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Report of Working Group I (Procurement) on the work of its eleventh session

(New York, 21-25 May 2007)

Contents

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to tenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, and Vienna, 25-29 September 2006, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595 and A/CN.9/615), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects. At its tenth session, the Working Group came to preliminary agreement on the draft revisions to the Model Law and the Guide to Enactment to the Model Law (the "Guide") that would be necessary to accommodate the use of electronic communications and technologies (including ERAs) in the Model Law. At that session, the Working Group decided that at its eleventh session it would proceed with further consideration of those draft revisions (A/CN.9/615, para. 11).

3. At its seventh, eighth and tenth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its tenth session, the Working Group requested the Secretariat to propose the appropriate location for the provisions on ALTs, taking into account that the issue should not be limited to tendering proceedings, and that risks of ALTs should be examined and addressed by the procuring entity at any stage of the procurement, including through qualification of suppliers (A/CN.9/615, para. 75).

4. At its tenth session, the Working Group also took up the topic of framework agreements and requested the Secretariat to prepare drafting materials for the Model Law on the use of framework agreements (A/CN.9/615, para. 11). At the same session, the Working Group considered the recommendation by the Commission at its thirty-ninth session that the Working Group, in updating the Model Law and the

Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, para. 11).

5. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, and A/61/17, para. 191).

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its eleventh session in New York, from 21 to 25 May 2007. The session was attended by representatives of the following States members of the Working Group: Canada, Chile, China, Colombia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Kenya, Lithuania, Mexico, Nigeria, Pakistan, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Thailand, Turkey, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

7. The session was attended by observers from the following States: the Democratic Republic of the Congo, Holy See, Honduras, Indonesia and Lao People's Democratic Republic.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Office of Legal Affairs and the World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), European Commission, European Space Agency (ESA), International Development Law Organization (IDLO) and the World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Working Group*: International Bar Association (IBA), International Law Institute (ILI) and the European Law Students' Association (ELSA).

9. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.49);

(b) Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders: note by the Secretariat (A/CN.9/WG.I/WP.50);

(c) Drafting materials for the use of electronic reverse auctions in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.51);

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

(e) Issues arising from the use of suppliers' lists, including drafting materials: note by the Secretariat (A/CN.9/WG.I/WP.45 and Add.1) (the consideration of the note was deferred to a future session at the previous two sessions of the Working Group (see A/CN.9/595, para. 9, and A/CN.9/615, para. 10)).

11. The Working Group adopted the following agenda:

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

III. Deliberations and decisions

12. At its eleventh session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 10 above (WP.50 and 51) as a basis for its deliberations. The Working Group held a preliminary exchange of views on document A/CN.9/WG.I/WP.52 and decided to consider the document in depth at its next session. It also deferred consideration of documents A/CN.9/WG.I/WP.45 and Add.1 and WP.52/Add.1 to a future session.

13. The Working Group requested the Secretariat to revise drafting materials contained in documents A/CN.9/WG.I/WP.50 and 51, reflecting the deliberations at its eleventh session, for its consideration at the next session. The Working Group noted that any time frame to be agreed for the completion of the project should take into account the time necessary to consider and address issues of conflicts of interest in revisions to the Model Law and the Guide. It was mentioned that the issue of conflicts of interest was an important issue in public procurement and it was recalled that at its tenth session the Working Group agreed to consider this issue as part of its current review of the Model Law and the Guide (A/CN.9/615, paras.11 and 82-85).

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

A. Draft provisions addressing the use of electronic communications in public procurement (A/CN.9/WG.I/WP.50, paras. 4-42)

1. Communications in procurement: article [5 bis] (A/CN.9/WG.I/WP.50, paras. 4-21)

14. The Working Group confirmed its understanding that revisions to the Model Law and the Guide should be drafted in technologically neutral terms and that they should not, for example, specify or encourage any particular method of authentication. They should also impose essentially equal requirements on both the paper-based and the electronic procurement environment. Reference in this context was made to some provisions of the Guide, such as paragraph 3 of the commentary to article 30 (regarding the submission of tenders), which specified that, in the use of alternatives to traditional means and forms of submission, at least a similar degree of authenticity, security and confidentiality should be provided.

15. As regards paragraph (1) of the draft article, the Working Group decided to replace the words “described in” with the words “required by”, so as to limit the breadth of the provision. It was also agreed to retain the general reference in the paragraph to chapter VI of the Model Law (addressing Review), but with an explanation in the Guide that the article was intended to cover only information generated and communicated in the course of procurement. This provision would therefore exclude communications generated in court proceedings and in those administrative proceedings that may fall outside the scope of the Model Law.

16. As regards paragraph (2), it was agreed that the reference in the paragraph to article 12 (3) should be deleted, so that notice of the rejection of all tenders, proposals, offers or quotations would have to be communicated to all suppliers or contractors concerned in a form specified in paragraph (1). Noting the interdependence of paragraphs (1) and (2), it was also suggested that paragraph (2) should be expanded to cover any communication of information in a procurement that was generated other than pursuant to a requirement of the Model Law. It was also observed that all language versions of the text should refer to the obligation of a procuring entity to specify the means by which any requirements for writing, or for signature, or for both should be satisfied.

17. As regards paragraph (3), the Working Group agreed to add the words “for the purpose of procurement covered by this Law” after the word “shall”, to avoid the inadvertent application of the article to contract administration. The view was expressed, however, that such an addition might be superfluous in the light of clearly defined scope of the Model Law, which excluded the contract performance phase of procurement. In this regard, it was observed that the text would be reviewed in due course to ensure that there was no ambiguity in the reference to “procurement”.

18. As regards paragraph (4), it was agreed to replace the word “among” with the word “by”.

19. As regards paragraph (5), while agreeing to retain the wording proposed, the Working Group requested the Secretariat, in preparing an accompanying text for the Guide, to make it clear that the requirement to secure the confidentiality of information would not apply to information that was intended to be made public under the Model Law.

20. With reference to paragraph 17 of the working paper, it was mentioned that the suggestion to use a definition instead of enumerating the list was a good idea. However, it was considered premature to make changes given that the text was not set.

2. Electronic submission of tenders: article 30 (5) (A/CN.9/WG.I/WP.50, paras. 22-29)

21. As regards subparagraph (a)(ii), it was agreed that the requirements should address "authenticity" and "security" in addition to "integrity" and "confidentiality" in the text, with explanation in the Guide of the meaning of each term in the context of that subparagraph.

22. As regards subparagraph (b), in response to the suggestion that the words "on request" should be deleted, concern was raised that the procuring entity might not be in a position in all cases to provide to a supplier or contractor a receipt showing the date and time when the tender was received (for example, when suppliers put tenders in a designated tender box without the procuring entity being aware of the submission). The view prevailed that since the policy objective in revisions of the Model Law and the Guide was to promote best practice, procuring entities should be required to provide to suppliers or contractors a receipt showing the date and time when the tender was received, in particular in the light of the importance of this information in review proceedings. The Working Group agreed therefore to delete the words "on request".

23. As regards subparagraph (c), it was agreed that the text should include a requirement to preserve "security" in addition to "integrity" and "confidentiality", with explanation in the Guide of the meaning of each term in the context of that subparagraph. Recognizing that the procuring entity could not generally preserve security, integrity or confidentiality before the receipt of tenders, it was also agreed that the phrase "from the time as determined by the procuring entity, but in no case later than the time of its receipt" should be deleted. Concern was raised that the reference to "authenticity" appeared in subparagraph (a)(ii) but not in subparagraph (c). It was argued that "authenticity" could only be ensured by the supplier and therefore the reference to "authenticity" should only appear in subparagraph (a)(ii).

24. The Working Group was informed that, in practice, in some cases, the precise time of receipt of paper-based tenders was not recorded, and recalling that more onerous requirements should not be placed on electronic submission, the Working Group considered how the time of receipt should be established and recorded. The Working Group noted that UNCITRAL Working Group IV (Electronic Commerce), when it worked on a draft convention on the use of electronic communications in international contracts, had encountered difficulties in defining the time of receipt of electronic communications. Recognizing that the characteristics of the electronic environment made it difficult to establish the time of receipt with precision, the

solution adopted in the United Nations Convention on the subject[1] was that the time of receipt of an electronic communication would be the time when an electronic communication became capable of being retrieved, presumed to be when it reached the addressee's electronic address.[2] It was agreed, therefore, that an element of discretion could be given to the procuring entity to establish the degree of precision to which the time of receipt of tenders submitted electronically would be recorded, and that the Guide should elaborate on that point.

3. Presence at the opening of tenders: article 33 (2) (A/CN.9/WG.I/WP.50, paras. 30-32)

25. The Working Group agreed with the proposed provisions in paragraph 30 of the working paper. It was also suggested that the Guide should note, as an example of the efforts to harmonize procurement texts, that the proposed text was consistent with similar provisions in other international instruments (such as World Bank procurement guideline 2.45[3]).

4. Publication of procurement-related information: article 5 and the publication of information on forthcoming procurement opportunities (A/CN.9/WG.I/WP.50, paras. 33-42)

Article 5

26. As regards paragraph (1), the Working Group agreed to replace the word "directives" with the words "other legal texts".

27. As regards paragraph (2), the Working Group agreed to open the paragraph with the phrase "notwithstanding the provisions of paragraph (1) of this article", to clarify that no category of text was intended to be included in both paragraphs, and to replace the proposed wording with the text reading "judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be."

28. The Working Group noted that all language versions of the proposed provisions should be aligned so that to draw a clear distinction between notions of making information accessible to the public (paragraph (1)) and making it available to the public (paragraph (2)).

29. It was agreed that the Guide should explain that, depending on legal traditions of enacting States, interpretative texts of importance to suppliers or contractors might be covered by either paragraph 1 or paragraph 2 of article 5, and the Secretariat was requested to address in this regard whether the phrase "judicial decisions and administrative rulings" would be sufficiently broad to cover all intended decisions and rulings.

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[1] "United Nations Convention on the Use of Electronic Communications in International Contracts." General Assembly resolution 60/21, annex.

[2] Ibid., article 10 (2).

[3] See in the "Guidelines Procurement under IBRD Loans and IDA credits", May 2004, revised 1 October 2006, available as of the date of this report at http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-10-06-ev1.doc.

Publication of information on forthcoming procurement opportunities

30. As regards proposed provisions on the publication of information on forthcoming procurement opportunities, contained in paragraph 37 of the working paper, the Working Group agreed: (i) to keep the word "promptly" without square brackets; and (ii) to split the provisions in two sentences. The understanding was that the Secretariat should propose wording for the second sentence that would provide that publication of information on forthcoming procurement opportunities did not oblige the procuring entity to solicit tenders, proposals, offers, quotations or bids in relation to the publicised procurement opportunities.

31. As regards the location of the provisions, it was suggested that provisions should be placed in the beginning of the Model Law, as paragraph (3) of article 5, and the Secretariat would change the title of article 5 to reflect the addition of a new paragraph.

32. It was agreed that the Guide should note that publication of information on forthcoming procurement opportunities was optional, and in that context enacting States might wish to provide for publication of such information for procurements above a certain value.

B. Draft provisions addressing abnormally low tenders (A/CN.9/WG.I/WP.50, paras. 43-49)

Article 12 bis

33. The suggestion was made that the last sentence in the proposed paragraph 13 of the accompanying Guide text (A/CN.9/WG.I/WP.50, para. 49) should be removed from the Guide text and its substance should be reflected in draft article 12 bis. One proposal was that an amended extract from that sentence reading "the solicitation documents or other documents for solicitation of proposals, offers, quotations or bids shall include an explicit statement that a procuring entity may carry out analyses of potential performance risks and prices submitted" should be placed as a new paragraph (1) (a) of draft article 12 bis. Another proposal was that, in order to align draft article 12 bis (1) with provisions of article 12 (1) of the Model Law, paragraph (1) should be supplemented with a new subparagraph (a) reading: "[provided that] the procuring entity has specified the right to do so in the solicitation documents or in any other documents for the solicitation of proposals, offers or quotations."

34. It was explained that the proposals were not intended to affect the right of the procuring entity to reject a tender under other articles of the Model Law or disqualify a supplier or contractor under articles 6 and 7 of the Model Law. The intention of the proposal was to require the express reservation of the right to reject an ALT under article 12 bis in the solicitation or equivalent documents.

35. Concerns were expressed about this proposal, in that in many jurisdictions and as a matter of general contract law, the procuring entity's right to reject a tender or offer, whether on the ground that the price suggested was abnormally low or any other ground, was unconditional and remained so up to the time when the tender or offer was accepted by, and therefore became binding on, the procuring entity.

36. It was also suggested that article 12 (1) of the Model Law, in which the same precondition was imposed regarding the rejection of all tenders, should be reconsidered. For example, the article could provide that, while no obligation should be imposed on the procuring entity to reserve the right to reject all tenders in the solicitation or equivalent documents, the procuring entity should be required to justify its grounds for rejection of all tenders if it did not do so. Objections were raised to the suggestion that the Working Group should consider such revisions to article 12 of the Model Law, as its approach represented a previously-negotiated and delicate balance between main legal systems, and should not be disturbed.

37. The Working Group decided to defer consideration of article 12 (1) to a later stage and to focus on the provisions of draft article 12 bis.

38. The first suggestion referred to in paragraph 33 above was subsequently amended by replacing the word "shall" with "may" or "should", so that there was no requirement to reserve the right to reject ALTs in the solicitation documents. It was also proposed to locate the amended wording as a new paragraph (2) of draft article 12 bis. The desirability of including such a permissive provision in the Model Law was however questioned.

39. The Working Group decided to consider both suggestions, the first as amended (see the immediately preceding paragraph) and the second as originally proposed (see paragraph 33 above), at its next session.

40. Another suggestion for the draft article was to add as an opening phrase to paragraph (1) the words similar to the ones found in article 12 (1) "(Subject to approval by … (the enacting State designates an organ to issue that approval))". The view prevailed however that no such wording should be included, in particular in the light of the Working Group's previous decision on that issue at its eighth session and of the reasons for that decision (A/CN.9/590, para. 109 (iii)).

41. The Working Group agreed that subparagraph (a) should be amended to make it clear that requests under that subparagraph were addressed to the supplier or contractor concerned.

Guide to Enactment

42. The Working Group agreed to make the following amendments to the draft text for the Guide that appeared following paragraph 49 of A/CN.9/WG.I/WP.50:

(a) To add the words "and it must substantiate its decision if it decides to reject a tender" at the end of the second sentence in paragraph (4), so as to ensure that the procuring entity's concerns and reasons for those concerns would be recorded in writing;

(b) That the text in paragraph (8) in square brackets, qualifying the term "realistic", should be deleted, because the qualification as drafted did not reflect the meaning of the term (whether or not there was a material performance risk). However, the Working Group agreed that some explanation of the term "realistic", by reference to the constituent elements of the tender that would be evaluated as described in paragraph (7), should be included;

(c) That the last sentence of paragraph (9) should be deleted.

43. Also, as regards paragraph (9), it was noted that, should a supplier or contractor fail to provide the clarifications requested, the concerns of the procuring entity regarding potential performance risk would inevitably persist, giving a reason to the procuring entity to reject an ALT under subparagraph (b). It was noted however that the procuring entity would be obliged in any case to look at other, perhaps circumstantial information. The Working Group did not consider that further additions to the text would be necessary to reflect this point.

44. As regards paragraph (11), it was observed that the draft text at the end of the paragraph envisaged guidance on the operation of review proceedings in the context of a rejection of an abnormally low tender, but no text was currently included pending a decision of the Working Group as to whether a decision to reject an abnormally low tender would be subject to review.

45. The Working Group therefore considered whether such a decision should indeed be subject to review. It recalled that, at its sixth session, the Working Group had decided on a preliminary basis that the list of exclusions from review contained in article 52 of the current Model Law text should be deleted (one effect being that a decision to reject all tenders under article 12 would then be subject to review). The importance of a consistent approach as regards the decisions within procurement that should be subject to review was also stressed, and thus it was observed that there should be a presumption that all stages of the procurement, including a decision to reject an ALT, should be subject to review.

46. The Working Group heard that many jurisdictions currently subjected any decision to reject an ALT to review, and that in some systems, a request for review could lead to the suspension of the procurement pending the outcome of the review. Noting that, by contrast with a rejection of all tenders under article 12, the rejection of an ALT would not of itself interrupt the procurement, some concern was expressed that suspension in the case of an ALT could unnecessarily interfere in the procurement. Further, it was noted that care should be taken to avoid any review taking the form of a de novo consideration as to whether or not the tender was abnormally low.

47. Observing that these issues would arise when considering article 52 and the review process as a whole, the Working Group decided to continue its deliberations in the context of its review of article 52 in due course. Those deliberations would proceed on the basis that there was wide support for the principle that a decision to reject an ALT should be subject to review.

48. As regards paragraph (12), the Working Group noted the educational purpose of the provisions contained therein. The Secretariat was requested to reconsider the paragraph in the light of the distinct issues it addressed, such as assessment of qualifications of suppliers or contractors and evaluation of tenders. It was suggested that appropriate cross-references to the relevant provisions of the Model Law and sections of the Guide might be included.

49. As regards paragraph (13), it was agreed that the last sentence of the paragraph should be removed in the light of the relevant amendments proposed to draft article 12 bis (see paragraphs 33 to 39 above).

C. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law (A/CN.9/WG.I/WP.51)

1. General comments

50. The importance of the Working Group's work on ERAs was highlighted. It was mentioned that in the absence of detailed regulation of the subject at national, regional or international level, UNCITRAL should set the standard in the use of that procurement technique, which could then be used internationally. It was noted that detailed regulation of the subject at an international level would benefit both jurisdictions that were experienced in the use of that procurement technique as well as those jurisdictions that were considering introducing it.

51. The Working Group noted general provisions on the subject included in the revised (December 2006 version) Agreement on Government Procurement of the World Trade Organization.[4] The point was made that since those provisions were formulated as general principles, they would benefit from the detailed guidance that UNCITRAL could provide.

2. Conditions for the use of electronic reverse auctions: draft article 22 bis (A/CN.9/WG.I/WP.51, paras. 6-13)

52. The view was shared, in the light of the novelty of ERAs and regulation in the field, that an article on conditions for the use of ERAs should establish the essential minimum conditions. So doing would allow both jurisdictions not familiar with the procurement technique properly to introduce and to use it, and would not prevent those jurisdictions that were already using the technique to continue with and refine its use.

53. The Working Group agreed: (i) to replace in the chapeau of the draft article the word "circumstances" with the word "conditions"; (ii) to keep subparagraphs (a) and (b) in the text of the Model Law but to remove subparagraph (c) to the Guide, with an explanation of the meaning of "construction and services of a simple nature"; (iii) to highlight in the Guide (with a possible cross-reference to article 16 (2)) the need for the procuring entity, in formulating detailed and precise specifications for the goods[, construction or services], to use the relevant objective technical and quality characteristics of the goods[, construction and services] procured; and (iv) amend subparagraph (d) to read as follows "Where the price is the only criterion to be used in determining the successful bid. The procurement regulations may establish conditions for the use of electronic reverse auctions in procurement where other criteria that can be expressed in monetary terms may be used in determining the successful bid." (For further drafting suggestions made to draft article 22 bis, see paragraphs 62 (b) and 69 to 72 below).

54. The understanding in the Working Group was that subparagraph (d) as amended was intended to provide for two versions of ERAs: those in which price was the only criterion to be used by the procuring entity in determining the successful bid (referred to as alternative A in paragraph 18 of the working paper)

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[4] See articles I (e) and XIV of the revised text. The revised text has been circulated among all WTO members as document GPA/W/297, available as of the date of this report at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

and those in which non-price criteria were evaluated at a pre-auction stage (referred to as alternative C in the same paragraph). The Working Group's attention was drawn to an example of regulation in one state that followed this formulation. No consensus was reached on whether the Model Law or the Guide should provide for alternative B as it stood. Concerns were expressed that alternative B contained inherently non-transparent mechanisms for the expression of non-price criteria in monetary terms (for their subsequent automatic evaluation through the auction). However, some delegates shared the view that, in order to preserve flexibility and given the different procedural consequences of the two alternatives, elements of alternative B should be retained in alternative C. (For further discussion of the relevant provisions, see paragraphs 63 to 72 below).

55. Doubts were expressed as to desirability of retaining references to construction and services in the text of the draft article. The view prevailed however that, as was agreed at the previous session (A/CN.9/615, para. 41), such references should be maintained in the text in square brackets, and the Guide would elaborate on the advantages and concerns that might arise in the use of ERAs for construction and services procurement.

56. The point was also made that referring to a requirement to ensure effective competition only in the context of ERAs (subparagraph (b)) might imply that similar considerations were not valid in the context of other procurement methods or techniques. The Working Group agreed to revisit the issue at a future time.

3. Procedures in the pre-auction and auction stages: draft articles 51 bis to septies (A/CN.9/WG.I/WP.51, paras. 14-59)

Draft article 51 bis. General provisions (A/CN.9/WG.I/WP.51, paras. 14-18)

57. The view was expressed that the draft article should be amended so as to provide for the use of ERAs only as a stand-alone procurement method, with explanation in the Guide that ERAs could be used in conjunction with some procurement methods. It was pointed out that the use of ERAs in some procurement methods referred to in the draft article as well as in tendering proceedings would be inappropriate due to the particular characteristics of those procurement methods (such as prohibition in tendering proceedings of substantive modification of tenders after their submission). It was also stated that the lack of practical experience with regulation and use of ERAs as a phase in procurement methods made regulating such use difficult, and the Guide should alert enacting States accordingly. It was noted that ERAs could more appropriately be envisaged in framework agreements.

58. Concerns that ERAs could be used in all procurement methods referred to in the draft article were shared. It was, however, pointed out that the agreement reached at the previous session (A/CN.9/615, para. 50) was that ERAs could be used not only as a stand-alone procurement method but also in conjunction with existing procurement methods, as and when appropriate. The importance of preserving flexibility in that regard was stressed. In response to concerns about the lack of practical experience with regulation and use of ERAs as a phase in procurement methods, it was stated that UNCITRAL, as part of its mandate to harmonize and modernize the law of international trade, should not only codify existing practices but should also contribute to their development.

59. Some support was expressed for the suggestion to delete the draft article as it did not add anything to the provisions in immediately following articles 51 ter and quater. Another suggestion was that, instead of specifying in which procurement methods ERAs might be used, the draft article should provide for their possible use in other procurement methods set out in the Model Law, as might be appropriate in the light of the conditions for use of those procurement methods and ERAs. Alternatively, the provisions could cross-refer to the articles that would define such methods.

60. The Working Group noted the experience of some jurisdictions in regulating ERAs and their practical use in various ways, including as a phase in procurement methods. Particular reference in this regard was made to the note by the Secretariat containing a study on the topic (A/CN.9/WG.I/WP.35 and Add.1).

61. The Working Group decided to defer its consideration of the draft article to a later stage. (For further discussion, see paragraph 77 below).

Draft article 51 ter. Pre-auction procedures in stand-alone electronic reverse auctions (A/CN.9/WG.I/WP.51, paras. 19-34)

62. The following drafting suggestions were made:

(a) In paragraph (1), to cross-refer to article 24 of the Model Law;

(b) In subparagraph (b) of paragraph (2), to retain only those elements of information regarding the evaluation process that were essential to ensure transparency and predictability in the process. It was agreed that the subparagraph would provide that the notice of an ERA should include a statement of the criteria to be used by the procuring entity in determining the successful bid, such as whether price and other criteria would be so used, or price alone, and the relative weight assigned to the criteria. The notice would also state explicitly which, if any, of the non-price criteria would be evaluated prior to the auction and would not subsequently be varied during the auction itself, and the mathematical formula that would be used in the evaluation procedure. It was also agreed that non-essential elements should be reflected elsewhere, such as in draft article 22 bis to supplement subparagraph (d) (see further paragraphs 69 to 72 below);

(c) To delete subparagraph (c) in paragraph (2). In this regard, a reference was made to subparagraph (j) that referred to rules for the conduct of the ERA (which should contain the information referred to in subparagraph (c)). The view prevailed that subparagraph (c) should remain since the rules for the conduct of the ERA might not necessarily contain such information, which was considered important for ensuring adequate competition and transparency in the process;

(d) In subparagraph (f) of paragraph (2), to replace the phrase the "[website or other electronic] address" with the word "location" and to refer to the website or other electronic address as examples of the location at which the ERA may be held in the Guide. Various alternatives were suggested for the opening phrase of that subparagraph, including "electronic site" and "where the electronic reverse auction will be held". The view prevailed that the beginning of paragraph 2 (f) should read "how the electronic reverse auction can be accessed";

(e) To replace the word "known" in subparagraphs (g), (h) and (i) of paragraph (2) with the word "determined". This suggestion was accepted. However,

the point was made that some information referred to in these subparagraphs should be determined and made known to suppliers or contractors by the procuring entity at the beginning of the procurement proceedings (i.e., in the notice of the ERA) and therefore the use of the phrase "if already determined" with reference to this kind of information might not be appropriate. The Secretariat was requested to reformulate the paragraphs, so that information that should be determined at the beginning of the procurement proceedings be expressly included without qualification;

(f) To merge subparagraphs (j), (k) and (l) of paragraph (2) to read as follows: "The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid." The proposal was accepted; and

(g) To delete paragraph (9). The view however prevailed that the paragraph should remain as an important element in ensuring predictability, objectivity and transparency in the process, and as a safeguard for suppliers or contractors against possible improprieties by procuring entities (such as manipulating the date and time of the auction opening to favour some suppliers).

63. In the context of consideration of paragraph 2 (b), various proposals were heard, including that provision should be made for price-based ERAs only in the Model Law (discussing the potential use of more complex ERAs only in the Guide) (alternative A); for price and non-price based criteria that would be evaluated only during the auction (alternative B); and making provision for price and non-price based ERAs, but the non-price based criteria could be evaluated either before or during the auction (alternative C). The Working Group was informed that there were no known examples of alternative B in systems that had been reviewed to date.

64. The Working Group recalled that one aim of the draft provisions contained in the working paper was to enable enacting States to select one of the three alternatives. The potential benefits and disadvantages of each alternative were discussed, with emphasis on the need to ensure adequate competition and transparency in the operation of ERAs, to avoid potential abuse, and to reflect and provide for best practice in the light of limited experience.

65. Concerns were reiterated as regards allowing non-price criteria to be used in ERAs. The Working Group noted the cautious approach taken by the World Bank towards ERAs, especially towards allowing the use of any non-price criteria in ERAs and using that tool for types of procurement beyond procurement of simple standardized goods. The point was made that in a Guide text accompanying provisions of the Model Law on ERAs, these concerns and grounds for them should be stressed.

66. The prevailing view was that both price and non-price criteria could be used in ERAs under the Model Law, in such a manner that enacting States could select any or both alternatives. (It was noted that the Guide would present the advantages and disadvantages of each option or recommend the use of ERAs where price was the only award criterion, or both. No consensus on this point being reached at this session, the Working Group agreed to reconsider the question at its next session.) It was also observed that it would not be necessary to separate the alternatives, and to provide for conditions for the use of price only and price and non-price based ERAs in one place would be a better approach.

67. It was emphasized that the Guide would need to provide detailed and practice-based guidance on the selection of appropriate alternatives for any enacting State. The Guide should explain what each variant of ERA entailed (advantages, disadvantages, challenges and the required level of expertise and experience, for example properly to factor any non-price criteria in a mathematical formula) and the risks of introducing subjectivity into the process. It was pointed out that more complex ERAs would require the higher level of expertise and experience in dealing with them in an enacting State and its procuring entities. Even those procuring entities that were supervising activities of third party service providers handling ERAs on behalf of procuring entities would require such expertise and experience.

68. As regards the use of ERAs involving non-price criteria, it was agreed that it was critical to ensure in the Model Law's provisions that the criteria should be transparent and objective, and transparently and objectively applied, and thus that they should be quantifiable and expressed in monetary terms. In addition, it was stressed that the provisions for ERAs should note that in the ERAs involving non-price criteria, price would always remain one of the determining criteria, so that ERAs could never be based on other criteria alone and the price would always be subject to the auction. The view was expressed that definition of an ERA (for example drawing on that in the GPA) might be included to reflect this point. Recalling the consensus in the Working Group reached at the previous session that no such definition should be included in the Model Law, the Working Group decided to consider at a later stage whether an express reference in the provisions governing the conduct of the auction itself (draft article 51 sexies) would be sufficient.

69. Accordingly, it was agreed that the conditions in draft article 22 bis (d) for use of ERAs should be revised, to provide that ERAs could involve either the price as the only evaluation criterion or price and other criteria. It was noted that it would have to be determined in advance (and fully reflected in the notice of the ERA to be published) whether the ERA would be price-based or price and other criteria-based, and whether all, some or none of those non-price criteria would subsequently be evaluated in the auction itself. The determination would also include the identification of all other non-price criteria concerned, and the relative weight of all such criteria (including the criteria used to determine the weighting, to be expressed in an objective manner and in monetary terms).

70. It was queried whether the conditions for use should require the submission of initial bids for all ERAs in which both price and non-price criteria would determine the successful bid. This question was subject to lengthy discussion, focusing on the two ways in which the non-price criteria could form part of the determination of the successful bid: that is, as criteria that could be evaluated during the auction or as criteria that were evaluated prior to the auction. It was agreed that initial bids would naturally be required in the latter case, and that the evaluation prior to the auction might lead to a ranking of the bids.

71. Views, however, differed as to whether there was a real benefit to a pre-auction evaluation if all criteria would subsequently be evaluated during the auction. On the one hand, it was said that such an evaluation would be an important step in ensuring the transparency of the application of the criteria and weightings, as it would be followed by a notice to each bidder of the results of that evaluation (the results including whether the bidder was qualified for the ERA, whether the initial

bid was responsive, and, if relevant, any ranking or scoring of the bid). This procedure would enable a challenge or review of the criteria or their application before the auction took place. On the other hand, certain delegations expressed the view that there was little real benefit if suppliers could change all elements of their bids during the auction.

72. Noting also that the 2004 European Union procurement directives required the submission of initial bids, their evaluation and the subsequent advising of bidders of the outcome of that evaluation,[5] the prevailing view was that the use of any ERA involving both price and non-price criteria should be subject to the condition that initial bids should be submitted and evaluated, and the results should be communicated to each supplier or contractor concerned. The Working Group therefore decided that conditions in draft article 22 bis (d) should also contain this requirement. It was also recalled that a critical anti-abuse feature of ERAs was that the anonymity of bidders should be preserved throughout the process, and therefore the results of the evaluation of each bid would be communicated only to the bidder concerned.

73. The Working Group agreed to delete the words "or partial" before the word "evaluation" in paragraphs (2) (e)(ii), and 6 (c). It also agreed to replace the reference to two working days in paragraph (9) with a reference to "adequate time, which is sufficiently long to allow suppliers or contractors to prepare for the auction," as suggested in the end of paragraph 34 of the working paper.

Draft article 51 quater. Pre-auction procedures in procurement by means of restricted tendering, competitive negotiation or request for quotations (A/CN.9/WG.I/WP.51, paras. 35-37)

74. The view was generally shared that the draft article should not refer to any specific procurement method set out in the Model Law in which ERAs might be used as the manner of determining the successful bid. It was preferred that the article should state generally that, as long as the objectives of the Model Law were preserved, and conditions and procedural requirements both for the use of ERAs and for the use of procurement methods set out in the Model Law were compatible, ERAs might be used in those procurement methods.

75. The view was reiterated that, in the absence of sufficient experience in regulating ERAs and their use as a phase in procurement methods, a flexible approach, and regulation at the general level, would be appropriate. Otherwise, it was stated, regulations formulated in unnecessarily prescriptive terms or in too much detail might turn out to be unworkable in practice. The point was also made that any explicit exclusion of the use of ERAs in a specific procurement method, or any omission of a reference to any procurement method in which ERAs might be used, might result in incompatibility of the provisions of the revised Model Law and

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[5] See article 56 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and article 54 of Directive 2004/18/EC 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, both available as of the date of this report at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

the Guide with other regional or international instruments that envisaged the use of ERAs in those procurement methods (for example, the 2004 European Union procurement directives that allowed the use of ERAs in open, restricted and negotiated procedures[6]).

76. The Working Group agreed to proceed on this basis. It was also agreed that, in revising the draft article, the Secretariat should retain the requirement that the procuring entity should disclose, at the solicitation stage, the fact that ERAs would be used to determine the successful bid in the procurement proceedings. Recognizing difficulties with introducing ERAs as a phase in some procurement methods, the Guide accompanying the relevant provisions would explain how ERAs might be incorporated in various procurement methods, and which modifications of traditional characteristics of those procurement methods would be needed (an example would be that the current Model Law did not envisage repetitive submission of tenders, offers or quotations, which would have to be adjusted to accommodate the use of ERAs).

77. The Working Group agreed to delete draft article 51 bis as a result of these amendments to draft article 51 quater.

Draft article 51 quinquies. Requirement of effective competition (A/CN.9/WG.I/WP.51, paras. 38-41)

78. Observing that the draft article dealt only with some means that aimed at ensuring effective competition in ERA, the Working Group agreed that the title of the draft article should be changed to read "Requirement of sufficient number of bidders to ensure effective competition."

79. The need for the draft article was questioned since the requirement of effective competition was already included in paragraph (b) of proposed article 22 bis. In response, it was noted that the conditions for use of ERAs contained in draft article 22 bis (b) required the existence of a competitive market as a precondition for the use of the ERA, but did not address how to ensure effective competition during the conduct of the procurement involving the ERA itself. The prevailing view was that the draft article was important and should remain.

80. In response to concerns that the requirement in paragraph (1) was onerous since the procuring entity would not have means to ensure effective competition at all stages of the ERA, it was observed that the paragraph addressed the stage of the procurement at which the procuring entity issued invitations to potential bidders, and therefore it would be within the control of the procuring entity to ensure that the number of suppliers or contractors invited to participate in the auction was sufficient to secure effective competition.

81. It was decided that paragraph (1) should be retained with some amendments to reflect the revisions that would be made to article 51 quater (see paragraphs 74 to 76 above).

82. As regards paragraph (2), it was agreed to replace the term "withdraw" with the term "cancel" since the former was used in the Model Law in a different context (that is, in the context of withdrawal of tenders under article 31). It was also agreed

[6] Ibid.

that the word “shall” in square brackets should be replaced by “may”, to provide flexibility to the procuring entity in dealing with situations where the number of suppliers or contractors registered to participate in the auction was insufficient to ensure effective competition (for example, the procuring entity in such a situation might consider extending a deadline for registration to participate in the auction).

83. Concerns were expressed that the draft article did not address how a procuring entity should proceed if the ERA was cancelled as a result of insufficient number of registered bidders to ensure effective competition. It was suggested that options could be provided in the Model Law, for example that the procuring entity could proceed to negotiate with potential suppliers. Observing that the 2004 European Union procurement directives[7] also did not provide a solution to this issue, and noting that the question involved practical considerations, it was commented that the procuring entity should be afforded some flexibility in this regard and should not be obliged to continue with the procurement in these circumstances. It was stated that the procuring entity might be able to proceed in various ways, all of which could not be envisaged and regulated in the Model Law, and therefore the Guide could illustrate some options and mention that solicitation or equivalent documents might set out any steps that the procuring entity intended to take should the situation arise.

Draft article 51 sexies. Requirements during the auction (A/CN.9/WG.I/WP.51, paras. 42-49)

84. As regards paragraph 1 (c), the Working Group agreed to omit the reference to ranking of the bidders and to refer only to successive results of the auction, which would be the price in ERAs where price was the only evaluation criterion, or otherwise the outcome, expressed in a figure, of the application of the pre-disclosed evaluation criteria (including the mathematical formula). It was agreed to replace the phrase “[according to the pre-disclosed formula]” with the phrase “according to pre-disclosed evaluation criteria”.

85. As regards paragraph (2), the Working Group agreed to delete the sentence in the square brackets that referred to articles 33 (2) and (3) of the Model Law, which referred to tendering proceedings and would no longer be relevant. As regards the issue in the same paragraph on whether the anonymity of bidders should be preserved after the auction, the view prevailed that the paragraph should be redrafted to reflect the following understanding of the Working Group: (i) the anonymity of bidders had to be preserved during the auction, and in the case of suspension or termination of the auction; and (ii) where the auction was successful and the winner known, the name of the winner and its address as well as information about the winning price would have to be communicated to other bidders, as envisaged in paragraph (3) of draft article 51 septies.

86. Views varied as to the practical value of the disclosure of the names of other bidders after the closure of the auction. Reference in this regard was made to articles 11 (1) and (2) of the Model Law, in which it was provided that this type of information was to be reflected in the records of procurement proceedings and to be made available to any person on request. The value of disclosing such information

[7] Ibid.

was emphasized as a general matter of transparency in the procurement process, and in particular as a means to verify that the procuring entity had complied with the requirement to ensure effective competition, as envisaged in draft articles 22 bis and 51 quinquies.

87. The view prevailed that the names of all bidders could be disclosed only if such disclosure would not result in the disclosure of price-sensitive commercial information regarding any particular bidder. That latter requirement was considered to be especially important for preventing collusion, protecting legitimate commercial interests of the bidders and thus maintaining competitiveness in the market and ensuring the success of future auctions. It was also noted that the introduction of ERAs as a new procurement tool would be successful only to the extent that potential bidders had sufficient confidence in the process, in particular that price-sensitive information about their business would be kept confidential through ERAs; otherwise, it was said, they would be reluctant to take part in procurement proceedings that involved ERAs. These considerations, it was pointed out, should prevail over transparency considerations.

88. It was suggested that the Guide should provide guidance to the enacting State and its procuring entities as regards situations and grounds that would justify keeping information relating to bids confidential. Reference in this regard was made to the provisions of article 11 (3) of the Model Law, which gave exceptions to disclosure of portions of the records of the procurement proceedings relating to detailed information on the examination, evaluation and comparison of submissions, as well as disclosure of records if such disclosure would inter alia inhibit fair competition or would prejudice legitimate commercial interests. It was noted that risks of anti-competitive effect of such disclosure was particularly high when a small number of bidders took part in the ERA.

89. As regards paragraph (4), the Working Group considered whether the provisions should provide for possibility to suspend or terminate the ERA in cases other than system or communications failures. The views were expressed that, in the light of practical experience, suspension might be desirable in the case of suspected abnormally low bids. In such case, it was said, there should be the means available to the procuring entity instantaneously to intervene to the process to prevent any disruptive effect that the abnormally low bid might have on the auction (such a bid might have the effect of preventing other bidders from continuing to participate). The Working Group also took note, with reference to paragraph 49 of the working paper, that complaints from bidders about irregularities in the process might be made, which might also justify suspension of the auction. The Secretariat was requested to redraft the paragraph taking into account these considerations. The view was shared that provisions should be redrafted also to make it clear that the procuring entity was not responsible for failures in the bidders' communication systems, and such failures would not justify the suspension of the ERA.

Draft article 51 septies. Award of the procurement contract on the basis of the results of the electronic reverse auction (A/CN.9/WG.I/WP.51, paras. 50-57)

90. It was noted that the draft article had been prepared on the basis of provisions previously presented to the Working Group, and were intended to be equivalent to those governing the award of the procurement contract, and relevant exceptions, in tendering proceedings.

91. In this regard, it was queried whether the full text of paragraph (1) of the draft article was necessary, or whether, more simply and concisely, references to article 36 and to other relevant articles could be used. In response, it was observed that article 36 applied only to tendering proceedings, and that a separate article on award of contracts in the specific context of ERAs was necessary. It was decided that paragraph (1) should be retained but simplified and shortened to the extent possible, for example by the greater use of cross references rather than a restatement of text that appeared elsewhere in the Model Law.

92. It was observed that the following changes should be made to the text: (i) in the chapeau of paragraph (1), the phrase "ranked first" should be replaced with the phrase "the lowest evaluated bid", to reflect changes proposed to draft article 51 sexies (1) (c) (see paragraph 84 above); and (ii) in paragraph (1) (b), the square brackets around "article 12 bis" should be removed.

93. It was noted that paragraph (2) addressed the options available to the procuring entity should the successful bidder not enter into a procurement contract by reason of the circumstances set out in paragraph (1), and presented a more flexible approach than that previously considered by the Working Group. The Working Group agreed with the flexible approach, noting, however, that the words "second lowest price" and "ranked second" in paragraph (2) (c) should be replaced with the words "next lowest price" and "next lowest evaluated bid", respectively.

94. It was agreed that the practical implications of each option would require elaboration in the Guide. The Working Group considered that the Guide, prior to addressing the options available, should emphasize the need for prompt action where there was any post-auction qualification of the successful bidder or a review of a possible abnormally low bid, so as to ensure that the final position should be determined as soon as reasonably practical.

95. As regards paragraph (3), it was agreed that square brackets therein should be removed and the reference to "accepted bid" should be replaced by the phrase "the bid that the procuring entity is prepared to accept".

96. The Working Group agreed to finalize the wording of the draft article after it had considered revisions to article 36 of the current Model Law in due course.

4. Consequential changes to other provisions of the Model Law (A/CN.9/WG.I/WP.51, paras. 60-69)

97. In the course of discussion of paragraphs 60 to 67 of the working paper, the Working Group agreed that issues related to the content of solicitation documents, period of effectiveness, modification and withdrawal of tenders, bid securities, and examination, evaluation and comparison of tenders, should be addressed in the context of provisions on ERAs as and where appropriate through cross-references to the relevant articles of the Model Law.

98. As regards the specific issue of withdrawal of bidders from the ERA before its closure, the Working Group noted that there might not be readily available solutions to that problem. Blacklisting of suppliers who withdrew was not considered to be a viable option, since it was often not possible to determine the reasons for an early withdrawal and the reasons for such a withdrawal might be justifiable. Recognizing that withdrawal of bidders might have a negative impact on effective competition,

the Working Group considered whether the procuring entity should have the right to suspend or terminate the auction when an insufficient number of bidders participated in the auction. Reference in this regard was made to paragraph (4) of draft article 51 sexies, which could be expanded so as to refer to other justifiable reasons as grounds beyond system or communication failures for the suspension or termination of an ERA. Noting that suspension or termination of an ERA for reasons other than system or communication failure might lead to challenges by affected bidders, and might be counterproductive in preventing last-minute competition (a common feature of ERAs), the view prevailed that draft articles 51 quinquies and septies were sufficient to deal with the issue.

99. As regards the specific issue of bid securities, noting that some jurisdictions required bid securities in the context of ERAs, in particular to alleviate risks of fraudulent bids, and also noting various circumstances that might justify a request for bid security, the Working Group agreed that the Guide should not discourage recourse to bid securities.

100. As regards paragraph 68 of the working paper, the Working Group agreed that the proposed text for the Model Law should be expanded to refer to all information that would have to be included in the record of procurement proceedings in the context of an ERA, which was not expressly mentioned in article 11 (1) of the Model Law. It was suggested in particular that records should contain information about the grounds and circumstances on which the procuring entity relied to justify recourse to the ERA, and the date and time of the ERA. It was also considered justifiable to provide exceptions to disclosure of some type of information under article 11 in the light of specific characteristics of the ERA.

D. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.52)

General comments

101. The Working Group considered the draft provisions to enable the use of framework agreements in public procurement under the Model Law presented in document A/CN.9/WG.I/WP.52, noting in particular the scope of the draft provisions and the approach to drafting contained in that document. It was agreed that the Working Group's deliberations on the topic would be continued at its next session, including on the following issues highlighted as of importance to the debate:

(a) How to provide for appropriate nomenclature for this procurement technique, especially given the different terms used in various jurisdictions and systems;

(b) Whether a framework agreement and/or a purchase order under a framework agreement should constitute the procurement contract under the Model Law. In this regard, it was observed that whether framework agreements themselves would constitute binding contracts would be a question of local law in any particular state, that it would be vital to ensure a common understanding on the optimal solution, and that the terms and conditions of a framework agreement should in any event be clear and transparent. It was also noted that the Guide should discuss the issue in detail;

(c) The related question of whether or not a procuring entity should be able to procure outside the framework agreement, which was noted to be a multi-faceted one, and the different experiences in various jurisdictions would need to be considered;

(d) Whether a multi-supplier framework agreement should take the form of one contract for all suppliers that were parties to the framework agreement, or whether each party should have a separate contract with the procuring entity;

(e) Whether the framework agreement should be open to additional suppliers or contractors during its term; and

(f) Whether provision should be made for a Model 2 framework[8] (normally envisaged to be a multi-supplier agreement) to be concluded with a single supplier, for example in the case of urgent procurement or a catastrophic event.

E. Simplification and standardization of the Model Law

102. The Working Group also considered the question of standardization and simplification of the Model Law by reference to the example of article 36 of the Model Law (noting that article 36 addressed the entry into force of procurement contracts in tendering proceedings). It was noted that the provisions governing the acceptance of successful submissions and the entry into force of the procurement contract (as set out in article 13 of the Model Law) were slightly different under different procurement methods. The need for consistency in these matters was accepted, in particular in the context of introducing ERAs as a possible technique in a variety of procurement methods, and as a method itself. It was also stated that these matters, and perhaps other steps described in the tendering process under the Model Law, might be considered to be issues that should be addressed from the perspective of general rules applicable to all procurement methods. Accordingly, the Working Group agreed that it would consider the steps in the tendering process, including article 36, from this perspective at a future time.

[8] See description of the models of framework agreements in paragraph 6 of A/CN.9/WG.I/WP.52.