THE USERS' GUIDE

TO

TENDERS AND CONTRACTS

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INTRODUCTION

1 Procurement of works, supplies and services under the European Development Fund

1.1. One common set of rules

By decision no. 3/90 of 29 March 1990, the ACP-EEC Council of Ministers approved for the first time a comprehensive set of rules for procurement of works, supplies and services financed by the European Development Fund (EDF): the General Regulations, General Conditions and Procedural Rules on Conciliation and Arbitration.[1] In doing so, it created one common set of rules for EDF financed procurement for all ACP States.

Although the adoption of such a common set of rules had already been an objective from the time of the first Lomé Convention, it has, after years of negotiations, only been realized under the fourth Lomé Convention. The rules came into force on 1 June 1991.

Until then, EDF financed procurement was partly governed by the General Conditions already used under the Yaoundé Conventions, for the ACP countries which were party to those Conventions (mainly French speaking countries); and partly by the General Conditions used by the Fédération Internationale des Ingénieurs-Conseils (FIDIC), for most of the English speaking ACP countries.

The new EDF rules are an attempt to merge these different rules into one single set of rules. This makes it possible to achieve greater efficiency in management of procedures and contracts. Furthermore, it will allow for larger numbers of companies to become familiar with EDF procurement rules, thus increasing competitive opportunities to the advantage of the ACP States.

It is important to note that the new rules do not only apply to procurement under the seventh European Development Fund, which corresponds to the fourth Lomé Convention (hereafter : Lomé IV), but also to that under the fifth and sixth European Development Fund corresponding to the second and third Lomé Conventions respectively (Art. 2 of Decision 3/90 and Art. 41 General Regulations). As a result, the new rules have to be applied to all EDF procurement and contracts.

1.2 The purpose of this Users' Guide

When adopting the new EDF rules, the ACP-EEC Council of Ministers agreed that a Users' Guide be prepared in order to promote a better understanding and a proper application of the rules.

The Guide is, therefore, intended not as a kind of handbook for the legal interpretation of the rules but primarily as a practical help for all those who have to work with the rules and to prepare, administrate or execute EDF procurement procedures and contracts and other EDF procurement documents (like tender documents). These persons are, in particular, officials of the national administrations of the ACP States, officials of the Commission of the European Communities at headquarters and in its Delegations in the ACP States as well as companies and

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[1] The full text of the Decision, the Regulations, Conditions and other rules has been published in the Official Journal of the European Communities no. L 382 of 31.12.90.

experts participating in EDF financed projects, tenders and contracts.

On account of its practical purpose, the Guide does not go into all the details of the new rules but deals with the most current issues relating to the EDF procurement procedures and contracts. Questions relating to other issues or more details may be addressed to the central procurement division (unit VIII/C/3) of the Commission's Directorate General for Development.

2 The set-up of the EDF procurement rules

2.1 Structure

Whereas the old General Conditions dealt, for each of the fields of supplies, works and services, with the procurement procedures up to the conclusion of a contract as well as with the execution of contracts, the new rules make a distinction between :

- the General Regulations, which relate to the rules and procedures applying up to the conclusion of a contract (tender procedures in particular) and which cover all fields of procurement (supplies, works and services);

- the General Conditions, which contain the rules and procedures which apply to the performance of contracts. A separate set of General Conditions exists for each of the fields of supplies, works and services;

- the Procedural Rules on Conciliation and Arbitration, which lay down the rules and procedures to be followed for the resolution and settlement of disputes on the execution of a contract.

This separation of the pre-contractual rules and procedures from the contractual ones is maintained in the tender documents which are to be issued for each individual tender procedure. Thus, on the one hand, the relevant provisions of the General Regulations are translated into the instructions to tenderers, which may further elaborate upon a certain number of relevant elements of the pre-contractual stage; on the other hand, there are the contractual rules and procedures, which include in particular the special conditions which take into account the specific subject matter of the contract concerned. These special conditions comprise, as necessary, amendments or additions to the General Conditions: they also contain the technical specifications and provisions concerning any other matter related to the contract (Art. 1.5 General Regulations hereafter : GR).

2.2 A complete set of rules

The new rules are an attempt to be as complete as possible. They try to avoid as much as possible situations where one has to combine application of EDF-rules and that of the national law of the ACP State concerned. Practice has shown that such situations led to quite a variety of procurement practices which made procedures and rules less transparent and more difficult for companies and experts to understand and more difficult for the EDF to administer and enforce them.

The new rules are also comprehensive in another respect : almost all provisions of Lomé IV on procurement procedures and contracts have been incorporated into the new rules. There is, therefore, practically no need any more to refer separately to the provisions of the Lomé Convention.

2.3 Possibilities for derogation from the EDF rules

Some possibilities for derogation from the EDF procurement rules exist. A distinction is to be made between a general derogation on the one hand, in case one would want to apply rules other than the EDF rules, and a derogation from the EDF rules on certain specific points on the other hand.

A general derogation is only possible for the General Conditions part of the EDF rules which concerns the performance of works, supply and service contracts; but not for the General Regulations part of the EDF rules and procedures which apply up to the award of the contract (Art. 1.1 and 1.2 G.R.).

This means that the EDF tender and other procedures for the award of contracts always apply, in all cases, without the possibility of following any other type of procedure, such as national tender procedures of the ACP State concerned.

For the performance of contracts, the situation is different. General conditions other than the EDF ones may be used in certain cases, provided that the ACP State(s) concerned and the Commission's services (the central procurement division of the Directorate General for Development) agree on that. These cases are mainly those of co-financed projects and programmes and accelerated tender procedures (Art. 1.2 G.R.). If, in the case of an accelerated procedure where mainly local companies are expected to participate, one would opt for contract conditions other than EDF ones, the choice would probably be for the national conditions used in the ACP State concerned. One should, however, keep in mind that the rule is that EDF conditions apply.

With respect to derogations from the EDF rules on specific points, one should again distinguish between the General Regulations and the General Conditions. Derogations from specific rules of the General Regulations are possible only in so far as these General Regulations explicitly allow for it, which they do only on some points.

On the other hand, derogations from specific points of the General Conditions are less exceptional. These take the form of amendments to the General Conditions and are included in the special conditions referred to earlier (see also point 7 below).

PART I. GENERAL REGULATIONS : RULES AND PROCEDURES UP TO THE CONCLUSION OF CONTRACT.

3 Who may participate in tenders and contracts under the EDF-rules?

The provisions which determine who may participate to tenders and contracts are generally referred to as the provisions on eligibility.

3.1 The nationality rule

As a general rule, only persons, companies or public or semi-public agencies from ACP or EEC States may participate in EDF financed tenders and EDF financed contracts (Art. 4.1. G.R.). These include joint ventures or groupings of ACP and/or EEC companies or persons. In fact, joint ventures and other types of cooperation between ACP and EEC companies are encouraged (Art. 5.1. and 22 G.R.).

How is the nationality of a company or firm determined? It should have been formed under the law of an ACP or EEC State and have its office, central administration or principal place of business in an ACP or EEC State. If it has only its statutory office there, it must at least be engaged in activities which have an effect on and continuous link with, the economy of the ACP or EEC State concerned (Art. 3.1 G.R.).

The nationality should be confirmed by documents to be submitted with the tender[2] or with an offer in case of negotiations on a direct agreement.

3.2 Exceptions

In certain cases, exceptions to the nationality rule are possible. This is to be done on a case-by-case basis and after a derogation has been granted by the Commission's services in Brussels (in practice : the central procurement division of the Directorate General for Development).

A derogation may be considered in the following cases:

- where the participation of a non-ACP or EEC expert or company is necessary, in particular in order to avoid excessive increases of costs or because of transport difficulties or problems with delivery time; in other words, where, for objective reasons, it may be considered that ACP or EEC companies or experts are not available.

- where a project or programme is jointly financed by the Community and a non-ACP or EEC country or institution (for ex. a third country or an international body, like the World Bank). The decision as to which other nationalities participation may be extended will depend on which are the other co-financing bodies;

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2 See point 5 hereafter which deals with the different types of procurement procedures.

- where there is a regional project or programme which includes non-ACP countries. In such a case, persons or companies from the non-ACP countries involved may, in certain circumstances, be permitted to participate (Art. 6.2 G.R.).

3.3 The nationality of subcontractors and experts employed by participating companies

The rules and exceptions on the question of nationality also apply to subcontractors contracted by consultants or by other companies which participate in an EDF financed tender or contract. For the choice of subcontractors, the rules also provide that preference should be given to persons and companies of ACP States if they are capable of performing the subcontract on similar terms to those of EEC persons or companies (Art. 9.1.d G.R.).

The nationality rules in principle also apply to experts employed by consultants participating in an EDF financed tender or contract or employed by subcontractors. Indeed, the importance of experts in the execution of services contracts is such that limiting the application of the nationality rules only to the consultancy companies themselves would not be justified and contrary to the spirit of these rules.

3.4 Other conditions for participation : financial and legal

In order to participate in a tender or to obtain a contract, the person or company should not be in a situation of bankruptcy, suspension of payments or condemnation for any crime or offence concerning professional conduct; nor in a state of being guilty of serious misrepresentation of information in an EDF tender or of being in breach of another contract with the contracting ACP State or body (Art. 4.2 G.R.).

The first three situations should be confirmed by documents established by competent bodies designated to that end by the country where the company is established. The latter two situations may be confirmed by sworn statement of the company concerned. Such a statement can also be accepted for the former three situations in case that no competent bodies have been designated.

A more specific condition for participation applies in the following case. If a consultant participating to a tender or negotiating a contract, entered into any legal relationship with natural or legal persons who might participate in the carrying out of works, the provision of supplies or the performance of services which precisely the consultant should define or prepare, he has to inform the contracting authority thereof. The same applies if the consultant maintains any other relations with such companies which are likely to compromise his independence.

The contracting authority may decide, in the light of the information, not to conclude a contract with the consultant. In case he does conclude the contract, the attention should be drawn to the obligation of the consultant to refrain from any such relationship and to the sanctions which may be applied if he fails to do so (see point 29 below).

It is also important to note that, as a matter of principle, the consultant is not allowed to perform other services for the same project, except with the written permission of the contracting authority. That also applies to the participation by any other consultant, contractor or supplier with whom the consultant has any such relationships (Art. 23.2 G.R. and Art. 12.2 General Conditions for service contracts).

4 The origin of products, materials and equipment supplied or used under EDF rules

All new products, materials and equipment and plant supplied or used under an EDF financing must be of an ACP or EEC origin. This includes equipment and machinery brought into the ACP State(s) concerned for performing works and services contracts or for testing and installing equipment or machinery supplied under a supply contract. If, however, in such cases, a company uses tools, equipment or machinery which were already in its possession before, the restriction on origin does not apply.

Exceptions to the rule of origin are possible on a case-by-case basis and after a derogation having been granted by the Commission following criteria which are similar to those for exceptions to the nationality rules (see point 3.2 above).

In certain cases, the national administration may, in agreement with the Delegation on the spot, decide itself to derogate from the origin rule. This is possible, during the execution of a project, for supplies of a limited amount to be bought on the local market (Art. 313.2.g Lomé IV).

In its tender or, in the case of a direct agreement contract, in its offer, the company has to indicate which is the ACP or EEC country of origin. It must supply the origin certificate when bringing the products, materials, equipment or plant into the ACP country.

Origin certificates must be established by the bodies or authorities designated by the country of origin. They should establish the certificates in accordance with the international agreements which their country has entered into. These agreements determine what level of local input is required to consider a product to be a product of that country. They may be regional agreements or agreements involving a larger number of countries. The agreements may contain criteria which are different from those in Protocol no. 1 of Lomé IV, which relates to the trade cooperation between the ACP countries and the EEC and applies to exports from those countries into the EEC and does not define the criteria for determining whether a product to be used in an EDF financed project has an ACP origin.

The control on the presence of an origin certificate should be exercised by the national ACP administration. The Delegation may assist in these controls and has access to the documents in question.

5 The different types of EDF procurement procedures

The guiding principle for EDF procurement is that competition offers the most equitable and effective way for companies to obtain contracts and for the European Communities to get projects implemented at the lowest reasonable price. This means that tendering is the normal procedure for procurement of works, supplies and services. The ACP States and the Commission have the obligation to ensure the widest

possible participation, on equal terms, to tenders (Art. 5 G.R.).

Tenders may be launched with a so-called suspensive clause. This means that the tender is launched before the financing convention between the Commission and the beneficiary ACP State is signed and that the award of contract as a result of the tender will depend on funds being made available. The reason for using a suspensive clause in some cases is that the tender result is needed for obtaining a better idea of the cost to implement the project. Launching a tender with suspensive clause is, furthermore, a way to speed up the implementation of the project.

Different types of procurement procedures exist, with decreasing degrees of competition. They may be summarized as follows (Art. 7, 8 and 13-15 G.R.).

5.1 Open invitation to tender

5.1.1 International tender

The open international tender is a procedure to which any ACP or EEC person or company can participate and which is published in the ACP State(s) concerned[3] and in the Official Journal of the European Communities. The minimum period for submission of tenders under this procedure is, according to Art. 30 G.R., 90 days.

5.1.2 Accelerated procedure

The open accelerated procedure aims at a more rapid and effective implementation of projects and programmes. This procedure is similar to the open international procedure, be it with two differences : the period for submission of tenders is shorter, to be agreed upon between ACP administration and Delegation, and the invitation to tender does not have to be published in the EEC Official Journal (although it may, on occasions), but only in the ACP State concerned and in the neighbouring ACP States (Art. 7.10 G.R. See also point 6 below). This does not change the right for all ACP and EEC companies to participate. This procedure may only be used for works up to 5 million ECU and not for supplies and services.

5.2 Restricted invitation to tender

5.2.1 Following an international call for prequalification

In this case an open international call for prequalification is published before inviting companies to tender. The purpose of the call for prequalification is to enable companies to present their candidature, to identify the companies which have a real interest for the project and to select them on their technical and financial capacities to do the job.

This procedure will normally be followed also in the case of a tender for a design competition, such as provided for in Article 8 of the General Regulations.[4]

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3 Officially in all ACP States, but in practice this appears quite difficult to realise. See also point 8.1.

4 Although Article 8 does not mention the type of procedure to follow, the nature of such a tender and the reasons for using it (technical, aesthetic or financial) make that a restricted tender with prequalifications appears normally to be the most appropriate procedure. Only in cases where the amounts involved are not important, a restricted tender without prequalification could be used.

The call for prequalification is published in a similar way as an open international tender. The difference is, of course, that companies do not yet have to present their prices which will only be done in the next stage; and that the period for the presentation of the candidatures is somewhat shorter and does not often exceed two months.

Out of the companies which submit their candidature, a short-list of companies will be drawn up by the ACP State concerned, in agreement with the Commission. Subsequently, only the short-listed companies will receive an invitation to tender.

The attention is drawn to the fact that a company selected and invited to tender may not associate with other companies or groups for submitting its tender, except in so far as that is explicitly permitted in the invitation to tender. Such an exception is usually made for association with non-selected companies or groups as subcontractors. This is, in particular, to facilitate association between EEC and ACP companies and/or experts. In the case of subcontracting, the short-listed main contractor remains always fully responsible for its bid and for the execution of the contract.

Association as between short-listed companies is, as a general rule, not allowed, as that would unnecessarily reduce competition. Only in exceptional cases where it is justified, such an association may be permitted.

5.2.2 Without prequalification

In this case a short-list of companies is drawn up by the ACP State in agreement with the Commission, without any previous official publication, on the basis of the information available. These companies will receive an invitation to tender.[5]

The period for submission of the tenders is, as a rule, not less than two months. This may, dependent on the characteristics of the contract, be more but also less (for example, in the case of a tender for homogeneous products where few technical specifications suffice, so that interested companies can prepare their bids relatively quickly).

5.3 Direct agreement

Under the direct agreement procedure, a short-list of qualified companies or persons has equally to be drawn up by the ACP State, in agreement with the Delegation or the Commission's services at headquarters. Subsequently, however, the ACP State concerned may enter freely into discussions and negotiations with these companies and persons.

It is understood that a contract under this procedure will normally only be awarded after a minimum degree of technical and price comparison took place in order to ensure that the award of the contract is an acceptable choice.

It may, however, be agreed at forehand between the ACP State and the Commission that negotiations will concentrate on a specific company. The reason may be that, through a previous tender, there has already been an exploration on what is available on the market, so that further comparison of possibilities is not justified any more.

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5 Article 7.5 G.R. What has been said in point 5.2.1 on association with other companies also applies here.

Another reason may be that, in the given circumstances, it is considered that the company concerned is best qualified to do the job.

5.4 Project execution by the national ACP administration : direct labour

In the case of execution through so called direct labour contracts, the project is implemented by public or semi-public bodies in the ACP State concerned which have a management capacity to do the job. In such a case, the Community only intervenes for financing temporary, supplementary expenditure for lacking equipment, materials or staff or other labour force. Staff experts should be from an ACP State (Art. 7.7 and 7.8 G.R.).

6 Which procurement procedures are used when ?

Generally, the financing agreement concluded between the Commission and the beneficiary ACP State for each project or programme indicates which procedures are to be followed for the procurement of works, supplies and services in the project or programme. Those indications are based on the following rules (Art. 7 G.R.) and also apply in cases where there is not (yet) a financing agreement (for example, in case of a study for identification of the project).

6.1 Supplies

The general rule for supplies is the open international tender. The vast majority of EDF financed supplies are tendered following this procedure.

However, a restricted tender may be used in agreement with the Commission's services mainly in case of urgency, for large scale contracts, for supplies of highly specialized nature and where the nature or certain characteristics of the contract justify it. That includes the case where the amount of the contract is not too important and where supplies can easily be obtained on the spot, without significant extra cost.

Where, however, the restricted tender relates to large scale contracts or expensive projects of a highly specialized nature, a prequalification will precede the restricted tender. This, rather than the normal open international tender, facilitates the selection of companies which have the appropriate technical and financial capacities to do the job and avoids unnecessary tender costs for other companies.

For supplies of a limited amount, ACP States may, in agreement with the Commission's Delegation, conclude contracts by direct agreement (Art.7.1 - 7.3 and 7.11 G.R.).

In certain circumstances, direct agreement may also be authorized by the Commission for larger amounts: in urgent cases or if it is clear that the supplies can reasonably be obtained from only one supplier and that there are no other suppliers; or following an unsuccessful invitation to tender ; or if the agreement is clearly complementary to an already existing contract (Art. 7.1 - 7.4 and 7.10 G.R.).

6.2 Works

The rule for works is as for supplies, namely the open international tender. However, for amounts up to 5 million ECU, the open accelerated procedure may be followed. This happens normally. For works contracts up to this amount, most often only companies in the ACP State or region concerned are interested.

A restricted tender and direct agreement may be used in certain cases, similar to those mentioned for supplies.

A restricted tender for works is sometimes used for large scale and more complex contracts. The tender is then preceded by a prequalification. It should be emphasized that in cases of works contracts below 5 million ECU where a restricted tender procedure is followed, a prequalification is normally not taking place.

Finally, a procedure which is used with some frequency for works is that of direct labour.

6.3 Services

The rule for services is the restricted invitation to tender. For more important contracts, the invitation to tender is preceded by an international call for prequalification.

In that case, the short-list of companies is, of course, drawn only from those which introduced their candidature, following the call for prequalification.

In all other cases, the Commission bases its proposals for companies to be included on the short-lists on registers of EEC and ACP consultancy companies held at its offices. Some ACP States and ACP regional bodies have similar registers.

In certain cases, direct agreement contracts may also be used. These cases, which are not exceptional, concern mainly actions necessary for the preparation or the completion of a project, short-term contracts, contracts of a limited amount and the case of an unsuccessful invitation to tender.

7 The tender documents

7.1 Preparation : quality and procedure

Well prepared, tender documents are essential not only for bringing the tender procedures to a good end but also for the subsequent execution of the contract.

Indeed, the tender documents contain all provisions and information for interested or invited companies, experts or organisations on all that is relevant in order to obtain the contract. They inform them in particular on the procedures to be followed, the documents to be submitted by the tenderers, the way in which the tenders are evaluated and the contract awarded. It is, therefore, essential that tenderers carefully examine all tender documents. Another reason why this is important is that the tender documents contain the essential information for the successful completion of the project.

A failure in the proper preparation of tender documents generally leads to complications during the tender procedure or in the execution of the contract. Moreover, well prepared and complete tender documents are, at the same time, essential for ensuring that sufficient companies and experts are confident in making bids. This enlarges competition for EDF financed projects and increases chances for an optimal implementation of the project.

The preparation of tender documents belongs to the primary responsibility of the ACP State(s) concerned, which in a number of cases, require technical assistance to that end.

In cases of an international tender or a restricted tender, tender documents should be submitted for approval to the Commission's services at headquarters. The same applies to prequalification documents. This procedure should be followed for works, services and supplies contracts.

For accelerated procedures, the Delegation may approve the tender dossier without first submitting it to the central services at headquarters (in the same way it may approve direct agreement contracts - Art. 13.2 and 13.3 G.R.).

7.2 The use of standard tender documents and contracts

In order to facilitate the preparation of tender documents, to rationalise management of tender procedures and of the execution of contracts and also to make tender procedures more transparent for participants in EDF tenders, the Commission has drawn up standard tender documents for supplies, works and the two main types of services, technical assistance and studies.

In the few cases that tender documents have to be drawn up for other fields of performance, the standard documents will offer useful references.

The standard documents are available at the central procurement division (unit VIII/C/3) of the Commission's Directorate General for Development.

7.3 Global contents of tender documents

In addition to the tender notice in the case of an international or accelerated tender, the prequalification notice in the case of a prequalification or the letter of invitation to tender in the case of a restricted tender, tender documents essentially comprise the following documents (Art 16 G.R.) :

- **Instructions to tenderers**
  These contain all practical information needed for making a bid as well as information on the type of tender procedure, type of contract and conclusion of the contract.

- **Description of the method for the evaluation of the tenders.**
  This description is to provide the tenderer with information on the evaluation procedure and criteria, including the weighting attached to each criterion in case of services tenders (see also point 9 below).

- **The relevant set of General Conditions**

- **Special Conditions**
  These amend or, most often, complete the General Conditions.

- **Technical specifications, drawings and/or terms of reference**
  These define the scope and the technical requirements of the contract, including the type and quality of materials and equipment, the standards of workmanship or the qualifications and experience of experts. In this connection, the attention may be drawn to the distinction between essential and non-essential staff and its importance in terms of procedures of tender evaluation, award and conclusion of contract and approval of staff after the conclusion of contract (see point 30 below).

  They should also include any specifications and limitations on the freedom of choice for the contracting company, expert or organisation as to the way of executing the contract (see for details Art. 5 and, in particular, art. 11 G.R.; and for terms of reference, Art. 16.3 G.R.).

  As far as technical specifications for materials, products and equipment is concerned, the attention of the users is drawn to the importance of specifications referring to or based on international standards, or, in their absence, to the possibility of offering equivalent quality so as to ensure equal conditions and as wide as possible participation .

- **Note of general information**
  For large scale contracts and other contracts where the nature of the contract justifies it, the tender documents should include a note with general information on the country or region and the applicable law in the different relevant fields such as taxes, customs, prices, wages, social security and exchange control as well as information which is more specific to the circumstances of the tendered contract, such as the description of the site location.

  The note is more common for works contracts than for supply contracts. It is not normally included in tender documents for services, where most of the information in question, where necessary, is included in the terms of references.

  The preparation of the note is a joint obligation for the Delegation and the ACP State concerned : it is to be drawn up by the Delegation in consultation with the ACP State, which has to approve it (see for more details art. 16.2 G.R.). The note does not become a contractual document and only constitutes an information help for tenderers, who remain ultimately responsible for their own inquiries.

- **Note on applicable tax and customs arrangements**
  This note is normally included in tender documents which do not contain a note of general information.

- **Price breakdown and bill of quantities.**
  The price breakdown form will help tenderers to submit sufficient details of the prices of the various components of their bid and in such a way that the various bids can be easily compared. In the case of works contracts, a detailed bill of quantities is necessary and constitutes together with the unit prices to be mentioned in the price breakdown, the basis for determining the final prices to be paid after remeasurement of the quantities really needed or

executed. A comparable exercise may take place in the case of service contracts.

- Tender form.

- **Form for tender guarantee.**
  A tender guarantee assures the seriousness of an offer by the tenderer and is generally to be required from tenderers in the case of works and supply tenders. It should not be less than 1% of the amount of the tender but not more than 2%. The tender guarantee may be called up if a tenderer withdraws his tender during the period of validity of his tender or if he fails to sign the contract or to furnish the performance guarantee (Art. 26 G.R.).

- **Form for performance guarantee.**
  This guarantee for full performance of the contract is generally to be required in the case of works and supply tenders and should be given by the successful tenderer within 30 days after the date he receives the notification that the contract has been awarded to him (Article 40 G.R., Article 15 of the General Conditions for works contracts and Article 11 of the General Conditions for supply contracts).

- **Contract Form.**

8 How should a company proceed in order to participate in a tender or to obtain contract?

8.1 Information on projects and tenders

It may be important for companies and experts to know well in advance about projects and tenders in order to anticipate their possible participation. From the stage of their preparation well before the financing decision, information on projects is available in the bi-monthly magazine "The Courier - EEC/ACP", published by the Commission. This information is continuously updated up to the moment that contracts are to be tendered and awarded.

In cases that contracts are awarded through a restricted tender procedure, or by direct agreement, this information is the only officially published information on business opportunities for companies and experts.

For open tenders and prequalifications, the situation is different. In these cases, once at the stage that contracts should be tendered, notices of invitation to participate are published. These notices contain the essential information which companies need in order to determine whether the tender may interest them. The notices are published in the official gazette of the ACP State(s) concerned and in the Supplement of the Official Journal of the European Communities.

Notices for accelerated open tenders only appear in the ACP State concerned and, normally, in neighbouring ACP States.

The information published in the Official Journal is also available on the electronic information system TED (Tenders Electronic Daily).[6]

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6 For more information: ECHO (European Commission Host organization), PO BOX 2373, L-1023 Luxembourg, tel: 352-34981200, fax: 352-34981234.

The above information is often also published by a number of specialist newspapers or magazines.

8.2 Is prior registration necessary?

For participation in open tenders and prequalifications for invitation to restricted tenders no prior registration of companies is required.

For participation in restricted tenders without prequalification and to directly negotiated contracts (direct agreement) the situation is somewhat different.

In the case of services, the ACP State(s) concerned and the Commission have (as mentioned in point 5.2.a), in common agreement, to draw up a short list of companies to invite for participation in the restricted tender or to contact for direct negotiations. The Commission bases its proposals for a short list on the register of companies which it holds at its offices and which contains basic information on the companies. A similar situation exists in some ACP States and regional bodies. This means that prior registration by companies is, in practice, necessary in order to obtain services contracts, except in cases where a prequalification procedure is followed.

Being registered is not a guarantee for being shortlisted. Therefore, companies may want to inform the Commission's services or the ACP State on their interest for specific projects.

The same applies to experts, for which a separate register is held. This register is administered by the so-called European Association for Cooperation, which is an association founded by the Commission under Belgium law. [7]

For supplies and works, the Commission does not hold registers of companies. The reason for this is that, contrary to services, restricted tenders for supplies and works not following prequalification generally relate to contracts of smaller amounts which are normally handled on the spot with a strong concentration on local or regional companies (although this may be less the case for supplies than for works).

8.3 Information in the tendering stage

Apart from the published tender notices, the most important source of information on how to proceed in the tendering stage are the tender documents themselves, in particular the instructions to tenders. This is the case for all types of tender procedures.

A further source of information is the site visit, which is often mandatory for tenderers in the case of works tenders and sometimes in the case of services and supplies tenders (Article 28 G.R.).

A complementary source of information results from the possibility for interested companies or tenderers to ask the contracting authority for clarification of tender information. Where the contracting authority, on its own behalf or in response to a request of such a company, gives complementary information regarding the contract or other information which may affect the pricing of the tender, that information shall

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7 Contracts with individual experts financed by the European Community are normally concluded through this association and are governed by belgian law.

be supplied in writing to all tenderers in so far as they are known.

A request for complementary information should be received by the contracting authority at least 30 days prior to the deadline for the submission of tenders. The contracting authority should not respond to such requests if they are received at a later date (Art. 17 G.R.).

8.4 Period for submission of tenders

The period for the submission of tenders is a critical point not only for the individual tenderers but also in terms of the project. Experience shows that too short a period will prevent companies from tendering or cause them to submit incomplete or badly prepared tenders. This, of course, reduces competition and, therefore, the chances for the project to be implemented on the basis of optimal conditions.

For open international tenders (works and supplies), a minimum submission period of 90 days from publication of the tender notice has to be respected (Art. 30.1 G.R.).

For the other types of tender procedures and for prequalifications no minimum periods are proscribed. However, in most cases, a minimum period of 2 months should be given. For several reasons, a shorter period does not appear to be reasonable and will generally lead to the disadvantages already mentioned. This applies to accelerated open tenders as well as to restricted tenders.

In some cases shorter periods may, of course, be justified. For example, in cases where urgency is required or in cases where the amounts involved and the complexity of the submissions are relatively small.

The contracting authority may decide to extend the period for submission in cases where modifications of tender documents are necessary. These modifications should be communicated to all companies having been provided with the tender documents (Articles 18 and 30 G.R.). The contracting authority should therefore keep registers identifying those companies. Tenderers do have the right to withdraw their submissions in case of extension of the submission period, for example because they feel that they cannot maintain their price offer or other parts of that offer (for example, experts proposed). It is evident that to avoid such withdrawals and also extra complications and costs, modification of tender documents should be limited to a minimum.

Finally, tenders received after the deadline for their receipt will, of course, be systematically rejected, whatever the reason for the late submission, and be returned unopened.

8.5 Currency of tender and contract and currency of payment

All tender and contract amounts should be in the national currency of the country of the contracting authority (Art. 24.4 G.R.). This is an important difference with the situation in the past and experience has shown that tenderers do not always pay sufficient attention to this. The requirement to submit in national currency is to be read in conjunction with the one that tenders are compared in national currency (Article 34.6 G.R.).

A tender not expressed in national currency will be rejected.

In addition to the amounts in national currency, tenderers may also mention the equivalent amounts in foreign currency. This should be then in ECU or in the currency of the country in which the tenderer has his registered place of business. The conversion into foreign currency should be on the basis of the rates indicated in the tender documents, which normally refer to the rates published in the Official Journal of the Communities 30 days before the deadline of submission of tenders. The fact that a tenderer also mentions the tender amounts in foreign currency does not, however, add anything to the tender nor change the rule that only the amount in national currency will be taken into account.

One should not confuse the currency of the tender with the currency in which payments may be made.

Although payments are, in principle, also in national currency, tenderers may request in the tender that a specified percentage be paid in foreign currency. That percentage should be justified by verifiable facts relating to the real origin of the works, supplies and services in question and the expenditure to be made. The conversion rate is the one indicated in the tender documents (Article 24.5 G.R.; see also points 21.9 , 25.5 and 30.5 below on payments in works, supply and service contracts).

What happens if the tenderer applies wrong conversion rates? Errors of this kind in the prices offered in the tender cannot be corrected any more. Thus, the prices such as mentioned in the tender will be taken into account for the comparison of bids and award of contract.

For determining the amounts to be paid during the execution of the contract, on the contrary, wrong conversion rates will have to be corrected and the amounts to be paid will be the corrected amounts.

8.6 Tender validity period

The contracting authority should fix in the tender documents a period during which tenderers remain bound by their tenders. The period should be sufficient to permit the evaluation of the tenders, the approval of the proposal for award, the notification of award and the conclusion of the contract. The period is, in practice, often 90 days from the final date for submission of tenders and should anyway not normally exceed 120 days. Some variation is, however, possible, depending on the nature and the complexity of the contract.

The rules provide for the possibility for the contracting authority, in exceptional circumstances, to request an extension of the tender validity period.

Upon the notification of award of the contract, the successful tenderer remains automatically bound by his tender for another 60 days (Art. 25 G.R.).

The tender validity period should be distinguished from the validity period of the tender guarantee. Tender guarantees (which are normally to be requested in cases of supply and works tenders) are to be valid for a period of 60 days beyond the tender validity period. This offers more security for the contracting authority in view of a situation where the award of contract can only be notified towards the end of the tender validity period and avoids administrative complications for the tenderer who

does not have to ask for an extension of the validity of the tender guarantee from his bank.

9 The opening of tenders and the process of evaluation

9.1 The opening of the tenders

The tender opening takes place in a public session which is to ensure the necessary transparency.

The names of the tenderers are announced as well as

- the tender prices, except for tenders where the double envelope system is applied; in these cases the price offer is placed in a separate envelope to be opened only after the technical evaluation;
- notifications from tenderers to modify or withdraw their tenders;
- the presence of a tender guarantee if such a guarantee is required in the tender documents.

The Delegation should be represented as an observer and should receive a copy of each tender.

The contracting authority has to make minutes of the tender opening and send a copy to the Delegation (Art. 33 G.R.). The rules do not oblige the contracting authority to send copies of the minutes to the tenderers, but he may decide to do so or to make it public.

9.2 General responsiveness of tenders

Before the detailed technical and financial evaluation of the tenders is started, the tenders are examined in order to determine whether they are substantially responsive to the requirements of the tender documents (Art. 34.2 G.R.).

At this stage the examination is to determine whether the documents and information requested from the tenderers, have been supplied and are complete and whether the other modalities for submitting tenders have been respected such as : have the documents been properly signed; are the language and tender currency respected; is the period of validity of the tender in accordance with the tender documents?

Some deviations or reservations could be accepted, but they may not be material, i.e. they may not affect the scope, quality or performance of the contract or be substantially inconsistent with the tender documents, nor may they limit the rights of the contracting authority or the obligations of the tenderer or affect unfairly the competitive position of other responsive tenderers.

If a tender is not responsive, it should be rejected. It is important to note that such a tender may not subsequently be made responsive by correction or withdrawal of the deviation or reservation (Art. 34.1 - 34.3 G.R.).

This stage of the evaluation process requires strict checking of the tenders in order to ensure that the tenders which are finally compared are really comparable. Practice

has shown that an insufficient strict control at this stage may lead to problems further on in the evaluation process or even during the implementation of the project.

9.3 Requests for clarification

To facilitate the evaluation of the tenders, the contracting authority may ask individual tenderers for clarification of their tenders. Requests and responses have to be in writing.

Clarifications may not lead to changes in the tender[8] or to completing the tender with documents or information initially lacking.

9.4 Technical evaluation

The responsive tenders are then examined on their technical conformity with the tender documents. This evaluation includes the assessment of the technical capacity of the companies to bring the job to a good end. This assessment is on the basis of information to be submitted in the tender on the professional experience of the company and the experts proposed and on the technical means to be used by the tenderer to execute the contract. The assessment should be on the basis of the criteria which are detailed in the tender documents. Such an assessment is particularly relevant for works and service contracts, but not so much for the majority of supply contracts. The technical evaluation in the case of supply tenders normally concentrates on the compliance of the supplies with the technical specifications. And it includes the evaluation of the tenderers' proposals for the after sales service, if the tender documents require such proposals.

If the tender documents provide for a system of ranking of the tenders on their technical qualities (normally only for services), the tenders will then be ranked, according to the number of points they obtained, following the method specified in the tender documents (Art. 35.5 G.R.).

Tenders which do not technically conform are rejected.

9.5 Financial evaluation

The financial evaluation is to ensure that the tenderers' financial bids are fully comparable and to ascertain which is the lowest bid. To that end the General Regulations contain specific rules for the checking and correction of arithmetical errors, made by tenderers (Art. 34.6 - 34.8 G.R.).

It is important to note that the financial comparison is made in national currency (Art. 34.6 G.R.).

Unless the tender documents provide for a different system, tenders are ranked in order of price. In the case of works and supply tenders, all technically and administratively responsive tenders are ranked in this way. In the case of services tenders, the tender documents normally provide a system where only the price bids of the technically highest ranked tenderers are opened. However, the bids opened are

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8 Only one exception is allowed: if changes are necessary to correct arithmetical errors discovered by the contracting authority during the evaluation.

ranked in order of price.

In the ranking of the tenders in order of price, account should be taken of preference margins which should be given to certain ACP tenders. In order to compare these tenders with non-ACP tenders, the prices of the non-ACP tenders are increased by 10% in the case of tenders for works contracts of a value less than 5 mecu and by 15% in case of supply tenders regardless of the value.[9] The reason for these preferences is to promote ACP enterprises and to give them better chances in their competition with non-ACP companies. No such preference margins are applied in the case of services tenders, where price competition plays a much more reduced role.

In order to profit from a preference margin, an ACP company should fulfil some conditions :

- for works contracts : at least one quarter of the capital stock and management staff should originate from one or more ACP countries;

- for supply contracts : supplies for at least 50% of the contract value should be of ACP origin (Art. 9 G.R.).

9.6 Selection

The final selection of the tenderer to whom to award the contract should be that of the most advantageous tender. Article 36(1) G.R. enumerates a number of criteria which may be taken into account in determining which tender is the most advantageous. However, what is decisive in each individual tender procedure are the selection criteria which are specified in the tender documents and which take into account the specific characteristics of the contract in question.

For works contracts, the tenderer to be selected is, according to the standard tender documents, normally the tenderer who made the lowest bid amongst those who are technically and financially capable of executing the works and who made administratively and technically responsive bids; and provided the bid is within the available funds.

For supply contracts, the tenderer to be selected is normally the one which had made the lowest bid amongst those who made administratively and technically responsive bids, including an acceptable proposal for after sales service, where required by the tender documents. Again, the bid should be within the available funds.

The tenderer to be selected in the case of service contracts is, under current procedures, the one which made the lowest bid amongst those which are administratively and technically responsive and ranked in the highest category of technical quality; and provided the bid is within the available funds. If none of these bids are within the available funds, the financial bids in the next best category are opened and the same procedure applies. Point 9.7 below deals with the situation where no responsive bids in any of the categories is within the available funds.

In connection with the available funds, the attention should be drawn to the fact that contrary to works and supply tenders, the budgeted amount for the financing of a services contract is normally indicated in the letter of invitation to tender. This is

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9 These are the percentages for contracts financed under Lomé IV. For those financed under Lomé III, the percentages are the same, but the maximum value of the works contracts for which a preference margin is applied is 4 mEcu instead of 5 mEcu.

related to the objective to obtain proposals of a technical quality as high as possible, while maintaining a certain degree of price competition.

There may be situations where the company selected does not want or is not able to uphold his bid. This happens for example in the case of service contracts when one ore more experts initially proposed by a tenderer are not available any more. In that case, the next ranked company should be selected.

9.7 Evaluation report, proposal to award the contract and approval by Delegation; periods for evaluation process

The evaluation proceedings are recorded by the contracting authority in an evaluation report. This report is not made public or communicated to any tenderer. A copy of the report is sent to the Delegation, who shall also receive for approval a proposal endorsed by the National Authorising Officer to award the contract.[10] Prior to that, the Delegation has to be closely involved in the evaluation process, albeit as an observer.

The Delegate has to inform the National Authorizing Officer of the Community's decision on the proposal to award the contract. Normally he should do so within 30 days but, in certain cases, within 60 days of the reception of the proposal. These cases are tenders for works contracts of more than 5 mecu or supply contracts of more than 1 mecu for which one of the three following situations exists:

- the tender selected is not the lowest responsive bid;
- it does not meet the evaluation and selection criteria stated in the tender documents;
- it exceeds the amount made available for the contract in the financing agreement concluded between the ACP country or countries concerned and the Community, or, for service contracts, the amount indicated in the letter of invitation to tender.

In these cases, the Delegate is obliged to forward the proposal for award of the contract to the Commission's services at headquarters (Art. 36.4 G.R.).

It is useful to note that this obligation does not preclude a similar consultation in other cases, either on the Delegation's own initiative or under instructions from headquarters. Such a consultation, which does not , however, alter the time period of 30 days for the Delegation to inform the National Authorising Officer of the Community's decision, is a common practice for international tenders and prequalifications as well as for restricted tenders for services.

The attention should be drawn to the fact that in a situation where no offer is within the available budget, three possibilities exist : start the procedure again, increase the available budget or annul the tender. An increase of the available budget may be on EDF funds or on other funds made available by the ACP State concerned. If it is decided not to start the procedure again or to increase the budget, the tender should be annulled. Point 10 below deals with that situation.

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10 See Articles 34(10) G.R. The national Authorising Officer is the central authority in an ACP State who represents the government of the ACP State in all operations financed from the resources of the EDF (Article 312 Lomé IV).

The whole evaluation process up to the notification of the award of the contract to the successful tenderer should take place within the tender validity period (Art. 36.3 and 37.1 G.R.). Only in exceptional circumstances, may the contracting authority request an extension of the tender validity period (see point 8.6 above). In this connection it is important to bear in mind the risk that the successful tenderer is not able any more to uphold his offer if the evaluation process takes too much time, in particular in the field of services.

9.8 Technical assistance in the evaluation

In a number of cases, the contracting authority needs technical assistance by a consultant for the evaluation of tenders. These cases coincide frequently with those where a technical assistance is also needed for the preparation of the tender documents. Frequently, the same consultant is contracted to perform the services in both stages. In the case of works tenders, it also happens that the consultant who is contracted for the supervision assists in the evaluation.

It is important to note that the responsibility for the evaluation of tenders rests with the contracting authority. This includes in particular the communications with tenderers, the conclusions to be drawn from the evaluation and the proposal to award the contract.

10 Annulment or recommencement of tender procedure

In certain cases, award of the contract may not be possible. Therefore, the contracting authority may, instead of awarding the contract on the basis of the tender procedure, annul the tender procedure or decide to recommence the procedure.

10.1 In which cases is annulment or recommencement possible?

Article 35(2) G.R. enumerates the cases in which annulment may take place. This enumeration is intended to be exhaustive.

Although Article 35 does not specify the cases in which recommencement of the procedure is possible, it is to be inferred that where annulment is possible, recommencement is also possible. There may, however, be an additional ground for recommencement of the procedure. This is the case where the modalities of the tender procedure have not been respected by the responsible services of the contracting authority in a way as to affect the transparency of the procedure and the objectivity of the evaluation.

In certain tender procedures, only one offer is received. This may be the result of collusion, but this is not necessarily the case. The contracting authority, thus, has to determine case by case, in particular in function of the nature of the project and the structure of the market in which potential tenderers operate, whether or not he is convinced that the lack of more than one offer is the result of the normal play of market forces and has been drawn up in a situation of normal competitive pressure.

It is important to note that annulment or recommencement of the procedure is possible not only for the whole tender but also for only one or some of the lots in which a call for tender may have been divided (Art. 35.1 G.R.).

10.2 The procedures to follow

In all cases of annulment of the tender procedure, the contracting authority should inform the tenderers who are still bound by their tenders, immediately release their tender guarantee and, in case tenders have not yet been opened, return these to the tenderers, at their cost (Art. 35.3 and 35.4 G.R.).

It is considered that the same applies where the procedure is not annulled but to be recommenced.

Recommencement of the procedure may take different forms : the same type of tender procedure may be launched again, but it is also possible for the contracting authority to use another type of tender procedure (Art. 35.1 G.R.), which is most often a restricted invitation to tender instead of an open invitation to tender. Indeed, if there has been an evaluation of the tenders, such a choice may be more appropriate in the circumstances.

This is normally not the case where recommencement of the procedure is decided because of material modifications of the tender documents. In such cases, it appears to be justified to recommence with the same type of procedure.

In case of an unsuccessful tender[11], the contracting authority may decide to annul the procedure and to proceed to negotiations on a direct agreement. In that case, a short-list of companies should be established with whom to negotiate (see also point 5.3 above). From a point of view of sound financial management, it generally appears justified that negotiations be started with the lowest bidders under the preceding tender procedure. For the same reason, non responsive bids should not a priori be excluded in that case and might, depending on the reasons for the non-responsiveness, be considered for the short-list.

That may, in particular, be the case where a tender was rejected for formal reasons, for example, because it was expressed in foreign currency.

11 Notification of award, the informing of unsuccessful tenderers and the conclusion of contract

11.1 Notification of award and the informing of unsuccessful tenderers

Prior to the expiry of the tender validity period, the contracting authority should notify the successful tenderer in writing that his tender has been accepted.[12]

The contracting authority may only proceed to the notification of award on condition that a financing agreement has been signed between the ACP State(s) concerned and the Community and that the proposal to award the contract has been approved by the Delegation. In cases where a financing agreement has not yet been signed, it should, of course, be concluded within the shortest time, as tenderers cannot be expected to remain bound to their tenders for an unreasonable long period .

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11 Unsuccessful for the reasons enumerated in Article 35(2) G.R.

12 Article 37(1) G.R. This notification is not equivalent to the conclusion of the contract, except in the case of the simplified procedure of the letter of contract. See point 11.2 hereafter.

Besides notifying the award of the contract to the winning tenderer, the contracting authority should also inform the unsuccessful tenderers that their tenders have not been accepted. If the tender documents require a performance guarantee from the winning tenderer, the contracting authority should provide this information to the unsuccessful tenderers only after having received the performance guarantee from the winning tenderer, who normally has to supply the guarantee within 30 days of receipt of the notification of award [13].

If the winning tenderer does not comply with that, the contracting authority may (apart from calling up the tender guarantee of the winning tenderer) approach the next lowest bidder or, if necessary, even recommence the tender procedure or start negotiations on a direct agreement.[14]

In informing the unsuccessful tenderers, the contracting authority is not obliged to state the reasons for his choice (Art. 37.3 G.R.).

The contracting authority should also return the tender guarantees to the unsuccessful tenderers. This ought to be done within 60 days of the end of the tender validity period (Art. 26.4 G.R.).

11.2 Conclusion of the contract

After having received the performance guarantee from the successful tenderer and having informed the unsuccessful tenderers, the contracting authority should then submit the contract to the winning tenderer who should sign it normally within 30 days of receipt. The contract is then signed by the contracting authority, which makes the contract binding upon both parties. The contracting authority should notify the fact of that signature to the contracting company and, furthermore, return the tender guarantee to him (Art. 38 and 39.1-39.3 G.R.).

In those cases where use is made of standard tender documents, the contractual documents, i.e., the contract and its annexes, are in principle fixed and contained in the tender documents. Depending on the case, the following contractual documents may be added to that:

- report of site visit which is normally presented as an addendum to the tender documents;
- any other addendum to the tender documents which has been issued in relation to the conditions of contract;
- requests for clarification and tenderer's replies;
- the names of the supervisor and his representative, if these are not included in the tender documents (Art. 38.1 G.R.).

It should be pointed out that under the EDF tendering system, no contract negotiations take place within a tender procedure. This does, of course, not prevent parties to a contract to agree some clarifications on points which are not substantial and which have turned up after the evaluation.

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13 This leaves a security margin of 30 days before the expiry of the tender guarantee.

14 Articles 37(2), 40 and 39(5) G.R. It may be assumed that, in those situations Article 35 G.R. on annulment and recommencement of tender procedures applies.

In certain cases, a simplified procedure for the conclusion of contract may be followed. In those cases, the notification of award constitutes the conclusion of contract. The performance guarantee can then, of course, only be given after the conclusion of contract. If it is not given within 30 days, the contracting authority may annul the award of the contract and approach the other tenderers. In the simplified procedure, the notification of award should specify which are the contractual documents. Those documents which were not communicated to the winning tenderer before, should be attached to the notification.

The advantage of the simplified procedure is the saving of time. This is not unimportant, if only because the conclusion of the contract should be finalized within 60 days beyond the tender validity period. (Both periods constitute the total period during which the tender guarantees should remain valid (Art. 26.2 G.R.)).

11.3 Endorsement of contract by Delegation, secondary commitment and starting date for execution of contract

Once the contract signed by both parties, the contract must be endorsed by the Delegation on the spot, without which the contract cannot be financed on EDF resources. Under the simplified procedure, the endorsement should be made on the letter of notification of award.

All contracts have to be sent by the Delegation to the Commission's services at headquarters together with a request for a so-called secondary commitment, which is necessary before any payment in local or foreign currency can be made.

The signing of contract by both parties is also the stage where the execution of the contract can start and where the application of the General Conditions comes into the picture. Before going in more detail into these General Conditions, one important observation should be made : no payments can be made for any performances of execution of a contract which took place before the contract has been signed by both parties and has become binding upon them. Therefore, the execution of a contract should not start before the reception by the contracting company of the notification of the contracting authority's signature of the contract, or under the simplified procedure, before the company's reception of the notification of award.

PART II. GENERAL CONDITIONS OF CONTRACT : THE PERFORMANCE OF CONTRACT

12 Introduction

The General Conditions contain the basic articles governing the post-contract-award phase for works, supply and service contracts respectively.

They may be subject to modification by the special conditions which are part of any contract and which 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 each and every article of the three sets of General Conditions for works, supply and services contracts but only with those articles which are considered essential, complex or different from previous General Conditions of contract such as to require some further explanations. Other provisions of the General Conditions speak for themselves. Furthermore, the standard tender documents and contracts (see point 7.2 above) contain several indications, references and proposals for modifying and completing the General Conditions through the special conditions.

Although the three sets of General Conditions have several elements in common and, as a starting point, have been drafted from the same model, they are for presentation purposes dealt with separately in this Guide. In certain instances, the explanations on one type of contract may refer to those on mother type. One issue, breach of contract and termination, is only dealt with in the explanations on works contracts. On this issue, the user of supply or service contracts will find guidance in referring to what has been said on works contracts.

A. WORKS CONTRACTS

13 The role of the supervisor

One of the most important persons in administering a works contract, and who is mentioned throughout the General Conditions, is the supervisor.

The supervisor is employed by the contracting authority as its agent responsible for monitoring the progress and execution of the works and generally acts on behalf of the contracting authority. In some other international conditions of contract, like the FIDIC Conditions which were previously applied to EDF contracts in most of English speaking ACP countries, the equivalent of the supervisor is known by a different name, e.g., "engineer" or "architect", depending on the nature of the works. The responsibilities of the supervisor in EDF contracts are, however, not exactly the same as those in other international conditions of contract.

The main differences are that, under the FIDIC Conditions, the engineer is, as a rule, empowered to take decisions with cost consequences for the contracting authority and to take decisions in case of disputes between the contracting authority and the contractor. These decisions are final unless they are overturned by arbitration.

In such cases, where the engineer, under FIDIC Conditions, has wide, discretionary powers, he is expressly required to act impartially between the employer and the contractor, and to apply the contract in a fair and an unbiased manner.

In this respect, one may note that, although the same requirement is not expressly stated in EDF General Conditions, it is implicit in the nature of the supervisor's duties. Indeed, a contract can only be administered successfully if the supervisor and his representative act in a reasonable and sensible manner. This is so, even in cases (which are not unusual to find) where the supervisor is part of the contracting authority's organisation .

It is to be noted, that 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 ACP State, 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) more frequently, a professional company, firm or natural person engaged under a separate service contract for the purpose of supervising the works.

The supervisor is largely responsible for the day-to-day technical supervision of the contract; in this capacity, 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. He is responsible for keeping a works register of the progress of the works (Art. 39), and for inspecting and testing components and materials before incorporation in the works (Art. 41). He grants or refuses the contractor's request for extensions of the period of performance of the contract (Art. 35), he can order variations to the works (Art. 37) and decide on suspension of the works (Art. 38).

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 performance, variations and claims for additional payment.

The supervisor is entitled to appoint a representative and delegate responsibilities to him as he considers necessary. The delegation should include provision for the representative to take action in an emergency such as instructing urgent remedial work. The scope of delegation will vary depending, amongst other things, on the size and nature of the project and its location in relation to the headquarters of the contracting authority and the calibre of the person appointed as representative. However, the supervisor retains the ultimate responsibility for supervising the works (Art. 5.2).

The supervisor's representative is normally an employee and acts as the agent of the supervisor. Nevertheless, without in any way diminishing the responsibility of the supervisor for the proper supervision of the works, the appointment of his representative is subject to the approval of the contracting authority. The contracting authority may also require the removal of the supervisor's representative, should 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 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 (Art. 5.2). He is also required to notify the contracting authority, although again this is not mentioned in the contract. The supervisor must also inform the contractor of the responsibilities which 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 he carries ultimate responsibility, the supervisor may at any time vary instructions given or actions taken by his representative. Where the supervisor cancels 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 will 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 which has been done incorrectly or work which 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 would not entitle the contractor to reimbursement of costs, since 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 variations (Art. 37.2) may, in the first instance, be issued orally. These situations usually arise in cases of urgency where it is important that the contractor is 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 (Art. 5.4) who should have full authority to receive and carry out any administrative order issued by the supervisor.

14 Performance programme

A tenderer will normally have been required to submit with his tender a preliminary programme for the execution of the works with a list of the major items of the equipment which 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 evaluation of the tenders and particularly for establishing that tenderers have correctly appreciated the activities required to ensure completion of the works within the specified time. 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.

Once the contract has been awarded, the contractor is required to submit to the supervisor a detailed programme for the performance of the works. This programme will be subject to the approval of the supervisor and has contractual significance for the actions taken by the contractor, the supervisor and the contracting authority. The programme will enable the supervisor to take timely action in monitoring the progress of the works and to enable him 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. It also permits the contractor to effect timely orders and the allocation of resources (materials, equipment, etc).

The special conditions should give the time frame for the submission of the programme and any additional information or specification about the manner in which the programme should be presented. 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, a general description of the methods which he proposes to adopt for carrying out the works and such further details and information as the supervisor may reasonably require (Art. 17.1). The special conditions may specify the format for the programme.

The deadline for submission of the programme should be such as to permit the supervisor to examine and propose any modifications, if necessary, to the programme before the performance of the works is due to commence. Thus a period of 21 days after signing the contract should be adequate, or alternatively a period of not less than 14 days before the date fixed for commencing performance.

The supervisor, on observing that the performance 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 (Art. 17.3). 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 is only possible with a realistic programme which 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 performance programme without the approval of the supervisor.

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

15 Sub-contracting

Sub-contracting should be distinguished from cases where the contracting authority enters into a separate direct contract with another contractor for work which 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 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.

Sub-contracting of certain specialised parts of the works is not unusual in the execution of a contract. Although the contracting authority may wish to have the contract carried out by the selected contractor, it is generally recognised that other

persons or firms, by reason of their greater specialisation, experience or capacity may be able to carry out particular works more efficiently than the contractor. Accordingly, with the contracting authority's authorization, the contractor may sub-contract work to others.

Although certain work may be subcontracted, the contractor remains fully responsible for constructing and completing the works in accordance with the contract (Art. 7.6). Sub-contracting is different from assignment in that, in the latter, rights and responsibilities vis-a-vis the contracting authority are transferred to another party, the assignee.

The work 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. 7.2). Approval, however, should not unreasonably be withheld (Art. 4.3). Sub-contracting without the approval of the contracting authority can result in termination of the contract (Art. 7.8).

Before approving a sub-contract, the contracting authority should examine the contractor's evidence that he has taken all necessary steps to make the greatest possible use of suitable sub-contractors in the state of the contracting authority (Art. 7.2) Any special requirements for the eligibility of sub-contractors (in addition to those mentioned in point 3.3 above) should be stated in the special conditions.

A tenderer may in his tender have stated the work which he proposes to sub-contract and sometimes also the name of the proposed subcontractors. 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 subcontractors, 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.

A contracting authority may, in the tender documents, have given names of sub-contractors which it would be prepared to approve for carrying out certain work. The successful tender is not obliged to enter into a contract with these subcontractors. On the other hand, the contractor's contractual responsibility will not be diminished if he does enter into a contract with those subcontractors.

In relation to the execution of a subcontract, it is sometimes necessary for the supervisor 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 supervisor and the sub-contractor and can comment or take such action as he considers appropriate.

If, at the end of the maintenance 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 (Art. 7.7). The contracting authority may also make such a request at any time after the end of the maintenance period. The contractor should always include a provision in his contract with the subcontractor so that he can fulfil his contractual obligations in this respect.

16 Variations

The supervisor can order variations to any part of the works which are necessary for the proper completion or functioning of the works. Article 37 defines 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 variations and, secondly, that variations 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 which has been given by the supervisor. This is deemed to be an administrative order unless immediately contradicted by the supervisor in writing (Art. 37.2).

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

a) The supervisor prepares the technical details of the variation (including its effect on the performance programme) and an estimation of the cost implications.

b) Although the supervisor is not obliged to seek the contracting authority's authorization before asking proposals from the contractor, it is advisable for 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

- a major change in the scope of the works, or/and
- financial consequences to be borne by the donor.

c) The supervisor notifies the contractor of his intention to order the variation and gives details of its nature and form. He also requests him to provide any necessary proposals for adjusting the contract price and the performance programme.

d) If the supervisor is satisfied with the contractor's submission and after due consultation with the contracting authority, the supervisor issues the administrative order for the variation which will state the technical details of the works to be undertaken, changes to the contract price, any changes to the performance programme and, if necessary, the manner in which the works are to be performed.

e) If the supervisor is not satisfied with the contractor's submission or it falls outside the authorization from the contracting authority, the supervisor may either:
   - consult further with the contracting authority; or
   - if he deems fit, issue the administrative order on the basis of his previous consultation with the contracting authority, stating how it is to be valued.

f) If the contractor disagrees with the changes to the contract price stated in the administrative order, he may claim for additional payment under Article 55. If the contractor considers that he is entitled to an extension to the period of performance greater than any he may have been granted, he may submit a request under Article 35. 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 all instructions have to be issued. If in those situations the cost estimate or the details of the variation 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 (Art. 37.6).

No administrative order is required for changes in the quantity of work which are a result of increases or decreases which normally occur, like in the case of earthworks, where payment will be made for the actual measured quantity irrespective of the quantity stated in the bill of quantities or price schedule (Art. 37.2 (c)).

All variations are priced in accordance with the rules set out in Article 37.5. 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 rates and prices which 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 variation is necessitated by a default of or a technical breach of contract by the contractor. In such a case, any additional cost attributable to that variation must be borne by the contractor.

At provisional acceptance, the supervisor is required to review the total contract price when the total value of the works resulting from administrative orders or other circumstances not caused by the contractor's default varies by more than 15 per cent (as an increase or decrease) of the original contract price. In calculating this percentage, changes in the contract price due to price revision (Art. 48) and provisional sums (Art. 49.2) are not included. The supervisor should consult with the contracting authority and the contractor on the sum and subsequently notify it to them. An administrative order, however, may stipulate - subject to the agreement of the contractor - that the related increase/decrease in costs are not to be taken into account as regards Article 37.7.

The extent to which the contractor is affected by such increases or decreases of the contract price will depend on the degree to which the fixed on-costs have been covered by separate items in the bill of quantities (sometimes called preliminaries) instead of being spread over the unit rates.

17 Testing, acceptance and maintenance

17.1. Introduction

The contractor is required to provide the works and supply the various materials and components necessary for the works which conform to the specifications, samples etc. laid down in the contract (Art. 40.1). It is essential that the materials and components are inspected and tested to check that they are satisfactory, before incorporating them

into the works. This is one of the most important tasks of the supervisor.

The various stages in the checking procedure result in preliminary technical acceptance for certain materials, if required in the special conditions (Art. 40.2), provisional acceptance of the works (Art. 60) and final acceptance of the works (Art. 62).

The provisional and final acceptance are the two stages in which the works are taken over effectively. The provisional acceptance intervenes when the works are complete and are capable of being occupied and used by the contracting authority; the final acceptance after the maintenance period when all defects have been properly made good. The contract may permit the provisional acceptance of the works in parts or sections (partial provisional acceptance).

The maintenance period stated in the contract commences on provisional acceptance. For defective items which have to be replaced or renewed, the maintenance period restarts at the time of replacement or renewal .

The contractor is responsible for rectifying all defects which are observed in the works up to 30 days after the maintenance 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 supervisor.

The contracting authority and the Delegate should be kept duly informed on the acceptance process and be given the possibility to assist to the various stages.

17.2 Preliminary technical acceptance: inspection and testing of materials and workmanship.

When the contractor considers that certain items are ready for preliminary technical acceptance, he takes the initiative by sending a request to the supervisor (Art. 40.2.) This is particularly important for inspections and tests not carried out on site but at the place of manufacture. If the supervisor 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 supervisor will proceed to inspection and testing. 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 programme. 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. 41.2). If no place is specified, the place should be agreed between the contractor and the supervisor.

In preparing his performance programme, the contractor should allow for inspection and testing by the supervisor and for the acceptance procedures and the contractor's tender price should include for all tests and all the contractor's responsibilities relating to testing and inspection specified in the contract.

The supervisor may instruct the contractor to carry out tests additional to those that have been specified. In this case, the contractor is entitled to be paid for any additional testing (Art. 41.2). This situation is different from the one where supervisor 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. 41.6).

Components and materials which are not of the specified quality must be rejected. Article 42 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 works although it is preferable that it is the contractor who rectifies the defects, since employment of another contractor can confuse liabilities especially if the rectification work 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 supervisor. It does not prevent the supervisor from rejecting components or materials should any defect in them become apparent at a later date or when the works are submitted for provisional acceptance.

On the other hand, when tests have shown no failure, interim payment has been made and work has proceeded normally, and only at a later stage is it realised that the work fails to meet the requirements of the contract, it may be appropriate for the supervisor to investigate with the parties to the contract whether an acceptable solution can be found on the basis of redesign and adjustment of payment. This is particularly the case where rectification would lead to long delays, yet where the defective work may still be of a standard which can be accepted in a different form, if necessary, by the contracting authority. 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 rectify the faulty work and in not having to pay liquidated damages. Instructions to remove the faulty work, therefore, should, at such a late stage, be an exceptional remedy if completion of the works is vital to the contracting authority. Again, the supervisor should specify a reasonable time for the contractor to act in these circumstances.

In carrying out his duties, in particular during inspection and testing, the supervisor 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. 41.7). This requirement should be repeated in the contract between the supervisor and contracting Authority.

17.3 Partial provisional acceptance

Partial provisional acceptance involves the acceptance on a provisional basis of parts or sections of the works which have been substantially completed and can be used as independent units (Art. 59.2).

This may be with or without the contract specifying different completion dates for various sections of the works (Art. 60.2).

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

prior contractor's agreement to it. The contractor is then permitted to complete the outstanding work as soon as practicable (Art. 59.1).

17.4 Provisional acceptance

The contractor is required to initiate the process of provisional acceptance of the works. He should give the supervisor a maximum of 15 days' notice reckoned to the time when the works are expected to be ready for provisional acceptance. The supervisor, 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. 60.2). These firm time limits for implementing the procedures are designed to reduce to the minimum possible the time needed for provisional acceptance. If the supervisor 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. 60.3).

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 he no longer requires and any litter or obstructions and restore the site to the condition specified in the contract (Art. 60.4). 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.

17.5 Maintenance period and obligations

On the date of provisional acceptance a maintenance period commences, which is 365 days if not otherwise specified in the contract. Separate sections of the works may be assigned different maintenance periods, if need be.

The maintenance 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 supervisor.

The main purpose of the maintenance 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 such outstanding items of work as may be listed in the certificate of provisional acceptance. He should also remedy any defects which are revealed during the maintenance period and up to 30 days thereafter (Art. 61.1).

The contract does not generally require the contractor to perform operational maintenance during the maintenance period, unless provision has been specifically made for this in the contract documents (with corresponding provisions in the technical specifications) (Art. 61.6).

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 maintenance period or within 30 days thereafter. 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. 61.3). 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 work is not carried out satisfactorily.

The issue of the notification of defect or damage to the contractor, referred to in Article 61.3, would normally fall within the duties of the supervisor. However, quite often the supervisor will have completed his contract and left the site. In that case, it falls to the contracting authority to issue the notification.

17.6 Final acceptance

A final acceptance certificate should be issued within 30 days after the expiration of the latest maintenance period or as soon thereafter as any works have been completed and defects or damage have been rectified if that completion or rectification did not take place before the end of the latest maintenance period (Art.62.1). A copy should be sent to the contracting authority, who should keep the Delegate informed.

Notwithstanding its wording, the final acceptance certificate does not release the contractor from all his obligations under the contract. It is possible that the works may have latent defects or faults which were not discoverable at the end of the maintenance period and the contractor remains liable for these for a period mentioned in the contract, which should also specify the nature and extent of this liability.

It may be recalled that a number of consequences follow from the issue of the final acceptance certificate. For example, the contractor is required to return to the supervisor all contract documents (Art. 8.1). The retention sum or retention guarantee must be released to the contractor within 90 days of final acceptance (Art. 47.3). The contractor must submit to the supervisor a draft final statement of account within 90 days of the issue of the final acceptance certificate (Art. 51.1). The performance guarantee is released only after the signed final statement of account has been issued (Art. 15.8). 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.

18 Property in plant and materials

The rights and obligations of the contracting authority, the contractor and the supervisor concerning the use and ownership of equipment, temporary works, plant and materials brought to the site by the contractor, are often the source of misunderstanding and disputes.

The minimum protection for the contracting Authority is described in Article 43.1, which provides that anything brought onto the site, other than vehicles which 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 (less likely) plant or materials, 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. Before giving consent, the supervisor should satisfy

himself that progress of the works will not be hindered as a result of reduced resources. Consent should not unreasonably be withheld.

To assist the supervisor in monitoring the movement of equipment, materials etc. to and from the site, it is useful to establish a system at the commencement of the works by which the contractor submits periodically, preferably weekly, to the supervisor a schedule of items and materials delivered to the site. This can be useful in compiling the works register, as well as in dealing with requests under Article 43.1. Thus at any time, the supervisor should know what physical resources the contractor has available on the site.

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 (Art. 43.2). If the special conditions do so, the contractor is entitled to receive interim payments, if such vesting of ownership or other arrangements have been realised (Art. 50.2).

In certain types of jurisdiction, however, it has been held that ownerships are not effective in transferring title. Thus, in the event of a contractor becoming bankrupt, other creditors may be able to show a better title 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 permit him 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 (Art. 43.3)[15] and where the contracting authority is entitled to purchase equipment, temporary structures, plant and materials (Art. 65.2).

Article 43.4 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.

19 Tax and customs arrangements

Clearance through customs, import and export licences, 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 his programme.

In accordance with Article 309 Lomé IV, the contractor is normally required to pay the customs duties and other dues for everything he imports into the country for being incorporated into the works, unless otherwise stated in the special conditions or the letter of contract. However, equipment and temporary works items should be admitted free of duties on a temporary basis. 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.

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15 The situation is different when the contractor is entitled to terminate the contract. In that case, he may remove his equipment from the site, subject, however, to the law of the state of the contracting authority.

Profits and other income resulting from the works are taxable if the contractor if the contractor is established in the country where the works are executed or, in other cases, if the works exceed a duration of 6 months.

It should be understood that, if the country applies more favourable arrangements to other states or international organisations, it should also apply them to the Community (Art. 308 Lomé IV).

The contracting authority should render whatever assistance he can to the contractor in connection with clearances through customs, but the contractor himself is ultimately responsible.

20 Revision of prices

The contractor is bound by the rates and prices in the contract and he carries the risk of increases in prices of labour, materials etc. during the period of performance. Revision of prices is allowed only if stated in the special conditions. In the case of changes in laws or public regulations or decisions which cause extra cost to the contractor, price revision is, however, possible even when not stated in the special conditions (Art. 48.1 and 48.2). This refers for example to situations where new taxes are introduced or a devaluation is decided upon by the competent authorities. However, price revision or any other measure provided for by this article are not automatic and are subject to common agreement as between the parties. It may be, however, that tender and contract documents make such a revision automatic.

Revision of prices refers to changes in the contract price which have become necessary due to external, non-technical 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 and changes in laws and regulations (Art. 48.2). Revision in respect of equipment is not common. Revision of prices can result in increases or reductions of the contract price, depending on the change in prices of the basic elements.

Revision of prices requires a reference date on which prices are determined. This date is the one 30 days prior to the latest date which was fixed for submission of the tenders or is, in the case of a direct agreement contract, the date that the contract was signed by the contractor (Art. 48.3).

The detailed rules for price revision are to be mentioned in the special conditions which should specify the elements which are to be subject of price revision. These will normally include the materials to be used in substantial quantities (e.g., cement, aggregates, timber, steel, fuel) and labour, grouped in different categories (e.g., clerical, various trades, plant operators, unskilled). Price revision supposes of course that the basic prices of these elements are clearly mentioned in the contract documents. Price revision includes price increases for fuel which is quoted in local currency while shortages require importation.

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 regularly 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,

including the provision that price increases are paid in national and foreign currencies in the same proportions as the contract price is paid.

This is different in the case where the special conditions do not refer to price indices for the revision of prices but to the prices effectively paid by the contractor. Where, in that case, payments are made to the contractor in more than one currency, the contractor should be paid the increases in the currency in which the contractor himself pays. This should be made clear in the special conditions (Art. 48.5).

Where the contractor fails to complete the works at the end of the period of performance or extended period, prices are frozen such that he receives no further increase. If, however, the prices of the basic elements are reduced after the stated date, appropriate deductions are made from amounts due to the contractor. (Art. 48.5).

21 Payments

21.1 General

The contractor is entitled to payments at various times throughout the performance of the contract: advances, interim and final payments. These payments are normally in the national currency unless the contract states otherwise (Art. 44.1). No payments can be made before the contractor has provided a performance guarantee and advances cannot be made until the contractor has provided an advance payment guarantee. Advances are repaid later by the contractor through deductions from the interim payments which the contractor is entitled to receive.

Interim payments are payments, normally at monthly intervals, for work which the contractor has done. 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 repayments of advances but also include a so-called retention sum.

The final payment is made to the contractor after the approval of the works has been given and the final statement of account has been issued by the supervisor.

Payments are normally made directly to the contractor by the EDF-paying agent (usually the central bank of the recipient country). After clearance and authorization, usually by the national authorizing officer, and endorsement by the Commission Delegate, payments in the local currency are effected by the EDF paying agent from transfers received from the Commission; payments in other currencies are made by the Commission itself, drawing on its accounts in Europe. The special conditions should identify the paying agents for the national currency and for the foreign currency payments.

Where projects are realized through direct labour by public service departments, particularly in the case of rural development projects, an advance fund is set up on which the national authorities responsible for implementing the project can draw. An initial allocation is paid into the fund, which is then replenished on proof of expenditure.

21.2 Advances

Advance payments to the contractor can be made only if permitted by the special conditions.

The contractor may request two types of advances:

a) a lump sum advance, 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 contract price;

b) advances for the purchase of equipment, tooling 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 (Art. 46.1 and 46.2).

Advances cannot be granted until the contract has been concluded and the performance guarantee and the advance payment guarantee have been provided (Art. 46.3).

It should be noted that the contractor may not make the commencement of the execution dependent on the receipt of advances.

Repayment of the advances is normally made by a deduction from the interim payments to the contractor. It is important that repayment of advances is not concentrated in an unduly short period, as otherwise the net amount of interim payment due to the contractor may be very small for some months and he will end up pre-financing a substantial part of the works. As a rule, repayment of advances should be completed not later than the moment that 80% of the contract price has been paid.

The guarantee for advance payment is normally progressively reduced by the amount repaid in interim payments and its release becomes due when the total advance is repaid. (Art. 46.7).

A somewhat different situation arises if the advance guarantee ceases to be valid and the contractor fails to re-validate it. In that case, the advance payments can be recovered directly by means of a deduction by the contracting authority from further payments laid down due to the contractor. The contracting authority may even terminate the contract (Art. 46.5).

The special conditions should specify the currency in which the advances will be paid (normally the types and proportions in which the normal contract payments are made); the latest time by which requests for advance payments must be made; that the conditions governing delayed payments laid down in Article 53 are also applicable to advances; and the provisions conditions for repaying the advances.

21.3 Interim payments

The contractor shall apply for interim payments at the end of each month, unless another period is specified in the special conditions (Art.50.7). At the start of the works, the supervisor should agree with the contractor the form of the application.

Interim payments relate to work which the contractor has done, 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 advances and for a retention by way of guarantee (Art. 50.1; see also point 19.5 below).

The specific conditions which must be satisfied before payment can be made for plant and materials delivered to the site are stated in Article 50.2. Payment for such items does not imply that the supervisor has accepted them; he is free to reject them at a later date if he considers that is necessary (Art. 50.3) and payment does not relieve the contractor of responsibility for loss or damage to them or of insuring them against the same (Art. 50.4).

Within 30 days of receiving the contractor's application for interim payment, the supervisor is required to issue to the contracting authority and the contractor an interim payment certificate stating the amount which in his opinion is due to the contractor (Art. 50.5). In deciding the amount, the supervisor is free to include corrections of errors or modifications of amounts in previous certificates.

Normally the interim payments are made in the currencies and percentages as stipulated in the contract. However, the contractor could request higher percentages for commencement costs in local currency.

21.4 Measurement

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

For lump-sum contracts, the supervisor should request a detailed breakdown of the contract price (Art. 18.1) 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. If the contract does not provide for payments in stages, the price breakdown will only serve for determining the cost of any variations.

For unit-price contracts, the quantities of work actually done are priced at the 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 he can attend. The contractor is required to help with the measurement and provide any necessary particulars requested by the supervisor. Failure by the contractor to attend when measurement is being done deprives him of the right to challenge the measurements later (Art.49.1 (b) (iv)).

Bills of quantities should be prepared in accordance with established principles and rules. Standard methods of measurement have been developed for this purpose and any such method used in preparing the bill should be clearly stated in the contract. Where a standard method of measurement has not been used, the principles of measurement and rules of itemisation should be clearly defined in the preamble to the bill of quantities.

The method of measurement is used also for measurement of the actual work done. During this process it may be necessary to delete certain items from the bill or add further items if the rules of the method of measurement so require. For smaller projects, where the design has been completed and full details of the works are shown on the drawings, it may be appropriate to divide the work into a number of lump sum items. This then constitutes the method of measurement. In this case, it should be made clear that no further items can be added to those in the bill.

Unless otherwise provided in the contract, measurements should be taken net (Art. 49.1(b) (v)). 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.

Items marked "provisional" in the bill of quantities, for which the contracting authority has allocated a provisional sum (Art. 49.2), are items about which there is some uncertainty. They should be carried out only on the specific instruction of the supervisor and, if the contract provides so, following the contracting authority's approval. Such items should be included only when absolutely necessary since the contractor is unable to take precisely account of them in his planning and programming of the works until he knows that they are to be implemented.

Where work instructed under a provisional sum is carried out either partly or wholly by a sub-contractor, the contractor should satisfy the supervisor that competitive quotations have been obtained, and all relevant vouchers are produced, unless the work can be valued at the rates and prices already mentioned in the bill of quantities.

21.5 Retention sum

The retention sums which are to be deducted from interim payments represent further security for the contractor's performance, additional to the performance guarantee. 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 (Art. 47.2) but approval of the contracting authority is first required. This approval is to ascertain, in the same way as for the performance guarantee, mentioned in Article 15, whether the guarantee is provided by an acceptable and eligible financial institution.

The sum retained or the retention guarantee should be released within 90 days of the date of final acceptance.

21.6 Final statement of account

The contractor initiates the finalising of accounts by submitting to the supervisor a draft final statement of account. The time limit for this submission is 90 days after the issue of the final acceptance certificate (Art. 51.1). In some ACP States a quicker procedure is practised whereby the final statement of account is agreed when the final acceptance certificate is issued. Such an alternative is permitted (Art. 51.1 and 51.6) provided the time limits are stated in the special 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 which he considers are due to him, since he is effectively barred from claiming at a later date (Art. 51.5).

Within 90 days of receiving the draft final statement of account and all supporting information from the contracts, the supervisor is required to prepare the final statement of account which determines the final amount due to the parties under the contract (Art. 51.2). The contracting authority and the contractor, then sign the final statement as an acknowledgement of the full and final value of the work performed under the contract. However, the final statement of account excludes any amounts still in dispute at that time (Art. 51.3).

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 (Art. 51.4).

21.7 Delayed payments

According to Article 53.1, payments should be made within 90 days of the issue by the supervisor of the interim payment certificates or final statements of account to the contracting authority. If this payment delay is exceeded, the contractor is entitled to interest payments.

Article 53.1 does not specify the time period within which advance payments should take place. These should therefore be specified in the special conditions in order to be able to determine interests, as the case may be, for delayed payment of advances.

The special conditions should provide the basis for determining the interest rates for local and foreign currency payments respectively to which the contractor will be entitled when delayed payment occurs.

These rates of interest are usually related to the minimum lending rate of the central bank issuing the currency in which the interest should be paid, increased by 1% or 2% depending on the general rates for commercial borrowing in the country issuing the currency in which the payment is to be made. The calculation of claims for interest payments should be done separately for local and foreign cost components, since the applicable interest rates may differ in each case.

A maximum period during which interest payments may be made has to be set in the special conditions which should not exceed 120 days. After that period, the contractor is entitled to suspend execution of the contract or to terminate it (Art. 53.2).

Although the contractor is automatically entitled to interest for delayed payments (Art. 53.1), he can only exercise this right if he submits an invoice. An invoice for interest should normally be submitted with the subsequent application for interim or final payment.

21.8 Claims for additional payment

Article 55 sets out a procedure for dealing with claims for additional payment. The article places time limits for the notification and substantiation of claims. The effectiveness of this procedure largely depends on the establishment of proper and adequate records of the day to day execution of the works by the contractor; such records should be included in the work register. Late submission of a claim or of the detailed particulars are sufficient grounds for rejecting it (Art. 55.3).

If, due to the recurrent nature of the circumstances of a claim or to other limitations beyond the control of the contractor, it becomes impossible to submit all details of the claim within 60 days, the supervisor may agree to an extended time limit, provided that the particulars are submitted no later than the date of submission of the draft final statement of account.

In making a proper assessment of the contractor's claim, the supervisor may need to relate it to other operations. For this reason, no time limit has been stated for the supervisor to determine the amount of the claim. However, this determination should be made as quickly as possible so that the contractor can be paid the money to enable him to defray the costs which he has incurred. Before taking his decision, the supervisor should consult with the contracting authority and, where appropriate, with the contractor.

21.9 Payments in foreign currency

According the Article 56, payment in foreign currency is effected at the rate of exchange set by the central bank of the state of the contracting authority. However where a central bank does not exist in an ACP State or where the central bank does not publish an exchange rate for the currency of payment, the rate or rates of exchange are to be established from other sources and included in the special conditions. This has become the current general practice, including for contracts with ACP states having a central bank. In accordance to that, tender documents normally stipulate that the exchange rates published by the Commission in the Official Journal of the EC, will apply. The stipulated rates of exchange are fixed for the duration of the contract.

Where payments to the contractor are made in more than one currency, the contractor will nominate separate accounts into which payment in the national currency and the foreign currencies are to be made. Except where of revision of prices refers to prices effectively paid by the contractor, the proportions stipulated in the contract for national and foreign currency payments will be maintained throughout the contract. However, in order to avoid an excess of local currency at the end of the contract, it is possible to take account of this at an early stage of the contract. Also, the special conditions may provide that the contractor receives a greater proportion of payment in local currency in the beginning of the contract execution, as long as the overall proportions of currencies will be respected.

21.9 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 the contractor and the contracting authority has given its

written consent (Art. 54.1).

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 (Art. 52). This situation may occur when a subcontractor introduces a claim to the supervisor that he is not receiving payment from the contractor.

Under such circumstances, the supervisor shall investigate the matter and enquire with the contractor whether the claim is founded. Is the claim founded and should the contractor not effect payment, 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.

22 Breach of contract and termination

22.1 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 performance or failure by the contracting authority to pay amounts due to the contractor, are major breaches and have serious consequences for the injured party.

Only serious breaches entitles one of the parties to terminate the contract, and these are enumerated in Article 64.2 (breaches by the contractor) and Article 65.1 (breaches by the contracting authority). For other breaches the injured party may claim damages. The same applies if, after the final acceptance certificate has been issued, it is discovered that one of the parties has committed a breach of contract which has not become known until that time. This may occur when some latent defect in the works becomes evident. The injured party is then entitled to recover damages from the other party either by negotiation and agreement, or, if necessary, by an action in the courts. However, it is not always clear who is responsible for a defect which appears at a late stage. It has to be decided whether it is caused by faulty design, in which case the contracting authority (assuming that it has done the design) would normally be responsible, or faulty workmanship in which case the contractor would be liable.

The damages to which an injured party is entitled may be either general damages or liquidated damages, both of which are defined in Article 1.1.

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. In construction 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 as a result of a failure on the part of the contractor. The contracting authority will not have to give proof that actual damages have been suffered. 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 he has suffered, whether he

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.

It is important that the level of liquidated damages represents a genuine pre-estimate of the loss suffered by the contracting authority. Any liquidated damages which are fixed at a higher level than this, perhaps with the object of forcing the contractor to finish his work as quickly as possible, constitutes a penalty and is not enforceable in law. If the liquidated damages are fixed at a lower level, they are of course enforceable, but the injured party cannot then recover greater sums than this.

Any amount of damages, whether liquidated or general, to which the contracting authority is entitled can be deducted from any sums which he is due to pay 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.

22.2 Termination by the contracting authority

The General Conditions enumerate several grounds which entitle the contracting authority to terminate the contract, and also stipulate his rights upon termination. Termination is a serious step and should only be taken after exhaustive consultations between the contracting authority and the supervisor. Before resorting to termination, the issue 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 all relate to defaults or abilities on the side of the contractor and may speak for themselves. Nevertheless, the 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 the latter did not obtain the prior consent of the contracting authority through an addendum to the contract (Art. 64.2.h).

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 he cannot accept. In that case he has the possibility to terminate the contract.

When for the above grounds, the contracting authority terminates a contract - and this is with immediate effect - a notice of seven days should 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 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 (Art. 64.1 and 64.9). Where termination by the contracting authority is not due to a fault of the contractor, the latter is entitled to claim an indemnity for loss suffered, in addition to sums owing to him for work already performed. Such a loss includes that of profit on the remaining part of the works.

The contractor should submit his claims in accordance with the procedures for claiming additional payments (see point 19.8 above).

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 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 contractors employees and the contracting authority . The contracting authority has the right to purchase temporary structures (Art. 64.6), plant and materials already supplied or ordered by the contractor but not delivered. These rights enable the contracting authority to complete the works himself or by contracting another contractor. For this purpose, the contracting authority is not obliged to proceed to a purchase and is anyway entitled to use the contractor's equipment, temporary works, plant and materials, included hired ones(Art. 43.3 and 43.4).

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 (Art. 64.7).

The contracting authority is also entitled to recover from the contractor any loss it has suffered because of inability to use work already completed and paid for. If no maximum is stated in the contract for the amount which can be recovered, the limit stated in Article 64.8 applies.

22.3 Termination by the contractor

Unlike the contracting authority, the contractor can terminate the contract only on few specific grounds listed in Article 65: the contracting authority fails to pay, consistently fails to meet its other 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 has given notice of termination to the contracting authority. In his notice, he should specify the grounds.

Subject to the law of the State of the contracting authority, the contractor is, upon termination by him, entitled to remove his equipment from the site (Art. 65.2). He will, however, not be entitled to remove any plant, materials or temporary works from the site to the extent that these have been paid for by, and therefore belong to the contracting authority.

The contractor is entitled to be paid by the contracting authority for any loss or damage he has suffered. This entitlement is limited to the amount stated in the contract (Art. 65.3).

22.4 Force majeure

There is no default or breach of contract if performance is prevented by force majeure (Art. 66.1). Because of the serious consequences, it is important that any notice of force majeure should be carefully examined to ensure that the alleged event is genuinely outside the control of the parties. For instances, strikes and lock-outs may be caused by some action of the contractor and would then not be force majeure.

Also floods and explosions may be preventable. Provisions of force majeure should, therefore, not be used as an escape from contractual obligations or where a party wishes improperly to 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". This explains why, in Article 66.3, the contracting authority is not entitled to call upon the performance guarantee or to the payment of liquidated damages or terminate for the contractor's default to the extent that these are 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 or to terminate for default where these are due to force majeure.

The procedure to be followed in the event of force majeure is stated in Article 66.4. It is initiated by either party giving prompt notice of the particular event. The contractor is then required to make proposals on how to continue with the works but he can proceed on this basis only under the supervisor's direction (Art. 66.4). The contractor is entitled to any extra costs incurred as a result of the supervisor's directions (Art. 66.5).

Continuation of force majeure for 180 days gives either party the right to terminate, on giving 30 days notice (Art. 66.5).

B. SUPPLY CONTRACTS

23 The supervisor

Although the General Conditions for supply contracts provide for a supervisor to follow the project, in practice for many supply contracts the functions of the supervisor are in fact carried out by the contracting authority or its representative. Any reference in the following to the supervisor may, therefore - as the case may be - apply to the contracting authority by substitution.

24 Testing, acceptance and maintenance

24.1 Introduction

The supplier is required to provide supplies which conform to the technical specifications laid down in the special conditions. It is essential that the supplies are checked by inspection and testing to ascertain whether they are satisfactory. This is one of the most important tasks of the supervisor.

The various stages in the checking procedure result in preliminary technical acceptance if required by the special conditions (Art. 24), provisional acceptance (Art. 39) and final acceptance (Art. 42) of the supplies, the latter intervening at the end of the warranty period. If no warranty period is required in the special conditions, the provisional and final acceptance coincide, except where the supervisor issues a so-called qualified provisional certificate.

The contracting authority and the Delegate should be kept duly informed on the acceptance process and be given the possibility to assist to the various stages of it.

24.2 Preliminary technical acceptance: inspection and testing of particular materials or components

In the case of certain supplies, for example a major item of plant, it may be necessary to check particular materials and components before incorporating them into the items to be supplied. In such situations, a certificate of preliminary technical acceptance can be required in the contract for such materials and components before they are incorporated.

Details should be given in the special conditions. When the supplier considers that certain items are ready for such acceptance, he sends a request to the supervisor (Art. 24.2). If he finds them satisfactory, the supervisor issues a certificate stating that they 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 is essentially visual in nature. It includes examining and measuring components and goods to check their conformity with the drawings, models, samples, etc., as well as checking the progress of manufacture against the programme which in such cases is normally to be drawn up.

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 place of delivery or other places as may be specified in the contract (Art. 25.2). If no place is specified, the place should be agreed between the supplier and the supervisor.

In preparing his performance programme, the supplier should allow for inspection and testing by the supervisor and for the acceptance procedures. And the supplier's tender price should include for all tests and all the supplier's responsibilities relating to testing and inspection specified in the contract. The supervisor may, however, instruct the supplier to carry out tests additional to those that have been specified. In this case, the supplier is entitled to be paid for any additional testing.

This situation is different from the one where supervisor and supplier 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. The party who is proved wrong pays for the repeat test (Art. 25.6). The result of the retesting is final.

Preliminary technical acceptance is not final and binding on the supervisor. It does not prevent the supervisor from rejecting the supplies should any defect become apparent at a later date or when they are submitted for provisional acceptance. Any items rejected must be replaced immediately. The supplier may, if he wishes, repair the rejected components or goods but these will only be accepted if they have been repaired to the satisfaction of the supervisor (Art. 24.3).

In carrying out his duties, the supervisor 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). The attention to this requirement should be drawn in the contract.

24.3 Verification and provisional acceptance

The contracting authority cannot formally take over the supplies and start using them until verification has been done and a certificate of provisional acceptance has been issued.

Verification is the process of inspecting, testing and checking the supplies at the place of delivery or at their final destination before provisional acceptance. It includes checking that the correct quantities, makes and types of supplies have been delivered and whether they are new and unused and that all operation and maintenance manuals and associated drawings have been supplied. It also includes checking for any defects or damage which may have occurred. Verification is, nevertheless, largely a routine procedure of checking that the supplier has fulfilled his obligations. The contract may, however, require the testing of performance or commissioning, particularly of items of electrical or mechanical plant.

The verifications are at the expense of the supplier (Art. 38.1).

Details of all verifications carried out and their results should be carefully recorded, as they form the basis of provisional and final acceptance. Only when the results are satisfactory can the supervisor issue the provisional acceptance certificate.

The supplier should, within 15 days of the date on which he considers the supplies will be complete, give notice to the supervisor applying for such a certificate (Art. 39.2). The supervisor must respond within 30 days. During this time he must carry out all the verifications necessary to satisfy himself that the supplies are satisfactory.

The supervisor must respond to the supplier's application either by issuing a certificate or rejecting the application (Art. 39.2). If he rejects, he must state the reasons and also state what action needs to be taken before the supplies can be accepted. It may be that the quantity of the supplies falls short of the specified quantity. Or that the quality of the supplies is deficient, in which case the supervisor should provide evidence of inspection or test results which have revealed the defects. This gives the supplier the opportunity to make good the deficiency and apply again for a certificate, at which time the procedure is repeated.

Where the supervisor is satisfied that the supplies are entirely satisfactory, he should issue an unqualified certificate of provisional acceptance and include the date when he considers the supplies were completed. However, the supplies may have been delivered essentially in accordance with the contract but the supervisor has identified some incidental shortcomings which can be remedied fairly quickly. In this case, the supervisor may issue a qualified certificate, that is, a certificate with reservations, stating in what respects the supplies fall short of the contract requirements and what outstanding work needs to be done, and when, to render them acceptable (Art. 39.2). The certificate may also stipulate that a certain part of the payment due to the supplier will be retained until the deficiencies have been corrected.

The provision permitting the issue of such a certificate of provisional acceptance with reservations is not intended to be a means of partial acceptance of supplies. It should only be used for cases of relatively minor shortcomings which can be remedied easily. The advantage of a qualified certificate instead of a refusal of certificate lies in the

field of payment.

A partial provisional acceptance may be provided for in the special conditions (Art. 40.4) but is rather exceptional. Such an acceptance could only be envisaged where the supplies in question can be separately shown to operate as a whole.

It is important to note that if the supervisor fails either to issue a provisional acceptance certificate or to reject within 30 days, he is deemed to have issued the certificate on the last day of that period (Art. 39.3). The supervisor should, therefore, take action within this period to prevent unsatisfactory supplies being accepted inadvertently through his neglect.

The issue of a certificate of provisional acceptance presupposes that the required verifications could be carried out. There may, however, be circumstances which are outside the control of the supplier which prevent verifications taking place. If these circumstances occur, the supervisor should discuss the matter with the supplier and issue a certificate stating that it is impossible to proceed with acceptance of the supplies. As soon as it becomes possible to carry out the verification operations, the 30 day period begins to run and the acceptance procedures continue. The supplier is not permitted to plead impossibility of verification as a reason for delaying completion of the supplies.

24.4 Warranty period and obligations

The special conditions may provide that, once provisional acceptance has been given, a warranty period follows. This period lasts 360 days if no other period is required in the special conditions. The main purpose of the warranty period is to demonstrate under operational conditions that the requirements of the contract have been complied with. The supplier should remedy any defects which appear during the warranty period and up to 30 days thereafter. The contract does not require the supplier to perform operational maintenance during the warranty period, unless it is specifically included as part of the contract with a corresponding provision in the technical specifications or other contract documents (Art. 40).

When an item shows a defect and has been repaired or replaced, the warranty period for that item starts again from the time of repair or replacement (Art. 40.4). Thus there may be a number of different warranty periods, according to the number of repairs and replacements carried out.

The rules and procedures applicable during the warranty period are similar to those for the maintenance period in works contracts (see point 17.5 above).

24.5 Final acceptance

If the special conditions provide for a warranty period, the supervisor issues a final acceptance certificate at the end of that period, provided the supervisor is satisfied that the supplier completed his obligations and made good all defects. The supervisor does not issue the final acceptance certificate until after the end of the latest period, if there are different warranty periods.

There is no requirement for the supplier to apply for a final acceptance certificate. The supervisor is required to issue it within 30 days after the latest warranty period.

If the special conditions do not provide for a warranty period, no provisional acceptance takes place and only a final acceptance certificate can be issued.

Notwithstanding its wording, the final acceptance certificate does not release the supplier from all his obligations under the contract. It is possible that the supplies may have latent defects or faults which were not discoverable at the end of the warranty period and the supplier remains liable for these. The nature, extent and period of this liability should be mentioned in the contract.

A number of consequences follow from the issue of the final acceptance certificate. For example, the supplier is required to return to the supervisor all contract documents (Art. 8.1). The retention sum or retention guarantee must be released to the supplier within 90 days of final acceptance (Art. 30.3). The supplier must also submit to the supervisor a draft final statement of account within 60 days of the issue of the final acceptance certificate (Art. 33.1). The performance guarantee, if any, is released only after the signed final statement of account has been issued (Art. 11.8). 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.

25 Payments

25.1 General

Suppliers are entitled to the same types of payments as contractors of works : advances, interim and final payments. These payments are normally in national currency, unless the contract states otherwise (Art. 27.1).

No payments can be made before the supplier has provided a performance guarantee, if the contract requires such a guarantee, and no advances can be made until the supplier has provided and advance payment guarantee.

Payments are normally made directly to the supplier by the EDF-paying agent (usually the central bank of the recipient country). After clearance and authorization, usually by the national authorizing officer, and endorsement by the Commission Delegate, payments in the local currency are effected by the EDF paying agent from transfers received by the paying agent from the Commission; payments in other currencies are made by the Commission itself, drawing on its accounts in Europe. The special conditions should identify the paying agents for the national currency and for the foreign currency payments.

25.2 Advances

Unless the special conditions provide otherwise, a lump sum advance of up to 60% of the contract price can be granted at the signature of the contract provided that an advance payment guarantee has been provided (Art. 29.2).

This guarantee must remain effective for at least 60 days after the date of provisional acceptance of the supplies (Art. 29.3.c). If , however, acceptance does not take place at the end of the period of performance, the guarantee should remain in force. If the advance guarantee ceases to be valid and the supplier fails to re-validate it, the advance payments can be recovered directly by means of a deduction by the contracting authority from future payments due to the contractor or the contracting authority may terminate the contract (Art. 11.6).

The repayment of advances take another form than in the case of works contracts. Point 25.3 on interim and final payments deals with that.

The special conditions should specify the currency in which the advances will be paid (normally the types and proportions in which the normal contract payments are made), the latest time by which requests for advance payments must be made, that the conditions governing delayed payments laid down in Article 35 also apply to advances, and the modalities for repaying the advances.

25.3 Interim payments, retention sum and final payment

The provisions in the General Conditions on interim payments, retention sum and final payment are at first sight largely the same as those for works contracts. Because of the amount of the advance payment, the nature of most supply contracts and the fact that the advance payment guarantee should not, according to Article 29.7, be released before the provisional acceptance, practice is, however, quite different from that under works contracts. Indeed, most commonly, the special conditions provide a 60% advance being the first payment, after which the second payment takes the form of a 30% interim payment subsequently to the provisional acceptance. This interim payment normally goes together with the release of the advance payment guarantee, which should, according to Article 29.7, take place within 60 days of the provisional acceptance.

Otherwise than for works contracts, Article 32.8 of the General Conditions for supply contracts provides that the special conditions may require certain interim payments to be fully secured by a guarantee.

The final payment of 10% will become due after final acceptance. To that end, the supplier has to submit, within 60 days of the issue of the final acceptance certificate, a draft final statement of account. The special conditions may, however, allow for a quicker procedure whereby, for example, the final statement of account is agreed when the final acceptance certificate is issued (Art. 33.1).

If the supplier wishes to receive the final payment of the 10% together with the second payment of 30% after the provisional acceptance, he must submit a retention guarantee for the 10% payment, which should be released by the contracting authority within 90 days after final acceptance (Art. 30.3). The interest of that appears to be limited to the case where a warranty period applies.

25.4 Delayed payments

According to Article 35.1, payments should be made within 90 days of the issue by the supervisor of the interim payment certificates or final statement of account to the contracting authority. If this payment delay is exceeded, the supplier is entitled to interest payments.

Article 35.1 does not specify the time period within which advance payments should take place. These should therefore be specified in the special conditions in order to be able to determine interests, as the case may be, for delayed payment of advances.

The special conditions should provide the basis for determining the interest rates for local and foreign currency payments respectively to which the contractor will be entitled when delayed payment occurs. These rates of interest are usually related to

the minimum lending rate of the central bank issuing the currency in which the interest should be paid, increased by 1% or 2% depending on the general rates for commercial borrowing in the country issuing the currency in which the payment is to be made. The calculation of claims for interest payments should be done separately for local and foreign cost components, since the applicable interest rates may differ in each case.

A maximum period during which interest payments may be made has to be set in the special conditions which should not exceed 120 days. After that period, the supplier is entitled to suspend the execution of the contract or to terminate it (Art. 35.2).

Although the supplier is automatically entitled to interest for delayed payments (Art. 35.1), he can only exercise this right if he submits an invoice. An invoice for interest should normally be submitted with the subsequent application for interim or final payment.

25.5 Payments in foreign currency

Payment in foreign currency is effected at the rate of exchange set by the central bank of the State of the contracting authority (Art. 36). However, where a central bank does not exist in an ACP State or where the central bank does not publish an exchange rate for the currency of payment, the rate or rates of exchange are to be established from other sources and included in the special conditions. This has become the current general practice, including for contracts with ACP states having a central bank. In accordance to that, tender documents normally stipulate that the exchange rates published by the Commission in the Official Journal of the EC will apply. The stipulated rates of exchange are fixed for the duration of the contract.

Where payments to the supplier are made in more than one currency, the contractor will nominate separate accounts into which payment in the national currency and the foreign currencies are to be made. Except where the revision of prices refers to prices effectively paid by the supplier, the proportions stipulated in the contract for national and foreign currency payments will be maintained throughout the contract. However, in order to avoid an excess of local currency at the end of the contract, it is possible to take account of this at an early stage of the contract. Also, the special conditions may provide that the supplier receives a greater proportion of payment in local currency in the beginning of the contract execution as long as the overall proportions of currencies will be respected.

26 After sales service

The purpose of an after sales service being to ensure the satisfactory operation of the supplies, comprises periodic maintenance, making available spare parts, repairs and an emergency call-out service in the event of breakdown. After sales service is mostly relevant to items of machinery, electrical and mechanical plant, vehicles and the like, whereas for certain other supplies like fertilizers, it is not needed. Therefore, the special conditions should specify whether after sales service is required (Art. 41). In that case the supplier should in his tender or before the conclusion of a direct agreement contract put forward an after sales service proposal.

In his proposal, the supplier may, of course, take into account whether existing facilities in the country and region are adequate, having regard to the purpose and the nature of the supplies. In this connection, it is relevant that for ACP States whose

economy is traditionally non-manufacturing, many supply contracts are satisfied through imports, mainly from Europe.

To what extent an after sales service is decided on a local rather than a country-wide or regional basis will depend on a number of factors. Much will depend on the period over which breakdown can be accepted and on the cost. The circumstances of the geographical area where the supplies are located are of course also relevant.

It may be necessary to require the supplier to provide a special guarantee as security for providing the after sales service over the specified period. This is particularly appropriate in the case of major contracts or contracts for the supply of specialised machinery. The contract should stipulate that this guarantee, or the relevant part of the performance guarantee, will be released only when all the after sales obligations have been fulfilled (Art. 11.8).

In order to ensure that adequate maintenance and repairs will continue after the end of the period of after sales service, it may be important that a training programme for nationals is included as part of the after sales service. Trainees should be able to take over these duties at the end of the period of after sales service. This period should be set to enable adequate training to take place.

Although the full cost of after sales service cannot normally be specified in the contract, the special conditions may specify the prices which the supplier will invoice for spare parts which he is required to supply within the framework of his after sales service (in the case of the tender, the supplier should submit these prices in his tender). Time limits for the delivery of various items could also be specified.

Where possible and dependent on the type of supplies and the circumstances of the project, the special conditions may include other conditions which the supplier has to meet under the after sales service.

C. SERVICE CONTRACTS

27 Introduction : the broad categories of service contracts

Various types of services may be the subject of services contracts concluded with consultants. In the day-to-day EDF practice, two broad categories of contracts may be distinguished: study contracts and technical assistance contracts.

Study contracts are in particular project identification and definition studies, (pre-) feasibility studies, economic and market studies, technical designs and preparation of tender documents, evaluations and audits (Art. 17.2). Technical assistance contracts are used in cases where the consultant is entrusted with an advisory function in respect of the technical aspects of the projects as well as in cases where the consultant has to assume the direction and supervision of the execution of a project (Art. 17.2, 17.4, 17.5 and 17.7 General Conditions for service contracts references to articles hereafter are to these General Conditions, unless mentioned otherwise).

28 Position and independence of the consultant

As a matter of principle, the consultant must at all times act loyally and impartially and be a faithful adviser to the contracting authority in accordance with his professional code of conduct. He should refrain from engaging in any activity or receiving any benefit which conflicts with his obligations towards the contracting authority (Art. 11).

This provision on independence has been further elaborated in Articles 12 and 13. Art. 13 provides the obligation for the consultant to be impartial and to base specifications and designs which he has to prepare on generally recognized systems, so as to promote competitive tendering, whereas Art. 12 contains a mechanism which has the objective to enable the contracting authority to verify the existence of relationships which may endanger such impartiality and independence and to take action if he concludes that such a situation exists.

As has been explained in point 3.4 above, the consultant must, before the conclusion of contract, give information on such relationships. The contracting authority may decide not to conclude a contract with the consultant or prevent the consultant or related companies to participate to other contracts (and tenders). Furthermore, the consultant must refrain from any such relationship during the execution of his contract.

The attention should be drawn to the fact that if the consultant fails to do so (or failed to disclose such information before the conclusion of the contract) the contracting authority may terminate the contract without giving any formal notice (Art. 12.1). This would be the normal sanction on the non-respect by the consultant of that obligation, not only because there is breach of contract by the consultant but also because any ex-post verification of the respect of independence in the execution of the contract would be most difficult. There may be circumstances, however, where other sanctions may appear to be more appropriate, for example in case where the consultant's contract is about to expire. Furthermore, measures may appear equally appropriate in relation to the position of the companies with whom the consultant has a relationship. Such measures may concern the participation of such companies to a tender or contract for the same project or its contractual position in case a contract with such a company has already been concluded.

29 Confidentiality of information and proprietary rights in reports and documents

In accordance with the obligation of being loyal and faithful towards the contracting authority, Article 11 also provides that the consultant shall maintain professional secrecy for the duration of the project and after its completion.

Along the same lines, Article 10.5 and Article 16 provide that all reports and documents received or drawn up by the consultant in the performance of the contract are confidential. Article 16 also makes it clear that those reports and documents will be the absolute property of the contracting authority (being the one who paid for the services).

30 Provision and replacement of personnel

Where the contract is for the provision of personnel for technical assistance, either in an advisory role or in a managerial role, the consultant is under the obligation to provide the personnel specified in the contract. This specification in the contract takes different forms.

At the start, the contract identifies and names the essential staff which the consultant shall provide under the contract. These are the experts previously proposed by the consultant in his tender or, in case of a direct agreement, in his offer made before the conclusion of the contract. The consultant's proposals included curriculum vitae of the experts and possible other references (Art. 18.1, 18.2 and 19.2).

The contract, however, should not only identify the essential staff to be provided, but also specify the qualifications and experience required for that staff (Art. 19.1). This is important in view of the situation where the consultant has to replace staff after the signing and conclusion of the contract. Such a situation may arise even before the start of the execution of the contract or after the execution has started. In both cases, the consultant needs the approval of the contracting authority, on the basis of a request to be submitted to the supervisor (Art. 18.4 and 19.6).

The consultant should, on his own initiative or on the request of the contracting authority propose such a replacement in the following situations :

- a member of staff is found by the contracting authority as incompetent or unsuitable in discharging his duties under the contract;
- death, sickness or accident of a member of staff;
- a member of staff has to be replaced for other reasons, beyond the control of the consultant (Art. 18.4).

The last two situations may arise before as well as after the start of contract execution, the first situation only after the execution has started and problems have turned up. Indeed, if before the award or conclusion of the contract, the contracting authority already found that a member of staff did not possess the minimum competence required or was unsuitable for other reasons related with the obligations of the consultant under the contract, he should have rejected the consultant's staff proposal. In case of negotiations on a direct agreement contract, the contracting authority should then have asked the consultant for alternative proposals or have turned to another consultant, whereas in case of a tender procedure, he should have rejected the tender for lack of compliance with the tender documents.

This, of course, only relates to essential staff which is to be identified in the contract and not to staff which is to be provided under the contract without being individually identified in the contract. For this staff, the special conditions will only specify the qualifications and experience required and the obligation for the consultant to ask the approval of the contracting authority or the supervisor before nominating or contracting the personnel concerned. (For certain less qualified personnel, the special conditions will normally not even specify qualifications and experience but only a very global job description).

When the consultant proposes to replace a member of staff, the replacing expert should have at least equivalent qualifications and experience and the remuneration to be paid for the replacing expert may not exceed that of the expert replaced (Art. 18.4 and 18.5). In case the consultant is not able to provide an expert with equivalent

qualifications and/or experience, the contracting authority may decide either to terminate the contract if the proper execution of the contract is endangered or, if he considers that this is not the case and that accepting the proposed expert would better serve the interest of the project, decide to accept the expert only on condition of renegotiating and lowering the fees for that expert.

In all situations where the consultant requests the approval of the contracting authority for staff he proposes (either as the initial staff or as replacement), the contracting authority may not unreasonably withhold or delay his approval (Art. 4.3). In the case of a request for approval of initial staff, this delay should not exceed 30 days as from the date of request (Art. 19.3).

The additional cost of replacing personnel is normally borne by the consultant. The fact that the contracting authority has given approval to the replacement or that the replacement was ordered by the supervisor or contracting authority for incompetence or unsuitability does not transfer the obligation to pay for the cost to the contracting authority.

Only in case of replacement resulting from death or replacement requested by the contracting authority but not provided for in the contract, the contracting authority is obliged to pay the additional cost (Art. 18.6), except for costs which are reimbursed to the consultant on the basis of an insurance policy which the contract obliges him to take out. This may, for example, be the case for costs concerning arrangements for the deceased

A further observation to be made relates to the situation where the expert is not replaced immediately and a certain period of time elapses before the new expert arrives. In such a situation the contracting authority may request the consultant to provide the project with a temporary expert awaiting the arrival of the new expert or to take other measures compensating the temporary absence of the expert. The special conditions may impose a penalty in case the consultant fails to meet such a request.

31 Trainees

With a view to ensuring the long term viability of projects, the training of ACP nationals is an important element of technical assistance and should be encouraged.

Article 20 lays down the provisions under which the consultant should give that training. The contracting authority, for his part, should make available, in accordance with the training time table, trainees with the basic skills consistent with the requirements of the training. This is particularly important for counterpart staff.

The details of the training requirements should be clearly defined in the special conditions and in the terms of reference, including the mechanisms for monitoring the training operations (performance reports, systematic handing-over of operations to trainees, etc.) in order to ensure that the objectives are fulfilled and to avoid unrealistic expectations on the part of prospective trainees or the agencies involved.

Counterpart staff appointed by the contracting authority to work with the consultant should ideally be incorporated into the consulting team with specific responsibilities. The consultant will expect each member of the team to be productive. The exact scope of any training required of counterpart staff should clearly be defined. In this connection it should be mentioned that the consultant should be given the possibility to request the contracting authority to replace a counterpart staff member if the latter

is found incompetent or unsuitable by the consultant on the basis of an evaluation of the staff member's performance. Unless the consultant's reasons are not considered valid by the contracting authority, the latter should accede to such a request.

While the cost of the training is part of the contract price, remuneration of the trainees and travel accommodation and other expenses incurred by them should be paid by the contracting authority, unless otherwise specified in the special conditions (Art. 20.3).

32 Variations requested by the supervisor

The supervisor may order variations of any part of the services. These variations must be necessary for the proper completion of the services and may not change the object or scope of the contract.

Article 26 further defines the variations which the supervisor may order and the procedures and criteria for processing and pricing variations. These procedures and criteria are similar to those which apply to variations ordered by the supervisor under works contracts. It may, therefore, be referred to point 16 above.

A particular attention should be drawn to the rule that a change of the contract price as a result of variations is only required where the total value of the services, including those resulting from variations or other circumstances not caused by the consultant's default, varies by more than 15% of the initial contract price.

Article 26 does of course not apply to situations where the contracting authority wants to terminate the contract on account of unsatisfactory performance of the consultant. In such a situation, the provisions in the special and general conditions on termination of contract and damages apply.

33 Reporting and approval

Normally, the consultant must draw up reports on the progress and completion of the services. These reports are essential for the approval by the contracting authority of the consultant's services and are normally made a condition for payments.

The subject matter and frequency of reports are to be specified in the special conditions. These may include regular progress reports (for example every two, three or six months, depending on the nature and duration of the contract) and annual progress reports.

Where the contract is executed in phases, the consultant should normally prepare a report at the end of each phase (Art. 31.3).

On implementation difficulties, omissions in the terms of reference (Art. 29) and back-up missions performed by the consultant's headquarters, the consultant should drawn up special reports.

The final report will deal with the achievements in comparison with the terms of reference (in case of supervision contracts, in particular going into issues like variations, cost increases and maintenance).

The frequency of reports will normally be higher for technical assistance contracts than for study contracts, where the projects of execution of contract will also appear

through the submission of preliminary drafts, drafts or parts of drafts of the documents which are the object of the contract.

The final report has to be forwarded by the consultant to the supervisor within 60 days after the completion of the services (Art. 31.2)

The time limits for transmitting other reports should be specified in the special conditions. These time limits should take account of the periods which are stated in the special conditions for examining and deciding on the reports (Art. 31.4). In general, the period for transmitting the reports range from two to four weeks after the end of the period concerned; the period for the supervisor's decision is of a similar duration, except for the final report, where the special conditions normally will provide a longer period, often two or three months.

If the supervisor does not approve the report, he should indicate the amendments he considers necessary or, alternatively, reject the report, giving his reasons (Art. 32.2). If he requests amendments, he should stipulate a period for making the amendments (Art. 32.3).

In connection with the reporting by the consultant and the approval by the supervisor, mention should be made of the role of the Delegation. Although the consultant is formally responsible towards the contracting authority and his supervisor,the Delegation should be given the opportunity to fulfil its role in verifying that the implementation of projects progresses as foreseen. This is the reason why the special conditions normally oblige the consultant to send copies of all his reports to the Delegation when submitting the reports to the supervisor. For the same reason, the consultant may want to inform the Delegation of certain difficulties encountered when he considers that may contribute, in the interest of all parties, to avoiding unnecessary complications and delays.

34 Revision of prices

The consultant is bound by the prices in the contract. Revision of prices is only possible if provided for in the special conditions. In the case of changes in law or public regulations or decisions which cause extra cost to the consultant, price revision is, however, possible even when not stated in the special conditions, according to Art. 37.4. This refers for example to situations where new taxes are introduced or a devaluation is decided upon by the competent authorities. Price revision is not the only way in which the parties may react to that situation and alternative possibilities are given in Article 37.4, including termination of contract. However, price revision or any other measure provided for by this article are not automatic and are subject to common agreement as between the parties. It may be, however, that tender and contract documents make such a revision automatic.

Price revision is normally allowed in contracts of more than one year but only for the period after the first year. It is related to the price rises in the country or countries of the currency or currencies in which payments are made. In case of countries with high inflation price revision may even be justified more often, provided, of course, the special conditions allow for that.

The price in service contracts often consists of three components: lump sums, unit prices and reimbursable costs. This is normally the case for technical assistance contracts. Other contracts, like most study contracts, only provide for a lump sum.

Price revision only applies to the lump sum and unit price components of the price. Since the cost reimbursable component refers to reimbursement of actual costs, the consultant does not bear the risk of increases in these costs.

The detailed rules for price revision should be mentioned in the special conditions. The usual price revision formula in standard EDF contracts refers to changes in the consumer price indices in the country where the consultant is based, as far as the part of the price is concerned which is paid in foreign currency; and to those in the ACP country or countries where the execution of the contract takes place, as far as the part of the price is concerned which is paid in local currency.

Price revision will not be applied 30 days before the date fixed by the supervisor for the completion of the services (after allowing for any extension of time granted in accordance with Article 23.3), except if the revision would result in a reduction of the contract price (Art. 37.5).

35 Payments

35.1 General

The consultant is entitled to payments at various times throughout the performance of the contract: advances, interim payments and final payments. These payments are in the currency or currencies stated in the contract (Art. 33.1).

Advances cannot be made until the consultant has provided an advance payment guarantee. They are later paid back to the contracting authority through deductions from the interim payments.

Interim payments are made at regular intervals, depending on the nature and duration of the contract. Deductions to be made from interim payments are not only for repayment of advances but also include a so-called retention sum.

The final payment is made after the approval of the final report and a final statement has been given by the contracting authority.

Payments are normally made directly to the consultant by the EDF-paying agent (usually the central bank of the recipient country). After clearance and authorization, usually by the national authorizing Officer, and endorsement by the Delegate, payments in local currency are effected by the EDF paying agent from transfers received by the paying agent from the Commission; payments in other currencies are made by the Commission itself, drawing on its accounts in Europe. The special conditions should identify the paying agents for the national and foreign currency payments.

35.2 Advances

Advance payments can be made only if provided by the special conditions. In that case, the consultant may request advances enabling him to meet expenditure resulting from the commencement of the execution of the contract. However, the consultant may not make the commencement of the execution dependent on the receiving of advances.

The advances take the form of a lump sum and their total may not exceed 20% of the contract price (Art. 34.1 and 34.2). The contract price is to be understood as including the reimbursable costs such as estimated in the contract.

Advances can only be granted once the contract has been concluded and an advance payment guarantee has been provided (Art. 34.3). This guarantee is normally progressively reduced by the amounts repaid through deductions from interim payments and fully released when the total advance is repaid.

It is important that the repayment is not concentrated in an unduly short period, otherwise the net interim payment to the consultant may be very small for some time and he will end up pre-financing a substantial part of his services. As a rule, repayment of advances should be completed not later than the moment that 80% of the contract price has been paid.

A different situation arises if the advance guarantee ceases to be valid and the consultant fails to revalidate it. In that case, the advance payments can be recovered directly by means of deduction from further payments due to the consultant. If the contracting authority considers that impracticable, he may even terminate the contract (Art. 34.5).

The special conditions should specify the currency or currencies in which the advances will be paid (normally the types and proportions in which the normal contract payments are to be made), the latest time by which requests for advance payments must be introduced as well as the time period within which an advance should be paid to the consultant (this is relevant in relation to the question of delayed payments - see point 35.4 below); and the conditions for repayment of the advances.

35.3 Interim payments, retention sum and final payment

The consultant may apply for interim payments in respect of services rendered and, as far as reimbursable costs are concerned, on the basis of submission of the supporting documents (Art. 35.1 and 35.3).

The intervals for interim payments should be specified in the special conditions. As a general rule, the payments are either on a monthly basis or as and when certain phases or parts of the services are completed (Art. 35.5). In practice, this means that interim payments quite frequently are made on a quarterly basis, subsequent to the approval of quarterly reports which the consultant has to draw up.

Within 30 days of receipt of the consultant's request for interim payment, the supervisor is required to issue a interim payment certificate to the contracting authority and the consultant, stating the amount which in his opinion is due to the consultant.

Normally, interim payments of lump sum parts of the contract price are made in the currencies and percentages as stipulated in the contract. The payments of the reimbursable costs are made in the currency in which the consultant paid those costs.

From the interim payments are not only deducted the repayments of advances but also a retention of 10%, which will only be paid as part of the final payment (Art. 35.4). No possibility is foreseen to obtain interim payment of that 10% against submission of a retention guarantee.

Final payment is made after the performance by the consultant of all his obligations and the approval by the contracting authority of the final phase or part of the services, including the approval of the final report and final statement to be submitted by the consultant (Art. 35.10). No maximum time period is provided for this final payment, but in the contract such a period may be specified.

35.4 Delayed payments

According to Article 38.1, payments should be made within 90 days of the issue by the supervisor of the interim or final payment certificates to the contracting authority. If this payment delay is exceeded, the consultant is entitled to interest payments.

Article 38.1 does not specify the time period within which advance payments should take place. These should therefore be specified in the special conditions, in order to be able to determine interest due, as the case may be, for delayed payment of advances.

The special conditions should also provide the basis for determining the interest rates for local and for foreign currency payments.

These rates are usually related to the minimum lending rate of the central bank (increased by 1% or 2% depending on the general rates for commercial borrowing) in the country issuing the currency in which the payment is to be made. Since the applicable interest rates may differ from one country to another, the calculation of claims for interest payments should be done separately for the cost elements in each currency.

A maximum period for making interest payments has to be set in the special conditions. It should not normally exceed 120 days, after which the consultant is entitled not to execute the contract or to terminate it (Art. 38.2).

Although the consultant is automatically entitled to interest for delayed payments (Art. 38.1), he can only exercise this entitlement if he submits an invoice for the interest. An invoice for interest should normally be submitted with the regular applications for interim or final payment.

35.5 Payments in foreign currency

The General Conditions for service contracts do not (unlike those for works and supply contracts) contain specific provisions for payments in foreign currency. Practice is, however, the same as for other contracts. Thus, payments in foreign currency are effected at the rates of exchange indicated in the special conditions. In case of a contract concluded as a result of a tender, the special conditions refer to the exchange rates published in the Supplement of the Official Journal of the EC 30 days prior to the latest date fixed for the submission of tenders (those publications take place once a month). In case of a direct agreement contract, the exchange rates referred to are normally those mentioned in the latest Supplement of the Official Journal published previously to the conclusion of the contract.

The rates of exchange are fixed for the duration of the contract.

Where payments to the consultant are made in more than one currency, the consultant will nominate separate accounts into which payment in the national currency and the foreign currencies are to be made.

Except where the revision of prices refers to prices effectively paid by the consultant, the proportions stipulated in the contract for national and foreign currency payments will be maintained throughout the contract. In this connection, the global proportions mentioned in the contract should correspond with those resulting from an adding up of separate cost elements mentioned in the price breakdown in each of the currencies. Practice has shown that this is not always the case. This problem, of course, does not exist in cases where a 100% payment in foreign currency is foreseen in the contract. Such a payment is possible where it can be justified.

The rule that the proportions are the same throughout the contract does not mean, however, that in order to avoid an excess of local currency at the end of the contract, it would not be possible to take account of this at an early stage of the contract. Therefore, the consultant may, if the special conditions provide so, ask for a greater proportion of payment in local currency at that stage, as long as the overall proportions of currencies will be respected.

PART III. SETTLEMENT OF DISPUTES AND THE PROCEDURAL RULES ON CONCILIATION AND ARBITRATION.

36 Introduction

36.1 Earlier provisions

In earlier EDF financed contracts, disputes were settled under the rules on conciliation and arbitration of the International Chamber of Commerce (ICC). However, it was considered that this by-passed domestic judicial procedures of the ACP States concerned, which might otherwise have been accepted and preferred by both national and foreign contractors as well as the contracting authorities. The referral of all disputes to the rules for conciliation and arbitration of a major international body could not be justified before other means of resolving them had been exhausted.

Lome III conferred a right to call for arbitration not only on the parties to a contract within the ACP State but also on tenderers for a works or supply contract, or candidates for a service contract, before the contract was awarded. This created some legal difficulty due to the absence of a legally enforceable agreement with the authority in the ACP State which gave the tenderer or candidate the right to call for arbitration.

36.2 Lome IV provisions

That difficulty does not directly exist under Lomé IV provisions. Article 307, which concerns the settlement of disputes, is limited to disputes arising between the contracting authority of an ACP State on the one hand and a contractor, supplier or provider of services (called "contractor" in the following) on the other hand, and does not confer a right on tenderers to use arbitration[16]. Moreover, under Article 307, arbitration became only one of a number of alternative means for settling disputes arising in EDF financed contracts.

As far as complaints from tenderers are concerned, the General Regulations for works, supply and service contracts do not make express provision either for dealing with such complaints.

The most likely complaint by a tenderer is that he was not awarded a contract when he considers that his tender was the most advantageous in accordance with the award criteria specified in the tender documents.

However, the contracting authority is not required to give reasons for its choice of the successful tenderer or to enter into discussion or correspondence with tenderers regarding its assessment of tenders. The result of this is that, except in cases where the contracting authority does give his reasons for rejection or selection or where the tenderer may otherwise have learned about the reasons for the decision leading to the award of contract, a tenderer will lack the basis for a complaint and for disputing the grounds for the award of contract.

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16 The contracting authority is defined as the State or legal person governed by public or private law which concludes a contract. This may be the State itself, a public agency, a local or other public authority, or a non-governmental organisation within the State.

There may be other situations in which a tenderer may want to complain that the contracting authority has not complied with the General Regulations on tendering procedures. Examples of such complaints are:

- use of technical specifications which discriminate in favour of contractors from a particular state (Art. 5 (b) and 11.2)
- clarification information which is not issued to all tenderers (Art. 17.1)
- acceptance of a tender which was received later than the date specified (Art. 30.1)
- failure to follow the rules for opening and examining tenders (Art. 33.3)
- wrongful correction of arithmetical errors (Art. 34.7)

In these circumstances a tenderer may want to seek redress in the courts of the ACP State concerned for breach of the General Regulations.

36.3 The General Conditions for works, supply and service contracts and the procedural rules on conciliation and arbitration

Concerning the settlement of disputes relating to the performance of contracts, the three sets of General Conditions for works, supply and service contracts provide that parties to a contract make every effort to settle disputes in an amicable way or, if that does not succeed, through conciliation. If that does not succeed either, they refer parties to other procedures, in particular arbitration.

Conciliation and arbitration are the subject of the new Procedural Rules on conciliation and arbitration (hereafter : Procedural Rules) which were, together with the General Regulations and Conditions, adopted by the ACP-EEC Council's decision no. 3/90 .

The new Procedural Rules have to a great extent been drafted on the basis of the UNCITRAL (United Nations Commission on International Trade Law) rules with a few modifications taking into account the specific characteristics of ACP-EEC cooperation. Compared to the previous practice of applying the ICC rules, certain differences appear. The principal differences between the ICC rules and the Procedural Rules will be set out below.

37 Amicable settlement

When a dispute arises in a contract, there are several ways in which it can be dealt with. Dispute resolution by conciliation is a lengthy and costly process and even more so in the case of arbitration. Thus, the parties should make every effort to settle disputes in an amicable manner in the first instance (Art. 68.1 General Conditions for works contracts, Art. 48.1 General Conditions for supply contracts and Art. 45.1 General Conditions for service contracts). The general principle is therefore that whenever possible, disputes are discussed by the parties and hopefully resolved in an amicable way. It should be noted that the fact that a dispute exists does not, however, relieve the contractor of his responsibility to continue complying with his contractual obligations with due diligence.

The way of achieving an amicable settlement may vary according to the internal administrative procedures of the ACP State concerned (see Art. 4 of the Procedural Rules) but it is usually of an informal nature. In order to ensure a certain efficiency

and transparency, the above mentioned provisions of the General Conditions provide, however, that the procedure and the limits for amicable settlement are to be prescribed in the special conditions of contract. If agreement is not reached within these time limits, the parties are then free to pursue the dispute through other procedures.

The next step depends then on whether the contract is a national or transnational one.

Disputes arising in a national contract, i.e., a contract concluded with a national of the State of the contracting authority, are, under Lome IV, to be settled in accordance with the national legislation of the ACP State. Disputes arising in transnational contracts, i.e., a contract concluded with a contractor who is not a national of the State of the contracting authority, are to be settled in one of the two following ways:

- if the parties so agree, in accordance with national legislation of the ACP State, or its established international practice, or

- by arbitration in accordance with the Procedural Rules approved by the ACP-EEC Council of Ministers.[17]

Therefore, in the case of a national contract, the next steps to be taken to resolve the dispute are as defined in the laws of the ACP State. This also applies in a transnational contract, where the parties agree to proceed in accordance with the procedures for settlement of disputes laid down in the laws of the ACP State. This agreement can be reached at the start of a contract, before any disputes have arisen and should be recorded in writing and signed by both parties. It is possible, however, that a contractor might be reluctant to agree to this, early in the contract, when he does not know what kind of disputes might arise. Therefore, such an agreement may not be reached until a dispute has arisen. The contractor is then likely to agree to this settlement procedure to resolve that particular dispute only and to reserve his position in relation to future disputes.

In the case of transnational contracts, the parties may agree to follow the national legislation of the ACP State but an alternative is given. This is to resolve the dispute in accordance with the established international practices of the ACP State concerned. Again, it is necessary that both parties should agree, either early in the contract in relation to all disputes which might arise or as each dispute arises in relation to that particular dispute. Where the ACP State has experience of resolving disputes in this way and has confidence in the particular international practice followed, both parties should be encouraged to proceed accordingly.

It is only when the parties to a transnational contract cannot agree to follow the national legislation of the ACP State or its established international practices, that they are required to proceed to arbitration in accordance with the Procedural Rules.

At any time before a request for conciliation or arbitration a party can request the amicable intervention of the Commission in accordance with the Procedural Rules (Art. 5.1). Where the parties request such an intervention of the Commission, its good offices procedure will be followed. This procedure is as follows:

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17 Article 307 Lomé IV Convention. Similar provisions are contained in the above mentioned provisions of the General Conditions.

- the parties give a mandate to the Commission services to examine the case and propose an amicable settlement. Either party may initiate the process by inviting the Commission to intervene in the dispute. However, the Commission will only take action if this is the wish of both of the disputing parties;

- once the procedure is commenced, all other instituted settlement procedures under the contract are suspended;

- the Commission will consult with the parties bilaterally in order to explore the facts of the dispute and the possibilities for a settlement;

- if the Commission finds that a compromise is likely, it will propose such a compromise to the parties in a joint meeting;

- if the parties agree, a protocol of agreement is drawn up and signed by the parties, which will be binding between them;

- if no settlement is reached, the parties can proceed to conciliation or arbitration;

The Commission's involvement in this process should not be taken as a commitment to finance a settlement. The sole purpose of the Commission's intervention is to try and find a solution which both parties can agree to and live with, hereby bringing to an end the deadlock created by the dispute.

38 Conciliation procedure

The main differences between the ICC rules and the new Procedural Rules concern conciliation. Two principal differences here warrants mentioning. The first difference lies in the administration of the procedure. While the ICC Conciliation Rules have an institutional structure like the ICC's Administrative Commission for Conciliation from which conciliators are, in principle, chosen, the Procedural Rules do not. Similarly, the ACP/EEC machinery does not have a central secretariat through which all requests for conciliation are routed as in the ICC Conciliation Rules. Furthermore, under the Procedural Rules, conciliation is either by a sole conciliator (if the parties agree) or by a committee of three, whereas the ICC Conciliation Rules only provide for a sole conciliator. Finally, under the Procedural Rules, only nationals of the ACP or EEC States can be appointed (which also applies to the system of arbitration).

The second principal difference concerns the payment of the cost of the procedure. While the ICC Rules prescribe the method of payment of expenses of the conciliation proceedings, the Procedural Rules are silent on the matter. One reason is that the nature of the ACP/EEC relationship renders a special institutional structure unnecessary thus making the procedure cheaper. Therefore, a specific description of a payment is less needed. A further reason may be that the settlement of disputes by conciliation ought anyway to be cheaper than settlement by arbitration.

Conciliation can proceed only if the parties to the dispute agree to proceed in this way. The conclusion is conducted by a sole conciliator if both parties so agree and if they agree on the person to be appointed as conciliator. If they cannot agree, conciliation is conducted by a committee of three conciliators. In this case, each party

appoints one conciliator and the two persons so appointed nominate a third person who acts as chairman.

There is no rigid procedure laid down for conciliation. The emphasis is on informality, consistent with a fair and just settlement of the dispute as promptly as possible[18]. It is important that each party's case is properly heard and understood and that each has the opportunity to reply. The conciliator or conciliation committee then prepares terms of a recommended settlement which is submitted to the parties. If they agree to accept, they sign the record which then becomes binding upon them.

There is no provision in the Procedural Rules for the payment of the costs of conciliation. The circumstances of any particular dispute will of course vary considerably and in any event the costs should be much smaller than those of most other procedures for resolving disputes.

If the parties agree to a sole conciliator, they should at the same time seek to agree how the costs of the conciliation are to be paid. At this stage the agreement might be that costs should be shared by the parties in equal parts, regardless of the outcome. Alternatively, the agreement might be that payment of costs is to be decided by the conciliator or the conciliation committee. In all cases, it is likely that the conciliator or conciliation committee will require a deposit from the party requesting the conciliation, or from both parties, in a fund set up for the purpose. The amount of the deposit will depend on the estimated cost of the conciliation and it will normally be required before the start of any work on the conciliation. Also, as part of the initial agreement, the conciliator will normally require payment of the balance of costs before submitting the terms of the settlement to the parties towards the end of the conciliation process.

In the event of failure to agree the payment of the costs of conciliation, or of failure by one or both parties to pay the required deposit or balance of costs within whatever time limits are laid down by the conciliator or conciliation committee, settlement by conciliation can be regarded as having failed and the parties will be at liberty to refer the dispute either to arbitration under the Procedural Rules or to settlement in accordance with the legislation of the ACP State or its established international practice, as the case may be.

39 Arbitration

When it comes to arbitration, the first task of the parties to the dispute is to nominate the arbitrator(s).

39.1 The tribunal

The parties may agree to arbitration by only one arbitrator. Failing agreement, or if they agree otherwise, the tribunal will consist of three arbitrators.

Where there is to be a sole arbitrator, the parties must agree on that arbitrator or upon an authority for appointing an arbitrator. If the parties fail to agree, or if an agreed appointing authority refuses to act or fails to appoint the arbitrator within 60 days, then, under Article 8.2, either party may request the most senior in rank amongst the

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[18] Article 1 of the Procedural Rules fixes some time limits for the different stages of the procedure in order to ensure the speedy arrival at a solution.

judges of the International Court of Justice at the Hague who are nationals of ACP or EEC States to appoint an arbitrator.

Where there are to be three arbitrators, Article 9 requires each party to appoint one arbitrator within 60 days. The two arbitrators then choose the third to be the presiding arbitrator. If the two chosen arbitrators fail in their task to choose within 30 days, either party may request the appointing authority to appoint the third arbitrator. Similarly, the appointing authority may be invited to act if within 30 days one of the parties has not notified the other party of the arbitrator he has appointed.

When it comes to the need of use of an appointing authority one should remember that it is only when the parties are unable to agree that the residual appointing authority is called into action.

The overriding obligation of the appointing authority is to act as promptly as possible and to secure the appointment of an independent and impartial arbitrator of a nationality other than the nationalities of the parties, of high moral standing and competent in law and who has the relevant technical and financial knowledge.

Except for the use of the Judge of the ICJ outlined earlier, the Procedural Rules are similar to those found in most arbitration procedures. An example is the rule dealing with challenges to arbitrators. Any arbitrator may be challenged by a party if facts or circumstances exist which give rise to justifiable doubts or suspicion as to his impartiality or competence. But a party appointing, or participating in the appointment of, an arbitrator may challenge him only for reasons of which he became aware after the appointment was made.

Where a decision on the challenge has to be made, in the case of an appointment made by an appointing authority, that authority decides on the challenge. Where the appointment is not made by an appointing authority and the tribunal consists of three arbitrators, the decision is taken by the other members of the tribunal. This decision is final.

Where the challenged arbitrator ceases to hold office, Article 12 (unlike some other arbitration systems) provides that the method of his replacement is the same as the method provided for the original appointment. The same applies where an arbitrator dies during the course of the proceedings or if an arbitrator fails to act or it becomes impossible for him to perform his functions. With the replacement of an arbitrator, the tribunal can decide to repeat any hearing previously held or set aside any decision or order previously made.

39.2 The arbitration proceedings

The rules governing the actual proceedings follow well accepted principles which give each party a fair and equal opportunity of presenting his case to the tribunal. The tribunal, however, has very wide discretion over the conduct of the arbitration. Subject to the Procedural Rules, the tribunal can, by Article 13.1, conduct the proceedings as it considers appropriate. The Procedural Rules themselves lay down that the tribunal should (a) rule on objections to its jurisdiction and determine the existence or validity of the contract under consideration; (b) decide what written statements can be presented by the parties and the manner and time-limits of their presentation; (c) call for summaries of documents and other evidence in support of the statement of claim or defence; (d) be free to decide how witnesses should be examined; (e) decide questions of admissibility, relevance, materiality and weight of

evidence; (f) have the power to appoint independent experts to examine and report on specific issues; and (g) be able to take interim measures to protect the parties' positions.

Any procedural matter not provided for or agreed by the parties is decided by the tribunal (Art. 14.4), which has to ensure that equality between the parties is observed. The tribunal must conduct the proceedings as expeditiously and economically as is consistent with doing justice between the parties (Art. 13.2).

If no party requests hearings for the presentation of evidence by witnesses, or for oral argument, the tribunal decides whether to hold such hearings or to conduct the proceedings on a documents - only basis. Hearings must be behind closed doors unless the parties agree otherwise. Evidence may be presented orally or as sworn, signed, written statements; in the latter case the tribunal may at the request of each of the parties hear witnesses orally so that the parties can question them.

The arbitration award must be made as soon as possible after the hearing or receipt of evidence or other material (Art. 33.1). The tribunal's powers include the making interim and partial awards (Art. 33.2).

The proceedings must be conducted and the award made in the language of the relevant contract. The tribunal can order that documents and exhibits in another language are accompanied by a certified translation.

Unless otherwise specified in the contract, the tribunal must apply the law of the ACP State of the relevant contracting authority. In all cases, the tribunal's decision must be in accordance with the contract and may take into account trade usages. Where the applicable law is silent on any specific point, the tribunal must apply the conflict of laws rules. The tribunal cannot decline to make an award on the ground that the law is silent or obscure.

The parties may, in the course of the arbitration proceedings, authorise the tribunal to deal with the dispute in some other way by changing its mandate and the basis for its decision, in which case the tribunal must act accordingly. If, before an award is made, the parties agree on a settlement by other means, the tribunal must either issue an order terminating the proceedings or, if requested by both parties, make an award on the agreed terms.

Arbitration proceedings must be conducted in the ACP State in which the contract was awarded or performed. However, in certain circumstances, they may be conducted elsewhere, if the parties agree (Art. 16.1). In any case, the tribunal can hold some hearings and meetings at any place it considers appropriate, depending on the circumstances.

The tribunal may call upon the parties to deposit an amount as an advance for costs (Art. 41.1). If an appointing authority, agreed or designated by the Procedural Rules, has consented to be consulted on the amount of deposit, the tribunal must fix such amounts only after consultation with the authority. The authority may make any comments to the tribunal which it considers appropriate concerning the amount of the deposit (Art. 41.3).

39.3 The award

The arbitration award must state reasons for the award, unless the parties have previously agreed that reasons should not be given. Other than correction of errors of computation etc., awards are final and binding on the parties (Art. 33.3 and 37.1).

Each ACP and EEC State has undertaken to recognise as binding every award made under the Procedural Rules and ensure enforcement as if it were a final judgement of one of the State's own courts (Art. 33.3). This means that no post-award court actions are permitted. This follows modern trends which seek to isolate international arbitration awards from interference by domestic courts, usually instigated by disappointed parties. In order to achieve enforcement, the party concerned must present a certified copy of the award to the authority designated for the purpose (Art. 34.1) in the ACP/EEC State. The order for enforcement must be appended to the presented copy. The means of the enforcement of the award are regulated by the law of the State in whose territory enforcement is to be carried out.

The tribunal must fix the costs of the arbitration in the award (Art. 40.1) or in the order to terminate the proceedings. The costs include the fees of the tribunal, travel costs and expenses of the arbitrators, costs of expert advice and other assistance, witnesses' expenses and the appointing authority's fees and expenses. The costs of legal representation and assistance of the successful party are allowed only if claimed during the proceedings, and only as the tribunal considers they are reasonable (Art. 40.1 (e)). Additional fees for interpretation, correction or completion of an award are not permitted (Art. 40.5).

The fees of the tribunal must be reasonable, taking into account all relevant circumstances (Art. 39.1). If an appointing authority, agreed by the parties or designated by the Rules, has issued a schedule of fees which it administers itself, the tribunal must take that schedule into account as it considers appropriate (Art. 39.2). If the authority has not issued such a schedule, any party may, before the tribunal issues an award fixing its costs, ask the authority for a statement of the basis on which fees are normally decided in international cases where the authority appoints arbitrators (Art. 39.3). In fixing its fees, the tribunal must take into account such a statement as appropriate. When an appointing authority agrees to draw up a proposal for fees, the tribunal must fix its fees only after consultation with the authority. The appointing authority can, as it considers appropriate, comment on fees to the tribunal (Art. 39.4).

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