INTPA Companion to financial and contractual procedures

applicable to external actions financed from the general budget of the EU and from the 11th EDF

EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR DEVELOPMENT AND COOPERATION

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21 The implementation of works contracts – A users' guide

[The content of this chapter is under the responsibility of Unit INTPA.R.4. The latest update was made in June 2022.]

21.1 Introduction

The user's guide is designed to support staff of the European Commission when implementing procurement contracts in the context of external actions. It is neither an official interpretation of the contract documents, nor does it create any rights or obligations. It is tailor-made for Commission staff and requires knowledge of and experience in internal procedures. It is not intended to provide guidance to contractors or the public.

The general conditions contain the basic articles governing the post-contract-award phase for works contracts.

They may be subject to modification by the special conditions that are part of the contract and that also include the necessary additions to the general conditions. Through these additions and modifications, the special conditions take into account the specific subject matter of the contract as well as the specific circumstances of the project to which the contract relates.

This guide does not deal with every article of the general conditions for works contracts but only with those articles that are considered essential or complex such as to require some further explanations. Furthermore, the standard tender documents and contracts contain several indications, references and proposals for modifying and completing the general conditions through the special conditions.

21.2 Role of the supervisor

The supervisor is employed/contracted by the contracting authority for controlling the progress and execution of the works.

The supervisor is not a party to the contract, and therefore cannot relieve the contractor of any of his obligations except as expressly provided for in the contract.

Depending on the type of contract and the practice in the partner country, the supervisor may be recruited from one of the following sources:

a. institutional, e.g., a ministry, department or agency of the government or contracting authority; or

b. a professional company, firm or natural person engaged under a separate service contract for supervising the works.

The supervisor is largely responsible for the day-to-day technical supervision of the contract. In this capacity, she/he is given the opportunity to exercise his independent professional judgment.

The duties and powers of the supervisor are described in several articles of the general conditions. She/he is responsible for keeping a works register of the progress of the works (Article 39 of the general conditions), and for inspecting and testing components and

materials before incorporation in the works (Article 41 of the general conditions). She/he grants or refuses the contractor's request for extensions of the period of implementation of tasks (Article 35 of the general conditions), she/he can order modifications to the works (Article 37 of the general conditions) and decide on suspension of the works (Article 38 of the general conditions).

The supervisor is required to consult with the contracting authority before reaching conclusions on certain specific matters having financial implications as, for example, extension of the period of implementation of tasks, modifications and claims for additional payment.

The supervisor, while retaining the ultimate responsibility for supervising the works, may appoint a representative and delegate responsibilities to her/him, as she/he considers necessary.

The duties, authority and identity of the supervisor's representative are determined in an administrative order that must be issued at the moment of the commencement order. The role of the supervisor's representative must be to supervise and inspect works and to test and examine the materials employed and the quality of workmanship. Under no circumstances will the supervisor's representative be empowered to relieve the contractor of its obligations under the contract or, save where express instructions to that effect are given in the contract, order works resulting in an extension of the period of implementation of tasks or additional costs to be paid by the contracting authority or introduce variants in the nature or scale of the works (Article 5(2) of the general conditions).

Without in any way diminishing the responsibility of the supervisor for the proper supervision of the works, the appointment of his representative should be subject to the approval of the contracting authority. The contracting authority should also have the power to request the removal/replacement of the supervisor's representative, should she/he prove unsuitable for the task. These powers of the contracting authority are not mentioned in the general conditions as they are a matter to be decided in the relation between the contracting authority and the supervisor (for example, in the context of a service contract) and not in that between the contracting authority and the contractor.

In order to give effect to the appointment of the supervisor's representative, the supervisor is required to notify the contractor (Article 5(2) of the general conditions). She/he should also be required to notify the contracting authority, although again this is not mentioned in the works contract. The supervisor must also inform the contractor of the responsibilities that she/he has delegated to the supervisor's representative and, where necessary, of any later modifications to these delegated powers.

Within the scope of the delegated powers, all actions taken by the supervisor's representative are regarded as actions of the supervisor and will have the same effect. However, because she/he carries ultimate responsibility, the supervisor may reverse or vary at any time instructions given or actions taken by his representative (Article 5(3)(b) of the general conditions). Where the Supervisor reverses or varies orders issued by his representative, and the contractor has already taken some action on the order incurring some expense (for example, ordering materials), the contractor should normally be entitled to reimbursement of his costs. The supervisor may also rectify any failure on the part of his representative to take necessary actions. This sometimes happens when the supervisor's representative does not notice work that has been done incorrectly or work that contains defects. In such cases this failure of the supervisor's representative does not prevent the supervisor from rejecting the work at a later date. This should not entitle the contractor to reimbursement of costs, since she/he is responsible for the defect.

All instructions and orders issued by the supervisor or the supervisor's representative to the contractor must be in writing in the form of an administrative order. However, the general conditions provide that, where the situation demands, instructions concerning modifications (Article 37(2) of the general conditions) may, in the first instance, be issued

orally (Article 37(3) of the general conditions). Such situations usually arise in cases of urgency where it is important that the contractor be instructed as soon as possible. Oral instructions must be confirmed promptly by administrative order.

Administrative orders issued by the supervisor or his representative should be addressed to the contractor and not to the contractor's site representative. However, in order to facilitate the progress of the works, a copy should be delivered to the contractor's representative (Article 5(4) of the general conditions) who should have full authority to receive and carry out any administrative order issued by the supervisor.

21.3 Program of the implementation of tasks

A tenderer will normally have been required to submit with his tender a preliminary work program with a list of the major items of the equipment that she/he proposes to bring to the site, a forecast of labour and staff and a forecast of expenditure in various currencies (if applicable) during the contract period.

This information is required for evaluating the tenders and particularly for establishing that tenderers have correctly appreciated the activities required to ensure completion of the works within the specified timeframe. It is also required in order to ascertain how the phasing of operations affects other contracts and activities of the contracting authority on the site. However, on award, this information is usually not made part of the contract.

In addition to the work program given as part of the offer, the contractor is required to submit to the supervisor a detailed program of implementation of tasks, broken down by activity and by month. The programme should contain, at least, the order in which the contractor proposes to carry out the works, the time limits within which submission and approval of drawings are required, an organisation chart containing the names, qualifications and curricula vitae of the staff responsible for the site, a general description of the method including the sequence, by month and by nature, proposed by the contractor to carry out the works, a plan for the setting out and organisation of the site and any additional details that the supervisor may reasonably require (Article 17(1) of the general conditions).

The programme must be sent by the contractor to the supervisor within 30 days of the signature of the contract and will be subject to the approval of the supervisor within 10 days of receipt (save where the supervisor, within these 10 days notifies the contractor of his wish for a meeting in order to discuss the documents submitted). If the supervisor fails to notify its decision or remark within this time limit, the program is deemed approved (Article 17(3) of the general conditions). The programme has contractual significance for the actions taken by the contractor, the supervisor and the contracting authority. The program will enable the supervisor to take timely action in monitoring the progress of the works and to enable the contracting authority to make arrangements for the release of the site, the provision of drawings and instructions, and the coordination with other contractors engaged in the project.

The special conditions should give any additional information or specification about the manner in which the program should be presented. The special conditions may specify the format for the program.

The supervisor, on observing that the implementation of the works has departed materially from the approved programme, may instruct the contractor to revise the programme within a given time and in the manner that the supervisor considers appropriate (Article 17(5) of the general conditions). The purpose of having a revised programme is to show how the contractor intends to make up for any delay, so as to complete the remaining work within the time available. Proper management of the contract strongly relies on a realistic programme that reflects the actual progress already made.

Where the contractor is proceeding with the works in accordance with or in advance of the programme, it should not be necessary for the supervisor to order such a revision. On the other hand, the contractor is not permitted to modify the programme of implementation of tasks without the approval of the supervisor.

21.4 Subcontracting (post award)

Sub-contracting should be distinguished from cases where the contracting authority enters into a separate direct contract with another contractor for work that is not part of the contract, but is part of the same project. Where a project is divided into a number of separate contracts, the supervisor will need to coordinate them, on behalf of the contracting authority. Whilst a contractor is fully responsible for his subcontractors, she/he is not responsible for other contractors working on the project but she/he may be responsible for liaising with them if she/he is required to do so in his contract.

The contractor remains fully responsible for implementing and completing the works in accordance with the contract (Article 7(5) of the general conditions). The work to be subcontracted and the names of the subcontractors must be notified to the contracting authority. The contracting authority then notifies the contractor of its decision authorising or refusing to authorise the proposed subcontract within 30 days or notifies the contractor that it needs a maximum of 15 additional days to study the request. Where the contracting authority refuses authorisation, the reason for the refusal should be stated (Article 7(2) of the general conditions). If the contracting authority fails to notify its decision within this time limit (with or without 15 days extra), the work to be subcontracted and/or the subcontractors are deemed to be approved at the end of the time limit. Subcontracting without the approval of the contracting authority can result in termination of the contract (Article 7(7) of the general conditions and 64(2)(d) of the general conditions).

Before approving a subcontract, the contracting authority must examine the contractor's evidence that the subcontractor she/he suggests satisfies the same eligibility criteria as those applicable for the award of the contract and is not in one of the exclusion situation mentioned in the tender dossier. Also, the contractor must ensure that the subcontractor is not subject to EU restrictive measures. For European Development Fund (EDF) financed contracts, where subcontracting is envisaged, preference must be given by the contractor to subcontractors of African, Caribbean and Pacific (ACP) States capable of implementing the tasks required on similar terms (Article 7(3) of the special conditions).

If, at any time after the expiration of the defects liability period, there is still some unexpired guarantee or other obligation from a subcontractor to the contractor, the latter must transfer this right to the contracting authority if so requested (Article 7(6) of the general conditions). The contractor should always include a provision in his contract with the subcontractor so that she/he can fulfil his contractual obligations in this respect.

21.5 Obligations of the contractor

Save where the European Commission requests or agrees otherwise, the contractor shall take all relevant measures to ensure the highest visibility to the financial contribution of the European Union. Additional communication activities required by the European Commission are described in the special conditions. All visibility and, if applicable, communication activities must comply with the latest Communication and Visibility Requirements for EU-funded external action, laid down and published by the European Commission at the following address: Communication and Visibility Requirements for EU External Actions | International Partnerships (europa.eu).

The Parties will consult immediately and endeavour to remedy any detected shortcomings in implementing the visibility and, if applicable, communication requirements set out in this Article and in the special conditions. Failure to perform the visibility and communication requirements can constitute a breach of contract and can lead – inter alia – to suspension of payment and/or reduction of the final payment in proportion to the seriousness of the breach.

21.6 Assignment

Through an assignment, the contractor's rights and obligations under the contract can be transferred to a third party, the assignee, who then in his turn becomes the new contractor for the contract or part thereof. An assignment could become necessary, for instance, following an internal organisational modification in the group of which the contractor forms part.

On the one hand, such an assignment whereby the assignee takes over the implementation of the contract requires the prior written consent of the contracting authority, formalised through an addendum of the contract. As the initial contractor, the assignor, obtained the contract through a public procurement procedure, the contracting authority, when giving its consent, has to ensure that the assignment is not a way to circumvent that award procedure. For this reason, the assignment must, for instance, equally satisfy the eligibility and exclusion criteria as well as the selection criteria applicable for the award of the contract. For the same reason, the assignment cannot alter the unit prices and contract conditions of the initial contract. As a result, the addendum formalising the transfer of the contract should be limited to a mere modification of the contractor's identity and bank account details. While such an addendum is to be signed by the contracting authority, the assignor and the assignee will often lay down the arrangements between them in a separate deed to which the contracting authority is not be a party.

Before giving its prior written consent to the proposed assignment, the contracting authority should dispose of a report of the works performed at the moment of the contract transfer, as well as an inventory of the temporary structures, materials, plant and equipment and an overview of the interim payments executed and pre-financings received. It is recommended that the inventory and the survey be carried out jointly by the supervisor, assignor and assignee as these reports should also be accepted by all three.

Likewise, before giving its written consent, the contracting authority should receive the necessary bank guarantees from the assignee, e.g. the assignee will have to mobilise a full performance guarantee. In addition, Article 6(3) of the general conditions stipulates that the assignment does not relieve the assignor of his obligations for the part of the contract already performed or the part not assigned. After the assignment, no more payments will be made to the assignor for the assigned contract or part thereof: their pre-financing guarantee and retention guarantee should therefore also be fully replaced by new guarantees from the assignee's side.

Assigning the contract whereby the assignee takes over the further implementation of the contract, without the authorisation of the contracting authority, constitutes a valid reason for the contracting authority to terminate the contract under Article 64(2)(d) of the general conditions. Article 6(4) of the general conditions further confirms that if the contractor has assigned the contract without authorisation, the contracting authority may, without giving formal notice, apply the sanctions for breach of contract.

On the other hand, contractors are sometimes required to assign rights under the contract for the benefit of their creditors or insurers. For instance, when the contractor insures itself for possible losses, the insurance contract will often require the contractor to transfer to the insurer his right to obtain relief against the person liable, so that the insurer can in his turn recover the damages from that person. Likewise, when granting credit, the contractor's

bank can demand from the contractor that the payments that the contractor receives under the works contract are directly paid to the bank. Such assignments for the benefit of the contractor's creditors or insurers, of course, do not imply that these bank or insurance companies will take over the further implementation of the contract. Consequently, Article 6(2) of the general conditions stipulates that for the cases under points (a) and (b) of that article, the prior written consent of the contracting authority is not required.

Still, even for those cases, the contractor will have the responsibility to notify the assignment to the contracting authority, as reflected in articles 54(1) and 54(2) of the general conditions.

21.7 Code of conduct — zero tolerance

The European Commission applies a zero tolerance policy regarding all forms of misconduct including sexual exploitation, abuse and harassment by its staff and those of partner organisations receiving EU funds.

In this respect, Article 12a(1) covers any form of physical, sexual and psychological conduct as well as any form of verbal and no-verbal abuse and intimidation, including harassment and sexual harassment.

Contractors must immediately report to the contracting authority any allegation of misconduct involving sexual exploitation, abuse and harassment. If the contracting authority is an EU delegation, it must also inform the relevant finance and contracts unit as well as the central contact point in Headquarters (DG INTPA Director R. Security Coordinator). As a minimum this notification should include the following information about the report/allegation e.g. misconduct category, type and short description. It is for the contracting authority to assess the gravity of the misconduct, taking into account possible remedial measures taken.

These remedial measures may include for instance:

- the active collaboration with the investigating authorities;

- the implementation of safeguarding procedures to prevent, respond and manage the harassment/sexual harassment and sexual exploitation and abuse situations, such as: creating internal procedures to address the risk of sexual exploitation and abuse in the contractor staff programme, developing a code of conduct with standards that include the sexual exploitation and abuse principles, developing complaints procedures for the staff and other personnel to report incidents, developing internal investigation procedures, ensuring disciplinary actions and sanctions, establishing and implementing a victim assistance mechanism;

- the evidence of appropriate staff reorganisation measures following the misconduct, such as the dismissal of the employee responsible of the infringement.

Investigations should be completed within an acceptable time frame and the contracting authority should update DG INTPA Directorate R and the appropriate geographical directorate on outcomes and actions taken.

If the contracting authority considers the remedial measures to be not sufficient, it must inform the contractor.

These procedures should take into consideration all relevant data protection and confidentiality related requirements. The contracting authorities must treat the related information as 'special categories of personal data' and in doing so ensure appropriate confidential storage and handling. To this end, the contracting authorities must have in place appropriate safeguards for the rights of the data subjects concerned, in particular

adequate technical and organisational measures to ensure the security and confidentiality of such categories of data, to prevent accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted stored or otherwise processed. Where the contracting authority is a EU delegation the measures may, among other, take the form of secure transmission of data via Secure Electronic Mail (SECEM), definition of access rights strictly on a need to know basis, secure storage of paper files in locked cupboards, restricted access to relevant Ares files, secured electronic documents stored in common drives.

The respect of the code of conduct set out in Article 12a constitutes a contractual obligation. Failure to comply with the code of conduct is always deemed to be a breach of the contract under Article 63 of the general conditions. In addition, failure to comply with the provision set out in the present Article can be qualified as grave professional misconduct that may lead either to suspension or termination of the contract, without prejudice to the application of administrative sanctions, including exclusion from participation in future contract award procedures.

The grave professional misconduct covers not only the misconduct related to offensive behaviours as defined in the 'zero tolerance' clause (Article 12a(1)), but also any wrongful conduct that has an impact on the professional credibility of the contractor and denoting a wrongful intent or gross negligence. In practical terms, the contracting authority may invoke the grave professional misconduct for all wrongful conduct that implies a breach of the obligations stated in the code of conduct/ethical obligations by contractors that the contracting authority can demonstrate with any means. In this respect, the grave professional misconduct may lead to suspension or termination of the contract, without prejudice to the application of administrative sanctions, including exclusion from participation in future contract award procedures. Article 136(1)(c) of the Financial Regulation[1] provides a no-exhaustive list of cases, such as:

- fraudulently or negligently misrepresenting information required for the verification of absence of grounds for exclusion or the fulfilment of eligibility or selection criteria or in the implementation of the legal commitment;
- entering into agreement with other persons or entities with the aim of distorting competition;
- violating intellectual property rights;
- attempting to influence the decision-making of the authorising officer responsible during the award procedure;
- attempting to obtain confidential information that may confer upon it undue advantages in the award procedure.

21.8 Modifications

Three situations are to be distinguished:

[1] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p.1).

21.8.1 No contract modification

In the overall majority of cases, the contract provides that it is paid by measurement: in such a case, the quantities indicated in the bill of quantities are estimates, as is the initial contract price derived from these estimated quantities.

Whenever an application for payment is submitted, the supervisor measures, for the respective items, the actual quantities of the works executed and certifies, by applying the unit rates, the amount due. **Increases vis-à-vis the initial contract price, which are the sole result of the measured actual quantity exceeding the stated bill of quantities or price schedule, do not represent a change of the contract and do not require an administrative order for modification nor a contract addendum.**

Likewise, it can occur that the application of the price revision clause of the contract will have the same effect. Again, **since the price revision formula is already agreed upon by the contracting parties in the initial contract, no modification of the contract is required to allow increases vis-à-vis the initial contract price to deal with their effect.**

Also, when changes regarding the contact persons, addresses and other contact details are needed, the contracting authority may simply notify those changes to the contractor in writing by any means of communication that provide assurance it was delivered.

21.8.2 Administrative order

The supervisor can order any modification to any part of the works that are necessary for the proper completion or functioning of the works, provided that such modification does not alter the subject matter of the contract. Articles 37(2) to 37(8) of the general conditions define these changes and the procedures and criteria for making, processing and pricing them. These procedures are based on two basic principles: firstly, that only the supervisor, and not the contracting authority, can order modifications and, secondly, that modifications are ordered in the form of administrative orders.

There may be urgent situations where it is necessary to issue oral instructions to the contractor. In such cases, the oral instructions should be promptly confirmed by issuing an administrative order. Alternatively, the contractor may confirm in writing to the supervisor an oral order that has been given by the supervisor. This is deemed to be an administrative order unless immediately contradicted by the supervisor in writing (Article 37(3) of the general conditions).

Except in the case of an emergency when oral instructions are issued, the following procedure applies to orders for modifications:

a. Although the supervisor is not obliged to seek the contracting authority's authorisation before asking proposals from the contractor, it is advisable for her/him to consult with the contracting authority in order to make sure that the latter does not disagree. This is particularly important in the event of financial consequences to be borne by the contracting authority.

b. The supervisor notifies the contractor of his intention to order the modification and gives details of its nature and form. The contractor must then, without delay, submit to the supervisor a written proposal containing:

    i. a description of the tasks to be implemented or the measures to be taken and a programme for execution;

    ii. any necessary amendments to the programme of implementation of tasks or to any of the contractor's obligations resulting from this contract; and

iii. any adjustment to the contract price in accordance with the rules set out in Article 37 general conditions.

c. If the supervisor is satisfied with the contractor's proposal and after due consultation with the contracting authority, the supervisor issues the administrative order for the modification that will state the technical details of the works to be undertaken, changes to the contract price, any changes to the programme of implementation and, if necessary, the manner in which the works are to be implemented.

d. If the supervisor is not satisfied with the contractor's proposal or it falls outside the authorisation given by the contracting authority, the supervisor may either:

    i. consult further with the contracting authority and the contractor; or

    ii. issue the administrative order on the basis of his previous consultation with the contracting authority, stating how it is to be valued in accordance with Article 37(6) of the general conditions.

e. If the contractor disagrees with the changes to the contract price stated in the administrative order, she/he may claim for additional payment under Article 55 of the general conditions. If the contractor considers that the requirements of an administrative order go beyond the authority of the supervisor or of the scope of the contract, it must give notice, with reasons, to the supervisor (Article 12(4) of the general conditions). If the contractor considers that she/he is entitled to an extension to the period of implementation greater than any she/he may have been granted, she/he may submit a request under Article 35 of the general conditions. In any event, the contractor is required to carry out the variation without waiting for the outcome of his claim or request.

As mentioned, the procedure is different in urgent situations where oral instructions have to be issued. If in those situations, the cost estimate or the details of the modification could not be fully specified before the order, the contractor must keep records of the costs of undertaking the variation and of time spent on it. These records must be open to inspection by the supervisor at all reasonable times (Article 37(7) of the general conditions).

All variations are priced in accordance with the rules set out in Article 37(6) of the general conditions. Wherever possible, appropriate rates and prices in the bill of quantities or price schedule are to be used, at least as a basis. Only when there are no appropriate rate and prices that are applicable, should a 'reasonable and proper' rate be fixed. This consists of an estimate of actual cost together with overheads and profit.

Sometimes a modification is required by a default or a technical breach of contract by the contractor. In such a case, any additional cost attributable to that modification must be borne by the contractor.

The cumulative value of the modifications ordered by the supervisor through administrative orders as well as any modification concluded by addendum in accordance with indent c) of Section 21.7.3 of the present guide must remain below the following thresholds: EUR 5 000 000 and 15% of the initial contract value.

21.8.3 Addendum

The parties to the contract may also decide to conclude modifications through an addendum (Article 37(1) of the general conditions).

In this regard, a works contract can be modified by means of simple addendum, with no need to undertake a negotiated procedure (see PRAG for more details on modifying works

contracts through a negotiated procedure), in the following cases, provided the modification does not alter the subject matter of the contract:

a. additional works by the original contractor that have become necessary, if the following cumulative conditions are fulfilled:

    a. they were not included in the initial procurement (i.e. not similar to the ones that were provided for in the initial contract);

    b. changing contractor is not feasible for technical reasons (e.g. compatibility with existing equipment, services or installations);

    c. changing contractor would cause substantial duplication of costs for the contracting authority;

    d. any increase in price, including the net cumulative value of successive modifications, does not exceed 50% of the initial contract value;

b. modification needed because of circumstances that a diligent contracting authority could not foresee, provided that any increase in price does not exceed 50% of the initial contract value;

c. where the value of the modification is below the following thresholds: EUR 5 000 000 and 15% of the initial contract value for works contracts (the net cumulative value of several successive modifications, **including modifications ordered by the supervisor through administrative orders,** must remain below these thresholds).

d. all other modifications that do not alter the minimum requirements of the initial procurement but the value of which is within the limits of point c) above, unless such modification of value results from the strict application of the procurement documents or contractual provisions.

NOTA BENE

Increases vis-à-vis the initial contract price, which result from the strict application of the procurement documents or contractual provisions, such as the price revision or the measurement clauses, are not to be considered as contract modifications and are not subject to the limitations specified above under indents a), b) and c) of Section 21.7.3 of the present guide.

Modifications under indents a) and b) of Section 21.7.3 of the present guide cannot be made by an administrative order issued by the supervisor but may only be concluded through an addendum.

21.9 Testing, acceptance and maintenance

21.9.1 Introduction

The contractor is required to provide the works and supply the various materials and components necessary for the works that conform to the specifications, samples, etc. laid down in the contract (Article 40(2) of the general conditions). The supervisor must be entitled to inspect, examine, measure and test the components, materials and workmanship, and verify the progress of preparation, fabrication or manufacture of anything being prepared, fabricated or manufactured for delivery under the contract in

order to establish whether the components, materials and workmanship are of the requisite quality and quantity. Specific arrangements regarding inspection and testing should be defined in the special conditions, Article 41.

In addition, if required in the special conditions (Article 40(3) of the general conditions), incorporation of components and materials in the works may be subject to preliminary technical acceptance.

The provisional acceptance intervenes when the works are complete and can be taken over by the contracting authority.

The final acceptance after the defects liability period is issued when all defects have been made good. The contract may permit the provisional acceptance of the works in parts or sections (partial provisional acceptance).

The defects liability period stated in the contract commences on provisional acceptance. For defective items that have to be replaced or renewed, the defects liability period restarts at the time of replacement or renewal being made to the satisfaction of the supervisor.

The contractor is responsible for rectifying all defects that are observed in the works during the defects liability period. She/he will not, however, be liable for defects that, for example, are attributable to an abnormal use of the works by, or acts of, the contracting authority or the supervisor.

21.9.2 Preliminary technical acceptance: inspection and testing of materials and workmanship

When the contractor considers that certain items are ready for preliminary technical acceptance, she/he takes the initiative by sending a request to the supervisor (Article 40(3) of the general conditions). If the supervisor finds them satisfactory, she/he must issue a certificate stating that the items meet the requirements for preliminary technical acceptance laid down in the contract.

Before delivering such a certificate, the supervisor will proceed to inspection and testing. Inspection and testing may take place at the place of manufacture, the site or other places as may be specified in the contract (Article 41(2) of the general conditions).

In preparing his programme of implementation of tasks, the contractor should allow for inspection and testing by the supervisor and for the acceptance procedures. The contractor's tender price should include cover the costs to be borne by the contractor for testing and inspection as specified in the contract.

If the supervisor and the contractor disagree on the test results, either party can require the test to be repeated or can request that the test is carried out by an independent expert. In that case, the party who is proved wrong pays for the repeated test. The result of the retesting is final (Article 41(6) of the general conditions).

Components and materials that are not of the specified quality must be rejected. Article 42 of the general conditions describes the procedure to be followed in that case including the possibility for the contracting authority to employ another contractor to make good any defects (Article 42(4) of the general conditions).

It should be pointed out that the signing of a preliminary technical acceptance certificate is not final. It does not prevent the supervisor from rejecting components or materials if further examination reveals defects or faults (Article 40(4) of the general conditions).

In carrying out his duties, in particular during inspection and testing, the supervisor often gains access to information of a commercial nature regarding methods of manufacture and how an undertaking operates. She/he is required to respect the confidentiality of this information (Article 41(7) of the general conditions).

21.9.3 Partial provisional acceptance

Partial provisional acceptance involves the acceptance, on a provisional basis, of parts or sections of the works that have been completed and can be used by the contracting authority (Article 59(2) of the general conditions).

In cases of urgency, the contracting authority may take over part of the works even though they have not been the subject of partial provisional acceptance. In those cases, the supervisor is required to prepare a list of outstanding work and obtain the contractor's prior agreement to it. The contractor is then permitted to complete the outstanding work as soon as practicable (Article 59(1) of the general conditions).

21.9.4 Provisional acceptance

The contractor is required to initiate the process of provisional acceptance of the works. She/he may apply for such provisional acceptance not earlier than 15 days before the works, in the contractor's opinion, are complete and ready for provisional acceptance. The supervisor is obliged within 30 days after the receipt of the contractor's application, either to issue the certificate of provisional acceptance to the contractor, with a copy to the contracting authority, or to reject the application (Article 60(2) of the general conditions). If the supervisor fails either to issue the certificate of provisional acceptance or to reject the contractor's application within the period of 30 days, she/he is deemed to have issued the certificate on the last day of that period (Article 60(3) of the general conditions).

Upon provisional acceptance of the works, the contractor is required to dismantle and remove from the site all his remaining equipment, temporary structures and materials she/he no longer requires and any litter or obstructions and restore the site to the conditions specified in the contract (Article 60(4) of the general conditions). The obligation of the contractor to leave the site in proper condition is of utmost importance as it carries both cost and environmental consequences. Particular attention should be paid not only to the completed works and its vicinity but also to any quarries, borrow pits, buildings, water sources, etc., which were put at the disposal of the contractor by the contracting authority. The supervisor should ensure that this obligation is enforced.

After provisional acceptance and without prejudice to the defects liability period referred to below, the contractor must no longer be responsible for risks that may affect the works and that result from causes not attributable to her/him. However, the contractor must be responsible as from the date of provisional acceptance for the soundness of the construction for the period specified in the law of the country in which the works are executed, that also specifies the nature and extent of this liability (Article 61(8) of the general conditions).

21.9.5 Defects liability period and obligations

On the date of provisional acceptance a defects liability period commences, which is 365 days unless otherwise specified in the special conditions. Separate sections of the works may be assigned different defects liability periods, if need be.

The defects liability period for items that have been replaced or repaired commences only after the observed defects have been remedied by the contractor and certified by the supervisor.

The main purpose of the defects liability period is to demonstrate under operational conditions that the works have been carried out technically in accordance with the requirements of the contract. During this period, the contractor must not only complete any outstanding items of work as may be listed in the certificate of partial provisional

acceptance. She/he should also remedy any defects that are revealed during the defects liability period (Article 61(1) of the general conditions).

The contract does not generally require the contractor to perform operational maintenance during the defects liability period, unless the special conditions provide otherwise (with corresponding provisions in the technical specifications) (Article 61(6) of the general conditions).

The contracting authority or the supervisor should notify the contractor if any defect appears or damage occurs for which the contractor is responsible during the defects liability period. If the contractor fails to remedy a defect within the time limit stipulated in the notification, the contracting authority itself may carry out the repairs or employ someone else to do so, at the contractor's risk and expense. In this case, the costs for carrying out the repairs are deducted from monies due to, or from guarantees held against, the contractor, or from both. Also, the contracting authority may terminate the contract (Article 61(3) of the general conditions).

21.9.6 Final acceptance

The supervisor must issue a final acceptance certificate to the contractor, with a copy to the contracting authority, within 30 days of the expiration of the latest defects liability period (if there is more than one such period).

The final acceptance certificate does not release the contractor from all his obligations under the contract and the contractor remains responsible as from the date of provisional acceptance for the soundness of the construction, as laid down in the in the law of the country in which the works are executed. The works could contain latent defects or faults that were not discoverable at the end of the defects liability period. The contractor remains liable for these defects or faults for the periods and extent specified both in the contract and in the law of the country in which the works are executed.

A number of consequences follow from the signature of the final acceptance certificate. For example, the contractor is required to return to the supervisor all contract documents (Article 8(1) of the general conditions). The contractor must submit to the supervisor a draft final statement of account within 90 days of the issuing of the final acceptance certificate (Article 51(1) of the general conditions). The retention sum or retention guarantee and the performance guarantee must be released to the contractor within 60 days after the signed final statement of account has been issued by the contracting authority (Article 47(3) of the general conditions and 15(8) of the general conditions). There may still, of course, be some matters in dispute at this time, which are the subject of amicable settlement, conciliation, arbitration or other litigation procedures. Therefore, the retention sum or retention guarantee and the performance guarantee are released for their total amount except for amounts that are the subject of amicable settlement, arbitration or litigation (Article 51(3) of the general conditions).

21.10 Property in plant and materials

The minimum protection for the contracting authority is described in Article 43(1) of the general conditions, which provides that anything brought onto the site, other than vehicles that are used for transporting labour, materials etc. to or from the site, is deemed to be intended exclusively for work on the site. Thus, it cannot be used by the contractor for work on other contracts. If the contractor wishes to remove from the site any equipment or temporary works or plant or materials, she/he is required first to obtain the consent of the supervisor. The requests and consents should be in writing, so that proper records can be kept.

The special conditions may provide that ownership of equipment, materials, etc. be vested in the contracting authority for the duration of the execution of the works, or that other arrangements are made, to protect the contracting authority for that period (Article 43(2) of the general conditions). In certain types of jurisdiction, in the event of a contractor becoming bankrupt, other creditors may be able to show a better title of ownership and thus have prior claim to the goods. In such jurisdictions, proper legal vesting or the establishment of a sufficient lien is essential to safeguard the rights of the contracting authority and allow it to complete the works.

This is equally important in case of termination of the contract due to breach of contract by the contractor where the contracting authority is entitled to use the equipment, temporary works, plant and materials on the site to complete the works (Article 43(3) of the general conditions). The situation is different when the contractor is entitled to terminate the contract. In that case she/he may remove his equipment from the site, subject, however, to the law of the country of the contracting authority.

Article 43(4) general conditions provides for the situation where the contractor hires equipment, temporary works etc. It requests the contractor to agree with the owner to hire these items to the contracting authority on the same terms as they were hired by the contractor, in the event of termination by the contracting authority. It also requires the owner to permit their use by another contractor employed by the contracting authority for completing the works.

21.11 Tax and customs arrangements

Clearance through customs, import and export licenses, port regulations, storage and transport regulations are normally the responsibility of the contractor and she/he should take all necessary steps in sufficient time to meet the requirements of his programme.

Under the EDF, in accordance with Article 31, Annex IV to the Cotonou Agreement[2], the contractor is normally required to pay duties and taxes for imported items to be incorporated into the works, unless otherwise stated in the contract. However, equipment and temporary works items should be admitted free of duties. Under such circumstances, it is important to clarify the limits on the use of such equipment and temporary works items as well as any time limit for their re-export after completion of the works.

Under Article 31(2)b of Annex IV of the Cotonou Agreement, profits and other income resulting from the works are taxable if the contractor is established in the country where the works are executed or, in any case, if the works exceed a duration of 6 months. If the ACP country applies more favourable arrangements to other states or international organisations, it should also apply them to projects funded by the EDF, cf. Article 31(1) Annex IV to Cotonou Agreement.

The contracting authority should give whatever assistance possible to the contractor in connection with clearances through customs, but the contractor herself/himself is ultimately responsible for fulfilling tax and customs obligations.

21.12 Revision of prices

The contractor is bound by the rates and prices in the contract and she/he carries the risk of increases in prices of labour, materials etc. during the period of implementation of tasks. However, revision of prices is allowed if stated in the special conditions (Article 48(2) of

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[2] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ 2000 L 317, 15.12.2000, p. 3).

the general conditions)[3]. In the case of changes in laws or public regulations or decisions that cause extra cost to the contractor, price revision is, however, possible even when not stated in the special conditions (Article 48(4) of the general conditions). This refers for example to situations where new taxes are introduced.

Revision of prices refers to changes in the contract price that are due to external factors, beyond the control of the contracting authority and the contractor, and takes account of changes in the prices of significant elements in the contractor's costs such as labour and materials (Article 48(2) of the general conditions and 48(4) of the general conditions). Revision of prices can result in increases or reductions of the contract price.

Revision of prices requires a reference date on which prices are determined. This date is set 30 days prior to the deadline for submission of tenders or is, in the case of a direct agreement contract, the date on which the contract was signed by the contractor (Article 48(3) of the general conditions).

The detailed rules for price revision are to be mentioned in the special conditions, which should specify the elements that are subject to price revision. These will normally include the materials to be used in substantial quantities (e.g. cement, aggregates, timber, steel, fuel), often subject of mono-material formulas, and other elements taken into account in the proportional formula, such as labour, grouped in different categories (e.g., office personnel, various trades, plant operators, unskilled). Price revision supposes of course that the basic prices of these elements are clearly mentioned in the contract documents.

If the special conditions refer to the prices effectively paid by the contractor as a basis for price revision, the contractor should supply the invoices. This is not requested where the special conditions refer to price indices as the basis for price revision. This method can only be used for elements for which regular price indices are published in the states concerned. Whilst this method gives only an approximate estimate of the effect of price increases on the contractor's costs, it is much simpler to use. Full details should be included in the special conditions if this method is to be used.

Where the contractor fails to complete the works on the date that corresponds to the end of the initial period of implementation of tasks or the extended period, prices are 'frozen' in the sense that they cannot be increased. If, however, the prices of the basic elements are reduced after the stated date, appropriate deductions are made from amounts due to the contractor (Article 48(5) of the general conditions).

21.13 Payments

21.13.1 General

The contractor is entitled to payments at various times throughout the performance of the contract: pre-financing, interim and final payments. These payments must be made in euro or in national currency (only in the case of indirect management) as specified in the special conditions (Article 44(1)). Unless otherwise specified in the special conditions, a performance guarantee is obligatory. If so, no payments can be made before the contractor has provided the performance guarantee. In addition, the contractor also has to provide a pre-financing payment guarantee, unless otherwise specified in the special conditions (Article 46(3)(c)).

Pre-financing is reimbursed by the contractor through deductions from the interim payments which the Contractor is entitled to receive.

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[3] A price revision clause must be defined in the special conditions in all cases for contracts with a total amount above EUR 5 000 000 (excluding VAT) and/or with an initial duration above 1 year.

Interim payments are payments, normally at monthly intervals, for work that the contractor has done (Article 50(7) of the general conditions). This is normally calculated by measurement of the work done and applying the unit rates to the quantities. Deductions to be made from the interim payments are not only for the reimbursement of pre-financing but also include a retention sum (Article 47 of the general conditions — unless the contracting authority agrees that retention sums are substituted by a retention guarantee). Normally, the sum to be retained from interim payments to guarantee implementation of the contractor's obligations during the defects liability period is 10% of each instalment.

A final payment may be made to the contractor after the final statement of account has been issued by the supervisor.

In indirectly managed contracts with *ex ante* Commission control, payments are normally made, after approval by the contracting authority and endorsement by the EU delegation, directly to the contractor by the Commission.

Contractors are encouraged to submit reports and other documents (if any) related to a payment request in electronic version, if this is allowed by the national law of the contracting authority (under indirect management).

21.13.2 Pre-financing

Pre-financing payments to the contractor can be made only if permitted by the special conditions (Article 46).

The contractor may request two types of pre-financing:

a. lump sum pre-financing, at the start of contract, enabling the contractor to meet expenditure resulting from the commencement of the execution of the contract; the amount of this advance may not exceed 10% of the original contract price;

b. pre-financing for the purchase of equipment, tools and materials required for carrying out the contract and for any other substantial prior expenses, such as surveys and the acquisition of patents; these advances cannot exceed 20% of the contract price (Article 46(1) of the general conditions and 46(2) of the general conditions).

Pre-financing cannot be granted until the contract has been concluded and the performance guarantee and the pre-financing payment guarantee have been provided (Article 46(3) of the general conditions).

Repayment of the pre-financing is normally made by a deduction from the interim payments to the contractor. As a rule, repayment of the lump sum pre-financing must be completed at the latest by the time 80% of the amount of the contract has been paid (90% in the case of the pre-financing for the purchase of equipment, tools and materials).

The guarantee for pre-financing payment is normally progressively reduced by the amount repaid in interim payments and its release becomes due when the total pre-financing is repaid (Article 46(7) of the general conditions).

A somewhat different situation arises if the pre-financing guarantee ceases to be valid and the contractor fails to re-validate it. In that case, the pre-financing can be recovered directly by means of a deduction by the contracting authority from further payments due to the contractor. The contracting authority may even terminate the contract (Article 46(5) of the general conditions).

21.13.3 Interim payments

The contractor must submit an invoice for interim payment to the supervisor at the end of each period of one month, unless another period is specified in the special conditions (Article 50(7)). At the start of the works, the supervisor should agree with the contractor on the form and content of the payment 'dossier' (Article 50(1) of the general conditions).

Interim payments relate to work that the contractor has executed, to plant and materials delivered to the site and other sums such as amounts resulting from revision of prices. Deductions should be made for repayment of pre-financing and for retention sums as guarantee for the contractor's obligations during the defects liability period (Article 50(1) of the general conditions and Article 47 of the general conditions).

The specific conditions, which must be satisfied before payment for plant and materials delivered to the site, are stated in Article 50(2) of the general conditions. Payment for such items does not imply that the supervisor has accepted them. She/he is free to reject them at a later date (Article 50(3) of the general condition) and payment does not relieve the contractor of responsibility for loss or damage to plant and materials on site.

Within 30 days of receiving the contractor's invoice for interim payment, the supervisor is required to issue to the contracting authority and the contractor an interim payment certificate stating the amount that (after due verification that the invoice amount reflects the payable amount) in his opinion is due to the contractor (Article 50(5)(a) and (b) of the general conditions). The supervisor is free to include corrections of errors or modifications of amounts in previous certificates (Article 50(6) of the general conditions).

21.13.4 Measurement

In deciding the payments to the contractor the supervisor must assess or measure the work that the contractor has done. The way that this measurement is done depends on the type of contract.

a) For lump-sum contracts, the supervisor should request a detailed breakdown of the contract price (Article 18(1) of the general conditions) and use this to calculate the value of work done. If the contract provides for payments in stages, payment of stated percentages of the contract price are made when various stages of the works, have been completed.

b) For unit-price contracts, the quantities of work actually done are priced at the unit rates mentioned in the contract. Payment is based on the measurement of work actually carried out and value of plant and materials on site.

When measuring the works, the supervisor is required to notify the contractor so that she/he can attend, or send a qualified agent to represent him/her. The contractor is required to help with the measurement and provide any necessary details requested by the supervisor. Failure by the contractor to attend, or omit to send such agent when measurement is being done deprives her/him of the right to challenge the measurements later (Article 49(1)(b)(iv) of the general conditions).

Unless otherwise provided in the contract, measurements should be taken net (Article 49(1)(b)(v) of the general conditions). This means that any extra work required, such as additional excavation for working space, or over-excavation, is not measured for payment purposes unless the method of measurement provides special items for such purposes.

c) For cost-plus contracts, the amount due under the contract must be determined on the basis of actual costs with an agreed addition for overheads and profit. The special conditions must stipulate the information that the contractor is required to submit to the supervisor and the manner in which it should be submitted.

21.13.5 Retention sum

The retention sums, which are to be deducted from interim payments, represent further security for the contractor's performance during the defects liability period. Although the maximum retention permitted is 10% of the contract price, a lower percentage may be appropriate depending on the risks inherent to the contract and bearing in mind that such deductions must be financed by the contractor, resulting in higher tender prices.

The contractor may offer a retention guarantee as an alternative to retention sums not later than the date agreed for the commencement of the works (Article 47(2) of the general conditions). The contracting authority's prior approval is required. This approval is to ascertain, in the same way as for the performance guarantee, mentioned in Article 15 of the general conditions, whether the guarantee is compliant with contractual obligations.

The sum retained or the retention guarantee should be released within 60 days of the issuing of the signed final statement of account. However, for contracts applying general conditions previous to PRAG 2015 version, the time period for release is 45 days.

21.13.6 Final statement of account

The contractor initiates the process by submitting to the supervisor a draft final statement of account. Unless otherwise agreed in the special conditions, the time limit for this submission is 90 days after the issuing of the final acceptance certificate (Article 51(1) of the general conditions).

To achieve submission within the stated period, it is essential that the contractor keeps up to date records as work progresses and that calculations are made progressively rather than left until the works have been completed. It is essential that the contractor includes in his draft final statement of account all claims for amounts that she/he considers are due to her/him, since she/he is effectively barred from claiming at a later date (Article 51(5) of the general conditions).

Within 90 days of receiving the draft final statement of account and all supporting information required by the contract, the supervisor is required to prepare and sign the final statement of account, which determines the final amount due to the parties under the contract (Article 51(2) of the general conditions). Then the contracting authority and the contractor also sign the final statement as an acknowledgement of the full and final value of the work implemented under the contract, and submit a signed copy to the supervisor together with an invoice for the payment of any amounts owed to the Contractor. However, the final statement of account excludes any amounts that are subject of negotiations, conciliation, arbitration or litigation at that time (Article 51(3) of the general conditions).

When signed, the final statement of account represents a discharge of the contracting authority's obligation for payment other than the amounts still in dispute. This discharge becomes effective when all amounts due in accordance with the final statement of account have been paid and the performance guarantee returned to the contractor (Article 51(4) of the general conditions).

21.13.7 Delayed payments

According to Article 44(3) of the general conditions, supplemented by the special conditions, payment time limits vary according to criteria. All payments have to be executed in 90 days in the EDF while for contracts financed under the budget time limits vary according to management mode (centralised/direct; decentralised/indirect) and also according to the type of payment requested (pre-financing, interim payment, final statement of account).

In directly managed contracts and according to Article 53(1) of the special conditions, if the payment time limit indicated in the contract is exceeded, the contractor is automatically entitled to late-payment interest. However, by way of exception, when the interest is lower than or equal to EUR 200, it must be paid to the contractor only upon demand, submitted within two months of receiving late payment.

In indirectly managed contracts and according to Article 53(1) of the general conditions, the contractor will be entitled to late-payment interest (irrespective of the amount) only upon demand, submitted within two months of receiving late payment.

Default interest is calculated:

- at the rediscount rate applied by the central bank by the law of the country in which the works are executed if payments are in the currency of that country;

- at the rate applied by the European Central Bank to its main refinancing transactions in euro, as published in the Official Journal of the European Union, C series, if payments are in euro,

on the first day of the month in which the time-limit expired, plus three and a half percentage points. The interest must be payable for the time elapsed between the expiry of the payment deadline and the date on which the contracting authority's account is debited.

Pursuant to Article 38(2) of the general conditions, the contractor has the right, after a 30 days' notice, to suspend all or part of the works when payment is late by more than 30 days (pre-financing and advances are not concerned)[4]. Work will resume once the contractor has received payments or has received reasonable evidence that the payment has been executed.

General conditions stipulate that non-payment for more than 120 days from the expiry of the time limit for payment entitles the contractor to terminate the contract in accordance with the procedure laid down in Article 65 of the general conditions.

21.13.8 Claims for additional payment

Article 55 of the general conditions sets out a procedure for dealing with claims for additional payment. The article places time limits for the notification and substantiation of claims. The contractor must give to the supervisor notice of his intention to make such claim within 15 days after the circumstances become known to the contractor or should have become known to her/him, stating the reason for his claim. The contractor must then submit full and detailed particulars of his claim as soon as it is practicable, but not later than 60 days after the date of the notice of his intention to claim additional payment. Nevertheless, the supervisor may agree on a different deadline, which in any case cannot go beyond the date of submission of the draft final statement of account. Late submission of a claim or of the detailed particulars is sufficient grounds for rejecting it (Article 55(3) of the general conditions).

No time limit is established for the supervisor to determine the amount of the claim. Before taking his decision, the supervisor should consult with the contracting authority and, where appropriate, with the contractor.

21.13.9 Payments to third parties

Orders for payments to third parties may normally be carried out only after an assignment of the contract or part of it to a third party has been notified to the contracting authority by

[4] See also section 18.13. 'Suspension'.

the contractor and the contracting authority has given its written consent (Article 54(1) of the general conditions and 6(2) of the general conditions).

However, while the contracting authority does not have any formal links with subcontractors, direct payment to them can exceptionally take place if that is in the interest of the contracting authority (Article 52 of the general conditions). This situation may occur when a subcontractor introduces a claim to the supervisor that she/he is not receiving payment from the contractor.

Under such circumstances, the supervisor must investigate the matter and enquire with the contractor whether the claim is founded. If the claim is founded and the contractor does not pay, then the supervisor may issue a payment certificate in favour of the subcontractor. Payment will then be made out of what is otherwise owed to the contractor at the time.

21.14 Suspension

Various reasons can justify the suspension of a contract. Sometimes, the law governing the contract provides for special causes of suspension, which are in addition to the specific causes mentioned in the contract. Article 38 of the general conditions foresees three cases of contract suspension:

21.14.1 Suspension by administrative order of the supervisor

This type of suspension can cover all or part of the work(s) for such time(s) and in such manner as the supervisor may consider necessary.

21.14.2 Suspension on notice of the contractor

Article 38(2) of the general conditions specifically provides for a suspension, on 30 days' notice by the contractor, for default in payment of more than 30 days after the expiry of the period referred to in Article 44(3) of the general conditions. This provision entitles the contractor to suspend or reduce the rate of the work.

21.14.3 Suspension for presumed substantial errors, irregularity or fraud

Such suspension may be notified by the supervisor or the contracting authority. If that substantial error, irregularity or fraud during the award procedure or performance of the contract is not confirmed, performance of the contract must resume as soon as possible.

The contractual and financial consequences of the suspension are set out in Articles 38(4) to 38(6) of the general conditions.

21.15 Breach of contract and termination

21.15.1 Breach of contract

A breach of contract is committed where one of the parties to the contract fails to discharge any of his obligations under the contract. Some breaches are of only minor importance, whereas others, such as failure to complete the works within the period of implementation of tasks or failure by the contracting authority to pay amounts due to the contractor, are serious breaches and have serious consequences for the injured party.

Serious breaches, enumerated in Article 64(2) of the general conditions (breaches by the contractor) and Article 65(1) of the general conditions (breaches by the contracting authority), may lead to the termination of the contract by the injured party.

Also, whether the breaches may lead to a termination in accordance with the articles mentioned above or not, the injured party may claim damages.

The damages to which an injured party is entitled may be either general damages or liquidated damages, both of which are defined in the Glossary of Terms, Annex 1 to the Practical Guide.

Liquidated damages are damages that have been agreed beforehand by the parties, and recorded in the contract, as being a genuine estimate of the loss suffered by the injured party for a particular breach of contract. In works contracts, the simplest and most frequently used example occurs when the contractor fails to complete and hand over the works on the agreed date. In that case, the contracting authority will be entitled to an amount stated in the contract as liquidated damages for every day that the handing over is delayed because of a failure on the part of the contractor. The contracting authority will not have to give proof that it suffered actual loss. The mere fact that a delay exists is a sufficient basis for imposing the liquidated damages.

General damages, on the other hand, are not agreed beforehand. An injured party seeking to recover general damages must prove the loss it has suffered, whether it attempts to do so by direct agreement with the party in breach or by means of arbitration or litigation.

Where liquidated damages for a particular breach have been agreed in the contract, the injured party cannot then claim general damages for that particular breach.

Any amount of damages, whether liquidated or general, to which the contracting authority is entitled can be deducted from any sums that must be paid to the contractor or, alternatively, from an appropriate guarantee (usually the performance guarantee). If at the time in question there are no amounts due to the contractor, the contracting authority can only recover sums from the guarantor or through legal action against the contractor.

21.15.2 Termination by the contracting authority

The general conditions enumerate several grounds that entitle the contracting authority to terminate the contract, and also stipulate its rights upon termination. Before resorting to termination, the issuing of warnings to the contractor or, in the case of defects, instructions to remedy should be considered.

The grounds for termination mentioned in Article 64(2) of the general conditions generally relate to defaults or inabilities on the side of the contractor. Nevertheless, the contracting authority may also terminate the contract for reasons of organisational modifications in the legal personality, nature or control of the contractor, for which the latter did not obtain the prior consent of the contracting authority through an addendum to the contract (Article 64(2)(f)) of the general conditions).

When, for the above-mentioned grounds, the contracting authority terminates a contract, a notice of seven days must be given to the contractor. This seven-day period is not intended to give the contractor an opportunity to remedy the default but rather to give her/him an opportunity to make the preparations necessary to leave the site.

The contracting authority may also, at any time and with immediate effect, terminate the contract for other reasons, whether they are provided elsewhere in the general conditions or not (Article 64(1) of the general conditions and 64(9) of the general conditions). Where termination by the contracting authority is not due to an act or omission of the contractor, force majeure or other circumstances beyond the control of the contracting authority, the contractor is entitled to claim an indemnity for loss suffered, in addition to sums owed to

her/him for work already performed.

Termination of the contract does not result in a cessation of all rights and obligations and activities.

Indeed, in such a case, the supervisor has to draw up a detailed report of work completed by the contractor including an inventory of temporary works, plant, materials and equipment on the site and of outstanding payments to the contractor's employees and the contracting authority. The contracting authority has the right to purchase temporary structures, plant and materials already supplied or ordered by the contractor but not delivered (Article 64(6) of the general conditions). These rights enable the contracting authority to complete the works itself or by contracting another party at the contractor's expense.

The net amount due to the contractor can be ascertained and paid only when the entire works have been completed and the full value of contracts with third parties and other costs have been deducted from monies due to the contractor (Article 64(7) of the general conditions).

The contracting authority is also entitled to recover from the contractor, in addition to the extra costs for completion of the works, any loss it has suffered up to 10% of the contract price, as stipulated in Article 64(8).

21.15.3 Termination by the contractor

Unlike the contracting authority, the contractor can terminate the contract only on few specific grounds listed in Article 65(1) of the general conditions: the contracting authority fails to pay, consistently fails to meet its obligations under the contract, or has suspended the works for more than 180 days for reasons not specified in the contract and not due to any failure by the contractor. The termination takes effect automatically 14 days after the contractor gives notice of termination to the contracting authority.

Subject to the law of the country in which the works are executed, the contractor is, upon termination by it, entitled to immediately remove its equipment from the site (Article 65(2) of the general conditions).

The contractor is entitled to receive, from the contracting authority, payment for any loss or damage she/he has suffered. This entitlement is limited to maximum 10% of the contract price (Article 65(3) of the general conditions).

21.15.4 Force majeure

If the contract implementation is prevented by any circumstances of force majeure, this will not be considered a breach of contract (Article 66(1) of the general conditions). Exemption may be partial or total, and allows contractors to request the termination of the contract.

Given the serious consequences that may arise, such qualification must be accepted only under very strict conditions and any notification of cases of force majeure has to be examined carefully to ensure that the event can indeed be qualified as force majeure.

To admit the existence of force majeure, three conditions should be met. First, the contractor faced 'unforeseeable' difficulties, i.e. the event escaped all the forecasts at the time of the conclusion of the contract. In this sense, floods and accidents such as explosions may in certain circumstances be predictable and therefore their consequences avoidable. The second requirement is that the event is in fact not a result of the contractor's action, e.g. strikes and lockout can be caused by an act of the contractor and are not, in that case, considered as force majeure situations. Finally, this difficulty should be of a scale or of such a nature that it renders performance of the contract impossible either temporarily or definitively. This last condition is not met if, as a result of economic or social

circumstances, the execution of the contract only becomes more expensive.

Due to these restrictive conditions, no party should be able to use the force majeure clause to avoid its contractual obligations or to terminate the contract improperly. Any dispute between the parties that would result from the application of this article is decided in accordance with the dispute settlement procedures.

If a situation of force majeure occurs, it is likely that at least one of the parties suffers some loss. The general principle here is that 'the loss falls where it falls'. This explains why, in Article 66(3) of the general conditions, the contracting authority is not entitled to call upon the performance guarantee or to the payment of liquidated damages or to terminate the contract due to the contractor's default to the extent that it is due to force majeure. Similarly, the contractor is not entitled to interest on delayed payments or to other remedies arising from the contracting authority's non-performance where this is due to force majeure.

The procedure to be followed in the event of force majeure is stated in Article 66(4) of the general conditions. Either party giving prompt notice of the particular event initiates it. The contractor must continue to perform its obligations as far as possible and must seek reasonable alternatives for the performance of its obligations. However, such alternatives may be put into effect only under the supervisor's direction (Article 66(4) of the general conditions). The contractor is entitled to any extra costs incurred as a result of the supervisor's directions (Article 66(5) of the general conditions).

The persistence of force majeure for a period of 180 days gives either party the right to terminate the contract after having served 30 days formal notice (Article 66(6) of the general conditions).

Article 66(2) of the general conditions also provides that a decision of the European Union to suspend cooperation with the partner country is considered force majeure when it involves suspending the contract's financing.

21.16 Dispute settlement procedures

Although a party can decide to initiate the dispute settlement procedures of Article 68 of the general conditions during the implementation period of the contract, in the overall majority of cases such procedures only start after the implementation period of the contract or after early contract termination. The fact that in an ongoing contract a dispute exists, does not relieve the contractor of his responsibility to continue complying with his contractual obligations with due diligence. Occasionally, the initiation of a dispute settlement procedure occurs years after provisional acceptance, for instance in case of defects affecting the soundness of the construction for which the contractor is liable under the law of the country in which the works are executed (Article 61(8) of the general conditions).

21.16.1 Amicable settlement

When a dispute relating to the contract arises, the parties are required to make every effort to settle this dispute amicably. To this effect, as an obligatory first step, Article 68(2) of the general conditions requires one of the parties to notify the other party in writing of the dispute, stating its position and requesting an amicable settlement (see template U1 and – as a follow-up – template U2). A prior information letter issued in the view of a recovery order can also take the place of a formal request for amicable settlement, if so indicated in the letter itself. The other party is to respond to that request within 30 days with its position on the dispute. The general principle is indeed that disputes are discussed by the parties and, whenever possible, resolved amicably. The way of pursuing an amicable settlement may vary according to the internal administrative procedures of the contracting authority

concerned, but it is usually of an informal nature. Nevertheless, in order to ensure a certain efficiency and transparency, Article 68(2) of the general conditions sets clear time limits for the attempt for amicable settlement. These time limits guarantee that a party cannot indefinitely prolong the amicable settlement negotiations in an attempt to gain time and without any genuine intention to come to a settlement. The maximum time period for reaching an amicable settlement is fixed at 120 days, unless both parties agree otherwise. The amicable settlement procedure can even be considered to have failed earlier if the other party did not agree to the request for an amicable settlement or if it did not respond to that request within 30 days.

21.16.2 Litigation

If the attempt at amicable settlement fails, each party can, by way of last resort, submit its claims to a court or initiate arbitration proceedings, as stipulated in the special conditions of the contract. Contrary to the attempt at amicable settlement, the court or arbitral tribunal may take a decision on the submitted claims, even if the other party would not cooperate during such legal proceedings, for instance by choosing to make default of appearance in those proceedings. Unlike the proposal made during a conciliation procedure, the final decision taken by the court or arbitral tribunal is binding.

The special conditions of the contract stipulate whether a court or an arbitral tribunal is competent and, if so, which court or arbitral tribunal.

As a rule, whenever the Commission is the contracting authority, the Courts in Brussels are designated as exclusively competent courts.

In the case of indirectly managed EDF financed contracts, the special conditions distinguish between disputes arising in national contracts and disputes arising in transnational contracts. Disputes arising in a national contract (i.e. a contract concluded with a national of the State of the contracting authority) are, according to Article 30(a) of Annex IV of the Cotonou Agreement, to be settled in accordance with the national legislation of the ACP State concerned.

Disputes in a transnational contract, i.e. a contract concluded with a contractor who is not a national of the State of the contracting authority, are, unless the parties agree otherwise, to be settled by arbitration in accordance with the Procedural Rules adopted by decision of the ACP-EC Council of Ministers (the EDF Procedural Rules)[5].

In an EDF indirectly managed transnational contract, parties also have the option to agree not to submit the dispute to arbitration, but instead to follow either the national legislation of the ACP State concerned or its established international practices. Such agreement can be reached at the start of the contract before any dispute has arisen, or later on. In any event, the agreement to deviate from recourse to arbitration in a transnational contract is to be recorded in writing and signed by both parties.

If within the ACP State an internal administrative appeal procedure exists, the arbitration will necessarily be preceded by that procedure. The contractor will only be in a position to initiate arbitration if this internal administrative appeal procedure fails or is deemed to have failed (in the absence of such procedure in the ACP State in question) as indicated in Article 4 of the EDF Procedural Rules.

Arbitration is a kind of private court procedure in which the parties contractually agree to submit their dispute to an arbitral tribunal and accept the decision of this tribunal to be

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[5] Decision No 3/90 of the ACP-EEC Council of Ministers of 29 March 1990 adopting the general regulations, general conditions and procedural rules on conciliation and arbitration for works, supply and service contracts financed by the European Development Fund (EDF) and concerning their application (OJ L 382, 31.12.1990, p. 1).

binding. If the parties agree, the arbitral tribunal can consist of a single arbitrator. If not, each party selects, on its own, one arbitrator who then jointly nominate a third arbitrator who will act as chairman of the tribunal. The arbitration procedure is an adversarial procedure, with written statements exchanged between the parties and concluded with oral proceedings. No appeal is open against the final decision taken by the arbitral tribunal.

For more information on arbitration in EDF contracts, please see the background document[6] on this topic, as well as the full text of the EDF Procedural Rules.

21.16.3 Conciliation

In the absence of an amicable settlement, the parties may agree, as an option, to request a conciliation by a third party.

The main difference between conciliation and arbitration is that, contrary to arbitration, the proposal made by a conciliator is not binding for the parties. They remain free to accept or reject any settlement-proposal made by the conciliator. Contrary to the attempt for amicable settlement, the conciliation is not an obligatory step.

Often, conciliation is initiated when one of the parties has already submitted the dispute to a court or arbitral tribunal. Indeed, as a protective measure, a party may, for instance, already have lodged a request for arbitration to avoid such possibility to become time-barred. Article 18 of the EDF Procedural Rules stipulates that the notice initiating arbitration must be time-barred unless it is given not later than 90 days after the receipt of the decision closing the internal administrative proceedings taken in the ACP State. If so, the conciliator will, as a rule, request the parties to suspend the arbitration proceedings pending the conciliation.

Like under the amicable settlement procedure, a conciliation starts with a party requesting the other party in writing to agree on an attempt to settle their dispute through conciliation by a third person. The other party must respond to this request within 30 days. The same safeguards as for the amicable settlement procedure govern the conciliation procedure: unless the parties agree otherwise, the maximum time period for reaching a settlement through conciliation is 120 days.

If conciliation fails, the parties must be at liberty to refer their dispute before court or arbitral tribunal, as specified in the special conditions. If so, nothing that has transpired in connection with the proceedings before the conciliator must in any way affect the rights of any of the parties in the arbitration.

In a contract to which the Commission is not a party, the Commission can intervene as a conciliator, and if so, it will take the form of a good offices procedure. Such good offices procedure can be conducted by the delegation or by Headquarters, depending on the availability of resources and competences. In any event, it is crucial that both parties have confidence in the impartiality and capacity of the conciliator and fully accept his mission.

For more information on the good offices procedure, please consult the document[7] to be previously signed by the parties, which describes its steps and principles.

21.17 List of annexes

U	**The implementation of works contracts – A users' guide**

[6] To be obtained from INTPA LEGAL HELPDESK INTPA-LEGAL-HELPDESK@ec.europa.eu.

[7] To be obtained from INTPA LEGAL HELPDESK intpa-legal-helpdesk@ec.europa.eu

U1	Letter to request amicable settlement – template LS	Letter_to request amicable settlement - template LS.docx
U2	Letter to convene amicable settlement meeting – template LS	Letter_to convene amicable settlement meeting - template LS.docx