regards the use of ERAs (A/CN.9/575, paras. 60-62, 66 and 67).

31. The Working Group postponed its final decision on the question of whether non-electronic reverse auctions should be provided for in the Model Law until it had before it draft provisions governing the use of ERAs (A/CN.9/575, para. 65).

(vi) *Abnormally low tenders*

32. The Working Group agreed to allow procuring entities to investigate possible ALTs through a price justification procedure (A/CN.9/575, para. 76). It also agreed that guidance should be provided in the Guide taking into consideration discussions in document A/CN.9/WG.I/WP.36 and Corr.1.

(c) Summary of conclusions at the Working Group's eighth session (Vienna, 7-11 November 2005)

33. The Working Group continued the in-depth consideration of issues arising from the use of electronic communications in the procurement process, including in the course of ERAs, and issues related to ALTs, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.38, 39 and 40 and their addenda). It requested the Secretariat to revise the presented drafting materials for further consideration at its ninth session and provide further information on pre-qualification, qualification and ranking of bidders in the context of ERAs and on the use of tender securities in electronic procurement, in particular ERAs (A/CN.9/590, paras. 10, 49, 85 and 100).

(i) Scope and extent of revisions of the Model Law and the Guide

34. The Working Group deferred its consideration of whether the Model Law should address the procurement planning and contract administration phases (A/CN.9/590, para. 13) and whether the Guide should provide greater detail of matters to be addressed in regulations or for draft regulations themselves (A/CN.9/590, paras. 14 and 15).

(ii) The use of electronic communications in the procurement process

35. The Working Group decided that it would continue its deliberations of “functional equivalence” of all methods of communicating, publishing, exchanging or storing information or documents on the basis of variant B for a new draft article 4 bis, as revised by the Secretariat in the light of the drafting suggestions made at the session, in particular without a statement of the accessibility standards within that article (A/CN.9/590, para. 26). The Working Group requested the Secretariat to prepare a revised draft for the “accessibility standards”, based on the alternative text proposed at the session (A/CN.9/590, para. 33).

36. The Working Group also: (i) requested the Secretariat to revise drafting suggestions for article 9 of the Model Law (Form of communication) in the light of the close interaction between those provisions and the provisions on “functional equivalence” and “accessibility standards” (A/CN.9/590, para. 42); (ii) concluded that the text of the Model Law should not include a definition of the term “electronic” or related terms and instead the Guide should describe those concepts (A/CN.9/590, para. 43); (iii) agreed to the proposed text addressing the legal value of procurement contracts concluded electronically (A/CN.9/590, para. 44); and (iv) made proposals for the revision of draft provisions addressing requirements to maintain a record of the procurement proceedings (A/CN.9/590, para. 45), and electronic submission (A/CN.9/590, para. 47) and opening of tenders (A/CN.9/590, para. 50).

37. The Working Group made some suggestions for the revision of the proposed text for the Guide (A/CN.9/590, paras. 17, 18, 33, 40-43 and 45) and deferred the consideration of the remaining parts of the Guide until after it had considered the revised drafting suggestions for the Model Law (A/CN.9/590, paras. 48 and 51).

(iii) Electronic publication of procurement-related information

38. The Working Group considered suggestions for revisions to the proposed articles 5 (Public accessibility of procurement-related information) and 5 bis

(Publication of information on forthcoming procurement opportunities) (A/CN.9/590, paras. 57-59 and 62) and deferred the consideration of some issues arising from the publication of procurement-related information by electronic means to a future session (A/CN.9/590, para. 63).

(iv) *Electronic reverse auctions*

39. The Working Group formulated some general guidance for revising provisions for the Model Law (A/CN.9/590, paras. 67, 81 and 102) and made some preliminary drafting suggestions with respect to the proposed new articles 19 bis (Conditions for use of electronic reverse auctions) (A/CN.9/590, paras. 74, 75 and 79), 47 bis (Conduct of electronic reverse auctions in the pre-auction period) (A/CN.9/590, para. 86) and 47 ter (Conduct of electronic reverse auctions during the auction itself) (A/CN.9/590, paras. 88-91), and to the proposed revisions to articles 11, 25, 27, 31 and 34 of the Model Law (A/CN.9/590, paras. 94, 96, 97, 99 and 101).

40. The Working Group noted that it would not be possible to finalize its deliberations on the remaining provisions proposed until the resolution of the following issues: (i) whether ERAs should be allowed in the revised Model Law as a procurement method or as a phase in other procurement methods (A/CN.9/590, para. 65); (ii) the desirability of approval by a third party of the use of ERAs (article 19 bis (1)) (A/CN.9/590, para. 68); (iii) types of procurement suitable for ERAs (A/CN.9/590, para. 73); (iv) evaluation criteria suitable for ERAs (A/CN.9/590, para. 78); (v) options available to a procuring entity should the successful bidder fail to enter into a procurement contract (A/CN.9/590, para. 92); and (vi) location in the Model Law of provisions on ERAs (A/CN.9/590, paras. 103-105) (A/CN.9/590, paras. 81, 86, 87 and 102).

41. Some drafting suggestions were made for the revision of some parts of the proposed text for the Guide (A/CN.9/590, paras. 66, 78, 83, 89, 91, 93, 97 and 100). The consideration of other parts of the proposed text for the Guide was deferred (A/CN.9/590, paras. 86 and 93).

(v) *Abnormally low tenders*

42. The Working Group decided to proceed on the basis that some minimum provisions would be included in the Model Law, supplemented by detailed discussion in the Guide, in particular as regards safeguards necessary to prevent arbitrary decisions and abusive practices (A/CN.9/590, para. 109). The Working Group provided the Secretariat with a number of general considerations for preparing the revised provisions (A/CN.9/590, para. 109) as well as some specific drafting suggestions for revising the proposed changes to article 34 (A/CN.9/590, para. 110) and the accompanying Guide text (A/CN.9/590, paras. 107, 109 and 111).

**(d) Summary of conclusions at the Working Group's ninth session
(New York, 24-28 April 2006)**

43. The Working Group continued the in-depth consideration of issues arising from the use of electronic communications in the procurement process, including in the course of ERAs, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.42 and Add.1, and the relevant part of A/CN.9/WG.I/WP.43). Consideration of the remainder of A/CN.9/WG.I/WP.43, and

A/CN.9/WG.I/WP.43/Add.1, dealing with some aspects of ERAs and with the ALTs, and A/CN.9/WG.I/WP.44 dealing with the issue of framework agreements and A/CN.9/WG.I/45 dealing with the issue of suppliers' lists, and their addenda, was deferred to the Working Group's tenth session (A/CN.9/595, para. 9).

(i) *The use of electronic communications in the procurement process*

44. The Working Group confirmed its understanding that the selection of means and form of communications were to be left up to the procuring entity. It was decided that the text of the Model Law should expressly allow more than one means of communications to be selected by the procuring entity (A/CN.9/595, paras. 59 and 60). The Working Group preliminarily agreed on the wording of the draft article 5 bis setting out a principle relating to the use of communications in the procurement process and on the wording of the revised article 9 dealing with the form of communications (A/CN.9/595, paras. 36, 37, 39, 40 and 44). A number of drafting suggestions were made for provisions of the Guide related to these articles (A/CN.9/595, paras. 11, 12, 14, 18 to 22, 30, 34, 38, 43 and 61).

45. The Working Group preliminarily agreed on the wording of article 30 (5) (a) dealing with submission of tenders (A/CN.9/595, para. 63). A number of drafting suggestions were made for the revision of accompanying Guide text (A/CN.9/595, paras. 53, 57, 58 and 61).

46. The Working Group preliminarily agreed on the amendments to the final part of the proposed article 33 (4) dealing with electronic opening of tenders (A/CN.9/595, para. 65). Drafting suggestions were made for the revision of draft Guide provisions related to legal value of procurement contracts concluded electronically and to requirements to maintain a record of the procurement proceedings (A/CN.9/595, paras. 47-51).

(ii) *Electronic publication of procurement-related information*

47. The prevailing view was that the current scope of article 5 should be maintained and that all proposed additions (A/CN.9/WG.I/WP.42, para. 38) should be reflected only in the Guide. The Working Group considered the option of splitting the article into two paragraphs: the first dealing with legal texts that had to be published (law, procurement regulations and directives of general application), with respect to which the requirements to "systematically maintain" would remain; and the second paragraph dealing with significant important judicial decisions and administrative rulings, with respect to which the requirement to "systematically maintain" would be replaced with the requirement "to update on a regular basis if need be". However, no definitive decision was taken (A/CN.9/595, paras. 67, 71, 72 and 74).

48. As regards the desirability of including in the Model Law provisions on the publication of information on forthcoming procurement opportunities, the understanding of the Working Group, was that, pending the decision of the Working Group on the matter, the Secretariat would revise the relevant draft provisions for the Model Law that were before the Working Group at its ninth session, incorporating drafting suggestions made at that session, for the consideration by the Working Group at its tenth session (A/CN.9/595, para. 76).

49. Drafting suggestions were made to the proposed provisions for the Guide related to article 5 and to the publication of forthcoming procurement opportunities (A/CN.9/595, para. 79).

(iii) *Electronic reverse auctions*

50. The Working Group preliminarily agreed on the wording of the draft article 36 bis, to be included in the end of chapter III “Tendering proceedings”, as a new section IV “Electronic reverse auctions” (A/CN.9/595, para. 95). The Working Group’s understanding was that ERAs would essentially be a part of tendering proceedings, while not excluding the possibility of using it as a stand-alone method or a phase in multi-stage framework agreements. It was also agreed that no approval of a third party would be required for ERAs to be used (A/CN.9/595, para. 103). Drafting suggestions were made to the proposed text of the draft article 36 bis and the accompanying Guide text (A/CN.9/595, paras. 98, 100-102 and 104).

51. The Working Group requested the Secretariat to redraft the proposed article 47 ter containing ERAs’ pre-auction period procedures so that it would contemplate distinct types of ERAs and the withdrawal of suppliers from the ERA before its closure, provided that sufficient safeguards were in place against fraud and abuse (A/CN.9/595, para. 108). The Working Group agreed to include the requirement of efficient competition as such a safeguard and proposed the wording thereof (A/CN.9/595, para. 110). The consequential changes were requested to be made in the Guide (A/CN.9/595, para. 109). The Working Group agreed to consider at its next session whether the procuring entity should have the option, or be required, to withdraw the ERA if the number of suppliers or contractors at any time before the closure of the auction was, in the opinion of the procuring entity, insufficient to ensure effective competition, in the light of whether or not suppliers should be permitted to withdraw from the ERA. The Working Group considered that the Guide text should address when and how suppliers might withdraw from the ERA process before its closure (A/CN.9/595, para. 111).

(iv) *Scope and extent of revisions of the Model Law and the Guide*

52. The Working Group agreed to continue at a future session its consideration of the nature of the Guide and the scope and extent of revisions of the Model Law and the Guide, taking into account the suggestions made at its ninth session, including on whether the Model Law and/or the Guide should address procurement planning and contract administration stages. As regards the nature of the Guide, it was agreed that drafting regulations as part of a more general guide addressed to the audience broader than legislators would not be feasible since that would require even a higher level of specificity than that required for the Model Law and would need to reflect divergent systems. A preference was expressed for using the verb “may”, not “will”, in the Guide, when referring to general legislative issues to be addressed by enacting States (A/CN.9/595, paras. 85 and 86).

(e) **Summary of conclusions at the Working Group’s tenth session
(Vienna, 25-29 September 2006)**

53. The Working Group considered the issues related to: (i) the use of electronic means of communication in the procurement process; (ii) aspects of the publication of procurement-related information, including revisions to article 5 of the Model

Law and the publication of forthcoming procurement opportunities; (iii) ERAs; (iv) ALTs; and (v) framework agreements. It used the notes by the Secretariat (A/CN.9/WG.I/WP.43 and 44 and their addenda, and WP.47 and 48) as a basis for its deliberations. The Working Group requested the Secretariat to revise the drafting materials reflecting the deliberations at the session. The Working Group deferred consideration of A/CN.9/WG.I/WP.45 and its addendum dealing with the issues of suppliers' lists to a future session (A/CN.9/615, paras. 10-11).

(i) *The use of electronic communications in the procurement process*

54. The Working Group decided that its future consideration of general conditions for communications in public procurement should be based on a consolidated article addressing both form and means of communications. A number of drafting suggestions were made as regards provisions of such a consolidated article as well as to articles 30 (5) (submission of tenders) and 33 (4) (opening of tenders) and to accompanying Guide texts (A/CN.9/615, paras. 17-26, 28, 30 and 32).

(ii) *Publication of procurement-related information*

55. The Working Group agreed to split the current text of article 5 of the Model Law into two paragraphs as described in paragraph 47 above (A/CN.9/615, para. 33).

56. The Working Group agreed that enabling provisions on publication of information on forthcoming procurement opportunities should be included in the Model Law, based on the wording of the text contained in paragraph 33 of document A/CN.9/WG.I/WP.47. The drafting suggestions were made as regards a Guide text that should accompany such provisions (A/CN.9/615, para. 36).

(iii) *Electronic reverse auctions*

57. The Working Group agreed on a preliminary basis to include provisions stipulating the conditions for the use of ERAs to chapter II and provisions on procedural matters of ERAs to chapter V, of the Model Law. The understanding was that the Model Law should allow the use of ERAs on a stand-alone basis and in appropriate procurement methods and techniques (A/CN.9/615, paras. 37 and 50).

58. The drafting suggestions were made to the text of a draft article on conditions for the use of ERAs that was before the Working Group at that session, and to accompanying provisions of the Guide (A/CN.9/615, paras. 41-47). No common understanding in the Working Group had been reached as regards whether ERAs are to be used exclusively in procurement where all criteria for determining a successful tender can be expressed in monetary terms and evaluated automatically, or also in a more complex procurement (A/CN.9/615, paras. 44, 45, 51, 54 and 55).

59. The understanding of the Working Group was that provisions on pre-auction and auction procedures had to be revised to ensure consistency with an article on conditions for the use of ERAs and in the light of the Working Group's decision that the Model Law should not prevent the use of ERAs on a stand-alone basis and in appropriate procurement methods and techniques other than tendering (A/CN.9/615, paras. 49, 58 and 59). The drafting suggestions were made to the provisions on pre-auction and auction procedures that were before the Working Group at that session, and to a Guide text that would accompany such provisions (A/CN.9/615, paras. 52, 53-56, and 61-63). The Working Group considered possible consequential

revisions to the relevant Model Law provisions (A/CN.9/615, paras. 65-71) and deferred decisions on some outstanding issues to a future session (A/CN.9/615, paras. 52 (viii), 60, 61 (iii) and (iv), 63, 65, 67 (ii), 69 and 71).

(iv) *Abnormally low tenders*

60. Drafting suggestions were made to draft provisions on ALTs and to the accompanying Guide text (A/CN.9/615, paras. 73, 74, 76-78). The Secretariat was requested to propose the appropriate location for the provisions on ALTs in the Model Law, taking into account that the issue should not be limited to tendering proceedings, and that risks of ALTs should be examined and addressed by the procuring entity at any stage of the procurement, including through qualification of suppliers (A/CN.9/615, para. 75). The Working Group deferred its decision on whether any decision regarding ALTs by the procuring entity should be open to review (A/CN.9/615, para. 74).

(v) *Framework agreements*

61. The Working Group, recognizing the widespread use of framework agreements and noting positive experience with their use in some jurisdictions (and trends towards their express regulation), entrusted the Secretariat with the preparation of drafting materials for the Model Law and the Guide that would set out conditions for the use of framework agreements and provide necessary safeguards against commonly encountered problems in their use, such as risks of collusion among suppliers, corruption and anti-competitiveness (A/CN.9/615, paras. 11 and 81).

(vi) *Other business*

62. The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, paras. 11 and 82-85).

63. The Working Group considered the project timetable and expressed its desire to complete its work on the preparation of the revised text of the Model Law in 2008 (A/CN.9/615, para. 13). Noting that a revised Guide might contain not only guiding principles for legislators and regulators but also practical guidance for operators (such as procurement officials), the Working Group requested the Secretariat to prepare first, with assistance of experts, the guidance to legislators and regulators, which would be considered together with the revised Model Law text by the Working Group at its final session before they were presented to the Commission. The Secretariat would subsequently be entrusted with drafting any remaining aspects of the Guide for consideration by the Working Group (A/CN.9/615, para. 14).

**(f) Summary of conclusions at the Working Group's eleventh session
(New York, 21-25 May 2007)**

64. The Working Group continued consideration of the issues related to the topics enumerated in paragraph 53 above, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.50-52), as well as the question of simplification and standardization of the Model Law by reference to the example of article 36. It requested the Secretariat to revise the drafting materials contained in the notes by

the Secretariat (A/CN.9/WG.I/WP.50 and 51), reflecting the deliberations at the session. It deferred consideration of documents A/CN.9/WG.I/WP.45 and its addendum dealing with the issues of suppliers' lists and A/CN.9/WG.I/WP.52/Add.1 dealing with the issues of dynamic purchasing systems, to a future session. The Working Group noted that any time frame to be agreed for the completion of the project should take into account the time necessary to consider and address issues of conflicts of interest in revisions to the Model Law and the Guide (A/CN.9/623, paras. 12 and 13).

65. As regards aspects of the use of electronic means of communication in the procurement process, amendments were proposed to draft articles 5 bis (Communications in procurement) and 30 (5) addressing submission of tenders (A/CN.9/623, paras. 15 to 24), and the Working Group preliminarily agreed on the wording of draft article 33 (2) addressing presence at the opening of tenders (A/CN.9/623, para. 25). Suggestions were made for a Guide text that would accompany the relevant provisions (A/CN.9/623, paras. 15, 19, 21, 23, 24 and 25).

66. As regards aspects of the publication of procurement-related information, amendments were proposed to draft article 5 and to the provisions on publication of information on forthcoming procurement opportunities, including incorporation of these provisions as a new paragraph 3 of draft article 5 (A/CN.9/623, paras. 26, 27, 30 and 31). Suggestions were made for a Guide text that would accompany an expanded article 5 (A/CN.9/623, paras. 29 and 32).

67. As regards the topic of ALTs, amendments were proposed to a new draft article 12 bis containing provisions on ALTs (A/CN.9/623, paras. 33 to 41) and to the Guide text suggested to accompany these provisions (A/CN.9/623, paras. 42, 48 and 49). No agreement was reached on whether the procuring entity's right to reject an ALT under draft article 12 bis had to be reserved in the solicitation or equivalent documents, and the Working Group agreed to continue considering that issue at its next session (A/CN.9/623, para. 39). The Working Group also agreed to consider at a later stage, in the context of its consideration of article 52 of the Model Law, whether a decision to reject an ALT would be subject to review, acknowledging wide support in the Working Group that such a decision should be subject to review (A/CN.9/623, paras. 44-47).

68. As regards the topic of ERAs, after lengthy discussion, the view prevailed that the Model Law should permit ERAs with non-price award criteria (A/CN.9/623, paras. 66-69) and that pre-auction evaluation would be mandatory in such ERAs (A/CN.9/623, paras. 70-72). Amendments were suggested to draft articles 22 bis on conditions for use of ERAs (A/CN.9/623, paras. 53, 62 (b) and 69 to 72), 51 ter on pre-auction procedures (A/CN.9/623, paras. 62 and 73), 51 quinquies on requirement of effective competition (A/CN.9/623, paras. 78, 81 and 82), 51 sexies on requirements during the auction (A/CN.9/623, paras. 84, 85 and 89) and 51 septies on award of a procurement contract as a result of the auction (A/CN.9/623, paras. 91-93 and 95) and to article 11 of the Model Law to adapt provisions on record of procurement proceedings to ERAs (A/CN.9/623, para. 100). The Working Group agreed to delete draft article 51 bis (A/CN.9/623, para. 77) and to redraft draft article 51 quater to provide for general possibility of the use of ERAs in other procurement methods envisaged by the Model Law without referring to any particular procurement method (A/CN.9/623, paras. 74 and 76). Suggestions were made as regards a Guide text that should accompany the relevant provisions

(A/CN.9/623, paras. 53, 55, 62 (d), 67, 76, 83, 88, 89 and 94). No consensus was reached on whether the Guide should exclusively recommend the use of ERA with price-only award criterion, and the Working Group agreed to continue considering the issue at its next session (A/CN.9/623, para. 66).

69. As regards the topic of framework agreements, the Working Group held a preliminary exchange of views on document A/CN.9/WG.I/WP.52 and decided to consider the document in depth at its next session (A/CN.9/623, paras. 12 and 101).

70. As regards the question of simplification and standardization of the Model Law, the Working Group agreed that, at a future session, it would consider which provisions currently applicable only to tendering proceedings under the Model Law should be reformulated to become general rules applicable to all procurement methods (A/CN.9/623, para. 102).

**(g) Summary of conclusions at the Working Group's twelfth session
(Vienna, 3-7 September 2007)**

71. The Working Group continued consideration of the issues related to the topics enumerated in paragraph 53 above, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.52, 54 and 55). It also heard an introduction of the first part of the proposal contained in document A/CN.9/WG.I/WP.56, and considered the time frame for completion of the project. The Working Group requested the Secretariat to revise the drafting materials contained in documents A/CN.9/WG.I/WP.54 and 55, reflecting the deliberations at the session, for its consideration at the next session. It deferred consideration of document A/CN.9/WG.I/WP.45 and Add.1 to a future session (A/CN.9/640, paras. 12-16).

72. As regards the use of electronic means of communication in the procurement process, the Working Group preliminarily agreed on the wording of draft articles 5 bis, 30 (5) and 33 (2) (A/CN.9/640, paras. 17, 23, 24, 28 and 38) and suggested revisions to the accompanying draft texts for the Guide (A/CN.9/640, paras. 27, 29, 39 and 41). As regards aspects of the publication of procurement-related information, revisions were made to the proposed article 5 and text for the Guide (A/CN.9/640, paras. 30 and 33-36). The Working Group deferred consideration of an expanded article 11 on the record of procurement proceedings and Guide texts to accompany that article and article 36 (A/CN.9/640, paras. 37 and 42). The Working Group agreed that issues of potential liability of a procuring entity for failures of its automatic systems should be addressed only in the Guide (A/CN.9/640, para. 40).

73. As regards provisions on ALTs, the Working Group preliminarily agreed on the wording of draft article 12 bis as amended at the session and suggested reflecting some additional points in an accompanying Guide text (A/CN.9/640, paras. 48 and 52-55).

74. As regards provisions on ERAs, the Working Group preliminarily agreed on the wording of draft article 22 bis and an accompanying Guide text, as amended at the session (A/CN.9/640, paras. 56-61). Drafting suggestions were made to draft articles 51 bis to sexies, the accompanying Guide texts and the proposed revisions to article 11 of the Model Law (A/CN.9/640, paras. 62-92).

75. As regards provisions on framework agreements, support was expressed for the drafting approach in document A/CN.9/WG.I/WP.52, applying the transparency and competition safeguards of the Model Law to all stages of procurement involving framework agreements including the second stage (the award of the procurement contract itself) (A/CN.9/640, para. 93). Views were exchanged on the proposed provisions of draft article 51 octies setting out general provisions on a framework agreement, and on whether the procuring entity should be permitted to purchase outside the framework agreement (A/CN.9/640, paras. 94-95).

76. As regards the time frame for completion of the project, the Working Group agreed that it would need time beyond 2009 to complete the project. It adopted the timeline for its thirteenth to fifteenth sessions and agreed to bring it to the attention of the Commission at its forty-first session and update it on a regular basis (A/CN.9/640, para. 16 and annex).

2. Documentation for the thirteenth session

77. The Working Group will have before it, and may wish to use as a basis for its consideration, the following notes by the Secretariat:

(a) Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders: note by the Secretariat (A/CN.9/WG.I/WP.58);

(b) Drafting materials for the use of electronic reverse auctions in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.59);

(c) Note transmitting a proposal by the United States regarding issues of framework agreements, dynamic purchasing systems, and anti-corruption measures (A/CN.9/WG.I/WP.56);

(d) Drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1); and

(e) Issues arising from the use of suppliers' lists, including drafting materials: note by the Secretariat (A/CN.9/WG.I/WP.45 and Add.1).

78. States and interested organizations in planning the attendance of their representatives may wish to note that the documents listed in subparagraphs (a), (b) and (d) of the preceding paragraph draw on, and need to be read together with, the following background documents, a limited number of which will be made available at the session:

(a) The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its accompanying Guide to Enactment (1994);

(b) The UNCITRAL Model Law on Electronic Commerce (1996);

(c) The UNCITRAL Model Law on Electronic Signatures (2001);

(d) Reports of Working Group I (Procurement) on the work of its sixth to twelfth sessions (A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623 and A/CN.9/640);

(e) Notes by the Secretariat:

- (i) Issues arising from the increased use of electronic communications in public procurement (A/CN.9/WG.I/WP.31);
- (ii) Issues arising from recent experience with the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/WG.I/WP.32);
- (iii) Issues arising from the use of electronic communications in public procurement (A/CN.9/WG.I/WP.34 and Add.1 and 2);
- (iv) Comparative study of practical experience with the use of electronic (reverse) auctions in public procurement (A/CN.9/WG.I/WP.35 and Add.1);
- (v) Comparative study of abnormally low tenders (A/CN.9/WG.I/WP.36 and Corr.1);
- (vi) Drafting materials addressing the use of electronic communications in public procurement (A/CN.9/WG.I/WP.38 and Add.1);
- (vii) Study of national, regional and international practices with the publication of procurement-related information not covered by the Model Law (A/CN.9/WG.I/WP.39 and Add.1);
- (viii) Drafting materials for the use of electronic reverse auctions in public procurement and addressing abnormally low tenders (A/CN.9/WG.I/WP.40 and Add.1);
- (ix) Drafting materials addressing the use of electronic communications in public procurement (A/CN.9/WG.I/WP.42 and Add.1);
- (x) Drafting materials for the use of electronic reverse auctions in public procurement and addressing abnormally low tenders (A/CN.9/WG.I/WP.43 and Add.1);
- (xi) The use of framework agreements in public procurement (A/CN.9/WG.I/WP.44 and Add.1);
- (xii) Drafting materials addressing the use of electronic communications in public procurement and electronic publication of procurement-related information (A/CN.9/WG.I/WP.47);
- (xiii) Drafting materials addressing the use of electronic reverse auctions in public procurement (A/CN.9/WG.I/WP.48, 51 and 55); and
- (xiv) Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders (A/CN.9/WG.I/WP.50 and 54).

79. UNCITRAL documents are posted on the UNCITRAL website (<http://www.uncitral.org>) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Commission and Working Groups Documents" section of the UNCITRAL website.

Item 6. Adoption of the report

80. The Working Group may wish to adopt, at the close of its session, on Friday, 11 April 2008, a report for submission to the forty-first session of the Commission.

The main conclusions reached by the Working Group at its ninth half day meeting (that is, on the morning of Friday, 11 April) will be summarily read out for the record by the Chairman at the tenth half-day meeting and subsequently incorporated into the Working Group's report.

IV. Scheduling of meetings

81. The Working Group's thirteenth session will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,³ the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

82. The Working Group may wish to devote its first eight half-day meetings (from Monday to Thursday) to its deliberations on agenda item 4, and to reserve its penultimate half-day meeting (on Friday morning) for an exchange of views on the possible additional issues as regards procurement that may warrant consideration by the Working Group in due course (agenda item 5). At its twelfth session, the Working Group agreed to start its deliberations at the next session with discussion of issues of framework agreements on the basis of the documents A/CN.9/WG.I/WP.52 and Add.1 and A/CN.9/WG.I/WP.56 (A/CN.9/640, para. 14).

³ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, para. 381, available on the UNCITRAL website: <http://www.uncitral.org/uncitral/en/commission/sessions/34th.html>.