



General Assembly

Distr.: Limited
27 June 2008

Original: English

**United Nations Commission
on International Trade Law**
Working Group I (Procurement)
Fourteenth session
Vienna, 8-12 September 2008

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

Note by the Secretariat

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of framework agreements, in public procurement.

2. This note has been prepared pursuant to the request of the Working Group at its thirteenth session to the Secretariat to revise the draft provisions on the use of framework agreements, and those addressing types, conditions and procedures for the use of framework agreements.¹

II. Proposed text for the Model Law

A. Terminology

3. The provisions below include certain terminology that may differ from equivalents used in procurement systems other than those based on the Model Law, and they are described here for ease of reference of the Working Group. In addition, some concepts that appear in the Model Law are described in the text differently as between procurement methods, and the Working Group may wish to consider whether the terms should be conformed for all procurement methods and techniques that will appear in the revised text.

4. For example, the “the criteria to be used ... in determining the successful tender”, as described in article 27 (e) and other provisions in Chapter III, are sometimes referred to in other systems as “evaluation” or “award” criteria. However, in Chapter IV (addressing services procurement) reference is made to “ascertaining” the successful proposal pursuant to a “selection procedure”. In other procurement systems, “selection” is sometimes used to refer to the identification of suppliers that are qualified, whereas in the Model Law, that process is called the “evaluation” of suppliers’ qualifications.

5. References are made throughout the Model Law to the “evaluation” of tenders or other submissions. “Evaluation” here refers to the competitive assessment that identifies the order in which tenders or other submissions are ranked (as distinct from an assessment as to whether they are responsive to the terms and conditions and including specifications of the procurement concerned). “Evaluation” is also used in the Model Law to refer to the assessment of suppliers’ qualifications.

¹ A/CN.9/648, para. 13.

6. For the purposes of the draft provisions addressing framework agreements, the following terminology will be used, and the Working Group may wish to re-consider whether it is appropriate for some of these terms to be so used throughout the Model Law:

(a) “Evaluation” to mean the competitive assessment that identifies the order in which tenders or other submissions are ranked;

(b) “Examination” to mean the assessment of responsiveness;

(c) “Ranking” to mean the ordering in which tenders or other submissions are placed, the highest-ranking being the supplier that best meets the needs of the procuring entity as measured by the terms and conditions of the procurement;²

(d) “Selection criteria” to mean the criteria to be used in determining the successful tender or other submission, and “selection” to mean the identification of the successful party/parties to the framework agreement and the identification of the successful supplier to which a procurement contract will be awarded;

(e) “Specifications” to refer to the “nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate” (description taken from article 27 (d) of the Model Law); and

(f) “Tenders” to refer to the submissions at the second stage of a framework agreement procedure.³

B. Proposed text

“Article 22 ter. Types of framework agreement procedures and conditions for their use

(1) A framework agreement procedure is a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award procurement contracts under the framework agreement to one or more of those supplier(s) or contractor(s).^{4, 5}

² The Working Group has requested the Secretariat to find a synonym for this term that describes this competitive placement. The Secretariat has not yet been able to do so.

³ The Working Group has requested the Secretariat to find a synonym for this term that is not already used for another purpose in the Model Law. The Secretariat has not yet been able to do so.

⁴ The Working Group may wish to consider whether and how to distinguish between a procurement (the totality of the purchases contemplated under a framework agreement), and each procurement (which will be represented by a procurement contract concluded under the framework agreement). There may be consequential drafting changes.

⁵ The Working Group may wish to consider presenting the definitions elements of this draft text in article 2 of the Model Law, so that all definitions are located together.

(2) A framework agreement [under this Law] shall be concluded in writing⁶ between the procuring entity and supplier(s) or contractor(s) and set out:

- (a) The procedures and selection criteria, including the relative weight of such criteria,⁷ for determining the successful supplier for procurement contracts under the framework agreement.⁸ A framework agreement may provide that the relative weights of these selection criteria may vary within a range set out in the framework agreement, provided that the variation does not lead to a [material] change in the procurement as described in paragraph (d) below;⁹
- (b) The specifications for the procurement;¹⁰ and
- (c) (i) Either all the terms and conditions upon which the supplier(s) or contractor(s) is or are to provide the goods, construction or services to be procured; or

(ii) All such terms and conditions that are known when the framework agreement is concluded, and a statement of remaining terms and conditions that are to be established through a second-stage competition;

⁶ As per para. 66 of A/CN.9/648, the Working Group has agreed that the definition of a framework agreement should refer to a written agreement.

⁷ There are two formulations of this notion in the current text of the Model Law: in article 27 (e), which is reproduced in this article, and in article 48 (4) (c), which refers to the relative weight of each such criterion. The Working Group may wish to use one consistent version throughout the revised text of the Model Law, and if so to consider whether the latter formulation is more precise than the former, and should be adopted.

⁸ By comparison, article 27 (e) refers to any criteria other than price, including margin of preference, and their relative weight.

⁹ See proposed text for the Guide to Enactment to address this article, contained in A/CN.9/WG.I/WP.63. The Working Group may wish to note that there is more flexibility in the equivalent provisions in article 32 of Directive 2004/18/EC (Directive of the European Parliament and of the Council of 31 March 2004: on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Official Journal of the European Union, No. L 134, 30 April 2004, pp. 1 and 114 et seq, available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm, the “EC Directive”). However, concerns were expressed at the thirteenth session to the effect that greater flexibility than provided in the current draft would permit the criteria for the award of procurement contracts to be amended during the procurement, which would be both contrary to the central philosophy of the Model Law and also open to abuse.

¹⁰ The Guide to Enactment would include a cross reference to the provisions of article 27 (d) addressing specifications. The Working Group may wish to consider whether the references to specifications in the framework agreement procedures provisions should be conformed to the longer description in art. 27 (d). (This description is set out in the terminology section, II.A, above.) So doing might avoid the difficulties of trying to separate the notions of terms and conditions and specifications, and would also promote consistency in the text of the Model Law. In this regard, the Working Group may wish to consider whether to amalgamate subparagraphs (b) and (c). See, also, the proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63, which will discuss, among other things, how to prevent these requirements becoming onerous. For example, enacting States could in their procurement regulations enable the procuring entity to annex the solicitation documents if they include this information and the legal system concerned treats annexes as an integral part of a contract.

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- (d) The terms and conditions of the procurement as set out in either the solicitation documents or the framework agreement or both may not be varied during the term of the framework agreement in any manner that leads to a material change in the specifications or other terms and conditions of the procurement.
- (3) A framework agreement shall be concluded for a given term, which is not to exceed [the enacting State specifies a maximum] years.¹¹
- (4) A procuring entity may engage in a framework agreement procedure, in accordance with articles [51 octies to 51 quindecies]:
- (a) Where the procuring entity intends to procure the goods, construction or services concerned on a repeated basis during the term of the framework agreement; or
 - (b) Where the procuring entity anticipates that by virtue of the nature of the goods, construction or services to be procured that the need for them will arise on an urgent basis during the term of the framework agreement.
- (5) A closed framework agreement is an agreement to which no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party.
- (6) An open framework agreement is an agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties.
- (7) A framework agreement procedure shall be conducted in one of the following ways:
- (a) A closed framework agreement procedure, in which the framework agreement is concluded with one or more suppliers or contractors, in which all the terms and conditions of the procurement are established upon the conclusion of the framework agreement, including the procedures that the procuring entity will apply to select the supplier(s) or contractor(s) to which procurement contracts under the framework agreement are to be awarded;¹²
 - (b) A closed framework agreement procedure, in which the framework agreement is concluded with more than one supplier or contractor, and in which not all the terms and conditions of the procurement are established upon the conclusion of the framework agreement, and a second-stage competition will be held to select the supplier(s) or

¹¹ The preliminary conclusion of the Working Group at its thirteenth session was that there should be no term set out in the text of the Model Law, though some delegations have indicated that this issue should be discussed further.

¹² Although the final part of this paragraph may not be strictly necessary in the light of article 22 ter (2), the Working Group may wish to consider including this text, and also to explain in the Guide to Enactment that the “terms and conditions” of the procurement include the specifications, the procedures for the award of second-stage contracts and selection criteria. The wording of this paragraph is intended to demonstrate that there is no second-stage competition.

contractor(s) to which procurement contracts under the framework agreement are to be awarded [and to establish the remaining terms and conditions of the procurement concerned];¹³

- (c) An open framework agreement procedure, in which the framework agreement is concluded with more than one supplier or contractor, and in which not all the terms and conditions of the procurement are established upon the conclusion of the framework agreement, and a second-stage competition will be held to select the supplier(s) or contractor(s) to which procurement contracts under the framework agreement are to be awarded [and to establish the remaining terms and conditions of the procurement concerned].”¹⁴

“Article [51 octies]. Commencement of a framework agreement procedure

- (1) Where the procuring entity intends to enter into a framework agreement, it shall:
- (a) Select the type of framework agreement procedure to be conducted from among the three options set out in article 22 ter (5);
 - (b) Select a method to conclude the framework agreement in accordance with the provisions of Chapter II of this Law.¹⁵
- (2) The procuring entity shall include in the record required under article 11 of this Law a statement of the grounds and circumstances upon which it relied to select the type of the framework agreement procedure specified in article 22 ter.”¹⁶

“Article [51 novies]. Information to be specified when first soliciting participation in a framework agreement procedure

When first soliciting the participation of suppliers or contractors in a framework agreement procedure, the procuring entity shall specify all information required for the procurement method chosen in accordance with

¹³ The Working Group may wish to consider whether the suppliers and contractors remain bound to fulfil the terms of their tenders under this closed framework procedure. For example, they could be bound for the term of the framework agreement unless the solicitation documents and framework agreement provide otherwise. While longer duration agreements may increase the security of supply for the procuring entity, there may be a correspondingly higher price.

¹⁴ In similar provisions in the EC Directive, these types of framework agreements must operate electronically, because from a practical perspective operating them non-electronically is highly complex. The Working Group decided on a preliminary basis at its thirteenth session that it would permit non-electronic frameworks of this type.

¹⁵ The application of Chapter II means that the procedure must be tendering proceedings or the services equivalent, unless the justifications for other methods apply. The Guide to Enactment will address this topic. The previous formulation required open framework agreements procedures to commence with tendering proceedings or the services equivalent, but this requirement was deleted on a preliminary basis at the previous session. The Working Group may wish to consider whether it would be appropriate to conduct an open framework agreement procedure other than using open procedures, because of the need to advertise the existence of the framework agreement for the benefit of new joiners.

¹⁶ See proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63.

article 51 octies,¹⁷ except the quantity of items to be procured, and in addition the following information and statements:¹⁸

- (a) That the procurement will be conducted as a framework agreement procedure;
- (b) Whether the framework agreement procedure will involve a closed or an open framework agreement as described in article 22 ter (6) and (7);
- (c) If the framework agreement will be an open agreement, 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;¹⁹
- (d) Either that only one supplier or contractor will be a party to the framework agreement, or the minimum and any maximum number of suppliers or contractors to be parties to the framework agreement;²⁰
- (e) If the procuring entity intends to enter into a framework agreement with more than one supplier or contractor, that the suppliers or contractors that are parties to the framework agreement will be ranked according to the selection criteria specified;
- (f) The duration of the framework agreement and, to the extent that they are known at this stage of the procurement, all other terms, conditions and the form of the framework agreement. If any such term or condition or any element of form may be tailored for individual suppliers or contractors, which such term(s), condition(s) or element(s) of form;²¹

¹⁷ See proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63.

¹⁸ Since this procedure could be based on either Chapter III, IV or V of the Model Law, some information that is needed for tendering proceedings that is not strictly necessary is repeated for the sake of clarity.

¹⁹ The Working Group may wish to consider whether, in order to provide for greater efficiency in the administration of an open framework, enacting States could alternatively provide for periodic opening of the framework agreement to new joiners (that is, at fixed times or intervals) and, if so, whether this alternative could be set out in the accompanying Guide to Enactment text.

²⁰ The Working Group has noted that any capacity limitations on the number of suppliers in the open system should be set out in the solicitation documents (see para. 101 of A/CN.9/648). The appropriate maximum will depend on the type of procurement and system in use, which are matters to be discussed in the Guide to Enactment. See, also, section III regarding the need for competition in the first stage of framework agreements procedures. If there is no competitive evaluation and selection of suppliers at this stage (including the elimination of responsive tenders submitted by qualified bidders), then arguably the result is a suppliers' list. There may also be risks to second-stage competition because procuring entities will wish to reduce the numbers invited to participate in the second stage, in ways that may not be transparent. The Working Group may wish to reconsider this provision and to provide for a transparent way of limiting the number of parties to the framework agreement.

²¹ A/CN.9/648, para. 63. The aim of the final sentence of this paragraph is to enable the use of multiple framework agreements. This issue is discussed in the proposed text for the Guide to Enactment to address this article in A/CN.9/WG.I/WP.63, but the Working Group may wish to

- (g) All information necessary to allow the effective operation of electronic framework agreements, including the equipment to be used, technical connection arrangements, the [website or other electronic address] at which the specifications, terms and conditions of the procurement, and notifications of forthcoming procurement opportunities can be accessed;²²
- (h) The nature of, and desired places and times of delivery of, the purchases envisaged under the framework agreement to the extent that they are known at this stage of the procurement;
- (i) The total quantity of or the minimum or maximum quantity of the purchases envisaged under the framework agreement to the extent that they are known at this stage of the procurement, and otherwise an estimate thereof;
- (j) If suppliers or contractors are to be permitted to submit tenders, proposals, offers or quotations (collectively referred to as “submissions” in this section) for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which they may be submitted;
- (k) The criteria to be used by the procuring entity in the selection of the supplier(s) or contractor(s) to be the party or parties to the framework agreement, including their relative weight and the manner in which they will be applied in the selection;²³
- (l) Whether the framework agreement will set out all the terms and conditions of the procurement or whether there will be second-stage competition to select the supplier or contractor to be awarded a procurement contract under the framework agreement;
- (m) The procedures and criteria that the procuring entity will apply to select the supplier(s) or contractor(s) to be awarded the procurement contract, including the relative weights of the criteria and the manner in which they will be applied in the selection;
- (n) If there is to be second-stage competition:
 - (i) All terms and conditions of the procurement that will be set out in the framework agreement;
 - (ii) The remaining terms and conditions, which will be subject to second-stage competition; and
 - (iii) If the procuring entity wishes to be able to vary the relative weights of the selection criteria during the second-stage competition, the range within which the relative weights may vary,

consider whether the terms and conditions of the procurement might thereby be varied between parties by stealth.

²² This paragraph was inserted as per the request of the Working Group recorded in para. 85 of A/CN.9/648.

²³ The Guide will explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

provided that any such variation may not lead to a material change in the specifications or other terms and conditions of the procurement.”²⁴

“Article [51 decies]. First stage of procurement involving framework agreements

(1) The first stage of procurement proceedings under closed framework agreements shall be conducted in accordance with the provisions governing the procurement method selected under article 51 octies of this Law.

(2) The first stage of procurement proceedings under open framework agreements shall be conducted in accordance with the provisions governing the procurement method selected under article 51 octies of this Law, [provided that the procurement method selected must be open and competitive/which must be conducted either in accordance with Chapter III or Chapter IV of this Law.]²⁵

(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, and shall promptly notify the selected supplier(s) or contractor(s) of their selection and, where relevant, their ranking.²⁶

(4) The procuring entity shall promptly publish notice of the award of the framework agreement, in any manner that has been specified for the publication of contract awards under article 14 of this Law. The notice shall identify the supplier(s) or contractor(s) selected to be the party or parties to the framework agreement.”²⁷

²⁴ The Guide will address first-stage competition, and explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

²⁵ See para. 90 of A/CN.9/648 and footnote 15 above.

²⁶ As noted in the terminology section above, the Working Group may wish to change this term (see also para. 91 of A/CN.9/648). An alternative could be to place the submissions in descending order to reflect those best meeting the needs of the procuring entity.

²⁷ The provision now requires the identities of the parties to be published in accordance with the instructions of the Working Group (para. 94 of A/CN.9/648). The Working Group may also wish to consider whether to make this information a general requirement when publishing notice of contract awards under article 14 of the current Model Law, and whether to adapt the threshold provisions. The text of Guide to Enactment could also elaborate on the minimum information to be published. For example, in respect of each contract awarded (under all procurement, including under framework agreements), either could require: (a) a brief description of the goods or services or construction procured (or reference to a tender or RFP number); (b) the identity of the supplier to whom the contract was awarded; (c) the contract price; and (d) the date, or fiscal period within which the contract was awarded. Consistency would then indicate that article 36 (6) should require all of these items, plus the address of the successful supplier, to be disclosed to the unsuccessful suppliers in any given tender. The same information could be required to be disclosed for the conclusion of a framework agreement, save for the contract price. In addition, the Working Group may wish to consider whether the remaining quantity to be procured, to the extent known, should be provided to parties to the framework agreement so that they can ascertain the extent of their standing commitment. The Guide to Enactment could also discuss this point.

“Article [51 undecies]. Additional provisions regarding the first stage of procurement involving open framework agreements

- (1) 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 agreement and to any other necessary information relevant to its operation.²⁸
- (2) The procuring entity shall, during the period of operation of the open framework agreement, either:
 - (a) Republish [the enacting State specifies the frequency of the republication, or in accordance with the procurement regulations] the initial solicitation of submissions and notice of award of the 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 solicitation was made;²⁹ or
 - (b) If the framework agreement operates electronically, maintain a copy of the initial solicitation and notice of award of the framework agreement at the [website or other electronic] address set out in [article 51 novies (g) above].
- (3) Suppliers and contractors may [become a party to the open framework agreement] at any time during its operation. [Applications to become parties] shall include all information specified by the procuring entity when first soliciting participation in the procurement.
- (4) 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 selection criteria set out when first soliciting participation in the framework agreement.
- (5) The framework agreement shall be concluded with all [qualified] suppliers or contractors satisfying the selection criteria,[and whose submissions comply with the specifications and any other additional requirements pertaining to the framework agreement,]³⁰ [unless technical or other capacity limitations require a maximum number of parties to the

²⁸ The Working Group may wish to consider whether this provision implies an electronic procedure, and if so, whether to incorporate it into paragraph 2 (b), and for non-electronic procedures, introduce a new provision to require the procuring entity to provide the documents as per the article 26 of the current text of the Model Law following each republication. In addition, the provisions imply procedures that start with a public announcement – that is, those conducted under Chapters II and III of the Model Law.

²⁹ This provision was inserted following the instruction of the Working Group at its thirteenth session – see para. 129 of A/CN.9/648. However, the Working Group may wish to consider whether the provision can be easily implemented if such notices are centralized. The Guide to Enactment would explain that where the framework agreement was paper-based, the initial notice to participate in the framework agreement should be republished periodically in the same journal in which the initial publication was made. In electronic systems, the notice would be available permanently on the relevant website and so further publication would not be necessary.

³⁰ The Working Group may wish to consider whether the text in square brackets is superfluous.

framework agreement. Any such limitations and the resultant maximum number shall be set out in the solicitation documents [or their equivalent.]]³¹

(6) The procuring entity shall promptly notify the suppliers or contractors whether they are to be parties to the framework agreement.

(7) Suppliers or contractors that are admitted to the framework agreement may improve their submissions at any time during the period of operation of the framework agreement, provided that they continue to comply with the terms and conditions of the framework agreement.”³²

“Article [51 duodecies]. Second stage of procurement involving closed framework agreements without second-stage competition

(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.³³

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

(3) The terms of a procurement contract awarded under the framework agreement may not materially alter or depart from any term or condition of the framework agreement.³⁴

(4) If the framework agreement is entered into with one supplier or contractor, the procuring entity shall award any procurement contract to that supplier or contractor on the basis of the terms and conditions of the framework agreement by the issue of a written notice to that supplier or contractor.

(5) If the framework agreement is entered into with more than one supplier or contractor, the procuring entity shall award any procurement contract on the basis of the terms and conditions of the framework agreement by the issue of a written notice to that supplier or contractor. The procuring entity shall also promptly notify in writing all other 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.”³⁵

³¹ See section III below for a discussion of providing for a maximum number of parties to the framework agreement at the first stage, based on a competitive evaluation and ranking. An alternative formulation could be to conclude the framework agreement with all qualified suppliers whose submissions are responsive, subject to technical and similar constraints (for all, or only open framework agreement procedures). See, also, para. 101 of A/CN.9/648.

³² This provision has been inserted pursuant to the Working Group’s request as per para. 104 of A/CN.9/648.

³³ This provision has been inserted pursuant to the Working Group’s request as per para. 111 of A/CN.9/648.

³⁴ The text of the provision has been conformed to similar text in article 34 (2) (b), as per the Working Group’s instructions in para. 113 of A/CN.9/648.

³⁵ This provision has been reformulated in accordance with the Working Group’s instructions as per para. 115 of A/CN.9/648, such that the notification should include the basic details of the

“Article [51 terdecies]. Second stage of procurement involving closed framework agreements with second-stage competition³⁶

- (1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions, including those governing the second-stage competition, and the provisions of this article.³⁷
- (2) No procurement contract under the framework agreement shall be awarded to suppliers or contractors that were not originally parties to the framework agreement.
- (3) The terms of a procurement contract awarded under the framework agreement may not materially alter or depart from any term or condition of the framework agreement.
- (4) Each anticipated procurement contract shall be the subject of a written invitation to tender. The procuring entity shall invite all suppliers or contractors³⁸ that are parties to the framework agreement, or where relevant all such suppliers and contractors [then capable of meeting the needs of the procuring entity]³⁹ to present their tenders for the supply of the items to be procured.
- (5) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the tenders. The deadline shall afford suppliers or contractors sufficient time to prepare and present their tenders.
- (6) The invitation to tender shall:
 - (a) Restate the existing terms and conditions of the anticipated procurement contract;
 - (b) [To the extent not already notified in the framework agreement] set out the terms and conditions of the anticipated procurement contract that are to be subject to the second-stage competition;
 - [(c) Where necessary, provide further detail of the terms and conditions of the anticipated procurement contract;]⁴⁰
 - (d) Restate the procedures and selection criteria for the award of the anticipated procurement contract;

award, such as the contract price, and to confirm with article 51 terdecies (as per para. 116 of A/CN.9/648).

³⁶ The Working Group may wish to consider whether the title for this and the subsequent two articles is sufficiently wide.

³⁷ The Working Group may wish to consider whether this formulation is sufficiently broad to encompass those terms and conditions that are not set in the framework agreement itself but are set by the second-stage competition.

³⁸ The previous reference to “those parties” has been amended to remove any ambiguity that the framework agreement could become an open agreement (see para. 119 of A/CN.9/648).

³⁹ This provision has been reformulated in accordance with the Working Group’s instructions as per para. 119 of A/CN.9/648.

⁴⁰ The Working Group may wish to consider whether the formulation would provide adequate flexibility at the second stage in framework agreement procedures with second-stage competition (greater flexibility is provided in the EC Directive).

(e) Set out instructions for preparing tenders and the submission deadline.

(7) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the selection criteria set out in the second-stage invitation to tender referred to in paragraph (4) above.⁴¹

(8) Subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful tender, and shall promptly notify the successful supplier or contractor that it has accepted its tender. The procuring entity shall also notify all other suppliers and contractors that submitted tenders of the name and address of the supplier or contractor whose tender was accepted and the contract price.⁴²

(9)⁴³ Without prejudice to the provisions of article [proper cross reference to the provisions on award of contracts through electronic reverse auction] and subject to articles [12, 12 bis and other appropriate references] of this Law,⁴⁴ the procuring entity shall accept the successful submission(s), and shall promptly notify in writing the successful supplier(s) or contractor(s) accordingly. The procuring entity shall also promptly notify in writing all other suppliers and contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) whose submission(s) was or were accepted and the contract price.”

“Article [51 quaterdecies]. Second stage of procurement involving open framework agreements⁴⁵

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions, including those governing the second-stage competition, and the provisions of this article.

(2) The terms of a procurement contract awarded under the framework agreement may not materially alter or depart from any term or condition of the framework agreement.

(3) Each anticipated procurement contract shall be the subject of a written invitation to tender. The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement, or where relevant all

⁴¹ The Guide will address first-stage competition, and explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

⁴² The Guide to Enactment will cross refer to the articles concerned, which enable the procuring entity to reject all tenders, reject abnormally low tenders or otherwise cancel the procurement. Previous references to plural tenders and suppliers have been changed because this article refers to each second-stage competition in which there is one successful supplier, not to all second-stage competitions as a whole.

⁴³ The previous para. 4 (e) has been deleted, as per para. 122 of A/CN.9/648.

⁴⁴ The Guide to Enactment will explain that this reference is to permit the procuring entity to reject all tenders, to reject abnormally low tenders, or otherwise cancel the procurement.

⁴⁵ Provisions relating to the second stage of framework agreements with competition have been conformed, as both types under the current formulation could be conducted electronically or in paper-based form, with the exception that paragraph (2) in article 51 quaterdecies would not apply to open framework agreements (see para. 130 of A/CN.9/648).

such suppliers and contractors [then capable of meeting the needs of the procuring entity] to present their tenders for the supply of the items to be procured;

- (4) The invitation shall:
 - (a) Restate the existing terms and conditions of the anticipated procurement contract;
 - (b) [To the extent not already notified in the framework agreement] set out the terms and conditions of the anticipated procurement contract that are to be subject to the second-stage competition;
 - [(c) Where necessary, provide further detail of the terms and conditions of the anticipated procurement contract;]
 - (d) Restate the procedures and selection criteria for the award of the anticipated procurement contract; and
 - (e) Set out instructions for preparing tenders.
- (5) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the tenders. The deadline shall afford suppliers or contractors sufficient time to prepare and present their tenders.
- (6) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the selection criteria set out in the second-stage invitation to tender referred to in paragraph (4) above.⁴⁶
- (7) Without prejudice to the provisions of article [proper cross reference to the provisions on award of contracts through electronic reverse auction] and subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful submission(s), and shall promptly notify in writing the successful supplier(s) or contractor(s) accordingly. The procuring entity shall also promptly notify in writing all other suppliers and contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) whose submission(s) was or were accepted and the contract price.

“Article [51 quindecies]. Award of the procurement contract under a framework agreement

- (1) The procurement contract, on the terms and conditions of the framework agreement, comes into force when a purchase order as provided for in [articles ...] or the notice of acceptance to the successful supplier(s) or contractor(s) as provided for in [articles ...] is issued and dispatched to the supplier or contractor concerned.
- (2) Where the contract price under the provisions of this section exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s) in any manner that has been specified

⁴⁶ The Guide will explain that whether the selection will be based on lowest price or lowest evaluated submission has to be disclosed. See A/CN.9/WG.I/WP.63.

for the publication of contract awards under article 14 of this Law. The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement or in any other manner set out in the framework agreement.”

III. Further issues arising in the use of framework agreement procedures

A. First-stage competition

7. The Working Group may recall that procurement regimes with multi-supplier framework agreements vary widely as regards whether all or merely some qualified suppliers whose submissions are responsive are to be admitted to the framework agreement. For example, article 32 (2) of the EC Directive implicitly provides that the procuring entity need not conclude the framework agreement with all such suppliers, but must make a selection based on the award criteria. The Directive continues that where possible the framework agreement must be concluded with at least three suppliers.

8. In the United States, on the other hand, at the first stage submissions are assessed in terms of price, quality and the qualifications of tenderers but there is little or no exclusion of qualified suppliers whose submissions are responsive, because the emphasis is placed on second-stage competition, in which suppliers are to be given a fair opportunity to compete.⁴⁷

9. The provisions set out above are closer to the United States model than the EC model, in that they do not envisage a competitive selection between qualified suppliers whose submissions are responsive at the first stage, and all parties that are capable of meeting the needs of the procuring entity are to be invited to compete. Although this approach will maximize the pool of suppliers available to compete at the second stage, or choices under a framework agreement procedure without second-stage competition, it means that there is no real competition at the first stage. Studies have shown two effects of this approach: first, suppliers do not provide low prices at the first stage, or otherwise do not seek to present a submission that is better than responsive; and in systems where all competition takes place at the second stage, the theoretical advantages of second-phase competition are not always present in practice and, indeed, that second-phase competition may be inadequate. Further, procuring entities may cite a practical need to limit the numbers invited to compete at the second stage (whether or not the need is real), and may resort to non-transparent means of so doing by way of exception to the normal procedures. Resisting requests for such exceptions for small, repeated procurements that are not conducted electronically may be difficult. Finally, if the same and small numbers of suppliers are regularly invited to compete at the second stage, there may be heightened risks of collusion.⁴⁸

10. The Working Group may wish to consider the provisions relating to first-stage competition in the light of the above observations. For example, it may be

⁴⁷ For further detail, see A/CN.9/WG.I/WP.44/Add.1, paras. 17-20.

⁴⁸ For further detail, see A/CN.9/WG.I/WP.44/Add.1, paras. 36-42.

considered that for closed framework agreement procedures, the advantages of real first-stage competition may outweigh the disadvantage of restricting the number of parties to the framework agreement. On the other hand, so far as open framework agreements are concerned, particularly where they operate electronically, the converse may be the case.

B. “Ranking”

11. If the Working Group considers that some limitation on the numbers of parties to the framework agreement should be permitted, the Working Group may wish to retain the provisions relating to evaluation of the first-stage submissions and ranking (or a similar term) of the qualified suppliers whose submissions are responsive. The Working Group may wish to provide for a minimum number of parties to avoid the risks of collusion at the second stage.

12. If there is to be no such limitation, the Working Group may consider that the administrative time and costs of evaluation of submissions (as distinct from examining them) may outweigh the benefits concerned, and decide either to remove the first-stage evaluation or to provide that it is an optional step.
