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Directorate-General for Development and Cooperation - EuropeAid

DEVCO COMPANION TO FINANCIAL AND CONTRACTUAL PROCEDURES

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

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20 GENERAL FINANCIAL FRAMEWORK

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20.1 Introduction

This users' guide is designed exclusively 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 neither intended nor able to provide guidance to Contractors or the general public.

The General Conditions govern the implementation of supply contracts. The standard tender documents and contracts contain several references and options for modifying and supplementing the General Conditions through the Special Conditions. The Special Conditions may thus include the necessary additions to the General Conditions. Through these additions and modifications, the Special Conditions should 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 each and every article of the General Conditions for supply contracts but only with those articles which are considered essential or so complex as to require further explanation. Other provisions of the General Conditions speak for themselves.

20.2 Article 5 – Assignment

Contractors sometimes need to assign rights under the contract for the benefit of their creditors or insurers: for instance, when the Contractor insures himself 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 liable person.

Likewise, when granting credit, the Contractor's bank can demand from the Contractor that the payments which the Contractor receives under the contract are directly paid to the bank. Such assignments for the benefit of the Contractor's creditors or insurers do, of course, not imply that these bank or insurance companies will take over the further implementation of the contract.

Consequently, Article 5.2 of the General Conditions stipulates that for the situations 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 Contracting Authority of the assignment, as covered in Articles 27.1 and 27.2 of the General Conditions.

In other cases a prior approval of the Contracting Authority is required. In these situations 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 a part of it. An

assignment could, for instance, become necessary following an organisational or shareholding change in the group of which the Contractor forms part (eg. acquisition, merge, etc.) when such change entails a modification in the juridical status of the Contractor.

The assignment through which the assignee takes over the further 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 assure that the assignment is not a way to circumvent the award procedure and does not call into question the basis on which the award decision was made. For this reason, the assignee must, for instance, also satisfy the eligibility and exclusion criteria applicable for the award of the contract in the original tender dossier.

For the same reason, the assignment must not alter the unit price or the contract conditions of the initial contract. As a result, the addendum formalising the transfer of the contract will often be limited to a mere modification of the Contractor's identity and bank account details.

Although the addendum is to be signed by the Contracting Authority, the assignor, and the assignee, often the assignor and assignee lay down the arrangements between them in a separate deed to which the Contracting Authority is not and should not be a party.

Before giving its prior written consent to the proposed assignment, where necessary, the Contracting Authority should receive the necessary financial guarantees from the assignee. As the assignee takes over all contractual obligations without limitation, the assignee will bear full liability for any contractual breach, regardless whether the cause took place before or after the assignment. Article 5.3 of the General Conditions states that assignment does not relieve the Contractor of its obligations for the part of the contract already performed or the part not assigned.

By virtue of Articles 5.4 and 36.2.d of the General Conditions, the assignment of a contract by the Contractor without authorisation by the Contracting Authority is valid cause for termination of the contract.

Article 5.4 of the General Conditions also states that, in the case where the Contractor has assigned the contract without prior authorisation, the Contracting Authority can apply, as of right, the sanctions for breach of contract. Therefore, in addition to the extra costs for completion of the contract, the Contracting Authority shall be entitled to recover from the Contractor any loss it has suffered up to the value of the supply (general damages), unless otherwise provided for in the Special Conditions.

20.3 Article 6 - Sub-Contracting

Although certain supplies may be sub-contracted, the Contractor remains fully responsible for his obligations under the contract (Art. 6.5). The supply to be sub-contracted and the names of the sub-Contractors must be notified to the Contracting Authority. The Contracting Authority then notifies the Contractor of its decision authorizing or refusing to authorize the proposed sub-contract within 30 days. Where the Contracting Authority refuses authorization, the reason for the refusal should be stated (Art. 6.2). Sub-contracting without the approval of the Contracting Authority can result in termination of the contract (Art. 6.7 and 36.2.d).

Before approving a sub-contract, the Contracting Authority should examine the Contractor's evidence that the sub-Contractor he proposes 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. For EDF financed contracts, where subcontracting is envisaged, preference shall be given by the Contractor to sub-Contractors of ACP States capable of implementing the tasks required on similar terms (Article 26.1.d, of Annex IV to the Cotonou Agreement). It is most likely the case that private sector operators of ACP States be awarded sub-contracts on the local market. However, when checking that the proposed sub-Contractor meets eligibility criteria, the Contracting Authority should bear in mind Art. 26 purpose of encouraging the widest participation of natural and legal persons from ACP States.

A tenderer may in his tender have stated the supply which he proposes to sub-contract and sometimes also the name of the proposed sub-Contractors. It should be made clear, before the contract is signed, whether the Contractor is to be bound by such proposed sub-contracts. This will be the case where the qualifications of the sub-Contractors, identified by a tenderer in his tender, have been taken into account during the evaluation of the bids and are part of the technical reasons for awarding the contract to the tenderer in question. If this is the case, it should be explicitly mentioned in the notification of award of the contract.

In relation to the execution of a sub-contract, it is sometimes necessary for the Project Manager to deal directly with the sub-Contractor on technical matters. In such a case, he may only do so with the agreement of the Contractor, and it is essential that the Contractor is kept informed at all stages so that the Contractor is immediately aware of discussions or correspondence that have taken place between the project manager and the sub-Contractor and can comment or take such action as he considers appropriate.

If, at the end of the warranty period, there is still some unexpired guarantee or other obligation due from a sub-Contractor to the Contractor, the latter must transfer this right including any guarantee to the Contracting Authority if so requested (Art. 6.6). The Contracting Authority may also make such a request at any time after the end of the warranty period. The Contractor should always include a provision in his contract with the sub-Contractor so that he can fulfil his contractual obligations in this respect.

Sub-contracting should be distinguished from cases where the Contracting Authority enters into a separate direct contract with another Contractor for supplies which are not part of the contract, but is part of the same project. Where a project is divided into a number of separate contracts, the Project Manager will need to coordinate them, on behalf of the Contracting Authority. Whilst a Contractor is fully responsible for his sub-Contractors, he is not responsible for other Contractors working on the project but he may be responsible for liaising with them if he is required to do so in his contract.

20.4 Article 9a –Code of Conduct

The Contractor must act at all times with impartiality and as a faithful advisor to the Contracting Authority in accordance with the code of conduct of its profession (Article 9a.1). It must abstain from partaking in any activity or receiving any benefit which are in conflict with its obligations towards the Contracting Authority (Article 9a.5).

The requirement that the Contractor be independent is further developed in Article 9a.4 which also concerns its sub-Contractors, agents, and personnel.

Article 36.2.n provides that the Contracting Authority may terminate the contract if the code of conduct has not been respected.

20.5 Article 9b –Conflicts of Interest

The Contractor must take all necessary measures to prevent or put an end to any situation of conflict of interest which may arise, for example financial interests, national or political affiliations, or familial or emotional links. This article does not only cover the Contractor, but also his sub-Contractors, agents, and personnel.

It is important to note that in principle, the Contractor is not authorised to carry out other tasks for the same project, except with written permission from the Contracting Authority. This rule is also valid for the employees of the Contractor, for members of its staff who have worked on other stages of the project, and for any other entity which is associated or linked to the contract.

Where a conflict of interest arises during the implementation of the contract, the Contractor must inform the Contracting Authority and take all necessary measures to put an end to the conflict.

Article 36.2.n permits the Contracting Authority to terminate the contract if the provisions concerning conflicts of interest have not been respected.

20.6 Article 10 –Origin

Origin is the "economic" nationality of goods in international trade. The rule of origin refers to the origin of goods and equipment and it is defined in the contract notice/instructions to tenderers of the call. Therefore, it is required to refer to those documents in order to assess goods compliance with the rule of origin.

In exceptional and well justified cases, the Contracting Authority may have sought derogation to the rule of origin. This could be the situation of particularly closed markets, or remote areas where spare parts are not easily available; another typical example is IT supplies which need to be compatible with existing installation not compliant with the rule of origin. In those cases the derogation must have been granted before the procurement procedure was launched.

Goods whose production involves more than one country shall be deemed to originate in the country where they underwent their last substantial transformation (see PRAG 2.3.1).
Obviously when goods are wholly obtained or produced in one country, the origin shall be established in that country. In practice this will be restricted to mostly products obtained in their natural state and products derived from wholly obtained products.

The Contractor must state the origin of goods in the offer. The origin must be proved by a "certificate of origin" provided by the Contractor to the Contracting Authority on provisional acceptance and before executing the final payment. The provision of the certificate of origin cannot be considered an *outstanding item* (see section 11.5) which the Contractor may address during the warranty period. The provisional acceptance certificate cannot be issued without previous positive assessment of the certificate of origin. This assessment aims at verifying that the certificate of origin is made out by the competent authorities of the country of origin of the supplies or supplier (normally the Chambers of Commerce). The Contracting Authority may request, in case of doubt regarding the certificates of origin provided by the Contractor or the information it contains, additional documentation on the origin of goods.

The Contracting Authority may require the Contractor to provide more information before the provision of the certificate (eg. when the supply is a component of a works contract) (Art. 10.2 General Conditions).

Failure to provide a certificate of origin, or providing a certificate with a non-compliant origin as well as a certificate not reflecting the actual origin of the supplies may lead, in addition to other possible sanctions (see section 15), to the ineligibility of the relevant costs of the supply covered by the certificate, or to termination of the contract (Art. 10.3 General Conditions).

20.7 Article 13 –Programme of implementation of tasks

If so required in article 13.2 of the Special Conditions, the Contractor shall submit to the Project Manager a programme of implementation of tasks. The programme should contain, at least, the order in which the Contractor proposes to carry out the tasks, the time limits within which submission and approval of drawings are required, a general description of the method which the Contractor proposes to carry out the contract, and such further details and information as the Project Manager may reasonably require (13.1 General Conditions).

The programme must be sent by the Contractor to the Project Manager within the deadline set in the Special Conditions and will be subject to the approval of the Project Manager within the time limit provided therein. The programme has contractual significance for the actions taken by the Contractor, the Project Manager and the Contracting Authority. The programme will enable the Project Manager to take timely action in monitoring the progress of the implementation and to enable the Contracting Authority to make arrangements for the provision of drawings, documents and items. It also permits the Contractor to effect timely orders and the allocation of resources (materials, equipment, etc.).

The Special Conditions should give any additional information or specification about the manner in which the programme should be presented. The Special Conditions may specify the format for the programme.

The Project Manager, on observing that the implementation of the tasks 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 Project Manager considers appropriate (Art. 13.4 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 tasks within the time available. Proper management of the contract is only possible with a realistic programme which reflects the actual progress already made.

Where the Contractor is proceeding with the tasks in accordance with or in advance of the programme, it should not be necessary for the Project Manager 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 Project Manager.

The Contractor is not entitled to any additional payment for revising the programme.

20.8 Article 16 -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 he should take all necessary steps in sufficient time to meet the requirements of the contract.

The Contracting Authority should facilitate the Contractor in connection with clearances through customs and tax exemptions where applicable although it is the Contractor himself ultimately responsible for fulfilling tax and customs obligations.

Delivery conditions are established in the tender dossier choosing between two options. The first one is DDP (Delivery Duty Paid), according to Incoterms established by the International Chamber of Commerce in 2010 (Art. 16 General Conditions). DDP sets the widest obligation for the seller in respect of transportation and loss risks and damage associated with the goods: "*the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities*." This means that the seller delivers the goods to the buyer, cleared for import and not unloaded from any arriving means of transport at the named place of destination.

The alternative Incoterms, which need to be specified in article 16 of Special Conditions (when so indicated in the instructions to tenderers), would be DAP (Delivered At Place): "*the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place*." This means that the buyer bears all risks and costs of import clearance at the port or at the border of the agreed place of destination, whereas customs clearance for export is on the seller, differently from DDP. DAP proves to be a favorable option especially when the Financing Agreement foresees an exemption of import duties.

Unloading is not included in the Incoterms delivery conditions; however it is already foreseen in article 15.1 of the General Conditions. Nevertheless when it is required, it should also be added in the instructions to tenderers and in the Special Conditions of the contract. Further requirements for liability and insurance may also be introduced in Special Conditions article 12.

In addition to choosing delivery conditions in Art. 16 of Special Conditions, any other element needing to be included or excluded from the tender price can be specified in Special Conditions article 15, otherwise art. 15.1 of the General Conditions fully applies.

For specific obligations on ACP States related to taxes and customs arrangements (Article 31 Annex IV to Cotonou agreement) please refer to DEVCO Companion section 10.4.5.1.

20.9 Article 22 –Modification of the contract

No request for modification can give rise to a change in the conditions of awarding the contract in question.

Three situations are to be distinguished.

20.9.1 Changes which do not need a contractual modification

Increases or decreases as regards the quantity of any incidental siting or installation which are a result of too low or too high estimates in the budget breakdown do not constitute a modification of the contract and do not therefore require an administrative order or a contractual addendum (Art. 22.4.c). The same applies to any changes of address or bank account by the Contractor (Art. 22.9).

20.9.2 Administrative order

The Project Manager or the Contracting Authority can, on his own initiative or at the request of the Contractor, order any modification that he considers useful for the proper implementation of the contract, so long as it does not have the effect of invalidating the contract. Article 22 of the general conditions outlines the modifications that he may make, and sets out the terms and criteria of their execution. These modifications can be ordered by making 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 an oral order which has been given by the Project Manager or the Contracting Authority. This is deemed to be an administrative order unless immediately contradicted by the Project Manager or the Contracting Authority in writing (Art. 22.4.b).

Except in the case of oral instructions, an administrative order to modify a contract is made in accordance with the following procedure:
a) The Project Manager evaluates the nature and form of the modification.
b) Although the Project Manager is not obliged to request authorisation from the Contracting Authority before inviting the Contractor to submit proposals, he can consult the Contracting Authority in order to be sure that it does not disapprove. This precaution is particularly important where the modification results in budgetary adjustments which must be considered by the donor.
c) The Project Manager or the Contracting Authority notifies the Contractor of his intention to request a modification and outlines its nature and the form. He also asks the Contractor to submit all necessary proposals for changing the budget of the contract and the programme of implementation for the tasks.
d) After receiving the Contractor's proposal, the Project Manager can issue an administrative order to make the modification, which should indicate any additional information given by the Contractor.
All administrative orders issued by the Project Manager must receive the agreement of the Contractor.

All modifications are evaluated in accordance with the rules defined in Article 22.7. Whenever possible, appropriate rates and prices in the budget should be used at least as a basis for comparison. An amount considered as "reasonable" should only be fixed when there are no appropriate applicable rates or prices. This amount should cover the estimated actual cost to the Contractor, as well as overheads and profit.

Among the modifications which can be requested by the Project Manager, there are for example changes in the quantity up to 100%, provided the total value of supplies does not vary more than +/- 25% of the tender price.

Sometimes a modification is made necessary by a failure of the Contractor or by a deficiency in implementation which is imputable to him. In this case, all the additional costs created by this modification are attributable to the Contractor (Article 22.7).

The Project Manager cannot issue an administrative order resulting in an increase or reduction in the initial amount of the contract. It should be noted that all modifications which result in an increase or reduction in the total value of the contract or substantial modifications require an addendum (see below).

An administrative order must be validated within the execution period of the contract, provided any modification is requested during the implementation period. It must be noted that the execution period of the contract may continue up to 18 months after the end of the period of

implementation.

20.9.3 Addendum

In addition to the above changes, it can happen that the parties to the contract (the Contracting Authority and the Contractor) mutually agree upon more serious modifications to the contract. Then, such contract modification must be formalised through an addendum (Art. 22.1).

In this regard, it is important to bear in mind that:

- It is necessary to proceed through a contract addendum when the envisaged modification would result in an increase or reduction of the total value of the supplies in excess of 25% of the initial contract price.

- An addendum is also necessary when additional deliveries by the original supplier become necessary. In this case, following negotiated procedure, an addendum to the contract can be concluded under the following conditions: (i) when the additional deliveries are intended as partial replacement of normal supplies or installations; or (ii) where the additional deliveries are the extension of existing supplies and installations; and (iii) where a change of supplier would oblige the Contracting Authority to acquire equipment having different characteristics which would result in either incompatibility or disproportionate technical difficulties in operational maintenance.

An addendum must be validated within the execution period of the contract, provided any modification is requested during the implementation period. It must be noted that the execution period of the contract may continue up to 18 months after the end of the period of implementation.

20.10 Article 23 –Suspension

Various reasons can justify the suspension - in principle temporary - of a contract. Sometimes, the law governing the Contract provides for special causes of suspension which are in addition to the specific causes in the Contract. Article 23 of the General Conditions of the Contract foresees two cases of contract suspension.

20.10.1 Suspension by administrative order of the Contracting Authority

Traditional event of suspension, concerns all the contract or part of it for such time or times and in such manner as the Contracting Authority may consider necessary.

20.10.2 Suspension for presumed substantial errors, irregularities or fraud

Suspension may be notified by the Project Manager or the Contracting Authority. It needs to be kept in mind that in the event that substantial error, irregularity or fraud are not confirmed and/or attributable to the Contractor this case of suspension allows the Contractor to be compensated for the expenses incurred due to any precautionary measures related to the suspension.

The contractual and financial consequences of the suspension are set out in Articles 23.4 to 23.6.

20.11 Testing, acceptance and maintenance

20.11.1 Introduction

The Contractor is required to provide the supplies which conform to the specifications, samples, etc. laid down in the contract (Art. 24.1).

The various stages in the checking procedure result in preliminary technical acceptance for certain materials, if required in the Special Conditions (Art. 24.2), provisional acceptance (Art. 31) and final acceptance of the supplies (Art. 34).

The provisional and final acceptance are the two stages in which the supplies are taken over effectively. The provisional acceptance takes place when the supplies have been delivered; the final acceptance after the warranty period when any defects have been properly made good. The contract may permit the provisional acceptance of the supplies in parts (partial provisional acceptance).

The warranty period stated in the contract commences on provisional acceptance. For defective items which have to be replaced or repaired, the warranty period restarts at the time of replacement or repair being made to the satisfaction of the Project Manager.

The Contractor is responsible for rectifying all defects which are observed in the supplies during the warranty period, provided that the defects are due to his default. He will not, however, be liable for defects which can reasonably be attributed to normal wear and tear or to faulty design or acts of the Contracting Authority or of the Project Manager.

The Contracting Authority and the Head of Delegation should be kept duly informed on the acceptance process.

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

If preliminary technical acceptance is requested it needs to be specified in Article 24.2 of the Special Conditions.

When the Contractor considers that certain items are ready for preliminary technical acceptance, he takes the initiative by sending a request to the Project Manager (Art. 24.2 General Conditions). This is particularly important for inspections and tests not earned out on site but at the place of manufacture. If the Project Manager finds them satisfactory, 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 Project Manager will proceed to inspection and testing as specified in Article 25.2 of the Special Conditions. Inspection is essentially visual in nature. It includes examining and measuring components and materials to check their conformity with the drawings, models, samples, etc., as well as checking the progress of manufacture against the program of implementation of tasks. Testing is the carrying out of technical tests on materials, components and manufactured goods, as described in the contract, to check that they are of the specified quality.

Inspection and testing may take place at the place of manufacture, the site or other places as may be specified in the contract (Art. 25.2 of the Special Conditions). If no place is specified, the place should be agreed between the Contractor and the Project Manager.

In preparing his program of implementation of tasks, the Contractor should allow for inspection and testing by the Project Manager and for the acceptance procedures and the Contractor's tender price should include costs for all tests; all Contractor's responsibilities relating to testing and inspection are specified in art. 25.3 General Conditions.

If Project Manager and Contractor disagree on the test results and where 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 repeat test. The result of the retesting is final (Art. 25.6).

Components and materials which are not of the specified quality must be rejected. Article 30 describes the procedure to be followed in that case including the possibility for the Contracting Authority to employ another Contractor to make good any rejected part of the supply (Art. 30.3) although it is preferable that it is the Contractor who rectifies the defects, since employment of another Contractor can confuse liabilities especially if the replacement order is not properly done.

It should be pointed out that the signing of a preliminary technical acceptance certificate is not final and depends on the Project Manager. It does not prevent the Project Manager from rejecting components or materials should any defect in them become apparent at a later date or when the supplies are submitted for provisional acceptance (Art. 24.3).

On the other hand, when tests have shown no failure and only at a later stage is it realized that the supplies fail to meet non-essential technical requirements of the contract, it may be appropriate for the Project Manager to investigate with the parties to the contract whether an acceptable solution can be found on the basis of adjustment of payment. This is particularly the case where replacement would lead to long delays, yet where the

supplies delivered still meet the essential technical requirements. Although it is not provided for in the contract, this may be in the best interests of all concerned. Any agreement reached should take due account of the savings to the Contractor in not having to replace the supplies and in not having to pay liquidated damages. On the other hand, the Contracting Authority could gain in smooth and timely achievement of the tasks, especially in cases where rejecting materials already delivered and installed entails serious delays or disruption in the contract implementation.

In carrying out his duties, in particular during inspection and testing, the Project Manager often gains access to much information of a commercial nature regarding methods of manufacture and how an undertaking operates. He is required to respect the confidentiality of this information and describe it to others only on a "need to know" basis (Art. 25.7).

20.11.3 Partial provisional acceptance

Partial provisional acceptance involves the acceptance on a provisional basis of parts of supplies which have been delivered separately (Art. 31.5).

This may be with or without the contract specifying different lots (Art. 31.4).

20.11.4 Provisional acceptance

The Contractor is required to initiate the process of provisional acceptance of the supplies. The Project Manager, on his part, 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 (Art. 31.2). These firm time limits for implementing the procedures are designed to reduce to the minimum possible the time needed for provisional acceptance. If the Project Manager fails either to issue the certificate of provisional acceptance or to reject the Contractor's application within the period of 30 days, he is deemed to have issued the certificate on the last day of that period (Art. 31.4). The provisional acceptance certificate cannot be issued without previous positive assessment of the certificate of origin (see section 6).

Upon provisional acceptance of the supplies, the Contractor is required to dismantle and remove from the place of acceptance all his remaining equipment, temporary structures and materials he no longer requires and any litter or obstructions and restore the place of acceptance to the condition specified in the contract (Art. 31.6). The obligation of the Contractor to leave the place of acceptance in proper condition is of utmost importance as it carries both cost and environmental consequences. Particular attention should be paid not only to the place of acceptance 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 Project Manager should ensure that this obligation is enforced.

After provisional acceptance and without prejudice to the warranty period referred to below, the Contractor shall no longer be responsible for risks which may affect the supplies and which result from causes not attributable to him.

20.11.5 Warranty period and obligations

On the date of provisional acceptance a warranty period commences, which is 365 days if not otherwise specified in the contract (Art. 32.7 of Special Conditions). Separate parts of the supplies may be assigned different defects liability periods, if need be (Art. 32.3).

The warranty period for items which have been replaced or repaired commences only after the observed defects have been remedied by the Contractor and certified by the Project Manager.

The main purpose of the warranty period is to demonstrate, under operational conditions that the supplies have been provided in accordance with the requirements of the contract. During this period the Contractor must not only make ready such outstanding items of supplies as may be listed in the certificate of provisional acceptance. He should also remedy any defects which are revealed during the warranty period (Art. 32.2). It is reminded that the certificate of origin cannot be treated as outstanding item (see section 6).

The Contract does not generally require the Contractor to perform further warranty obligations, unless provision has been specifically made for this in the contract documents (with corresponding provisions in the technical specifications) (Art. 32.6 of Special Conditions). This can be the case of the commercial or manufacturer warranty, which is the warranty the manufacturer provides for a defined period that the supply will be free from structural defects due to substandard material or workmanship, under conditions of normal commercial use and service.

The Contracting Authority or the Project Manager should notify the Contractor if any defect appears or damage occurs for which the Contractor is responsible during the warranty period. If the Contractor fails to remedy a defect or damage 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 to the Contracting Authority for carrying out the repairs are deducted from monies due to or from guarantees held against the Contractor or from both. Alternatively, the Contracting Authority may terminate the contract (Art. 32.4). However, it is always preferable to give the Contractor every opportunity to make good defects in order to avoid disputes which may arise if the repair supply is not satisfactory.

The issue of the notification of defect or damage to the Contractor, referred to in Article 32.4, would normally fall within the duties of the Project Manager.

20.11.6 Final acceptance

The Project Manager should issue a final acceptance certificate to the Contractor within 30 days upon the expiration of the latest contractual warranty period or as soon thereafter as any supply have been provided and defects or damage have been rectified if that replacement or rectification did not take place before the end of the latest warranty period (Art. 34.1). A copy should be sent to the Contracting Authority, who should keep the Head of Delegation informed.

Notwithstanding its wording, 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 his obligations, as laid down in the law of the state of the Contracting Authority. For latent defects or faults of the supplies which were not discoverable at the end of the warranty period, the Contractor remains liable for the period specified in the law of the state of the Contracting Authority which also specifies the nature and extent of this liability.

A number of consequences follows from the issuance of the final acceptance certificate. For example, the Contractor is required to return to the Contracting Authority any drawings, specifications or other relevant contractual documents (Art. 7.1). The performance guarantee is also released within 45 days after the signed final acceptance certificate has been issued (Art. 11.7). There may still, of course, be some matters in dispute at this time, therefore the performance guarantee is released for its total amount except for amounts which are the subject of amicable settlement, arbitration or litigation.

20.12 Article 26 –Revision of Prices

The Contractor is bound by the rates and prices specified in the contract, and he assumes the risk of cost increases that may occur during the period of implementation of the tasks. Nevertheless, for contracts extending over several years, when the price of goods is subject to heavy inflation it is possible to make recourse to indexation.

Revision of prices is only authorised if provided for in the special conditions (Article 26.9). It may occur that the tender documents or the contract documents make this revision automatic. The procedure for this revision must specify the items to be subject to the revision. This is particularly the case for contracts of duration of greater than one year, but only for the period following the first year. There is a revision of prices when there is a rise in prices in the country of the currency in which payments are made.

The detailed rules as regards the revision of prices must be mentioned in the special conditions. The formula for the price revision makes reference to changes in the indices of consumer prices. A circular from DG BUDG which is annexed to this DEVCO Companion (J2), indicates the formula to be used in this case.

"Price revision" means any change in the contract price that is made necessary by factors which are external, non-technical, and beyond the control of the Contracting Authority and the Contractor, and which takes account of changes in the prices of significant elements of the costs incurred by the Contractor.

The price revision may result in either an increase or a decrease of the contract price, depending on the variation in the price of the basic elements.

The price revision requires a reference date for when the prices were determined. This date must be, in case of a call for tenders the deadline for submission of tenders or the expiry date of tenders or, in the case of contracts signed pursuant to a negotiated procedure, the month before the day on which the Contractor signed the contract.

20.13 Payments

20.13.1 General

The Contractor is entitled to pre-financing and final payments. These payments shall be made in euro or in national currency as specified in the Special Conditions (Art. 26.1). Unless otherwise specified in the Special Conditions (Art. 11.1), a performance guarantee is mandatory. If so, no payments can be made before the Contractor has provided the performance guarantee. The Contractor has to provide a pre-financing guarantee, except if the amount of the contract is below EUR 60 000 or if the pre-financing payment requested is below or equal to EUR 300 000 (despite being in this situation the Contractor would however be requested a financial guarantee if he has not submitted the documentary proof for verifying selection criteria or if after a risk evaluation the Contracting Authority decides to request a financial guarantee, Art. 26.5.a Special Conditions).

Where the Contractor is a public body, the obligation for a pre-financing guarantee may be waived depending on a risk assessment made.

The final payment is made to the Contractor after receipt by the Contracting Authority of an invoice and of the application for the certificate of provisional acceptance (and presentation of the certificate of origin when required, Art. 10.3).

In indirect management with Beneficiary Countries, for contracts with ex ante Commission control, payments are normally made, after clearance by the Contracting Authority and endorsement by the Delegation, directly to the Contractor by the Commission.

According to Article 26.3 of the General Conditions supplemented by the Special Conditions for indirect management with Beneficiary Countries, payment delays vary according to criteria. Please refer to DEVCO Companion section 10.1.6.1. - Time limits for expenditure operations.

Payments due by the Contracting Authority shall be made to the bank account mentioned on the financial identification form completed by the Contractor. The same form, annexed to the invoice, must be used to report changes of bank account.

20.13.2 Pre-financing and final payment

Pre-financing payment, equal to maximum 40% of the total contract amount, can be made only after the contract has been concluded and the performance guarantee (Art. 11) and the pre-financing guarantee have been provided (Art. 26.5), unless otherwise provided for in the Special Conditions.

Pre-financing payment shall be made in accordance with Art. 26.3 of the General and Special Conditions and upon receipt of an admissible invoice by the Contracting Authority. The invoice shall not be admissible if one or more essential requirements are not met.

The final payment (equal to maximum 60% of the total contract value, as payment of the balance), must be paid within the time period laid down in Art. 26.3 of the General and Special Conditions after receipt by the Contracting Authority of an invoice and of the application for the certificate of provisional acceptance as per Art. 31.2. The balance should only be paid after the provisional acceptance certificate has been issued by the Project Manager. When the balance is paid the pre-financing and liquidated damages, if any, should be deducted.

20.13.3 Delayed payments

All payments to be made by the Contracting Authority to the Contractor must be executed in accordance with Art. 26.3. Once the time limit for payment has expired, the Contractor shall, within two months of receipt of the late payment, receive default interest. Under indirect management, however, the Contractor is entitled to late-payment interest upon demand to be submitted within two months of receiving late payment (Art. 28.2 Special Conditions).

Default interest shall be calculated:

- at the rediscount rate applied by the central bank of the Partner country 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 eight percentage points.

By way of exception, when the interest calculated in accordance with this provision is lower than or equal to EUR 200, it shall be paid to the Contractor only upon demand submitted within two months of receiving late payment.

The late-payment interest shall apply to the time which elapses between the date of the payment deadline, and the date on which the Contracting Authority's account is debited.

Note that pursuant to Article 28.3 of the General Conditions, the Contractor has the right, after giving notice to the Contracting Authority, to suspend performing the contract or to terminate it when payment is late by more than 90 days. Performance will resume once the Contractor has received payments or has received reasonable evidence that the payment has been proceeded with.

20.13.4 Payments to third parties

Article 27.1 is linked with Article 5 on assignment. Orders for payments to third parties may only be carried out after an assignment of the contract or part of it to a third party has been notified to the Contracting Authority by the Contractor, and the Contracting Authority has given its written consent (Article 5.2).

20.14 Financial Guarantees

For the financial execution of the supply contract two types of financial guarantee could be required:

a) The performance guarantee (Art. 11);

b) The pre-financing guarantee (Art. 26.5.a).

The financial guarantee templates in Annex V to the Supply contract (annexes c4h and c4i to PRAG) should be used.

For further information about types and conditions for release please refer to DEVCO Companion section 10.4.7.

20.14.1 Performance guarantee

For contracts worth more than EUR 150 000 the Contractor must provide the Contracting Authority with a performance guarantee, unless the Contracting Authority has decided not to demand such a guarantee on the basis of objective criteria such as the nature and value of the contract. This guarantee (whose amount is set by the Contracting Authority between 5 % and 10 % of the amount of the contract and any riders) must be placed at the latest on return of the countersigned contract. It is intended to cover the Contractor's liability for the full and proper performance of the contract; therefore no payment can be made to the Contractor before the performance guarantee has been submitted.

The performance guarantee is normally released within 45 days starting from the date of issue of the final acceptance certificate by the Project Manager.

The performance guarantee is autonomous from the underlying supply contract; therefore calling on the guarantee is not conditioned to any objections related to the underlying contract, save a few exceptions (namely a fraudulent claim by the Contracting Authority), which the Contractor has to back with actual evidence.

20.14.2 Pre-financing guarantee

A pre-financing guarantee must be requested and received before any pre-financing payment above EUR 300 000; it must cover the amount of the pre-financing, and be denominated in the currency of payment. However, for a pre-financing amount which is less than EUR 300 000, such a guarantee is not required unless:

- The documents proving that the Contractor fulfils the selection criteria were not provided by the Contractor (or demanded by the Contracting Authority). This is the case for contracts awarded pursuant to a competitive negotiated procedure;

- A risk analysis by the Contracting Authority requires it to seek such a guarantee. This is the case for a Contractor who has been registered in the Early Warning System over the previous 3 years, or for a Contractor which has not fulfilled the selection criteria itself, but has had recourse to the financial, technical, or professional capacity of another entity.

For supply contracts of less than EUR 60 000, it is not allowed to demand a guarantee to cover the pre-financing.

The pre-financing guarantee is released within 45 days of issue of the provisional acceptance certificate for the supplies.

20.15 Article 35 –Breach of Contract

A breach of contract is committed where one of the parties to the contract fails to discharge any of its obligations under the contract. Some breaches are of only minor importance, whereas others, such as the non-implementation of the contract by the Contractor or the failure by the Contracting Authority to pay amounts due to the Contractor, are major breaches and have serious consequences. Only serious breaches entitle one of the parties to terminate the contract, and these are enumerated in Article 36 (breaches by the Contractor) and Article 37 (breaches by the Contracting Authority). For other breaches the injured party may claim damages, suspend payments, or suspend the implementation of the contract.

The injured party is then entitled to recover damages from the other party either by negotiation and agreement or, if necessary, by a court action.

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 A1 to the Practical Guide.

Liquidated damages are damages which 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.

General damages 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.

Any amount of damages, whether liquidated or general, to which the Contracting Authority is entitled, can be deducted from any sums which it is due to pay to the Contractor, or alternatively from an appropriate guarantee, usually the performance guarantee (see section 14.1).

20.16 Article 36 –Termination by the Contracting Authority

The General Conditions enumerate several grounds which entitle the Contracting Authority to terminate the contract, and also stipulate its rights upon termination.

The period of 7 day-notice mentioned in Article 36.2 is not aimed at giving the Contractor a final chance to remedy his failures.

Termination is a serious step and should only be taken after exhaustive consultations between the Contracting Authority and the Project Manager. Before resorting to termination, the issue of warnings to the Contractor or instructions to remedy should be considered. The grounds for termination mentioned in Article 36.2 all relate to defaults or lack of ability on the side of the Contractor and speak for themselves. Nevertheless, attention should be drawn to the fact that the Contracting Authority may terminate the contract for reason of any organisational modification in the legal personality, nature, or control of the Contractor, for which it did not obtain the prior consent of the Contracting Authority through an addendum to the contract (Art. 36.2.f).

Of course, any modification which is acceptable to the Contracting Authority should be formally agreed. This is most likely to occur in the case of a change to the legal relationship between the parties within a consortium or a joint venture. However, there may be changes which affect the rights of the Contracting Authority in a way which it cannot accept. In that case it has the possibility to terminate the contract.

The Contracting Authority may also, at any time and with immediate effect, terminate the contract for other reasons than those provided in Article 36.2,whether they are provided elsewhere in the General Conditions or not.

Where termination by the Contracting Authority is not due to a fault of the Contractor, force majeure, or other circumstances beyond the control of the Contracting Authority, the Contractor may be entitled to claim an indemnity for loss suffered, in addition to sums owed to him for supplies already delivered. Such a loss includes that of profit on the remaining part of the supplies to be delivered. Termination of the contract does not result in a cessation of all rights and obligations and activities as between the parties. Indeed, in such a case, the Project Manager has to draw up a detailed report of the supplies which have been delivered by the Contractor, of the incidental siting or installation performed and has to take an inventory of the materials supplied and unused.

The net amount due to the Contractor can be ascertained and paid only when all supplies have been completed and the full value of contracts with third parties and other costs have been deducted from monies due to the Contractor (Art. 36.7).

The Contracting Authority is also entitled to recover from the Contractor, in addition to the extra costs necessary for completion of the contract, any loss it has suffered because of inadequacies in work already completed and paid for.

20.17 Article 37 –Termination by the Contractor

Unlike the Contracting Authority, the Contractor can terminate the contract only on few specific grounds listed in Article 37: the Contracting Authority has not paid him sums due for longer than 90 days after the expiration of the contract payment deadline, consistently fails to meet its obligations under the contract, or has suspended the contract for more than 180 days for reasons which are not specified in the contract and which are not due to any failure by the Contractor. The termination takes effect automatically 14 days after the Contractor has given notice of termination to the Contracting Authority. In the notice, the Contractor should specify the grounds for the termination.

The Contractor is entitled to be paid by the Contracting Authority for any loss or damage it has suffered (Art. 37.3).

20.18 Article 38 –Force majeure

There is no default or breach of contract if implementation is prevented by force majeure (Art. 38.1). Because of the seriousness of the consequences which arise, it is important that any notification of force majeure should be carefully examined to ensure that the event in question is genuinely outside the control of the parties. For example, strikes and

lock-outs may be caused by some action of the Contractor, and would then not be considered as resulting from force majeure. Provisions of force majeure should, therefore, not be used as an escape from contractual obligations or to improperly terminate the contract. Any dispute between the parties arising from the application of this article should be resolved under the procedures for settlement of disputes.

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".

An additional case of force majeure has appeared as from 2013 in the General Conditions of contracts, and concerns the suspension of cooperation with the partner country. This new case allows for the protection of the interests of the Contractor who can terminate the contract in this way without putting itself in default towards a decentralised Contracting Authority with whom cooperation has been suspended.

As a result of Article 38.3, the Contracting Authority does not have the right to forfeit the performance guarantee, to demand the payment of liquidated damages or to terminate the contract for the Contractor's failure of implementation, to the extent that this failure 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 failure to fulfil its contractual obligations, or to terminate the contract for failure of implementation, where these failures are due to force majeure. The procedure to be followed in the event of force majeure is set out in Article 38.4. It is initiated by either party giving prompt notice of the event in question. The Contractor is then required to make proposals on how to continue with implementation of the contract. The Contractor is entitled to any extra costs incurred as a result of the Project Manager's directions (Art. 38.5).

If the situation of force majeure continues for a period of 180 days, this gives either party the right to terminate, on giving 30-day notice (Art. 38.6).

20.19 Article 40 –Dispute settlement procedures

Although a party can decide to initiate the dispute settlement procedures of Article 40 of the General Conditions at a moment when the contract is still being implemented, these procedures may also begin once the contract has been completed, or after the termination of the contract by one of the parties. It should be noted that if there is a dispute which concerns an on-going contract, this does not relieve the Contractor of its responsibility to continue complying with its contractual obligations with due diligence.

20.19.1 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 end, as an obligatory first step, Article 40.2 of the General Conditions requires one of the parties to notify the other party in writing of the dispute, stating its position and any solution it envisages, and requesting an amicable settlement. The other party is to respond to that request within 30 days with its position on the dispute. The general principle is that disputes are discussed by the parties and, whenever possible, resolved in an amicable way. 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 40.2 of the General Conditions sets clear time limits to 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. As such, the maximum time period for reaching an amicable settlement is fixed at 120 days, unless both parties agree otherwise. The amicable settlement procedure can 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.

20.19.2 Litigation

If the attempt to resolve the dispute through 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.

- Unlike with an amicable settlement, a court or arbitral tribunal may take a decision on the submitted claims even if the other party does not cooperate during the legal proceedings - for instance if one party does not attend proceedings, the court or tribunal may still make a decision. Unlike a proposal made during a conciliation procedure, the final decision taken by a court or arbitration tribunal will be binding. Whether a court or an arbitral tribunal will be competent and, if so, which court or arbitral tribunal, will be laid down in the Special Conditions of the contract. As a general rule, whenever the Commission is the Contracting Authority, the courts in Brussels are designated as being exclusively competent for the litigation. In the case of decentralised EDF-financed contracts, the Special Conditions will distinguish between disputes arising in a national contract and disputes arising in a transnational contract. Disputes arising from a national contract, i.e. a contract concluded with a national of the State of the Contracting Authority, are under 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 arising from 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 the decision of the ACP-EC Council of Ministers. These Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund have been adopted by Decision N° 3/90 of the ACP-EC Council of Ministers of 29 March 1990 and published in the Official Journal L-382 of 31 December 1990.

In an EDF indirect transnational contract, parties further 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 must be recorded in writing and signed by both parties.

If an internal administrative appeal procedure exists within the ACP State, the arbitration must be preceded by that procedure. The Contractor will only be in a position to initiate arbitration if internal administrative appeal procedures fail or are deemed to have failed

(that is if there are no such procedures in the ACP State in question) as indicated in Article 4 of the EDF Procedural Rules.

Arbitration is a kind of private dispute resolution procedure in which the parties contractually agree to submit their dispute to an arbitral tribunal and accept the decision of this tribunal to be binding. If the parties agree, the arbitral tribunal can consist of one 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. It should be noted that arbitration procedures are not public, and are subject to payment – the cost shall be borne by the party requesting the arbitration. For more information on arbitration in EDF contracts, please see the brief overview of the rules of arbitration applicable to contracts financed by the EDF:

http://www.cc.cec/dgintranet/europeaid/contracts_finances/guides/prag/documents/edf_arbitration_mar10_fr.pdf

and the rules of procedure for conciliation and arbitration of contracts financed by the EDF:

http://ec.europa.eu/europeaid/work/procedures/legal_affairs/documents/edf_arbitration_fr.pdf

20.19.3 Conciliation

Once the dispute has arisen, the parties may agree to have recourse to conciliation by a third party.

The link below leads to a declaration of acceptance of a procedure of conciliation by the European Commission:
https://myintracomm.ec.europa.eu/dg/devco/finance-contracts-legal/legal-affairs/legal-disputes/Pages/court-actions-our-tasks.aspx
The main difference between conciliation and arbitration is that, unlike 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. Unlike 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. In that respect, one should bear in mind that Article 18 of the EDF procedural rules for conciliation and arbitration stipulates that the notice initiating arbitration shall 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. The conciliator will, as a general rule, request the parties to suspend arbitration proceedings pending conciliation.

Like under the amicable settlement procedure, 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.

Should conciliation fail, the parties may refer their dispute to, or continue their dispute before, a court or arbitral tribunal, as specified in the Special Conditions. If so, nothing that has transpired in connection with the proceedings before the conciliator shall in any way affect the legal rights of any of the parties at the arbitration.

In a contract to which the Commission is not a party, the Commission can act as a conciliator, and if so, this will take the form of a good offices procedure. Such a 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 which describes its steps and principles (and which should have been previously signed by the parties).

20.20 List of Annexes

T	**The implementation of supply contracts – A User's Guide**	
T1	The implementation of supply contracts – A User's Guide	t1_users_guide_supplies_en.pdf