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

Note by the Secretariat

Addendum

This note sets out chapters VI (Framework agreements procedures) and VII (Review) of a revised text of the Model Law. The Secretariat's comments are set out in the accompanying footnotes.



CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES

Article 49. Conditions for use of a framework agreement procedure¹

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

(a) The need for the subject matter of the procurement will arise on a repeated basis during a given period of time; or

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

(2) For the purpose of this chapter:

(a) 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 a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement;

(b) A “framework agreement” is an agreement between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;

(c) A “closed framework agreement” is a framework agreement to which no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party;

(d) An “open framework agreement” is a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;

(e) A “framework agreement procedure with second stage competition” is a framework agreement procedure in which certain terms and conditions of the procurement, which cannot be established with sufficient precision when the framework agreement is concluded, are to be established or refined through second-stage competition; and

¹ Based on paras 1, 4, 5, 6 and 7 of Article 22 ter, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), reordered to conform with the equivalent provisions regarding electronic reverse auctions, and including additional definitions to implement the Working Group’s decision to provide for open and closed framework agreements separately (A/CN.9/664, para. 90). The Working Group may wish to consider the order of the resultant provisions, which have been drafted to present provisions addressing both types of frameworks separately from those applying to one or other type. Further, the Working Group may wish to consider whether the procedures should be available for all types of procurement, including negotiated procurement or procurement where specifications are set later than at the outset of the procurement, which are effectively excluded in the current draft.

(f) A “framework agreement procedure without second stage competition” is a framework agreement procedure without a second-stage competition to establish or refine the terms and conditions of the procurement.

(3) The procuring entity shall include in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the recourse to a framework agreement procedure.

Article 50. Information to be specified when first soliciting participation in a framework agreement procedure²

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

- (a) The name and address of the procuring entity;
- (b) That the procurement will be conducted as a framework agreement procedure;
- (c) The type of the framework agreement to be concluded from those described in article 49;
- (d) All minimum information required to be included in the framework agreement in accordance with article [53] or [56], as applicable;
- (e) In framework agreements with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties to the framework agreement;
- (f) The procedures and criteria to be used by the procuring entity in the selection of the parties to the framework agreement, including in the case of closed framework agreements, the evaluation criteria, their relative weight and the manner in which they will be applied in the selection and whether the selection will be based on the lowest price or lowest evaluated submission;
- (g) In closed framework agreements procedures, the information referred to in article 25 (e)-(j) and article 27 (a)-(c) and (g)-(z), unless such information will be established in a second-stage competition.³

² Based on draft article 51 novies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), simplified by cross referring to the mandatory provisions in articles 53 (closed framework agreements) and 56 (open framework agreements) and to avoid unnecessary repetition, and incorporating the Working Group’s decisions on that draft (A/CN.9/664, paras. 78-82).

³ The Working Group may wish to consider the extent of the information required in solicitation under articles 25 and 27 of the Model Law during tendering proceedings, and whether any information specified therein would be subject to refinement at the second stage of framework agreements without second-stage competition.

Article 51. No material variation during the operation of the framework agreement

(1) During the operation of the framework agreement, no amendment to the terms and conditions of the procurement, including variation of the relative weight of the evaluation criteria, shall be permitted if it leads to a material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement established when first soliciting the participation of suppliers or contractors in a framework agreement procedure in accordance with article 50.

[(2) A “material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement” means any amendment that would make the submissions from any suppliers or contractors parties to the framework agreement non-responsive, that would render previously non-responsive submissions responsive, that would change the status of suppliers or contractors with regard to their qualification[, or that would raise concerns about competition, transparency or integrity].]⁴

Article 52. First stage of a closed framework agreement procedure⁵

(1) The procuring entity shall select the type of framework agreement and procedure to be conducted from among the options set out in article 49 (2).

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

(a) By means of tendering proceedings in accordance with provisions of chapter II of this Law except to the extent that those provisions are derogated from in this article and article [54]; or

(b) By means of a method of procurement of chapter III under the conditions of article [7 (3)] of this Law and in accordance with the relevant provisions of chapter III except to the extent that those provisions are derogated from in this article and article [54];⁶

(c) In the case of a framework agreement concluded with one supplier or contractor, in addition to the methods of procurement specified in subparagraphs (a) and (b) of this paragraph, by means of single-source procurement under the conditions of article [7 (6) (a) and (c) to (f)].

⁴ See A/CN.9/664, para. 101 (c) and (d), in which the Working Group considered that this description could be located in the Guide to Enactment.

⁵ New article applying to closed framework agreements procedures only (A/CN.9/664, para. 90), based on article 51 octies before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), updated to reflect amended provisions in Chapters I, II and III of the revised Model Law, and draft article 51 decies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), implementing the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90).

⁶ See A/CN.9/664, para. 86.

(3) The procuring entity shall include in the record required under article 22 of this Law a statement of the grounds and circumstances upon which it relied to justify the selection of the type of closed framework agreement set out in article 49 (2) and upon which it relied to justify the use of any method of procurement other than tendering for the selection of the party or parties to a closed framework agreement with the procuring entity.

(4) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, including the relative weights of such criteria and the manner of their application and shall promptly notify the selected supplier(s) or contractor(s) of their selection.⁷

Article 53. Minimum requirements of closed framework agreements⁸

(1) A closed framework agreement entered into under this Law shall be concluded in writing between the procuring entity and supplier(s) or contractor(s) and shall set out:

(a) The duration of the framework agreement;⁹

(b) The description of the subject matter of the procurement¹⁰ and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;¹¹

(d) Where a closed framework agreement concluded with more than one supplier or contractor, that there will be a second-stage competition to award a procurement contract under the framework agreement, and a statement of the terms and conditions that are to be established or refined through second-stage competition;

(e) The procedures for and the envisaged frequency of any second-stage competition;

(f) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or lowest evaluated tender [...];¹²

⁷ The Working Group may wish to consider whether this paragraph could alternatively be incorporated into draft article 19 (Acceptance of submissions and entry into force of the procurement contract).

⁸ Based on paras 2 and 3 of Article 22 ter before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), separated into an independent article for ease of reading, and applying to closed framework agreements procedures only (A/CN.9/664, para. 90).

⁹ A/CN.9/664, paras. 94-95.

¹⁰ The word “description” has replaced the word “specifications” in the light of the proposed new definition in articles 2 and 11.

¹¹ The Working Group may wish to consider whether the situation in which some terms and conditions of the framework agreement cannot be settled at the outset is sufficiently regulated (for example, the notion of “refining” terms at the second stage without a competition).

(g) Evaluation procedures and criteria, including the relative weight of such criteria and the manner in which they will be applied, in accordance with article [12] of this Law, during any second-stage competition. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to a material variation in the procurement as described in article [51].

(2) A closed framework agreement may be concluded with one supplier or contractor or with [more than one supplier or contractor] [at least [three] suppliers or contractors].¹³

(3) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless the procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded. Any variation in the terms and conditions of the separate agreements for a given procurement shall be minor, be of a non-material nature and concern only those provisions that justify the conclusion of separate agreements. The procuring entity shall include in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the conclusion of separate agreements.¹⁴

(4) If the procuring entity is to maintain a closed framework agreement electronically, the framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the electronic framework agreement, including information on how the electronic framework agreement and notifications of forthcoming procurement contracts under the framework agreement can be accessed, the electronic equipment being used, and technical specifications for connection.¹⁵

(5) The duration of a closed framework agreement shall not exceed [the enacting State specifies a maximum] years.¹⁶

¹² The Working Group has considered the possibility of including an alternative method of awarding the procurement contract, such as rotation. The Working Group may wish to consider whether the inclusion of such alternative methods could be included in the light of the draft evaluation criteria article (article 12).

¹³ The Working Group may wish to consider whether a provision to ensure effective competition in multiple supplier agreements is required and, if so, whether any minimum such as that for requests for proposals or quotations procedures should be included.

¹⁴ A/CN.9/664, para. 78.

¹⁵ New paragraph included to conform to other electronic procurement provisions.

¹⁶ On the other hand, the Guide to Enactment would explain that the duration of an open framework agreement is not limited under the Model Law, but that a duration must be set in accordance with the provisions of this article.

Article 54. Second stage of a closed framework agreement procedure¹⁷

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

(2) No procurement contract under the 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) Where the framework agreement provides for second-stage competition:

(a) 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 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;

(b) 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 the suppliers or contractors sufficient time to prepare and present their tenders;

(c) The invitation to tender shall:

(i) Restate the existing terms and conditions of the anticipated procurement contract, set out the terms and conditions that are to be subject to the second-stage competition and provide further detail of the terms and conditions where necessary;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application), and including the information referred to in article 27 (q) to (s) and (x) to (z);

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 27 (g) to (p), and the submission deadline;

(d) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;¹⁸

(e) The procuring entity shall accept the successful tender in accordance with article 19.

¹⁷ Based on draft articles 51 duodecies and terdecies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), consolidated in accordance with the Working Group's decision at that session (A/CN.9/664, para. 106), and updated to reflect revised draft Chapters I and II of the Model Law.

¹⁸ The Working Group may wish to consider whether additional cross references to the provisions of Chapter II addressing the selection of the winning supplier should be included.

(5) The procuring entity shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price.

(6) Where the contract price 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 for the publication of contract awards under article 20 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.¹⁹

Article 55. First stage of an open framework agreement procedure²⁰

(1) The procuring entity shall establish and maintain an open framework agreement in electronic form.²¹

(2) To establish an open framework agreement, the procuring entity shall publish a notice of the open framework agreement procedure, in accordance with article 24.²² The notice shall contain the information specified in article [50].

(3) 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.

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

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

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

¹⁹ The Working Group may alternatively wish to consider including this provision in draft article 20 of the revised Model Law. The provisions of draft articles 19, 20 and 22 may need to be revised following the Working Group's finalization of the framework agreements procedures.

²⁰ New article applying to open framework agreements procedures only (A/CN.9/664, para. 90), based on article 51 octies before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), updated to reflect amended provisions in Chapters I, II and III of the revised Model Law, and draft article 51 decies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), implementing the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90).

²¹ See A/CN.9/664, para. 91.

²² The Working Group may wish to incorporate a cross reference to article 23 (domestic tendering).

(5) Suppliers and contractors may apply to become a party or parties to the open framework agreement at any time during its operation. Applications to become parties shall include all information specified by the procuring entity in the notice of the open framework agreement procedure.

(6) 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 description set out in the notice of the open framework agreement procedure.

(7) The framework agreement shall be concluded with all qualified suppliers or contractors whose submissions are responsive unless technical or other capacity limitations require a maximum number of parties to the framework agreement, and provided that the procuring entity includes in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the imposition of such a limitation.²³

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

(9) The procuring entity shall include in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the establishment of the open framework agreement.

Article 56. Minimum requirements as regards open framework agreements²⁴

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

(a) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

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

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

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

²³ See A/CN.9/664, para. 103.

²⁴ This article is new, and adapts the equivalent provisions for closed framework agreements contained in article 53 above. The Working Group may wish to consider whether this procedure should be available for all types of procurement, or the more standardized low-value items, such as are provided for in Chapter III of the revised Model Law.

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

(i) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation, subject to any maximum number of suppliers, if any;

(ii) The information specified in article 25 (e), and article 27 (b), (c), (t), (u), (w) and (z); and

(iii) Instructions for preparing and submitting indicative tenders, including the information referred to in article 27 (i) to (k);

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

(g) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or lowest evaluated tender;²⁵

(h) The evaluation procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with article [12] of this Law. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to a material variation in the procurement as described in article [51].

Article 57. Second stage of an open framework agreement procedure²⁶

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

(2) (a) 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 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;

(b) 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 the suppliers or contractors sufficient time to prepare and present their tenders;

(c) The invitation to tender shall:

(i) Restate the existing terms and conditions of the anticipated procurement contract, set out the terms and conditions that are to be subject to the

²⁵ See footnote 12 above.

²⁶ Based on draft articles 51 duodecies and terdecies, before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), consolidated in accordance with the Working Group's decision at that session (A/CN.9/664, para. 106), and updated to reflect revised draft Chapters I and II of the Model Law.

second-stage competition and provide further detail of the terms and conditions where necessary;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application), and including the information referred to in article 27 (q) to (s) and (x) to (z);

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 27 (g) to (p), and the submission deadline;

(d) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;²⁷

(e) The procuring entity shall accept the successful tender in accordance with article 19.

(3) The procuring entity shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price.

(4) Where the contract price 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 for the publication of contract awards under article [20] 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.²⁸

CHAPTER VII. REVIEW²⁹

Article 58. Right to review³⁰

Any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to non-compliance with the provisions of this Law³¹ may seek review in accordance with articles 58 to 63 and challenge in appropriate bodies in accordance with applicable law any decisions taken as a result of such a review.³²

²⁷ The Working Group may wish to consider whether additional cross references to the provisions of Chapter II addressing the selection of the winning supplier should be included.

²⁸ The Working Group may alternatively wish to consider including this provision in draft article 20 of the revised Model Law.

²⁹ A footnote accompanying this chapter has been deleted reflecting the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 19).

³⁰ The article was revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 25, 26 and 74).

³¹ The phrase "due to non-compliance with the provisions of this Law" has replaced the phrase "due to a breach of a duty imposed on the procuring entity by this Law", reflecting the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 25).

³² See A/CN.9/664, para. 74, for the reasons of including the reference to the right to challenge.

Article 59. Review by the procuring entity or the approving authority³³

(1) A supplier or contractor entitled under article 58 to seek review may submit a complaint to the procuring entity or where applicable to the approving authority. The complaints shall be submitted in writing provided that:

(a) Complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions;

(b) All other complaints arising from the procurement proceedings shall be submitted before the entry into force of the procurement contract within [20]³⁴ days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(2) Unless the complaint is resolved by mutual agreement of the parties, the procuring entity or the approving authority as appropriate shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

(b) If the complaint is upheld in whole or in part, state³⁵ the corrective measures that shall be undertaken.³⁶

(3) If the procuring entity or the approving authority does not issue a decision by the time specified in paragraph (2) of this article, the supplier or contractor submitting the complaint or the procuring entity as the case may be is entitled immediately thereafter to institute proceedings under article 60 or 61. Upon the institution of such proceedings, the competence of the procuring entity or the approving authority to entertain the complaint ceases.

³³ The article was revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 28-33 and 65).

³⁴ The Working Group may wish to shorten this time-limit in the light of the provisions on the standstill period in the proposed article 19. This time-limit together with article 56 provisions on suspension of procurement proceedings may lead to unreasonably long duration of standstill periods, which would have to run for at least 20 days.

³⁵ The word "state" replaced the word "indicate" pursuant to the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 31).

³⁶ The words "shall be undertaken" replaced the words "are to be taken" pursuant to the Working Group's decision taken at its fourteenth session (see A/CN.9/664, para. 31).

Article 60. Review before an independent administrative body^{37, 38}

(1) A supplier or contractor entitled under article 58 to seek review may submit a complaint to [insert name of administrative body].

(2) The complaints shall be submitted in writing within [20] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the [original] complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier, provided that the complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions.

(3) The timely submission of a complaint under article 60 shall suspend the time period for submission of a complaint under this article for the whole duration of the actual proceedings under article 59 up to the maximum period required for the procuring entity or the approving authority as the case may be to take a decision in accordance with article 59 (2) and communicate such decision to the supplier or contractor in accordance with article 62 (5).

(4) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity and to the approving authority where applicable.

(5) The [insert name of administrative body] may grant³⁹ one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject-matter of the complaint;

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

³⁷ The article was revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 35, 36, 39, 44, 53, 55 and 56).

³⁸ The current title of the article replaced the title "administrative review". A footnote accompanying article 54 (referring to the optional nature of the article depending on the legal traditions of enacting States) was deleted. These changes reflect the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, para. 35). The Working Group may wish to reinstate a footnote to this article that would read as follows:

"* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 61 and provide only for judicial review (article 64), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption."

³⁹ See A/CN.9/664, para. 56, for the preference expressed at the Working Group's fourteenth session to use the word "grant" instead of "recommend" in this provision.

(d) Annul in whole or in part an unlawful act or decision of the procuring entity;⁴⁰

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;⁴¹

(f) Require the payment of compensation for

Option I

Any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

Option II

Loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings;

(g) Order that the procurement proceedings be terminated;

(h) Annul the procurement contract that entered into force unlawfully⁴² and, if notice of the procurement contract award has been published, order the publication of notice of the annulment of the award.

(6) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(7) The decision shall be final unless an action is commenced under article 63.

**Article 61. Certain rules applicable to review proceedings
under articles 59 and 60⁴³**

(1) Promptly after the submission of a complaint under article 60 or article 61, the review body shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates as well as any governmental authority whose interests are or could be affected of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the review proceedings. A supplier or contractor or the governmental authority that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

⁴⁰ See A/CN.9/664, para. 55, for the decision at the Working Group's fourteenth session to amend this provision of the Model Law by deleting the reference to "other than any act or decision bringing the procurement contract into force".

⁴¹ Ibid., as regards deletion of a similar reference in this provision.

⁴² Added pursuant to the Working Group's decision at its fourteenth session (A/CN.9/664, paras. 53-55).

⁴³ The article was revised pursuant to the discussions at the Working Group's fourteenth session (A/CN.9/664, paras. 59-60).

(3) The participants to the review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision of the review body being made on the complaint, the right to be represented and accompanied, and the right to request that the proceedings take place in public and that witnesses be presented.⁴⁴

(4) In the cases of the review by the approving authority or the [insert name of administrative body], the procuring entity shall provide timely to the review body all relevant documents, including the record of the procurement proceedings.⁴⁵

(5) A copy of the decision of the review body shall be furnished within five days after the issuance of the decision to the participants to the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

(6) Any decision by the review body and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.⁴⁶

Article 62. Suspension of procurement proceedings⁴⁷

(1) The timely submission of a complaint suspends the procurement proceedings for a period to be determined by the review body.⁴⁸

(a) Provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;

(b) Unless the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.⁴⁹

⁴⁴ The paragraph is based on article XVIII (6) of the revised Agreement on Government Procurement, as discussed at the Working Group fourteenth session (A/CN.9/664, para. 59).

⁴⁵ This paragraph has been added pursuant to the relevant point made at the Working Group's fourteenth session (see A/CN.9/664, para. 60).

⁴⁶ The paragraph was added based on the provisions of article 56 (5) of the Model Law.

⁴⁷ The article was revised to reflect the Working Group's discussions at its fourteenth session (A/CN.9/664, paras. 61-73). Although a proposal was made to delete the article and include the relevant provisions in articles 53 and 54 as appropriate, the Secretariat in avoidance of repetitions in articles 53 and 54 retained the provisions, which are equally applicable to review proceedings under both article 53 and article 55, in a separate article.

⁴⁸ The provisions reflect the Working Group's decision at its fourteenth session (A/CN.9/664, para. 65).

⁴⁹ The provisions in both subparagraphs reflect the Working Group's decisions at its fourteenth session (A/CN.9/664, para. 68).

(2) The review body may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the review body to take decision in accordance with article 60 or 61 as applicable.⁵⁰

(3) The decision on the suspension or the extension of the suspension shall be promptly communicated to all participants to the review proceedings, indicating the duration of suspension or extension.⁵¹ Where the decision was taken not to suspend the procurement proceedings on the grounds indicated in paragraph (1) of this article, the review body shall notify the supplier or contractor concerned about that decision and the grounds therefor.

Article 63. Judicial review

The [insert name of court or courts] has jurisdiction over actions pursuant to article 58 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 59 or 60.

⁵⁰ The provisions reflect the Working Group's decision at its fourteenth session that the period of suspension should be aligned with the period required for the review body to issue its decision (a maximum being 30 days) (A/CN.9/664, paras. 64 and 69).

⁵¹ The provisions were added further to the Working Group's decision at its fourteenth session (A/CN.9/664, para. 65).