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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany Chapter VII of the UNCITRAL Model Law on Public Procurement on framework agreements, comprising commentary on articles 60-63 of chapter VII (Framework agreements procedures).



GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

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B. Provisions on framework agreements procedures (*continued*)

Article 60. Establishment of an open framework agreement¹

1. The purpose of the article is to set out the procedure for the first stage of an open framework agreement procedure. By comparison with the provisions for closed framework agreements, which are concluded through the use of a procurement method under chapter III, IV or V of the Model Law [\[**hyperlinks**\]](#), an open framework agreement procedure is a self-contained one, and this article provides for the relevant procedures. An open framework agreement is described in paragraphs [**](#) of the commentary in the Introduction to this Chapter above [\[**hyperlink**\]](#), and the guidance to this and the following article of the Model Law makes cross-reference to that description where necessary.

2. Paragraph (1) records the requirement that the agreement be established and maintained online. This provision is a rare exception to the approach of the Model Law in that its provisions are technologically neutral, and is included because seeking to operate an open framework agreement in traditional, paper-based format would defeat the administrative efficiency that lies at the heart of open framework agreement procedures, in that it relies on the use of Internet-based, electronic means of communication. The procedure is designed to involve a permanently open web-based procurement opportunity, which suppliers or contractors can consult at any time to decide whether they wish to participate in the procurements concerned, without necessarily imposing the administrative burden of providing individual information to those suppliers or contractors, with consequent delays in response times, as is further explained in paragraphs ... below. Responses to opportunities and requests to participate are intended to be provided in a time frame that only online procurement can accommodate.

3. Paragraph (2) provides the mechanism for solicitation of participation in the open framework agreement procedure. It applies the provisions of article 33 [\[**hyperlink**\]](#) by reference; it is self-evident that solicitation to become a party to an open framework agreement must itself be open. The solicitation must also be international, unless the exceptions referred to in article 33(4) [\[**hyperlink**\]](#) and article 8 [\[**hyperlink**\]](#) by cross-reference apply (guidance for which is found in [**](#) above [\[**hyperlink**\]](#)). It is recommended that the invitation also be made permanently available on the website at which the framework agreement will be maintained (see, also, the guidance to article 61(2) [\[**hyperlink**\]](#) below,

¹ The Working Group may wish to consider whether these open framework agreements should be discussed as a tool for the use of electronic catalogues, and how they could operate as a forum for request for quotations. Although electronic catalogues are increasingly used as a procurement technique, there is no express provision on the Model Law permitting such use, which would be feasible within an open framework agreement. If commentary on these matters is desired, appropriate guidance on the contents is requested.

regarding ongoing publicity and transparency mechanisms, including periodic republication of the initial invitation).

4. Paragraph (3) sets out the requirements of the invitation that solicits participation in the procedure, and tracks the requirements for an invitation to tender in open tendering proceedings, with certain deviations necessary to accommodate the conditions of an open framework agreement. The provisions are also consistent, so far as possible, with those applicable to closed framework agreements. Thus, the commentary to solicitation in closed framework agreements should be consulted on the provisions equivalent to those contained in paragraphs (3)(b) and (3)(e) (subparagraph (b) is intended to make it clear that the procedure involves an open framework agreement) and the commentary to solicitation in open tendering proceedings should be consulted on the provisions equivalent to those in paragraphs (3)(d)(i), (3)(f) and (3)(g). Guidance on issues particular to open framework agreement procedures appears in the following paragraphs.

5. Paragraph (3)(a) requires the names and addresses of the procuring entities that will be parties to the open framework agreement or that otherwise can place orders (procurement contracts) under it to be recorded.² The provision is therefore flexible in terms of allowing procuring entities to group together to maximize their purchasing power, and in allowing the use of centralized purchasing agencies, but the framework agreement is not open to new purchasers. The reason for both the flexibility and the limitation is to provide adequate transparency and to support value for money: suppliers or contractors need to know the details of the procuring entities that may issue procurement contracts if they are to be encouraged to participate and to present submissions that meet the needs of the procuring entity, and the efficacy of the procedure is to be ensured. In addition, the requirements of contract formation in individual States will vary; some may not permit procuring entities to join the framework agreement without significant administrative procedures, such as novation. The provision should be read together with the definition of “procuring entity”, in article 2(l), which allows more than one purchaser in a given procurement to be the “procuring entity” for that procurement. In the context of framework agreements, the entity that awards a procurement contract is by definition the procuring entity for that procurement; the framework agreement itself allows for several potential purchasers at the second stage. However, one agency will be responsible for establishing and maintaining the framework agreement, and it will be identified as the “procuring entity” for that purpose, as provided for in paragraph (3)(a).

6. Paragraph (3)(c) requires the languages of the framework agreement to be set out in the invitation, and includes other measures to promote transparency and consequently to enhance access to the framework agreement once it has been concluded. The website at which the open framework agreement is located should be easy to locate, as an example of the general considerations regarding effective transparency in electronic procurement (see the commentary on e-procurement in Section ** of the general commentary above [**hyperlink**]). The invitation is also required to set out any specific requirements for access to the framework agreement;

² This commentary reflects the points made when the Working Group was considering the provisions of the Model Law. Guidance to the Secretariat on how this flexibility could operate in practice is requested.

guidance on ensuring effective market access to procurement is provided in the commentary to article 7 above [\[**hyperlink**\]](#).

7. Paragraph (3)(d) contains a mixture of provisions of general applicability, and provisions concerning framework agreement procedures alone, which together provide the terms and conditions under which suppliers or contractors can become parties to the framework agreement. Paragraph (3)(d)(i) requires the standard declaration as to whether participation is to be restricted on the basis of nationality in the limited circumstances envisaged by article 8 [\[**hyperlink**\]](#). Paragraph (3)(d)(ii) is an optional provision (accordingly presented in brackets) permitting a maximum number of suppliers or contractors parties to the framework agreement to be set. As the accompanying footnote explains, the provision need not be enacted by States where local technical constraints do not so require, and in any event should be read in conjunction with the limited scope of this permission in paragraph (7) of this article (as explained in the commentary to that paragraph of the article below), so as to provide essential safeguards against abuse and undesirable consequences. The paragraph requires the non-discriminatory procedure and criteria that are to be followed in selecting any maximum to be disclosed. In order to select the participants on an objective basis, the procuring entity may use a variety of techniques, as further explained in the commentary in the Introduction to Chapter IV, such as random selection, the drawing of lots or a “first come first served” approach [\[**hyperlink**\]](#), or it may apply other criteria that seek to distinguish among the bidders, provided that they are non-discriminatory.³ This relatively informal approach reflects the fact that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited.

8. Paragraph (3)(d)(iii) addresses the manner in which applications to become parties to the framework agreement are to be presented and assessed, and it tracks the information required for tendering proceedings under article 39 [\[**hyperlink**\]](#). The provision refers to “indicative submissions”, a term used to reflect that there will always be second-stage competition under an open framework agreement, so that the initial submissions are merely, as their name suggests, indicative. Moreover, while the qualifications of suppliers or contractors are assessed, and their submissions are examined against the relevant description to assess responsiveness (see paragraphs (5) and (6) of the article), by comparison with initial submissions in closed framework agreements, there is no evaluation of indicative submissions (i.e. no competitive comparison of submissions, such as is provided for in article 43 [\[**hyperlink**\]](#)). Also by contrast with the position in closed framework agreements, and as is explained in the guidance to paragraph (6) of the article below, all suppliers or contractors presenting responsive submissions are eligible to join the framework agreement, provided that they are qualified.

9. Paragraph (3)(d)(iv) requires the invitation to include a statement that the framework agreement remains open to new suppliers or contractors to join it throughout its duration (see paragraph (4) of the article for the related substantive requirement), unless the stated maximum of suppliers or contractors parties to the agreement is exceeded and unless the potential suppliers or contractors are excluded under limitations to participation imposed in accordance with article 8 of the Model

³ The Working Group may wish to consider whether the provisions indeed confer a greater flexibility than those of Chapter IV procurement methods, as this comment indicates.

Law [\[**hyperlink**\]](#). The invitation should also set out any limitations to new joiners (which might arise out of capacity constraints, as described above, or as a result of imposition of limitations under article 8 of the Model Law), plus any further requirements, for example as regards qualifications of parties to the agreement and responsiveness of their indicative submissions.

10. Paragraph 3(f) requires all the terms and conditions of the framework agreement (themselves governed by article 61 [\[**hyperlink**\]](#)) to be set out in the invitation, to include, among other things, the description of the subject-matter of the procurement and evaluation criteria. The requirements for those terms and conditions are discussed in the commentary to article 61 [\[**hyperlink**\]](#) below.

11. Paragraph (4) sets out the substantive requirement that the framework agreement be open to new suppliers or contractors throughout the period of its operation. As is noted in paragraphs ** of the commentary in the Introduction to this Chapter, this provision is a key feature of open framework agreements.

12. Paragraph (5) requires indicative submissions received after the establishment of the framework agreement to be assessed promptly, in order that the framework agreement remains open to new joiners in reality; this is a critical feature in the context of an online open framework agreement, which may be designed for small-scale and regular purchases. All responsive submissions from qualified suppliers or contractors must be accepted and the suppliers or contractors concerned admitted to the framework agreement, as provided for in paragraph (6), subject to any capacity constraints justifying rejection imposed under paragraphs (3)(d)(ii) and (7) as set out in the invitation to become a party to the agreement, or other restrictions (where the procurement is domestic, for example; see the relevant discussion above).

13. Paragraph (7) is linked to paragraph (3)(d)(ii), both of which are put in brackets as an optional text to be considered for inclusion in the law by an enacting State. They concern imposition of the maximum number of suppliers or contractors parties to the agreement because of technical constraints. In addition to the considerations raised in connection with the similar provisions appearing in the context of ERAs (see commentary to article 53(1)(k) and (2) in [** above \[**hyperlink**\]](#)), there are additional considerations that an enacting State should keep in mind when considering enacting these provisions. Because the salient difference between closed and open framework agreements is that the latter remain open to new suppliers or contractors throughout their operation, any imposition of a maximum number of suppliers or contractors parties may effectively turn the framework into a closed agreement. This situation may be exacerbated in that the benefits of a fluctuating pool of suppliers or contractors may be lost if suppliers or contractors that cease to participate in second-stage competition remain, from a technical point of view, parties to the framework agreement and block new joiners. Paragraph (7) therefore permits such a maximum number of supplier or contractors parties only where technical capacity constrains access to the systems concerned (e.g. the software for the framework agreement may accommodate only a certain maximum number). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision is likely to become obsolete within a short period.

14. Even though a maximum number, where needed, is likely to be of a reasonable size, the procuring entity is required to be objective in the manner of selecting the

suppliers or contractors parties up to that maximum. See, further, the discussion of ensuring objectivity in paragraphs ** above, and the commentary in the introduction to Chapter IV [\[**hyperlink**\]](#). The procurement regulations, or other applicable rules, should provide guidance on these matters to procuring entities (noting, in particular, the risk, albeit limited, of a challenge under Chapter VIII [\[**hyperlink**\]](#)).

15. Enacting States will observe that there is no evaluation of the indicative submissions provided for in this article. The nature of an open framework agreement is that, as is explained in paragraph ** above, all responsive submissions from qualified suppliers or contractors are accepted. As is further explained in the guidance to article 62 [\[**hyperlink**\]](#) below, price competition is largely absent at the first stage, and so ensuring genuine competition at the second stage is critical.

16. The provisions of paragraph (8) are designed to provide transparency in decision-making and to allow a supplier or contractor to challenge the decision of the procuring entity not to accept the supplier or contractor in the framework agreement procedure if desired. The inclusion of such provision in the context of the open framework agreement is justified because safeguards of the standstill period notification would not be applicable to indicative submissions but only to submissions presented in response to the specific purchase orders placed under the agreement (the second-stage submissions). It is therefore essential for the supplier or contractor to know whether it is the party to the agreement without which it would not be able to learn about purchase orders placed under the agreement and present second-stage submissions. However, in the case of the challenge of the procuring entity's decision, the policy considerations regarding delaying the execution of a procurement contract to allow an effective challenge and allowing the procurement contract to proceed are different in the open framework agreement context from the norm (the general policy considerations are set out in the guidance to article 22 above [\[**hyperlink**\]](#)). In the case of open framework agreements, any aggrieved supplier or contractor whose submission was rejected as non-responsive or that was not admitted because of disqualification will be able to be admitted to the framework agreement for future purchases if a challenge is resolved in its favour, the harm occasioned by the delay in participation was considered as unlikely to override the interest in allowing an effectively limited portion of procurement contracts in open framework agreements to proceed.

Article 61. Requirements of open framework agreements

17. This article mirrors article 59 [\[**hyperlink**\]](#) regarding closed framework agreements, and governs the terms and conditions of the open framework agreement and the award of contracts under it. As was also the case for closed framework agreements, the law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law. These issues are therefore not addressed in the Model Law. Suppliers or contractors that join the framework agreement after its initial conclusion will need to be bound by its terms; they may be so bound automatically upon joining the agreement, and so enacting States should ensure that the law makes appropriate provision in this regard.

18. Paragraph (1) records the requirement that the award of procurement contracts under the open framework agreement must be carried out through a competition at the second stage of the framework agreement procedure. Subparagraphs (c) to (f) set

out the terms and procedures of the second-stage competition. They are similar to the provisions in paragraph (1)(d) of article 59 [\[**hyperlink**\]](#), guidance for which is found at paragraphs [** above \[**hyperlink**\]](#). The differences reflect the nature of the possible subject-matter to be procured through open framework agreements (i.e. simple standardized items, as explained in [** above \[**hyperlink**\]](#)).

19. Paragraph (1)(a) requires the duration of the framework agreement to be recorded in that agreement. By comparison with closed framework agreements, there is no reference to any maximum duration imposed under the procurement regulations: the fact that the agreement is open to new suppliers or contractors throughout its period of operation lessens the risks of choking off competition as described in the context of closed framework agreements in paragraph [** above \[**hyperlink**\]](#). However, in order to allow for new technologies and solutions, and to avoid obsolescence, the duration of an open framework agreement should not be excessive, and should be assessed by reference to the type of subject-matter being procured. (See, also, the general guidance at paragraph [** above on the importance of a periodic reassessment of whether the framework agreement continues to reflect what is currently available in the relevant market.](#)) In addition, suppliers or contractors may be reluctant to participate in an agreement of unlimited duration.

20. Paragraph 1(b) requires the terms and conditions of the procurement that are known at the stage when the open framework agreement is established to be recorded in the framework agreement (and under article 60 [\[**hyperlink**\]](#) will have been provided in the invitation to become a party to the open framework agreement). This provision is similar to article 59(1)(b) [\[**hyperlink**\]](#) regarding closed framework agreements, but as noted above, some deviations are justified in the light of the nature of subject-matter intended to be procured through the open framework agreements. Their nature would not require establishing any terms and conditions of the procurement at the second stage but only the refinement of the established ones, for example as regards the quantity, place and time frame of the delivery of the subject-matter. Although the nature of an open framework agreement tends to indicate that the description of the procurement will be framed in functional and broad terms so as to allow refinement to the statement of the procuring entity's needs at the second stage, it is important that it is not so broad that the open framework agreement becomes little more than a suppliers' list. If that were the case, the procuring entity or entities using the framework agreement would be required to conduct or re-conduct stages of the procurement at the second stage (fuller reconsideration of qualifications and responsiveness as well as the evaluation of second-stage submissions), thus defeating the efficacy of the procedure. In addition, the extent of the change in the initial terms of solicitation at the second stage is subject to limitations of article 63 [\[**hyperlink**\]](#). On the other hand, sufficient flexibility is required to allow for changes in the regulatory framework, such as regarding environmental requirements or those pertaining to sustainability.

21. Paragraph (2) requires the periodic re-advertising of the invitation to become a party to the open framework agreement. The invitation must be published, at a minimum, once a year, in the same place as the initial invitation. Nonetheless, enacting States may consider that more frequent publication will encourage greater participation and competition. The electronic operation of the open framework agreement implies purely online publication, including at the first stage under

article 33,⁴ thus keeping the costs of publication to a reasonable level. The invitation must contain all information necessary for the operation of the framework agreement (including the relevant website, and supporting technical information). The paragraph also requires the procuring entity to ensure unrestricted, direct and full access to the terms and conditions of the framework agreement; the agreement operates online, which means that such information must be available at a website indicated in the invitation. It should also include the names of all suppliers or contractors parties to the framework agreement and, as noted above, all procuring entities that may use the framework agreement. Second-stage competitions should also be publicized on that website, as further explained in paragraphs ... below.

Article 62. Second stage of a framework agreement procedure

22. This article governs second-stage competition under both closed and open framework agreements. Some of its provisions, such as in paragraph (3) are intended to accommodate differences in the award of procurement contracts under closed framework agreements without second-stage competition and closed framework agreements with second-stage competition.

23. As paragraph (1) notes, the framework agreement sets out the substantive criteria and certain procedures governing the award of procurement contracts under the framework agreement, and the provisions of this article record the other elements of the award procedures. Thus there is a requirement for full transparency as regards both the award criteria and the procedures themselves.

24. The procedures are aimed at allowing effective competition at this second stage of the procedure, while avoiding excessive and time-consuming requirements that would defeat the efficiency of the framework agreement procedures. These considerations are particularly important in open framework agreements, in which there have been indicative, rather than initial, submissions at the first stage and there has been no evaluation of those submissions.

25. Paragraph (2) records that a procurement contract can be awarded only to a supplier or contractor that is a party to the framework agreement. This may be self-evident as regards closed framework agreements, but in the context of open framework agreements, the provision underscores the importance of swift examination of applications to join the framework agreement itself, and the utility of relatively frequent and reasonable-sized second-stage competitions to take advantage of a competitive and dynamic market. In practice, a second-stage competition will probably be announced on the website for the framework agreement itself, with a relatively short period for presenting final submissions in the second-stage competition. New joiners may wish to present their indicative submissions in time to be considered for the second-stage competition but may be able to participate only in subsequent competitions. The interaction between final submission deadlines, the time needed to assess indicative submissions and the frequency and size of second-stage competitions should be carefully assessed when operating the framework agreement.

⁴ The provision of guidance to the Secretariat is requested on whether this understanding is correct, or whether, once the open framework agreement is established, the notice may also be required to be published in paper-based media should procurement notice generally still be so published in the enacting State concerned.

26. Paragraph (3) records that article 22 on the award of the procurement contract applies to closed framework agreements without second-stage competition, save as regards the application of a standstill period required under paragraph (2) of that article.⁵

27. Paragraph (4) sets out the procedures for the second-stage competition. Subparagraph (a) requires the issue of an invitation to the competition to all parties of the framework agreement or only those then capable of meeting the needs of the procuring entity in the subject-matter of the procurement. This invitation is provided in accordance with the terms and conditions of the framework agreement which may, for instance, allow for automated invitations for efficiency reasons. Best practice is also to provide notice or a copy of the invitation on the website at which the framework agreement itself is located; this may also encourage new suppliers or contractors to participate in the procedure where possible (i.e. in open framework agreements). The use of electronic notices keeps the costs of so doing to a minimum; as communications methods improved over time, there may be opportunities to publicize the second-stage competition further, without additional costs implications.

28. The provisions of subparagraph (a) require all suppliers or contractors parties to the framework agreement to be invited to participate or, where relevant, only those “capable” of fulfilling the procuring entity’s requirements. The latter should be understood in a very narrow sense, in the light of the terms and conditions of the framework agreement and terms and conditions of initial or indicative submissions, to avoid allowing much discretion on the procuring entity as regards the pool of suppliers or contractors to be invited, which may lead to abuse, such as favouritism. For example, the framework agreement may permit suppliers or contractors to supply up to certain quantities (at each second-stage competition or generally); initial or indicative submissions may state that certain suppliers or contractors cannot fulfil particular combinations or certain quality requirements. The assessment of suppliers or contractors that are “capable” in this sense is therefore objective; all suppliers or contractors parties to the agreement must be presumed to be capable unless the framework agreement or their initial or indicative submissions provide to the contrary. The objectives of this provision are two-fold: first, to avoid abuse or misuse in the award of contracts to favoured suppliers or contractors and, secondly, to limit submissions to those that are capable of fulfilling them to enhance efficiency. The procuring entity should include an explanation in the record of the procurement as to why any suppliers or contractors parties to the agreement are not invited to participate in the second-stage competition; the publication of the invitation on the relevant website will allow for any such exclusion to be challenged. While such publication is not mandatory under the Model Law, it should assist in avoiding late challenges; similarly, rules or guidance for the public procurement agency or similar body should discuss that the procuring entity may avoid being confronted by a large number of challenges related to its assessment of suppliers’ or contractors’ capability to supply, if the framework agreement clearly sets out procedures and criteria that would clearly identify which suppliers or contractors will be considered capable. These safeguards and supporting guidance are considered critical to ensure that second-stage competition is effective, recalling

⁵ The Working Group is requested to provide an explanation for this decision. The explanation will also need to be included in the commentary to article 22(3)(a).

that experience in the use of framework agreements indicates that this stage of the process is a vulnerable one from the perspective of participation and competition. Vulnerability increases even further since the provisions on the standstill period (article 22(2 [**hyperlink**](#))) will apply in the case of framework agreements with second-stage competition only to suppliers or contractors that presented second-stage submissions (but not to all parties of the framework agreement).

29. Paragraph (4)(b) regulates the content of the second-stage invitation. Subparagraphs (iii) to (xi) repeat provisions from article 39 [**hyperlink**](#) on the contents of solicitation documents, guidance on which is found in Section [**above**](#) [**hyperlink**](#). In the context of framework agreements, it is important to provide a suitable deadline for presenting submissions: in the context of open framework agreements, for example, it may be expressed in hours or a day or so. Otherwise, the administrative efficiency of the procedure will be compromised, and procuring entities will not avail themselves of the technique. The period of time between the issue of the invitation to present second-stage submissions and the deadline for presenting them should be determined by reference to what sufficient time to prepare second-stage submissions will be in the circumstances (the simpler the subject-matter being procured, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement will be in any event qualified by the reasonable needs of the procuring entity, as explicitly stipulated in article 14(2) of the Model Law [**hyperlink**](#), which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events. (See also the relevant considerations in paragraph [**above**](#).)

30. Enacting States will observe, however, that there is no requirement to issue a general notice of the second-stage competition, reflecting the presumption that the first stage of the framework agreement will have included an open invitation since the default rule under articles 28 [**hyperlink**](#) and 58(1) [**hyperlink**](#) is to use open tendering, and the desire to avoid imposing too many procedural steps on the process that might compromise its efficiency. This presumption may be however displaced when alternative methods of procurement involving direct solicitation are used for the award of the framework agreement. An advance notice of purchase orders placed under framework agreements to all parties of the framework agreement should be considered as a significant safeguard against abuse; such a notice would make the safeguards in the context of framework agreements consistent with those applicable in restricted tendering, for example (in which an ex ante notice of procurement is required to be made public under article 34 (5) of the Model Law), and with other methods involving direct solicitation [**hyperlinks**](#). As noted above, such a notice enables suppliers or contractors to challenge their exclusion from the procurement proceedings on the basis of, for example, an assumption on the part of the procuring entity that the limited number of suppliers or contractors capable of delivering the subject-matter at the second stage does not include the challenging supplier or contractor. Enacting States are therefore encouraged to consider including a requirement for an advance notice in the procurement regulations, or to encourage such a notice in other rules or guidance.

31. Subparagraph (i) requires the information that sets the scope of the second-stage competition to be included in the invitation, a vital transparency requirement. Where the invitation is issued electronically (which must be, for

example, in open framework agreements), procuring entities may wish to incorporate the required restatement of the existing terms and conditions of the framework agreement by hyperlink (i.e. by cross-reference), provided that the link is adequately maintained. The invitation must also include both the terms and conditions of the procurement that are the subject of the competition and further details thereof where necessary. This provision should be read together with articles 59(1)(d)(i) [\[**hyperlink**\]](#) and (61)(1)(c) [\[**hyperlink**\]](#), which require the framework agreement to set out the terms and conditions that may be established or refined through second-stage competition. The flexibility to engage in such refinement is limited by application of article 63 [\[**hyperlink**\]](#) which provides that there may be no change to the description of the subject-matter of the procurement that is governed by article 10, and that other changes may be made only to the extent permitted in the framework agreement. Where modifications to the products, or technical substitutions, may be necessary, they should be foreshadowed in the framework agreement itself, which should also express needs on a sufficiently flexible and functional basis (within the parameters of article 10 [\[**hyperlink**\]](#)) to allow for such modifications. Other terms and conditions that may be refined include combinations of components (within the overall description), warranties, delivery times, and so forth. The balance of allowing sufficient flexibility to permit the maximization of value for money and the need for sufficient transparency and limitations to avoid abuse should form the basis of guidance to procuring entities in this aspect of the use of framework agreements.

32. Subparagraph (ii) requires a restatement of the procedures and criteria for evaluation of submissions, as originally set out in the framework agreement. Again, this provision is aimed at enhancing transparency, and should be read together with articles 59(1)(d)(iii) [\[**hyperlink**\]](#) and 61(1)(f) [\[**hyperlink**\]](#), which allow the relative weights of the evaluation criteria (including sub-criteria) to be varied within a range set out in the framework agreement itself. Appropriate evaluation criteria and procedures at this second stage are critical if there is to be effective competition, objectivity and transparency, and their importance and application are explained in the guidance to article 59 above (see paragraphs [** \[**hyperlink**\]](#)).

33. Paragraph (4)(c) is derived from the general requirements in article 11(6), requiring objectivity and transparency in the evaluation of submissions by not permitting any previously undisclosed criteria or procedures to be applied during the evaluation.

34. Paragraph (4)(d) recalls the requirements of article 22 [\[**hyperlink**\]](#) regarding notices and associated formalities when the successful submission is accepted (for guidance on those provisions, see ... above). The notice provisions would require that the price of each purchase be disclosed to the suppliers or contractors that presented second-stage submissions, so as to facilitate any challenge by unsuccessful suppliers or contractors. It is considered to be good practice to give notice to unsuccessful parties to the framework agreement, such as by individual notification in electronic systems or, in paper-based closed framework agreements without large numbers of participants, as well as by a general publication. In the context of framework agreements, this manner of notification is not only efficient, but can be effective where repeated procurements can benefit from improved submissions, particularly when the notices are accompanied by explanations of why the submissions were unsuccessful or by debriefing procedures. The requirements of article 22, requiring publication of the award, also apply

(allowing smaller purchases to be grouped together for publicity purposes, as set out in that article and discussed in the accompanying guidance).

Article 63. Changes during the operation of the framework agreement

35. This article is intended to ensure objectivity and transparency in the operation of the framework agreement. It first provides that there can be no change in the description of the subject-matter of the procurement, because allowing such a change would mean that the original call for participation would no longer be accurate, and a new procurement would therefore be required. The need for flexibility in the operation of framework agreements, such as permitting refinements of certain terms and conditions of the procurement during second-stage competition, means that changes to those terms and conditions (including to the evaluation criteria) must be possible. The article therefore provides that such changes are permitted, but only to the extent that they do not change the description of the subject-matter of the procurement, and with the transparency safeguard that changes are possible only to the extent permitted in the framework agreement. (This policy objective — ensuring objectivity and transparency in the procurement process — also underlies the provisions of article 15(3) [\[**hyperlink**\]](#), which require a re-advertisement of the procurement and an extension of the submission deadline where the solicitation documents are modified to the extent that there is a material inaccuracy in the original advertisement.)

36. As a result, the description of the subject-matter of the procurement will commonly be framed in a functional or output-based way, with minimum technical requirements, so as to allow for product modifications or technical substitutions as described in the guidance to the previous articles of this chapter [\[**hyperlinks**\]](#). Whether this approach is appropriate will depend on the nature of the procurement itself, as explained in paragraphs ** of the commentary in the Introduction to this Chapter [\[**hyperlink**\]](#) and in the commentary to article 59 above [\[**hyperlink**\]](#). There is a risk of abuse in both allowing broad and generic specifications, and in permitting changes; the framework agreement may be used for administrative convenience beyond its intended scope, allowing non-transparent and non-competitive awards of procurement contracts. Furthermore, this lack of transparency and competition will also have the potential significantly to compromise value for money in those awards. The regulations, or rules and other guidance should therefore address these risks and appropriate measures to mitigate them in some detail.