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ACP-EEC Council of Ministers

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This issue closes the 'L' series for 1990.

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other Acts are printed in bold type and preceded by an asterisk.

ACP-EEC COUNCIL OF MINISTERS

DECISION No 3/90 OF THE ACP-EEC COUNCIL OF MINISTERS

of 29 March 1990

adopting the general regulations, general conditions and procedural rules on conciliation and arbitration for works, supply and service contracts financed by the European Development Fund (EDF) and concerning their application

THE ACP-EEC COUNCIL OF MINISTERS,

HAS DECIDED AS FOLLOWS:

Having regard to the Third ACP-EEC Convention signed at Lomé on 8 December 1984 and in particular Articles 212, 237 and 238 thereof,

Having regard to the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, and in particular Articles 305, 306 and 307 thereof,

Having regard to the joint resolution on the report 'Ten Years of Lomé' whereby maximum information should be provided to tenderers,

Having regard to the opinion of the committee referred to in Article 193 of the Third ACP-EEC Convention,

Whereas it is necessary to adopt the general regulations and general conditions governing works, supply and service contracts financed from the resources of the Seventh European Development Fund (EDF), administered by the Commission, hereinafter referred to as 'the resources of the Fund';

Whereas it appears desirable to make provision, as far as possible, for such general regulations and general conditions to apply to contracts financed from the resources of previous Funds and to those financed from the resources of any subsequent Funds;

Whereas it is also necessary to establish procedural rules on conciliation and arbitration for cases where one of these methods of settlement is used for disputes arising from the contracts in question;

Whereas it will be necessary to implement various follow-up actions in the form of seminars and a user's guide, in order to familiarize users with such general regulations and general conditions,

Article 1

The preparation and award of contracts financed from the resources of the Fund shall be governed by the general regulations for works, supply and service contracts financed by the European Development Fund (EDF), appearing in Annex I.

The performance of contracts financed from the resources of the Fund shall, except as otherwise provided in Article 306 (b) of the Fourth ACP-EEC Convention, be governed by:

- (a) the general conditions for works contracts financed by the European Development Fund (EDF), appearing in Annex II;
- (b) the general conditions for supply contracts financed by the European Development Fund (EDF), appearing in Annex III;
- (c) the general conditions for service contracts financed by the European Development Fund (EDF), appearing in Annex IV.

Disputes relating to a contract financed from the resources of the Fund, which, pursuant to the general conditions and the special conditions governing the contract, are to be settled by conciliation or by arbitration, shall be settled in accordance with the procedural rules on conciliation and arbitration of contracts financed by the European Development Fund (EDF), appearing in Annex V.

Article 2

The general regulations and general conditions referred to in Article 1 shall also apply to contracts financed from the resources of the Fifth and Sixth Funds administered by the Commission, having due regard to the provisions of the relevant Convention.

Article 3

The general regulations and general conditions referred to in Article 1 can be made applicable to contracts financed from the resources of any subsequent Fund, by a decision of the ACP-EEC Council of Ministers taken on the basis of the relevant Convention.

Article 4

The ACP States and the Commission shall take the necessary measures regarding any follow-up action which will advance the implementation of the general regulations and general conditions referred to in Article 1.

Article 5

The ACP-EEC Council of Ministers shall review the general regulations and general conditions referred to in Article 1 in the light of the experience obtained from the implementation thereof before the expiry of the Fourth ACP-EEC Convention.

Article 6

This Decision shall take effect from a date to be determined by the committee referred to in Article 193 of the Third

ACP-EEC Convention or by the committee referred to in Article 325 of the Fourth ACP-EEC Convention (*).

Article 7

Notwithstanding the date of taking effect referred to in Article 6 as regards the general regulations referred to in Article 1, Article 16 (2) of the said general regulations concerning a 'note of general information' to be included in the tender dossier, shall take effect on a subsequent date, to be fixed by the committee referred to in Article 193 of the Third ACP-EEC Convention or by the committee referred to in Article 325 of the Fourth ACP-EEC Convention.

Article 8

The ACP States, the Member States of the Community and the Community shall be bound, each to the extent to which it is concerned, to take the measures necessary to implement this Decision.

Done at Fiji, 29 March 1990.

For the ACP-EEC Council of Ministers

The Chairman

G. COLLINS

(*) The committee referred to in Article 193 of the Third ACP-EEC Convention decided, during its meeting of 9 November 1990, that the new instruments would enter into force on 1 June 1991.

ANNEX I

GENERAL REGULATIONS FOR WORKS, SUPPLY AND SERVICE CONTRACTS FINANCED
BY THE EUROPEAN DEVELOPMENT FUND (EDF)

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INTRODUCTION

Article 1

Conditions

- 1.1. The award of works, supply and service contracts financed from the resources of the Seventh European Development Fund (EDF) shall be governed by these general regulations.
- 1.2. The performance of works, supply and service contracts financed from the resources of the Seventh European Development Fund (EDF) shall be governed by:
 - (a) the general conditions applicable to each category of contract financed by the EDF, or
 - (b) in the case of cofinanced projects and programmes, or where derogation to third parties has been granted, or in accelerated procedures or in other appropriate cases, such other general conditions as may be agreed by the African, Caribbean and Pacific (ACP) States concerned and the European Economic Community, i. e.:
 - (i) the general conditions prescribed by the national legislation of the ACP State concerned or its established practices regarding international contracts, or
 - (ii) any other international general conditions for contracts, and
 - (c) the special conditions.
- 1.3. These general regulations comprise the principles and conditions for participation in contracts, instructions to tenderers, and the principles and conditions for the award of contracts.
- 1.4. The general conditions governing a particular category of contract comprise contractual clauses of an administrative, financial, legal and technical nature relating to the performance of contracts.
- 1.5. The special conditions applicable to each contract comprise:
 - (a) amendments to the general conditions;
 - (b) special contractual clauses;
 - (c) technical specifications; and
 - (d) any other matter related to the contract.

Article 2

National law

In all matters which are not covered by these general regulations, the national law of the State of the contracting authority shall apply.

DEFINITIONS AND PRINCIPLES

Article 3

Definitions

- 3.1. The definitions which shall apply to these general regulations are the following:

EEC: the European Economic Community,

EDF: the European Development Fund,

ACP States: the African, Caribbean and Pacific States which are signatories to the European Communities,

Commission: the Commission of the European Communities,

Delegate: the representative of the Commission in the ACP States,

Member States: the Member States of the European Economic Community,

Convention: the relevant Convention between the ACP States and the EEC,

contracting authority: the State or the legal person governed by public or private law which concludes the contract or on behalf of which the contract is concluded,

the State of the contracting authority: the ACP State on whose territory the works, supply or service contract is to be executed,

tenderer: any natural or legal person or group of such persons submitting a tender, with a view to concluding a contract,

successful tenderer: the tenderer selected after an invitation to tender procedure or, in the case of direct agreement contracts, the tenderer who signs the contract,

supervisor: the government department, legal person governed by public law, or the natural or legal person designated by the contracting authority in accordance with the law of the State of the contracting authority, who is responsible for directing and/or monitoring the performance of the contract, and to whom the contracting authority may delegate rights and/or powers under the contract,

supervisor's representative: any natural or legal person, designated by the supervisor as such under the contract and empowered to represent the supervisor in the performance of his functions, and

in exercising such rights and/or powers as have been delegated to him. Accordingly, where functions, rights and/or powers of the supervisor are delegated to the supervisor's representative, references to the supervisor include the supervisor's representative,

works: the temporary and permanent works to be carried out under the contract,

supplies: all items which the supplier is required to provide to the contracting authority, including, where necessary, services such as installation, testing, commissioning, provision of expertise, supervision, maintenance, repair, training and other such obligations connected with the items to be provided under the contract,

services: tasks to be performed by the consultant under a service contract such as studies, designs, provision of technical assistance and training,

plant: machinery, apparatus, components and all items to be provided or incorporated under the contract,

equipment: appliances and other machinery, and where applicable under the law and/or practice of the State of the contracting authority, the temporary structures on the work site, required for carrying out the contract but excluding plant or other items required to form part of permanent works,

bill of quantities: the document containing an itemized breakdown of the tasks to be carried out in a unit price contract, indicating a quantity for each item and the corresponding unit price,

price schedule: the completed schedule of prices, including the breakdown of the overall price, submitted by the tenderer with his tender, modified as necessary, and forming a part of the unit price contract,

breakdown of the overall price: the itemized list of rates and prices showing the build-up of the price in a lump sum contract, but which does not form part of the contract,

tender price: the sum stated by the tenderer in his tender for carrying out the contract,

contract price: the sum stated in the contract representing the initial estimate payable for carrying out the works, supplies or services, or such other sum as ascertained at the end of the contract as due under the contracts,

drawings: drawings provided by the contracting authority and/or by the tenderer in connection with the tender,

day: calendar day,

time limits: those periods in the contract which shall begin to run from the day following the act or event which serves as the starting point for those periods. Should the last day of the period fall upon a non-working day, the period shall expire at the end of the first working day following the last day of the period,

writing: any handwritten, typewritten or printed communication, including telex, cable and facsimile transmission,

communications: certificates, notices, orders and instructions issued under the contract,

national currency: the currency of the State of the contracting authority,

ecu: European currency unit,

foreign currency: any permissible currency within the meaning of these general regulations which is not the national currency, and which has been indicated in the tender,

terms of reference: the statement issued by the contracting authority giving the definition of his requirements and/or objectives of the services, including, where applicable, the methods and means to be used and/or results to be achieved,

companies or firms: companies or firms constituted under civil or commercial law, including corporations, whether public or otherwise, cooperative societies and other legal persons and partnerships governed by public or private law, save for those which are non-profit making, formed in accordance with the law of a Member State or an ACP State and whose statutory office, central administration or principal place of business is in a Member State or ACP State; however a company or firm having only its statutory office in a Member State or an ACP State must be engaged in an activity which has an effective and continuous link with the economy of that Member State or ACP State.

3.2. The headings and titles in these general regulations shall not be taken as part thereof or be taken into consideration in the interpretation of these regulations.

3.3. Where the context so permits words importing the singular shall be deemed to include the plural and *vice versa* and words importing the masculine shall be deemed to include the feminine and *vice versa*.

3.4. Words importing persons or parties shall include firms and companies and any organization having legal capacity.

*Article 4***Eligibility**

4.1. Save where a derogation is granted in accordance with the Convention and/or Article 6:

- (a) participation in the invitations to tender and in award of contracts financed by the EDF shall be open on equal terms to:
 - (i) natural persons, companies or firms or public or semi-public agencies of the ACP States and the EEC;
 - (ii) cooperative societies and other legal persons governed by public or private law, save for those which are non-profit-making, of the EEC and/or of the ACP States;
 - (iii) joint ventures or groupings of ACP and/or EEC companies or firms;
- (b) supplies must originate in the EEC and/or the ACP States. The concept of origin for the purpose of implementing this Article will be assessed by reference to the relevant international agreements.

4.2. Natural persons, companies or firms shall not be eligible for the award of contracts where:

- (a) they are bankrupt;
- (b) payments to them have been suspended in accordance with the judgment of a court other than a judgment declaring bankruptcy and resulting, in accordance with their national laws, in the total or partial loss of the right to administer and dispose of their property;
- (c) legal proceedings have been instituted against them involving an order suspending payments and which may result, in accordance with their national laws, in a declaration of bankruptcy or in any other situation entailing the total or partial loss of the right to administer and dispose of their property;
- (d) they have been convicted, by a final judgment, of any crime or offence concerning their professional conduct;
- (e) they are guilty of serious misrepresentation with regard to information required for participation in an invitation to tender;
- (f) they are in breach of contract on another contract with the contracting authority.

4.3. To be eligible for participation in invitations to tender and the award of contracts, tenderers shall

provide evidence satisfactory to the contracting authority of their eligibility under Article 4, proof of compliance with the necessary legal, technical and financial requirements and of their capability and adequacy of resources to carry out the contract effectively. To this end all tenders submitted shall include the following information:

- (a) a document, dated less than 90 days previously, drawn up in accordance with the tenderer's national law or practice certifying that:
 - he meets the conditions laid down in Article 4 (1),
 - none of the situations referred to in Article 4 (2), applies to him;
- (b) copies of original documents defining the constitution and/or legal status, and establishing the place of registration and/or statutory seat and, if it is different, the place of central administration of the company, firm or partnership or, if a joint venture, of each party thereto constituting the tenderer;
- (c) details of the experience and past performance of the tenderer (or of each party to a joint venture) on contracts of a similar nature within the past five years, and details of other contracts in hand including details of the actual and effective participation in each such contract;
- (d) where applicable, the major items of equipment proposed for use in carrying out the contract;
- (e) the qualifications and experience of key personnel proposed for administration and performance of the contract, both at and away from the place of performance of the contract;
- (f) proposals relating to the nature, conditions and modalities of subcontracting wherever the subcontracting of any elements of the contract amounting to more than 10% of the tender price is envisaged;
- (g) reports on the accounting and financial standing of the tenderer (or of each party to a joint venture) such as profit and loss statements, balance sheets and auditor's reports for the past five years, an estimated financial projection for the next two years, and an authority from the tenderer (or authorized representative of a joint venture) to seek references from the tenderer's bankers; and

- (h) information regarding any current legal or arbitration proceedings or dispute in which the tenderer is involved. The information referred to shall be confined to matters of direct interest to the award or performance of the contract.

Article 5

Equality of participation

5.1. The ACP States and the Commission shall take the necessary measures to ensure the widest possible participation on equal terms in invitations to tender for works, supply and service contracts, including, as appropriate, measures to:

- (a) ensure publication of invitations to tender in the *Official Journal of the European Communities*, the official journals of all the ACP States and any other appropriate information media;
- (b) eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms;
- (c) encourage cooperation between companies and firms of the Member States and of the ACP States, for example, by means of prequalification of joint ventures and consortia between companies and firms of the Member States and the ACP States;
- (d) ensure that all the selection criteria are specified in the tender dossier; and
- (e) ensure that the tender selected conforms to the requirements of the tender dossier and meets the selection criteria stated therein.

Article 6

Derogation

- 6.1. In order to ensure the optimum cost-effectiveness of the system, natural or legal persons from non-ACP developing countries may be authorized to participate in contracts financed by the EEC at the request of the ACP States concerned.
- 6.2. The ACP States concerned shall, on each occasion, provide the delegate with the information needed for the EEC to decide on such derogations, particular attention being given to:
 - (a) the geographical location of the ACP State concerned;

- (b) the competitiveness of contractors, suppliers and consultants from the EEC and the ACP States;
- (c) the need to avoid excessive increases in the cost of performance of contracts;
- (d) transport difficulties or delays due to delivery times or other similar problems;
- (e) technology that is the most appropriate and best suited to local conditions.

6.3. Participation by third countries, which are not parties to the Convention, in contracts financed by the EEC may also be authorized:

- (a) where the EEC participates in the financing of regional or inter-regional schemes involving such countries;
- (b) in the case of co-financed projects and programmes;
- (c) in case of emergency assistance.

6.4. In exceptional cases and in agreement with the Commission, consultancy firms or experts which are nationals of third countries referred to in Article 6 (3) may participate in service contracts.

Article 7

Competition

- 7.1. Save as otherwise provided in Article 7, works and supply contracts financed from the EDF shall be concluded following an open invitation to tender and service contracts shall be concluded following a restricted invitation to tender.
- 7.2. ACP States may, in accordance with the provisions in Article 7 (3), 7 (4) and 7 (7), and in agreement with the Commission:
 - (a) place contracts after restricted invitations to tender following, where applicable, a call for prequalification;
 - (b) conclude contracts by direct agreement;
 - (c) perform contracts through public or semi-public departments of the ACP States.
- 7.3. Restricted invitation to tender may be used:
 - (a) where the urgency of the situation is established or where the nature, or certain particular characteristics of the contracts so warrant;
 - (b) for projects or programmes of a highly specialized nature;
 - (c) for large-scale contracts after prequalification.

7.4. Direct agreement contracts may be awarded in the following cases:

- (a) small-scale operations, or in urgent situations or short-term technical cooperation schemes;
- (b) emergency assistance;
- (c) operations assigned to individual experts;
- (d) operations which are complementary to or necessary for the completion of others already in hand;
- (e) where the execution of the contract is exclusively reserved for holders of patents or licences to use, process or import the articles concerned;
- (f) following an unsuccessful invitation to tender.

7.5. The following procedure shall apply to restricted invitations to tender and direct agreement contracts:

- (a) in the case of works and supply contracts, a short-list of prospective tenderers shall be drawn up by the ACP State concerned in agreement with the delegate following, where applicable, a call for prequalification of tenders;
- (b) in the case of service contracts, the short-list of prospective tenderers shall be drawn up by the ACP States, in agreement with the Commission, on the basis of the proposals of the ACP State concerned and the proposals submitted by the Commission;
- (c) in direct agreement contracts, the ACP State shall enter freely into such discussions as it may consider appropriate with the prospective tenderers whom it has short-listed in accordance with Article 7 (5) (a) and (b) and award the contract to the tenderer whom it has selected.

7.6. For service contracts, due account shall be taken of the availability of suitable candidates residing in the ACP State or in the region.

Direct labour

7.7. Contracts shall be performed by direct labour through public or semi-public agencies or departments of the ACP State concerned, where the State has the qualified management staff available in its national departments, in cases of emergency assistance, service contracts and all other operations the estimated cost of which is less than ECU 5 million.

7.8. The Community shall contribute to the costs of the department involved by providing the equipment and/or materials that it lacks and/or resources to

allow it to acquire additional staff required in the form of experts from within the ACP States concerned or other ACP States. The participation of the Community shall cover only costs incurred by supplementary measures and temporary expenditure relating to execution strictly confined to the requirements of the project in question.

Emergency assistance contracts

7.9. Contracts under emergency assistance shall be undertaken in such a way as to reflect the urgency of the situation. To this end, for all operations relating to emergency assistance, the ACP State may, in agreement with the delegate, authorize:

- (a) the conclusion of contracts by direct agreement;
- (b) the performance of contracts by direct labour;
- (c) implementation through specialized agencies;
- (d) direct implementation by the Commission.

Accelerated procedure

7.10. With the aim of ensuring the rapid and effective implementation of projects and programmes, an accelerated tendering procedure shall be used except as otherwise indicated by the ACP State concerned, or by the Commission by way of a proposal for the agreement of the ACP State concerned. The accelerated procedure for issuing invitations to tender shall involve shorter time limits for tendering and the call for tender is confined to the ACP State concerned and the neighbouring ACP States, in accordance with the rules in force in the ACP State concerned. The accelerated procedure shall apply in the following cases:

- (a) works contracts: the estimated cost of which is less than ECU 5 million;
- (b) emergency assistance: irrespective of the value of the contract.

7.11. By way of derogation, the national authorizing officer, in agreement with the delegate, may procure supplies and/or services of a limited amount where they are available in the ACP States concerned or neighbouring ACP States.

7.12. In order to speed up the procedure, the ACP States may request the Commission to negotiate, draw up and conclude service contracts on their behalf directly or through its relevant agency.

*Article 8***Design competition**

8.1. Where the contracting authority, for technical, aesthetic or financial reasons, considers it appropriate, an invitation to tender may be issued for participation in a design competition. The design competition shall take place on the basis of a schedule and criteria drawn up by the contracting authority. Further, the following shall apply:

- (a) the schedule may make provision for prizes to be awarded for the best proposals. Such prizes shall be specified by the schedule and awarded to the originators of the said proposals in accordance with the order established by the contracting authority. The contracting authority may withhold prizes if the proposals are not judged satisfactory;
- (b) unless otherwise stated in the invitation to tender, copyright in the proposals submitted shall belong to the competitors. However, the contracting authority may, with the agreement of the competitors, use the proposals for further development.

8.2. The contracting authority may invite tenders for further investigation, study and design as may be necessary for further development of the project.

8.3. Subject to Article 8 (1) (b) and 8 (2) the contracting authority may invite tenders for detailed development of a competitor's design and the preparation of documents to the stage where tenders for supply or construction may be invited.

8.4. The contracting authority may invite tenders for design and build proposals on a turnkey basis. Such tenders shall be of the lump sum type. Tenders shall be assessed according to their aesthetic, practical, technical and economic merits. No prizes shall be offered.

*Article 9***Preference**

9.1. Measures shall be taken to encourage the widest participation of the natural and legal persons of ACP States in the performance of contracts financed by the EDF in order to permit the optimization of the physical and human resources of those States. To this end:

- (a) for works contracts of value less than ECU 5 million, tenderers of the ACP States, provided that at least one quarter of the capital stock and

management staff originates from one or more ACP States, shall be accorded 10 % price preference where tenders of an equivalent economic, technical and administrative quality are compared;

- (b) for supply contracts, irrespective of the value of these supplies, tenderers of the ACP States who offer supplies of at least 50 % in contract value of ACP origin shall be accorded a 15 % price preference where tenders of equivalent economic, technical and administrative quality are compared;
- (c) in respect of service contracts, given the required competence, preference shall be given to experts, institutions or consultancy companies or firms from ACP States, where tenders of equivalent economic and technical quality are compared;
- (d) where subcontracting is envisaged, preference shall be given by the successful tenderer to natural persons, companies and firms of the ACP States capable of performing the contract required on similar terms.

9.2. The threshold and the percentages referred to in Article 9.1 may be altered on the basis of the relevant Convention.

*Article 10***Types of contract**

10.1. Contracts may be one of the following:

- (a) lump sum contracts, where an all-in price shall cover the whole of the works, supplies and services which are the subject of the contract;
- (b) unit-price contracts, where the works, supplies and services shall be broken down on the basis of the bill of quantities and the proposed unit prices shall be indicated;
- (c) cost-plus contracts, where the works, supplies and services shall be priced on the basis of actual costs with an addition for overheads and profit;
- (d) composite contracts, where the prices shall be fixed on the basis of at least two of the methods laid down in Article 10 (1);
- (e) provisional price contracts, where in the exceptional cases provided in Article 10 (2), contracts are awarded without prices being

predetermined after consultation and agreement between contracting authority and the tenderer, and paid for in the manner agreed.

- 10.2. The award of a provisional price contract may only be made:
- (a) where the contract is of a complex nature or involves new techniques presenting considerable technical hazards which necessitate commencement before all conditions of execution can be determined;
 - (b) in the event of exceptional and unforeseeable circumstances, such as where the contract is urgent or the nature and means of execution are difficult to determine.
- 10.3. Except for provisional price contracts, contracts shall be awarded on the basis of predetermined prices. These prices may be lump sums or unit prices.
- 10.4. The instructions to tenderers shall:
- (a) state the type of contract;
 - (b) for cost-plus contracts, state the rules for calculating the costs, overheads and profit;
 - (c) for composite contracts, state the methods which are to be used for calculating amounts to be paid under the contract.

Article 11

Technical specifications and standards

- 11.1. The technical specifications and methods of testing, checking, acceptance and calculation in each contract, may be defined in order of precedence, by reference to the common standards accepted by the EEC and the ACP State, or the national standards of the ACP State, or of a Member State, or any other standard, including international standards.
- 11.2. Unless it can be justified by the subject of the contract, technical specifications which mention products of a specific make or source, or a particular process, and which therefore favour or eliminate certain products, shall be prohibited. Such prohibition shall cover trade marks, patents or types, or a specific origin or production. However, where products or processes cannot be specified in terms which are sufficiently precise and intelligible, they may be named, provided that the words 'or equivalent' are added.

Article 12

Notices and written communications

- 12.1. Unless otherwise specified in the special conditions, communications between the contracting authority and/or the supervisor on the one hand, and tenderers or the successful tenderer on the other hand, shall be sent by post, cable, telex, facsimile transmission or personal delivery, to the appropriate addresses designated by those parties for that purpose.
- 12.2. If the sender requires evidence of receipt, he shall state such requirement in his communication and shall demand such evidence of receipt whenever there is a deadline for the receipt of the communication. In any event, the sender shall take all the necessary measures to ensure receipt of this communication.

INVITATION TO TENDER

Article 13

Notice of invitation to tender

- 13.1. A contracting authority wishing to award a contract by open tendering procedure or by restricted tendering procedure with pre-selection shall make known its intention by means of a notice published by the Commission in the *Official Journal of the European Communities* and in all the official journals of the ACP States and any other appropriate information media.
- 13.2. The contracting authority shall submit before issuing invitations to tender the invitation to tender dossier to the Delegate.
- 13.3. The Delegate shall:
- (a) for accelerated procedures, direct agreement contracts, and contracts for emergency assistance, approve, before the contracting authority issues them, the invitation to tender dossier within 30 days of its submission to him by the contracting authority;
 - (b) for all cases other than those mentioned in Article 13 (3) (a) above, transmit the invitation to tender dossier to the Commission for approval within 30 days of its submission to him by the contracting authority.
- 13.4. In an open tendering procedure, the notice of invitation to tender shall state:
- (a) the subject, purpose and extent of the contract; if the contract is subdivided into several lots, the

order of magnitude of the different lots and the possibility of tendering for one, several or all of the lots; the possibility of submitting variant solutions where authorized; if the notice concerns an invitation to tender for a design-and-build competition, the design criteria and other requirements necessary for tenderers to understand the scope of the contract and to tender accordingly;

- (b) eligibility criteria and any important or unusual tender evaluation criteria (e.g. margin of preference);
 - (c) the location of the project, the source of financing, the period of performance, and in the case of supplies contracts, the place of delivery and/or installation;
 - (d) the contracting authority, and the name and address of the department awarding the contract;
 - (e) the method of tendering, the place where the tender dossier may be inspected and the terms on which it may be acquired;
 - (f) the period, reckoned from the final date fixed for receipt of tenders, during which tenderers shall remain bound by their tenders;
 - (g) the final date and time fixed for receipt of tenders, the address to which they must be sent, the number of copies required and the language in which they must be drawn up;
 - (h) where appropriate, the place, date and time for the opening of the tenders;
 - (i) the various guarantees which the contracting authority requires, the amount of each guarantee, where appropriate expressed as a percentage of the tender, and the time when such guarantees are to be presented;
 - (j) the address of the departments from which tenderers may obtain any further information.
- 13.5. In a restricted tendering procedure with pre-selection, the notice shall state in particular:
- (a) the method of tendering and the information referred to in Article 13 (4) (a), (b), (c), (d) and (g);
 - (b) the terms on which the tender dossier may be acquired;
 - (c) where appropriate, the final date for the issue of invitations to tender by the contracting authority;
 - (d) the information to be given in the request to participate, in the form of statements and

documents concerning the applicant's standing and ability which the contracting authority requires in accordance with Article 4 together with the economic and technical conditions each applicant must fulfil if he wishes to be considered for selection.

Article 14

Pre-selection of tenderers

- 14.1. In a restricted tender with pre-selection, a short-list of prospective tenderers shall be drawn up in accordance with Article 14 (2) following, where applicable, a call for pre-qualification after publication of the notice referred to in Article 13 (1).
- 14.2. The short-list shall be drawn up, *inter alia*, in accordance with the provisions of Article 5 and the necessary qualifications to perform the intended project, in particular the provisions of Article 4.
- 14.3. The contracting authority shall select the prospective tenderers on the basis of the information given by them in the request made pursuant to Article 13.5 (d). The prospective tenderers selected shall receive an invitation to tender stating in particular the following:
 - (a) the information given in Article 13 (4) (e), (f), (g), (h), (i), and (j);
 - (b) a reference to the notice mentioned in Article 13 (5);
 - (c) any amendments, as referred to in Article 18.

Article 15

Direct agreement contracts

- 15.1. For direct agreement contracts, the works, supplies or services which are to be the subject of the contract shall be defined after negotiations between the contracting authority and the tenderer.
- 15.2. Where the procedure by direct agreement is applied, the candidate shall be chosen by the ACP State on the basis of a short list drawn up in accordance with Articles 4 and 7 (5).
- 15.3. On completion of the negotiations, the contracting authority shall draw up and notify the text of the contract in accordance with Article 38.
- 15.4. The contracting authority and the tenderer shall agree on a date which shall be deemed to be the date of the conclusion of the contract. This date shall be set out in the text of the contract.

TENDER DOSSIER

Article 16

Contents of tender dossier

16.1. The invitation to tender dossier shall contain details of the way in which tenders are to be presented and the criteria for selection of the successful tender. In addition to the invitation to tender, the tender dossier may contain any or all of the following:

- (a) the instructions to tenderers;
- (b) the general conditions applicable to the particular category of contract;
- (c) the special conditions for the specific contract;
- (d) the technical specifications and/or terms of reference;
- (e) the form for the breakdown of the overall price in the case of lump sum contracts, or the form for the unit price schedules and/or the bill of quantities in the case of unit price contracts;
- (f) the schedule of requirements or additional information;
- (g) the drawings;
- (h) the tender form;
- (i) the tender guarantee form;
- (j) the contract form;
- (k) the performance guarantee form; and
- (l) a description of the tender evaluation system giving the criteria for evaluation and the weight attached to the individual criteria.

16.2. In addition, and depending on the nature of the contract, the tender dossier shall be accompanied by a 'note of general informations'. This note will be prepared by the delegate in consultation with the ACP State and subject to the approval by the latter. It will be provided for information only and shall not form part of the contract. It shall include all or part of the following:

- (a) geographical notes on the region in which the place of execution of the contract is located including notes on the climate;
- (b) location of the place of execution of the contract, access routes and other infrastructures which may be used in the performance of the contract;
- (c) information concerning customs, tax and price laws and regulations;

(d) wage scales and legal or contractual charges payable by employers, including an indication of minimum or normal wage levels laid down by the law of the State of the contracting authority or customary in the place where the contract is to be performed, corresponding to the main local categories of labour required for the contract;

(e) information on the exchange control laws and regulations and the monetary and banking system of the State of the contracting authority;

(f) any other information relating to the laws and regulations of the State of the contracting authority which govern the performance of contracts, including details as to the departments to which application should be made to obtain copies of those laws and regulations.

16.3. The terms of reference for service contracts shall contain in particular:

- (a) a description, which shall be as detailed as possible, of the object of the contract;
- (b) factual details, such as data in the possession of the contracting authority, restrictions that are binding upon the contracting authority in observance of certain technical or other rules, and obligations laid down by the contracting authority;
- (c) depending on the nature of the contract, preliminary draft studies or implementation schemes, and a draft contract, if available;
- (d) general documentation comprising, in particular, the laws and regulations relating to the technical field covered by the contract, or any other reference enabling access to such laws and regulations.

16.4. The tenderer shall carefully examine all instructions, conditions, forms, terms, specifications and drawings in the tender dossier. The tenderer shall be solely responsible for the responses he provides to the requirements in the tender dossier and for any omission or errors in his responses. Failure to furnish all information required by the tender dossier or submission of a tender which is not responsive to the tender dossier in every respect, will be at the tenderer's own risk and may result in rejection of his tender.

Article 17

Clarification of tender information

Where, in response to a tender's queries or otherwise, information regarding the contract to be performed or other information which may affect the pricing of the tender is supplied to a tenderer, such information shall also be issued in writing by the contracting authority to the other tenderers, insofar as these are known, provided that information of a

commercial nature relating to the acceptability of variant solutions shall not be issued to the other tenderers. The contracting authority will respond only to those queries or requests for clarification which it receives at least 30 days prior to the deadline for the submission of tenders.

Article 18

Amendments to tender dossier

Any change made to the tender dossier during the tender period by the contracting authority shall be communicated forthwith in writing to all prospective tenderers who have been provided with the tender documents, together with notice of any extension of the tender period which the contracting authority may consider necessary to enable tenderers to take account of such a change.

INSTRUCTIONS TO TENDERERS

Article 19

Language

The tender, contract documents and all correspondence and documents relating to them shall be in the language stated in the instructions to tenderers.

Article 20

Contents of tender

- 20.1. The tender to be prepared and submitted by the tenderer shall, in accordance with the requirements stated in the tender dossier, comprise:
- (a) the completed tender form and appendix thereto;
 - (b) the tender guarantee;
 - (c) the breakdown of the overall price in the case of lump sum contracts, or the unit price schedule and/or the bill of quantities in the case of unit price contracts;
 - (d) schedules of supplementary information;
 - (e) the documents providing proof of the standing and ability of the tenderer referred to in Article 4, save in the event of a restricted tendering procedure with pre-selection;
 - (f) the authorized variant solutions, and any other elements required to be submitted in accordance with the instructions to tenderers embodied in the tender dossier;

- (g) all information necessary to assess the tenders;
- (h) if the instructions to tenderers specify that an after-sales service is required, a note indicating the means with which the tenderer shall meet the obligations to provide such a service;
- (i) where appropriate, additional guarantees proposed by the tenderer concerning, *inter alia*, the period of performance and the scope of work;
- (j) all information on any subcontracting envisaged;
- (k) the tender price and the method and the currencies of payment.

20.2. After-sales service shall be required for supply contracts unless the nature of the supplies do not justify such service. Where the contracting authority requires an after-sales service:

- (a) the special conditions shall specify the conditions and modalities of this service and its duration;
- (b) the successful tenderer shall, unless the nature of the supplies or relevant conditions do not so justify, establish within the State of the contracting authority the required after-sales service.

Article 21

Lots

- 21.1. In considering how a project may be carried out, account shall be taken of the advantage, for economic and technical reasons, of dividing the project into homogenous lots which are as large as possible.
- 21.2. Where a project has been divided into lots, the instructions to tenderers shall state:
- (a) the number of lots;
 - (b) the nature, location and size of each lot; and
 - (c) where appropriate, the minimum and maximum number of lots for which a tenderer may tender.
- 21.3. The procedure for submitting a tender shall be as follows:
- (a) a tenderer may submit a tender for each lot;
 - (b) unless the instructions to tenderers provide otherwise, a tenderer may include in his tender the overall rebate he would grant in the event of amalgamation of some or all of the lots for which he has submitted individual tenders;

- (c) unless the instructions to tenderers state that lots apportioned to the same tenderer shall form a single contract, each lot shall form a separate contract;
- (d) where lots are to be apportioned to different tenderers, the invitation to tender dossier or the instructions to tenderers may provide that the tenderer for a particular lot shall ensure the coordination of the execution of all lots.

in the special conditions. In the calculation of remuneration or tender prices, account shall be taken of any cost borne by the tenderer as a result of the provision of on-the-job training for trainees. On-the-job training of trainees shall not under any circumstances limit the obligations of the successful tenderer with whom the contract is concluded, nor shall it impose any liability whatsoever on the contracting authority or the supervisor.

- 22.4. The parties involved shall undertake to cooperate mutually and shall agree on the procedure for such cooperation and in particular the responsibilities arising from it.

Article 22

Cooperation with third parties

- 22.1. In order to enhance the ACP States' capacity to build up their technical skills and to improve the know-how of their consultants, cooperation partnership arrangements shall be encouraged between consultancy firms, consulting engineers, experts and institutions of the EEC and those of the ACP States. To this end, the Commission and the ACP States shall make every effort to:

- (a) encourage by means of temporary associations, sub-contracting or the use of experts who are nationals of the ACP States in teams employed by consultancy firms, consulting engineers or institutions in the EEC;
- (b) inform tenderers in the tender dossier of the selection criteria and preferences provided for in these general regulations, particularly those relating to the encouragement of the use of ACP human resources.

- 22.2. The contracting authority may, in the invitation to tender or during the negotiation of a contract, propose to prospective tenderers the assistance of other firms, national experts or consultants to be selected by mutual agreement. This cooperation may take the form either of a joint venture, or of a subcontract or of on-the-job training of trainees.

- 22.3. When the cooperation takes the form of:

- (a) a joint venture, Article 4 (3) (b) shall apply;
- (b) a subcontract, Article 4 (3) (f) shall apply;
- (c) on-the-job training of trainees, the trainees proposed by the contracting authority must have basic skills consistent with effective participation in the on-the-job training tasks involved in the performance of the contract. The maximum number of trainees shall be stipulated

Article 23

Independence of tenderers

- 23.1. If a tenderer in the case of service contracts has entered into a legal relationship with natural or legal persons who might participate in the carrying out of works, or the provision of supplies, which the services are intended to define or prepare, or if he otherwise maintains with them special relations likely to compromise his independence, he shall inform the contracting authority thereof in his tender, or at the time of negotiation of the contract, or whenever such circumstances arise before the award of the contract.
- 23.2. If, notwithstanding such information, a contract is concluded with the said tenderer, the contracting authority shall reserve that right to exclude the natural or legal persons concerned from participating in carrying out such works or providing such supplies.

Article 24

Pricing of tenders

- 24.1. The tenderer shall provide the information required by the tender dossier for the pricing, make the necessary arithmetical calculations, sign the form of tender and attach it to his tender.
- 24.2. The total amount of the tender shall be written in figures and in words. In all cases where there is a discrepancy between a price stated in figures and also in words, the price stated in words shall prevail. Where the instructions to tenderers so require, the following shall also be written in figures and in words:
- (a) the breakdown of the overall price in the case of lump sum contracts;
 - (b) the unit prices for each item in the bill of quantities and/or the unit price schedule in the case of unit price contracts;

- (c) in the case of a composite contract, the breakdown of the overall price part as well as the bill of quantities and/or the price schedule for the unit price part.

- 24.3. Prices must correspond to the relative value of each item in relation to the total amount of the tender. Prices should not be of such a nature as to distort the comparison of tenders or to result in interim payments which are disproportionate to the value of the work done.
- 24.4. Tenders shall be expressed in the national currency of the State of the contracting authority. The tenderer may in addition express the equivalent value of his tender in either ecus or in the currency of the country in which he has his registered place of business. The conversion rate shall be that in force 30 days prior to the latest date fixed for the submission of tenders.
- 24.5. A tenderer may request in his tender that a justified part, expressed as a percentage of the tender price, be paid directly to him in foreign currency. The justification required shall be assessed in the light of the verifiable facts as regards the real origin of the works, supplies or service to be performed and the expenditure to which they give rise.
- 24.6. The price offered by the tenderer shall take into account the tax arrangements applicable as set out in the Convention.

Article 25

Period of validity

- 25.1. Tenderers shall remain bound by their tenders for the period prescribed by the contracting authority, pursuant to Article 13. Any tender valid for a shorter period may be rejected by the contracting authority. The period fixed by the contracting authority shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contract. The validity period should normally not exceed 120 days from the final date fixed for the submission of tenders but it may vary depending on the nature and complexity of the contract.
- 25.2. In exceptional circumstances, prior to the expiry of the original tender validity period, the contracting authority may request the tenderer for a specified extension in the period of validity. Tenderers agreeing to the request will neither be required nor permitted to modify their tenders, but will be required to extend the validity of their tender guarantees correspondingly. The provisions of Article 26 regarding discharge and forfeiture of the tender guarantee shall continue to apply during the extended period of tender validity.
- 25.3. The successful tenderer shall remain bound by his tender for a further period of 60 days following the

receipt of the communication notifying him of his selection.

Article 26

Tender guarantee

- 26.1. Unless otherwise provided in the instructions to tenderers, tenderers for works and supplies contracts shall, as an earnest of their tenders, provide a guarantee. The tender dossier shall specify the amount of this guarantee which shall not be less than 1 % of the amount of the tender, but shall in no case exceed 2 %.
- 26.2. The tender guarantee shall be provided in the form of a bank guarantee, a banker's draft, a certified cheque, a bond provided by an insurance or bonding company, an irrevocable letter of credit or a cash deposit made with the contracting authority. If the tender guarantee is to be established in the form of a bank guarantee, a banker's draft, a certified cheque or a bond, it shall be issued by a bank, insurance or bonding company, approved by the contracting authority and established in an ACP or a Member State. The bank guarantee or the bond shall be in strict conformity with the tender guarantee form included in the tender dossier or, in the case of direct agreement contract, in the special conditions. Whatever form it takes, the guarantee shall be independent and payable on first demand and valid for at least 60 days beyond the tender validity period.
- 26.3. Any tender not accompanied by an acceptable tender guarantee may be rejected by the contracting authority.
- 26.4. The tender guarantees of tenderers who have not been selected will be released not later than 60 days after the expiration of the tender validity period, as extended where appropriate in accordance with Article 25 (2), or upon the award of the contract, whichever is earlier.
- 26.5. The tender guarantee of the successful tenderer shall be discharged when the tenderer has signed the contract and furnished the required performance guarantee, to the satisfaction of the contracting authority.
- 26.6. The tender guarantee may be called up without notice:
- (a) if a tenderer withdraws his tender during the period of tender validity of his tender;
 - (b) in the case of the successful tenderer, if he fails within the specified time limit to sign the contract or furnish the required performance guarantee.

*Article 27***Variant solutions**

- 27.1. Unless otherwise stated in the instructions to tenderers, tenderers may submit a tender based on a variant solution. The instructions to tenderers must specify any limitations, design criteria and other requirements applicable to a variant solution. Unless stated otherwise in the instructions to tenderers, the submission of a tender based on a variant solution is conditional upon the submission of a tender based on the conforming solution.
- 27.2. Variant solutions may not derogate from the requirements of these general regulations. Tenders based on the tender dossier and those for variant solutions shall be evaluated simultaneously.
- 27.3. The instructions to tenderers must state whether the tenderer submitting a variant solution is to be responsible for the design of the variant solution, and if this is the case, must specify procedures, in particular for checking, revision and approval.
- 27.4. The submission of any variant solution shall comprise:
- (a) an individual tender for the variant solution;
 - (b) a demonstration of the benefit of the variant solution over the conforming solution, including quantifiable justification of any economic advantage;
 - (c) a draft of the amendments to the technical provisions of the special conditions necessitated by the variant solution;
 - (d) the drawings and specifications provided for in the conforming solution, but not affected by the variant solution;
 - (e) the drawings and specifications affected by the variant solution;
 - (f) a technical note on the conception of the variant solution and where appropriate, drawings and the calculations;
 - (g) for lump sum contracts, an itemized breakdown of the overall price as modified by the variant solution;
 - (h) for unit-price contracts, a bill of quantities and/or a price schedule as modified by the variant solution.

*Article 28***Pre-tender visit**

- 28.1. The tenderer is advised to visit and inspect the place where the contract is to be executed and its surroundings and obtain for himself, on his own responsibility, all information that may be necessary

for preparing the tender and entering into a contract. The costs of visiting the place where the contract is to be executed shall be borne by the tenderer.

- 28.2. The tenderer and any of his personnel or agents will, so far as is practicable, be granted permission by the contracting authority to enter the place where the contract is to be executed for the purpose of such inspection, provided that the tenderer, his personnel or agents will release and indemnify the contracting authority and its personnel and agents from and against all liability in respect thereof. Accordingly, the tenderer will be responsible for any personal injury, whether fatal or otherwise, loss or damage which, but for acting on such permission, would not have arisen.
- 28.3. Without prejudice to the laws and regulations on immigration of the State of the contracting authority, the ACP State concerned shall grant an entry permit to any person who substantiates his eligibility in terms of Article 4 as a participant in an invitation to tender, or any agent of such person, for the purpose of carrying out visits enabling him to prepare his tender. This permit shall expire on the day following the end of the tender validity period.

*Article 29***Signing of tenders**

- 29.1. The tender shall be signed by the tenderer or by his duly authorized agent as required by the instructions to tenderers. It shall be drawn up in a single original bearing the word 'original'. The number of copies to be supplied by the tenderer shall be stated in the instructions to tenderers. Copies shall be signed in the same way as the original and shall bear the word 'copy'.
- 29.2. A tender submitted by an agent must state the name of the principal on whose behalf he is acting. No agent may represent more than one tenderer. Agents shall attach to the tender the simple contract or notarial act or deed which empowers them to act on behalf of tenderers. A signature to a deed must be certified in accordance with the national law of the State of the principal.
- 29.3. If a tenderer is a joint venture or consortium of two or more persons, the tender must be single with the object of securing a single contract, each person must sign the tender, and all such persons shall be jointly and severally bound by the tender and any resulting contract according to the law of the State of the contracting authority, and shall designate one of

such persons to act as leader with authority to bind the joint venture or consortium. The composition or constitution of the joint venture or consortium shall not be altered without the prior consent in writing of the contracting authority.

- 29.4. The tender may be signed by the representative of the joint venture or consortium only if he has been expressly so authorized in writing by the members of the joint venture or consortium, and the authorizing contract, notarial act or deed is attached to the tender. All signatures to the authorizing instrument must be certified in accordance with the national laws and regulations of each of the parties comprising the joint venture or the consortium together with the powers of attorney establishing, in writing, that the signatories to the tender are empowered to enter into commitments on behalf of the members of the joint venture or consortium. Each member of such joint venture or consortium must provide the proof required under Article 4 as if he, himself, were the tenderer.
- 29.5. The complete tender shall be without alterations, interlineation or erasures, except those to accord with instructions issued by the contracting authority, or necessary to correct errors made by the tenderer. Alterations and corrections shall be initialled by the person or persons signing the tender.
- 29.6. Except in the case of lots pursuant to Article 21 and variant solutions pursuant to Article 27, only one tender may be submitted by each tenderer. No tenderer may participate in the tender of another for the same contract in any capacity whatsoever.

SUBMISSION OF TENDERS

Article 30

Time limit

- 30.1. Tenders must be received by the contracting authority at the address and not later than the date and time specified in accordance with Article 13. In determining this date, the contracting authority must ensure that adequate time is allowed, taking into account the nature, size, complexity, and location of the intended project and other relevant factors. Such period shall not, however, be less than 90 days for an open invitation to tender.
- 30.2. The contracting authority may, at its discretion, extend the deadline referred to in Article 30 (1) for the submission of tenders by amending the tender

dossier in accordance with Article 18, in which case all previous rights and obligations of the contracting authority and tenderers, subject to the previous deadline, will thereafter be subject to the deadline as extended. Should a tenderer exercise his right of withdrawal after receiving notice of the extension, his tender shall be returned to him and his tender guarantee shall be released after the tender opening session.

- 30.3. Any tenders received by the contracting authority after the deadline for receipt of tenders prescribed by the contracting authority, in accordance with Articles 13 (4) (g) and 18 shall be rejected and returned to the tenderer after the tender opening session.

Article 31

Sealing and marking of envelopes

- 31.1. The tender, the annexes thereto as stipulated in the instructions to tenderers and the supporting documents referred to in Article 4 shall be placed in a sealed non-identifiable envelope, bearing only:
- (a) the address designated for submission of tenders in the notice of invitation to tender or in the invitation to tender;
 - (b) the reference to the notice of invitation to tender in reply to which the tender is being submitted;
 - (c) where appropriate, the numbers of the lots tendered for; and
 - (d) the words 'not to be opened before the tender opening session' written in the language of the tender dossier.
- 31.2. The instructions to tenderers shall specify in each case whether the documents relating to the price proposal shall be placed together with the technical proposal in one envelope or in separate envelopes. In the latter case, the price proposal shall be placed in a separate identifiable envelope, bearing the words 'tender price', which shall be sealed and placed together with the technical proposal in the envelope referred to in Article 31 (1).

Article 32

Withdrawals and amendments

- 32.1. Any tenderer may modify or withdraw his tender before the deadline referred to in Article 30 (3), provided that written notice of such modification or withdrawal is received by the contracting authority prior to that deadline.

- 32.2. The tenderer's modification or withdrawal notice shall be prepared, sealed, marked and dispatched in accordance with the provisions of Article 31. A withdrawal notice may also be sent by personal delivery or by telex, cable, or facsimile transmission but followed by a signed confirmation copy, post marked not later than the deadline for submission of tenders. Withdrawals will be unconditional and will end further participation in the tendering procedure.
- 32.3. No tender may be modified subsequent to the deadline referred to in Article 30 (3), except in accordance with Article 34 (1).
- 32.4. No tender may be withdrawn in the interval between the deadline referred to in Article 30 (3) and the expiration of the period of tender validity. Withdrawal of a tender during this interval may result in forfeiture of the tender guarantee.

EXAMINATION OF TENDERS

Article 33

Opening of tenders

- 33.1. On receipt of the tenders, the envelopes shall be entered in a special register in the order in which they arrive. The registration number and the date and time of arrival shall be recorded on the envelope. Envelopes remain sealed and be kept in a safe place until they are opened under the conditions set out in Articles 33 (2) and 33 (3).
- 33.2. At a public tender opening, the tenderers' names, the tender prices, written notifications of tender modifications and withdrawals, the presence of the requisite tender guarantee, and such other details as the contracting authority may consider appropriate shall, if any, be announced. In the case of a 'two-envelope' system as mentioned in Article 31 (2) the announcement shall include the fact that no price envelope has been opened.
- 33.3. Opening and examination of tenders shall comply with the rules of the ACP States concerned and with the Convention, and shall be for the purpose of checking whether the tenders are complete, whether the requisite tender guarantee has been furnished, whether the documents have been properly signed and whether the tenders are generally in order.
- 33.4. The envelopes which bear the words 'tender price' in accordance with Article 31 shall not be opened until the work of evaluating the tenders, other than the prices, has been completed.

- 33.5. Only the tenders contained in those envelopes which have been received not later than the deadline referred to in Article 30 (3) shall be taken into consideration in the evaluation.
- 33.6. The contracting authority shall prepare, for its own records, minutes of the tender opening, including the information disclosed to those present in accordance with Article 33 (2).
- 33.7. After the public opening of tenders, information relating to the examination, clarification, evaluation and comparison of tenders and recommendations concerning the award of the contract shall not be disclosed to tenderers or other persons not officially concerned with such process.
- 33.8. Any attempt by a tenderer to influence the contracting authority in the process of examination, clarification, evaluation and comparison of tenders, and in decisions concerning the award of the contract, shall result in the rejection of his tender.
- 33.9. The delegate shall be present at the opening of tenders, and shall receive a copy of each tender.

Article 34

Evaluation of tenders

- 34.1. To facilitate the examination, evaluation and comparison of tenders, the contracting authority may ask each tenderer individually for clarification of his tender, including breakdowns of unit prices. The request for clarification and the response shall be in writing and communicated by any of the means referred to in Article 12, but no change in the price or substance of the tender shall be sought, offered or permitted except as required to confirm the correction of arithmetic errors discovered by the contracting authority during the evaluation of the tenders pursuant to Article 34 (7).
- 34.2. Prior to the detailed evaluation of tenders, the contracting authority shall determine whether each tender is substantially responsive to the requirements of the tender dossier.
- 34.3. For the purpose of Article 34, a responsive tender is one which conforms to all the terms, conditions and specifications of the tender dossier without material deviation or reservation. A material deviation or reservation is one which affects the scope, quality or performance of the contract, or which, in any substantial way, is inconsistent with the tender dossier or limits the contracting authority's rights or

the tenderer's obligations under the contract, and affects unfairly the competitive position of tenderers presenting responsive tenders.

34.4. If a tender is not responsive to the tender dossier, it shall be rejected by the contracting authority, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation.

34.5. Tenders determined to be responsive shall be evaluated technically for conformity with the invitation to tender dossier and the provisions of Article 36, and then ranked on the basis of their technical qualities. The special conditions shall, where appropriate, specify the detailed criteria for technical evaluation.

34.6. Following the completion of the technical evaluation, tenders which, on the basis of Article 34 (5), are technically responsive shall be evaluated financially. Tenders shall be compared in the national currency.

34.7. Tenders determined to be responsive shall be checked by the contracting authority for any arithmetic errors in computation and summation. Errors shall be corrected by the contracting authority as follows:

- (a) where there is a discrepancy between amounts in figures and also in words, the amount in words shall prevail; and
- (b) except for lump-sum contracts, where there is a discrepancy between the unit price and the total amount derived from the multiplication of the unit price and quantity, the unit price as quoted shall prevail, unless in the opinion of the contracting authority there is an obvious error in the unit price, in which event the total amount as quoted shall prevail and the unit price shall be corrected by the contracting authority.

34.8. The amount stated in the tender, corrected if necessary by the contracting authority, in accordance with Article 34 (7), shall be considered as binding upon the tenderer. If the tenderer does not accept the corrected amount of the tender, his tender shall be rejected.

34.9. After tenders have been evaluated fully in accordance with the provisions of Article 34, responsive tenders shall be grouped into tenders offered by those tenderers eligible for preference under Article 9 and tenders offered by other tenderers. For the purposes of further evaluation and comparison of tenders only, the tender prices, corrected where necessary, of the tenderers not eligible for preference shall be increased by the percentage margin of preference. Further details of the procedures to be used in giving effect to the margin of preference provisions of Article 9 shall be as laid down by the contracting authority in the tender dossier.

34.10. The evaluation proceedings shall be recorded in properly signed minutes which shall not be made public or communicated to any tenderer. A copy of these minutes will be sent to the delegate.

Article 35

Annulment of the tender procedure

35.1. The contracting authority may, prior to awarding the contract, without thereby incurring any liability to the tenderers, and notwithstanding the stage reached in the procedures leading to the conclusion of the contract:

- (a) either decide to annul the tender procedure in accordance with Article 35 (2), or order that the procedure be recommenced, if necessary, using another method; or
- (b) where the project is divided into lots, award only certain of the lots and possibly decide that the others are to be the subject of another tender or other tenders, if necessary, using another method.

35.2. The annulment by the contracting authority of a tender procedure may take place in the following cases:

- (a) if no tender is responsive to the tender dossier;
- (b) if no tender satisfies the criteria for the award of the contract as set out in Article 36;
- (c) if the economic or technical data of the project have been altered;
- (d) if exceptional circumstances render normal performance of the contract impossible;
- (e) if every tender received exceeds the financial resources earmarked for the contract;
- (f) if the tenders received contain serious irregularities resulting in interference with the normal play of market forces; or
- (g) if there has been no competition.

35.3. In the event of annulment of any tender procedure, tenderers who are still bound by their tenders shall be notified thereof by the contracting authority. Such tenderers shall not be entitled to compensation; they shall be entitled to the immediate release of the tender guarantee.

35.4. When the annulment of the tender procedure is caused by circumstances which do not necessitate the opening of tenders, the unopened and sealed envelopes containing the price proposals, where appropriate, and, in any event, the other elements of the tender shall be returned to the tenderers at the tenderers' cost.

AWARD OF CONTRACT

Article 36

Selection

36.1. The contracting authority shall award the contract to the tenderer:

- (a) whose tender is found to be responsive to the tender dossier; and
- (b) for works and supply contracts, who has offered the most advantageous tender as assessed, *inter alia*, on the basis of:
 - (i) the price, the operating and maintenance costs;
 - (ii) the qualifications of, and the guarantees offered by the tenderers, as well as the technical qualities of the tender, including the offer of an after-sales service in the ACP State;
 - (iii) the nature of, the conditions and the time limits for performing the contract, and the adaptation to local conditions;
- (c) for service contracts, who offers the most advantageous tender taking into account, *inter alia*, the price, the technical value of the tender, the organization and the methodology proposed for the provision of the services, as well as the competence, independence and availability of the personnel proposed.

36.2. Where two tenders are acknowledged to be equivalent on the basis of the criteria stated above, preference shall be given to:

- (a) the tenderer of an ACP State; or
- (b) if no such tender is forthcoming, to the tenderer who:
 - (i) permits the best possible use of the physical and human resources of the ACP States; or
 - (ii) offers the greatest sub-contracting possibilities to ACP companies, firms or natural persons; or
 - (iii) is a consortium of natural persons, companies and firms from ACP and EEC States.

36.3. The contracting authority shall:

- (a) complete the evaluation of tenders within the tender validity period taking into consideration the period required for the approval of contracts;
- (b) transmit the result of the examination of the tenders and a proposal for placing the contract to the delegate.

36.4. The delegate shall:

- (a) approve within 30 days the contracting authority's proposal for the placing of the contract for all:
 - (i) direct agreement contracts;
 - (ii) service contracts;
 - (iii) contracts relating to emergency assistance; and
 - (iv) contracts by accelerated procedures, for works contracts worth less than ECU 5 million and supply contracts worth less than ECU 1 million;
- (b) approve within 30 days the contracting authority's proposal for the placing of the contract not covered by Article 36.4 (a) wherever the following conditions are fulfilled: the tender selected is the lowest of those conforming to the requirements of the tender dossier, meets the selection criteria stated therein and does not exceed the sum earmarked for the contract;
- (c) where the conditions set out in Article 36 (4) (b) are not fulfilled, forward the proposal for the placing of the contract to the Commission which shall decide thereon within 60 days of the receipt by the delegate. Where the price of the selected tender exceeds the sum earmarked for the contract, the Commission shall, upon giving approval to the award, make the necessary financial commitment.

Article 37

Notification of award

37.1. Prior to the expiration of the period of tender validity, the contracting authority shall notify the successful tenderer in writing that his tender has been accepted.

37.2. Unless otherwise provided in the tender dossier, in the case of works and supply contracts, once the successful tenderer has furnished a performance guarantee in accordance with the provisions of Article 40, the contracting authority shall promptly notify the other tenderers that their tenders have been unsuccessful, and return their tender guarantees.

37.3. The contracting authority shall not be obliged to state the reasons for its choice nor enter into any discussion or correspondence with tenderers on the results of the invitation to tender.

37.4. The results of public invitations to tender shall be published in the *Official Journal of the European Communities* and, subject to the practice in the ACP State concerned, in the official journal of the State and/or any other appropriate information media.

*Article 38***Preparation of contract document**

- 38.1. After communication of the result of the tender in accordance with Article 37, the contract shall be prepared by the contracting authority for submission to the successful tenderer for signature. This document shall include at least the following:
- (a) a list of documents comprising the contract specifying the order of precedence of the documents;
 - (b) any agreed additions to and derogations from these documents;
 - (c) the contract price;
 - (d) any decisions taken by the contracting authority pursuant to Article 34 (7);
 - (e) the names of the supervisor and the supervisor's representative, if these are not included in the special conditions.
- 38.2. The contract document shall be submitted to the successful tenderer for signature.

*Article 39***Signing of the contract**

- 39.1. Unless otherwise provided in the tender dossier, within 30 days of receipt of the contract document, the successful tenderer shall sign the contract. After signature by the successful tenderer the contract document shall be returned to the contracting authority or his authorized representative or the competent authority of the ACP State for approval as necessary, and signature.
- 39.2. The contracting authority shall not, unless otherwise provided by the tender dossier, sign the contract until the performance guarantee has been established in accordance with Article 40.
- 39.3. By the signature of the contracting authority, the contract becomes binding upon both parties and the successful tenderer shall be notified of the fact of such signature.
- 39.4. Notwithstanding the provisions of Article 39 (1) to 39 (3), the contracting authority may, depending on the nature of the contract, decide to conclude the contract on the basis of the letter of contract procedure whereby the notification of award of contract shall constitute the conclusion of the contract. In such case, the items listed in Article 38 (1) shall be attached to the letter.

- 39.5. In the event of withdrawal by the successful tenderer, the contracting authority may call up his tender guarantee. In addition, it may approach the other tenderers according to the order in which their tenders are classified, or may initiate a fresh procedure for the invitation of tenders. If necessary, a contract by direct agreement may be negotiated.

*Article 40***Performance guarantee**

- 40.1. Unless otherwise provided by the tender dossier, the successful tenderer for a works or supply contract shall, within 30 days of receipt of the notification of award from the contracting authority furnish to the contracting authority a performance guarantee in the form specified in the general conditions.
- 40.2. Failure of the successful tenderer to comply with the requirements of Article 40 (1) shall constitute sufficient grounds for the annulment of the award and forfeiture of the tender guarantee, in which event the contracting authority may proceed in accordance with Article 39 (5).

GENERAL AND FINAL PROVISIONS*Article 41***General and final provisions**

- 41.1. All documents and proposals submitted by the contracting authority to the Commission or the delegate for agreement or approval in accordance with these general regulations shall be approved or deemed to be approved within the time limits laid down by these general regulations, or where no time limit is stated herein, within 30 days.
- 41.2. These general regulations and the general conditions referred to in Article 1 (2) (a), subject to the provisions of the Convention:
- (a) shall apply to contracts financed from resources of the Fifth and Sixth EDF administered by the Commission;
 - (b) may also be applied by a decision of the ACP-EEC Council of Ministers to contracts financed from the resources of EDFs subsequent to the Seventh EDF.
- 41.3. Claims accepted for delayed payments shall be borne by the ACP State and by the Commission, each from its own resources, for that part of the delay for which it is responsible.

ANNEX II

GENERAL CONDITIONS FOR WORKS CONTRACTS FINANCED BY THE EUROPEAN
DEVELOPMENT FUND (EDF)

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PRELIMINARY PROVISIONS

Article 1

Definitions

- 1.1. The following definitions apply to these general conditions and to the contract:

EEC: the European Economic Community,

ACP States: the African, Caribbean and Pacific States which are signatories to the Convention,

Convention: the relevant Convention between the ACP States and the EEC,

contract: the signed agreement entered into by the parties for the execution of the works including all attachments thereto and all documents incorporated therein,

contractor: the party with whom the contracting authority concludes the contract,

contracting authority: the State or the legal person governed by public or private law which concludes the contract, or on behalf of which the contract is concluded, with the contractor,

the State of the contracting authority: the ACP State on whose territory the works contract is to be executed,

supervisor: the government department, legal person governed by public law, or the natural or legal person designated by the contracting authority in accordance with the law of the State of the contracting authority, who is responsible for directing and/or monitoring the execution of the works contract, and to whom the contracting authority may delegate rights and/or powers under the contract,

supervisor's representative: any natural or legal person, designated by the supervisor as such under the contract, and empowered to represent the supervisor in the performance of his functions, and in exercising such rights and/or powers as have been delegated to him. Accordingly, where functions, rights and/or powers of the supervisor have been delegated to the supervisor's representative, references to the supervisor include the supervisor's representative,

works: the temporary and permanent works to be carried out under the contract,

plant: machinery, apparatus, components and all items to be provided under the contract for incorporation in the works,

equipment: appliances and other machinery, and, where applicable under the law and/or practice of the State of a contracting authority, the temporary

structures on the site required for carrying out the works but excluding plant or other items required to form part of the permanent works,

bill of quantities: the document containing an itemized breakdown of the works to be carried out in a unit price contract, indicating a quantity for each item and the corresponding unit price,

price schedule: the completed schedule of prices, including the breakdown of the overall price, submitted by the contractor with his tender, modified as necessary and forming a part of the unit price contract,

breakdown of the overall price: the itemized list of rates and prices showing the build-up of the price in a lump sum contract, but not forming part of the contract,

contract price: the sum stated in the contract representing the initial estimate payable for the execution of the works or such other sum as ascertained by the final statement of account as due to the contractor under the contract,

provisional sum: a sum included in the contract and so designated for the execution of work or the supply of goods, materials, plant or services, or for contingencies, which sum may be used in whole or in part, or not at all, as instructed by the supervisor,

drawings: drawings provided by the contracting authority and/or the supervisor, and/or drawings provided by the contractor and approved by the supervisor, for the carrying out of the works,

site: the places provided by the contracting authority where the works are to be carried out, and other places stated in the contract as forming part of the site,

maintenance period: the period stated in the contract immediately following the date of provisional acceptance, during which the contractor is required to complete the works and to remedy defects or faults as instructed by the supervisor,

final acceptance certificate: certificate(s) issued by the supervisor to the contractor at the end of the maintenance period stating that the contractor has completed his obligations to construct, complete and maintain the works concerned,

day: calendar day,

time limits: those periods in the contract which shall begin to run from the day following the act or event

which serves as the starting point for those periods. Should the last day of the period fall upon a non-working day, the period shall expire at the end of the first working day following the last day of the period,

writing: any handwritten, typewritten or printed communication, including telex, cable and facsimile transmission,

communications: certificates, notices, orders and instructions issued under the contract,

administrative order: any instruction or order issued by the supervisor to the contractor in writing regarding the execution of the works,

national currency: the currency of the State of the contracting authority,

foreign currency: any permissible currency which is not the national currency, and which is indicated in the contract,

general damages: the sum, not stated beforehand in the contract, which is awarded by a court or arbitration tribunal, or agreed between the parties, as compensation payable to an injured party for a breach of the contract by the other party,

liquidated damages: the sum stated in the contract as compensation payable by the contractor to the contracting authority for failure to complete the works or part thereof within the periods under the contract, or as payable by either party to the other for any other specific breach identified in the contract,

special conditions: the special conditions issued by the contracting authority as part of the invitation to tender, as amended where necessary, and incorporated into the contract, consisting of:

- (a) amendments to these general conditions;
- (b) special contractual clauses;
- (c) technical specifications; and
- (d) any other matter related to the contract.

1.2. The headings and titles in these general conditions shall not be taken as part thereof or be taken into consideration in the interpretation of the contract.

1.3. Where the context so permits words importing the singular shall be deemed to include the plural and *vice versa* and words importing the masculine shall be deemed to include the feminine and *vice versa*.

1.4. Words importing persons or parties shall include firms and companies and any organization having legal capacity.

Article 2

Law and language of the contract

- 2.1. The law of the contract shall be the law of the State of the contracting authority unless otherwise stated in the special conditions.
- 2.2. In all matters which are not covered by these general conditions, the law of the contract shall apply.
- 2.3. The language of the contract and of all communications between the contractor, contracting authority and supervisor or their representatives shall be as stated in the special conditions.

Article 3

Order of precedence of contract documents

Unless otherwise stipulated in the contract, the order of precedence of the contract documents shall be as stated in the special conditions.

Article 4

Notices and written communications

- 4.1. Unless otherwise specified in the special conditions, communications between the contracting authority and/or the supervisor on the one hand, and the contractor on the other hand, shall be sent by post, cable, telex, facsimile transmission, or personal delivery, to the appropriate addresses designated by those parties for that purpose.
- 4.2. If the sender requires evidence of receipt, he shall state such requirement in his communication and shall demand such evidence of receipt whenever there is a deadline for the receipt of the communication. In any event, the sender shall take all the necessary measures to ensure receipt of his communication.
- 4.3. Wherever in the contract provision is made for the giving or issue of any notice, consent, approval, certificate or decision, unless otherwise specified such notice, consent, approval, certificate or decision shall be in writing and the words 'notify', 'certify', 'approve' or 'decide' shall be construed accordingly. Any such consent, approval, certificate or decision shall not unreasonably be withheld or delayed.

Article 5

Supervisor and supervisor's representative

- 5.1. The supervisor shall carry out the duties specified in the contract. Except as expressly stated in the

contract, the supervisor shall not have authority to relieve the contractor of any of his obligations under the contract.

- 5.2. The supervisor may, from time to time, while retaining ultimate responsibility, delegate to the supervisor's representative any of the duties and authority vested in the supervisor and he may at any time revoke such delegation or replace the representative. Any such delegation, revocation or replacement shall be in writing and shall not take effect until a copy thereof has been delivered to the contractor.
- 5.3. Any communication given by the supervisor's representative to the contractor in accordance with the terms of such delegation shall have the same effect as though it had been given by the supervisor, provided that:
- (a) any failure on the part of the supervisor's representative to disapprove any work, materials or plant shall not prejudice the authority of the supervisor to disapprove such work, materials or plant and to give the instructions necessary for the rectification thereof;
 - (b) the supervisor shall be at liberty to reverse or vary the contents of such communication.
- 5.4. Instructions and/or orders issued by the supervisor shall be by way of administrative orders. Such orders shall be dated, numbered and entered by the supervisor in a register, and copies thereof delivered by hand, where appropriate, to the contractor's representative.

Article 6

Assignment

- 6.1. An assignment shall be valid only if it is a written agreement by which the contractor transfers his contract or part thereof to a third party.
- 6.2. The contractor shall not, without the prior written consent of the contracting authority, assign the contract or any part thereof, or any benefit or interest thereunder, except in the following cases:
- (a) a charge, in favour of the contractor's bankers, of any monies due or to become due under the contract; or
 - (b) assignment to the contractor's insurers of the contractor's right to obtain relief against any other person liable in cases where the insurers have discharged the contractor's loss or liability.
- 6.3. For the purpose of Article 6 (2) the approval of an assignment by the contracting authority shall not

relieve the contractor of his obligations for the part of the contract already performed or the part not assigned.

- 6.4. If the contractor has assigned his contract without authorization, the contracting authority may, without giving formal notice thereof, apply as of right the sanctions for breach of contract provided for in Articles 63 and 64.
- 6.5. Assignees must satisfy the eligibility criteria applicable for the award of the contract.

Article 7

Sub-contracting

- 7.1. A sub-contract shall be valid only if it is a written agreement by which the contractor entrusts performance of a part of his contract to a third party.
- 7.2. The contractor shall not sub-contract without the prior written authorization of the contracting authority. The work to be sub-contracted and the identify of the sub-contractors shall be notified to the contracting authority. The contracting authority shall with due regard to the provisions of Article 4 (3) within 30 days of receipt of the notification, notify the contractor of his decision, stating reasons should he withhold such authorization.
- 7.3. In the selection of sub-contractors, preference shall be given by the contractor to natural persons, companies or firms of the State of the contracting authority capable of performing the work required on similar terms.
- 7.4. Sub-contractors must satisfy the eligibility criteria applicable for the award of the contract.
- 7.5. Subject to Article 52, the contracting authority shall have no contractual relations with the sub-contractors.
- 7.6. The contractor shall be responsible for the acts, defaults and negligence of his sub-contractors and their agents or employees, as if they were the acts, defaults or negligence of the contractor, his agents or employees. The approval by the contracting authority of the sub-contracting of any part of the contract or of the sub-contractor to perform any part of the works shall not relieve the contractor of any of his obligations under the contract.
- 7.7. If a sub-contractor has undertaken any continuing obligation extending for a period exceeding that of the maintenance period under the contract towards the

contractor in respect of the work executed or the goods, materials, plant or services supplied by the sub-contractor, the contractor shall, at any time after the expiration of the maintenance period, transfer immediately to the contracting authority, at the contracting authority's request and cost, the benefit of such obligation for the unexpired duration thereof.

- 7.8. If the contractor enters into a sub-contract without approval, the contracting authority may apply, as of right without giving formal notice thereof, the sanctions for breach of contract provided for in Articles 63 and 64.

OBLIGATIONS OF THE CONTRACTING AUTHORITY

Article 8

Supply of documents

- 8.1. Within 30 days of the establishment of the performance guarantee provided for in Article 15, the supervisor shall provide to the contractor, free of charge, a copy of the drawings prepared for the performance of the contract as well as two copies of the specifications and other contract documents. The contractor may purchase additional copies of these drawings, specifications and other documents, insofar as they are available. Upon the issue of the maintenance certificate, or upon final acceptance, the contractor shall return to the supervisor all drawings, specifications and other contract documents.
- 8.2. Unless it is necessary for the purposes of the contract, the drawings, specifications and other documents provided by the contracting authority shall not be used or communicated to a third party by the contractor without the prior consent of the supervisor.
- 8.3. The supervisor shall have authority to issue to the contractor administrative orders incorporating such supplementary documents and instructions as shall be necessary for the proper and adequate execution of the works and the remedying of any defects therein.

Article 9

Access to site

- 9.1. The contracting authority shall, in due time and in conformity with the progress of the works, place the site and access thereto at the disposal of the contractor in accordance with the programme of performance referred to in these general conditions. The contractor shall afford all reasonable opportunities to other

persons concerned for carrying out their work as set out in the special conditions or as required by administrative orders.

- 9.2. Any land procured for the contractor by the contracting authority shall not be used by the contractor for purposes other than the performance of the contract.
- 9.3. The contractor shall preserve any premises placed at his disposal in a good state while he is in occupation and shall, if so required by the contracting authority or the supervisor, restore them to their original state on completion of the contract, taking into account normal wear and tear.
- 9.4. The contractor shall not be entitled to any payment for improvements resulting from work carried out on his own initiative.

Article 10

Assistance with local regulations

- 10.1. The contractor may request the assistance of the contracting authority in obtaining copies of laws, regulations and information on local customs, orders or by-laws of the country where the works are located, which may affect the contractor in the performance of his obligations under the contract. The contracting authority may provide the assistance requested to the contractor at the contractor's cost.
- 10.2. Subject to the provisions of the laws and regulations on foreign labour of the State in which the works are to be carried out, the contracting authority shall make all efforts necessary to facilitate the procurement by the contractor of all required visas and permits, including work and residence permits, for the personnel whose services the contractor and the contracting authority consider necessary as well as residence permits for their families.

Article 11

Delayed payments to the contractor's staff

Where there is a delay in the payment to the contractor's employees of wages and salaries owing and of the allowances and contributions laid down by the law of the State in which the works are located, the contracting authority may give notice to the contractor that within 15 days of the notice he intends to pay such wages, salaries, allowances and contributions direct. Should the contractor contest that such payments are due, he shall make representations to the contracting authority with reasons, within the 15 day period. If the contracting authority, having considered such representations, is of the opinion that payment of the wages

and salaries should be made, it may pay such wages, salaries, allowances and contributions out of amounts due to the contractor. Failing this, he may obtain a contribution under any of the guarantees provided for in these general conditions. Any action taken by the contracting authority under this Article, shall not relieve the contractor of his obligations to his employees, except to the extent that any obligation may be satisfied by this action. The contracting authority shall not assume any responsibility towards the contractor's employees by this action.

OBLIGATIONS OF THE CONTRACTOR

Article 12

General obligations

- 12.1. The contractor shall, with due care and diligence, and in accordance with the provisions of the contract, design the works to the extent stated in the contract, and execute, complete and remedy any defects in the works. The contractor shall provide all superintendence, personnel, materials, plant, equipment and all other items, whether of a temporary or permanent nature required in and for such design, execution, completion and remedying of any defects, insofar as specified in, or can be reasonably inferred from, the contract.
- 12.2. The contractor shall take full responsibility for the adequacy, stability and safety of all operations and methods of construction under the contract.
- 12.3. The contractor shall comply with administrative orders given by the supervisor. Where the contractor considers that the requirements of an administrative order go beyond the authority of the supervisor or of the scope of the contract he shall, on pain of being time-barred, give notice, with reasons, to the supervisor within 30 days after receipt thereof. Execution of the administrative order shall not be suspended because of this notice.
- 12.4. The contractor shall respect and abide by all laws and regulations in force in the State of the contracting authority and shall ensure that his personnel, their dependants, and his local employees also respect and abide by all such laws and regulations. The contractor shall indemnify the contracting authority against any claims and proceedings arising from any infringement by the contractor, his employees and their dependants of such laws and regulations.
- 12.5. If the contractor or any of his sub-contractors, agents or servants offers to give or agrees to offer or to give or

gives to any person, any bribe, gift, gratuity or commission as an inducement or reward for doing or forbearing to do any act in relation to the contract or any other contract with the contracting authority; or for showing favour or disfavour to any person in relation to the contract or any other contract with the contracting authority, then the contracting authority may, without prejudice to any accrued rights of the contractor under the contract, terminate the contract in which case the provisions of Articles 63 and 64 hereof shall apply.

- 12.6. The contractor shall treat all documents and information received in connection with the contract as private and confidential, and shall not, save insofar as may be necessary for the purposes of the execution thereof, publish or disclose any particulars of the contract without the prior consent in writing of the contracting authority or the supervisor after consultation with the contracting authority. If any disagreement arises as to the necessity for any publication or disclosure for the purpose of the contract, the decision of the contracting authority shall be final.
- 12.7. If the contractor is a joint venture or consortium of two or more persons, all such persons shall be jointly and severally bound to fulfil the terms of the contract according to the law of the State of the contracting authority and shall, at the request of the contracting authority, designate one of such persons to act as leader with authority to bind the joint venture or consortium. The composition or the constitution of the joint venture or consortium shall not be altered without the prior consent of the contracting authority.

Article 13

Superintendence of the works

- 13.1. The contractor shall himself superintend the works or shall appoint a representative to do so. Such appointment shall be submitted to the supervisor for approval. The approval may at any time be withdrawn. Should the supervisor refuse to approve, or withdraw approval of the appointment, he shall set out the grounds on which his decision is based, and the contractor shall submit an alternative appointment without delay.
- 13.2. If the supervisor withdraws his approval of the contractor's representative, the contractor shall, as soon as is practicable, after receiving notice of such withdrawal, remove the representative from the works and replace him with another representative approved by the supervisor.

13.3. The contractor's representative shall have full authority to make any decision necessary for the execution of the works, to receive and carry out administrative orders and to countersign the work register referred to in Article 39 or attachment, where appropriate. In any event, the contractor shall be responsible for ensuring that the works are carried out satisfactorily including ensuring that the specifications and administrative orders are adhered to by his own employees and by his sub-contractors and their employees.

Article 14

Staff

14.1. The persons employed by the contractor must be sufficient in number, and permit the optimum use of the human resources of the State in which the works are located. Such employees must have the skills and experience necessary to ensure due progress and satisfactory execution of the works. The contractor shall immediately replace all employees indicated by the supervisor as likely to jeopardize the satisfactory execution of the works.

14.2. The rates of remuneration and the general working conditions, as laid down by the law of the State of the contracting authority, shall apply as a minimum to employees on the site.

Article 15

Performance guarantee

15.1. The contractor shall, within 30 days of receipt of the notification of the award of contract, furnish to the contracting authority a guarantee for the full and proper performance of the contract. The amount of the guarantee shall be as specified in the special conditions and shall not exceed 10 % of the amount of the contract price including any amounts stipulated in riders to the contract, save where the special conditions provide otherwise. However, it may in no case exceed 20 % of such price.

15.2. The performance guarantee shall be held against payment to the contracting authority for any loss resulting from the contractor's failure to fully and properly perform his obligations under the contract.

15.3. The performance guarantee shall be in the format given in the special conditions, and may be provided in the form of a bank guarantee, a banker's draft, a certified cheque, a bond provided by an insurance and/or bonding company, an irrevocable letter of credit or a cash deposit made with the contracting

authority. If the performance guarantee is to be provided in the form of a bank guarantee, a banker's draft, a certified cheque or a bond, it shall be issued by a bank or bonding and/or insurance company approved by the contracting authority in accordance with the eligibility criteria applicable for the award of the contract.

15.4. Unless stated otherwise in the special conditions, the performance guarantee shall be denominated in the types and proportions of currencies in which the original contract is payable.

15.5. No payments shall be made in favour of the contractor prior to the provision of the guarantee. The guarantee shall continue to remain valid until the contract has been fully and properly performed.

15.6. During the performance of the contract, if the natural or legal person providing the guarantee is not able to abide by his commitments, the guarantee shall cease to be valid. The contracting authority shall give formal notice to the contractor to provide a new guarantee on the same terms as the previous one. Should the contractor fail to provide a new guarantee, the contracting authority may terminate the contract.

15.7. The contracting authority shall demand payment from the guarantee of all sums for which the guarantor is liable under the guarantee due to the contractor's default under the contract, in accordance with the terms of the guarantee and up to the value thereof. The guarantor shall, without delay, pay those sums upon demand from the contracting authority and may not raise any objection for any reason whatsoever. Prior to making any claim under the performance guarantee, the contracting authority shall notify the contractor stating the nature of the default in respect of which the claim is to be made.

15.8. Unless the contract provides otherwise the performance guarantee shall be released within 30 days of the issue of the signed final statement of account referred to in Article 51.

Article 16

Insurance

16.1. The contractor shall insure in the joint names of the contracting authority and himself against loss or damage for which he is liable under the contract. Such insurance shall, unless the special conditions provide otherwise, cover:

- (a) the works, together with materials and plant for incorporation therein, to the full replacement cost against all loss or damage from whatever cause arising other than from *force majeure* or

risks attributable under the contract to the contracting authority;

- (b) an additional sum of 15% of such replacement cost, or as may be specified in the special conditions, to cover any additional costs of and incidental to the rectification of loss or damage including professional fees and the cost of demolishing and removing any part of the works and of removing debris of whatever nature;
- (c) the contractor's equipment and other things brought onto the site by the contractor, for a sum sufficient to provide their replacement at the site.

16.2. The contractor may substitute the insurance provided for in Article 16.1 by a global policy of insurance which covers, *inter alia*, the elements of Article 16 (1) (a), (b) and (c). In such case, the contractor shall notify the insurer of the contracting authority's interest.

16.3. The contractor shall take out insurance covering his liability with regard to industrial accidents and civil liabilities to any person employed by him on the works, to the contracting authority and any employee of that authority, arising from the execution of the works. Such liability shall be unlimited in the case of personal injuries.

16.4. The contractor shall take out insurance covering liability with regard to risks and civil liability resulting from an act or omission attributed to him, to his legal successors or agents. Such insurance shall be for at least the amount stated in the special conditions. Furthermore, he shall ensure that all his sub-contractors have taken out a similar insurance.

16.5. All the insurance referred to in this Article shall be taken out within 30 days of the notification of the award of the contract, and shall be subject to approval by the contracting authority. Such insurance shall take effect from the commencement of the works and remain in force until final acceptance of the works. The contractor shall produce to the contracting authority the insurance policy and shall furnish proof of regular payment of premiums without delay whenever he is required to do so by the contracting authority or the supervisor.

16.6. Notwithstanding the obligations of the contractor to insure in accordance with Article 16, the contractor shall be solely liable and shall indemnify the contracting authority and the supervisor against any claims by third parties for damage to property or personal injuries arising from the execution of the works by the contractor, his sub-contractors and employees in connection with the works.

Article 17

Performance programme

17.1. The contractor shall draw up, and submit for the approval of the supervisor, a programme of performance of the contract, in accordance with the special conditions. The programme shall contain at least the following:

- (a) the order in which the contractor proposes to carry out the works;
- (b) the time limits within which submission and approval of the drawings are required;
- (c) a general description of the methods which the contractor proposes to adopt for carrying out the works; and
- (d) such further details and information as the supervisor may reasonably require.

17.2. The approval of the programme by the supervisor shall not relieve the contractor from any of his obligations under the contract.

17.3. No material alteration to the programme shall be made without the approval of the supervisor. If, however, the progress of the works does not conform to the programme, the supervisor may instruct the contractor to revise the programme and submit the revised programme to him for approval.

Article 18

Detailed breakdown of prices

18.1. Where appropriate and within a period of not more than 20 days following the supervisor's reasoned request, the contractor shall provide a detailed breakdown of his rates and prices, where such breakdown is required for any purpose under the contract.

18.2. After the notification of award, the contractor shall, within the time limit stated in the special conditions, provide to the supervisor for his information only, a detailed cash flow estimate, in quarterly periods, of all payments which may be due to the contractor under the contract. The contractor shall subsequently supply revised cash flow estimates at quarterly intervals, if so required by the supervisor. The communication shall not impose any liability whatsoever on the contracting authority or the supervisor.

Article 19

Contractor's drawings

19.1. The contractor shall submit to the supervisor for approval:

- (a) such drawings, documents, samples and/or models as may be specified in the contract within

the time limits laid down therein or in the programme of performance;

- (b) such drawings as the supervisor may reasonably require for the performance of the contract.

19.2. If the supervisor fails to notify his decision of approval referred to in Article 19 (1) within the time limits referred to in the contract or the approved programme of performance, such drawings, documents, samples or models shall be deemed to be approved at the end of the time limits specified. If no time limit is specified, they shall be deemed to be approved 30 days after receipt.

19.3. Approved drawings, documents, samples and models shall be signed or otherwise identified by the supervisor and shall not be departed from except as otherwise instructed by the supervisor. Any contractor's drawings, documents, samples or models which the supervisor fails to approve, shall be forthwith modified to meet the requirements of the supervisor and resubmitted by the contractor for approval.

19.4. The contractor shall supply additional copies of approved drawings in the form and number stated in the contract or in subsequent administrative orders.

19.5. The approval of the drawings, documents, samples or models by the supervisor shall not relieve the contractor from any of his obligations under the contract.

19.6. The supervisor shall have the right at all reasonable times to inspect all contract drawings, documents, samples or models at the contractor's premises.

19.7. Before provisional acceptance of the works, the contractor shall supply operation and maintenance manuals together with drawings, which shall be in such detail as will enable the contracting authority to operate, maintain, adjust and repair all parts of the works. Unless otherwise stated in the special conditions, the manuals and drawings shall be in the language of the contract and in such forms and numbers as stated in the contract. The works shall not be considered to be completed for the purpose of provisional acceptance until such manuals and drawings have been supplied to the contracting authority.

Article 20

Sufficiency of tender prices

20.1. The contractor shall be deemed to have inspected and examined the site and its surroundings and to have

satisfied himself before submitting his tender, as to the nature of the ground and sub-soil, and to have taken into account the form and nature of the site, the extent and nature of the work and materials necessary for the completion of the works, the means of communication with and access to the site, the accommodation he may require and in general to have obtained for himself all necessary information as to risks, contingencies and all other circumstances influencing or affecting his tender.

20.2. The contractor shall be deemed to have satisfied himself before submitting his tender as to the correctness and sufficiency of the tender and of the rates and prices stated in the bill of quantities or price schedule which shall, except in so far as it is otherwise provided in the contract, cover all his obligations under the contract.

20.3. Since the contractor is deemed to have determined his prices on the basis of his own calculations, operations and estimates, he shall carry out without additional charge any work which is the subject of any item whatsoever in his tender for which he neither indicates a unit price nor a firm sum.

Article 21

Exceptional risks

21.1. If during the execution of the works the contractor encounters artificial obstructions or physical conditions which could not reasonably have been foreseen by an experienced contractor, and if the contractor is of the opinion that additional costs will be incurred and/or an extension of the period of performance of the contract will be necessary as a result of this, he shall give notice to the supervisor in accordance with Articles 35 and/or 55. The contractor shall specify in such notice the artificial obstructions and/or physical conditions, giving details of the anticipated effects thereof, the measures he is taking or intends to take and the extent of the anticipated delay in or interference with the execution of the works.

21.2. Following receipt of the notice, the supervisor may *inter alia*:

- (a) require the contractor to provide an estimate of the cost of the measures he is taking or intends to take;
- (b) approve measures referred to in Article 21.2 (a) with or without modification;
- (c) give written instructions as to how the artificial obstructions or physical conditions are to be dealt with;

- (d) order a variation, a suspension, or termination of the contract.

21.3. To the extent that the supervisor shall decide that the whole or part of the said artificial obstructions or physical conditions could not reasonably have been foreseen by an experienced contractor, the supervisor shall:

- (a) take into account any delay suffered by the contractor as a result of such obstructions or conditions in determining any extension of the period of performance to which the contractor is entitled under Article 35; and/or
- (b) in case of artificial obstructions or physical conditions other than weather conditions, determine additional payments due to the contractor in accordance with Article 55.

21.4. Weather conditions shall not entitle the contractor to claims under Article 55.

21.5. If the supervisor decides that the artificial obstructions or physical conditions could, in whole or in part, have been reasonably foreseen by an experienced contractor, he shall so inform the contractor as soon as practicable.

Article 22

Security of sites

22.1. The contractor shall have the right to forbid access to the site to any person not involved in the performance of the contract, with the exception of persons authorized by the supervisor.

22.2. The contractor shall ensure the security of sites during the whole period of execution and shall be responsible for taking the necessary steps, in the interests of his employees, agents of the contracting authority and third parties, to prevent any loss or accident which may result from carrying out the works.

22.3. The contractor shall take all essential steps, on his own responsibility and at his expense, to ensure that existing structures and installations are protected, preserved and maintained. He shall be responsible for providing and maintaining at his expense all lighting, protection, fencing and security equipment which proves necessary for the proper performance of the works or which may reasonably be required by the supervisor.

22.4. If, during the performance of the contract, urgent measures are necessary to obviate any risk of accident or damage or to ensure security following any accident or damage, the supervisor shall give formal notice to the contractor to do what is necessary. If the

contractor is unwilling or unable to undertake the necessary measures, the supervisor may carry out the work at the expense of the contractor to the extent that the contractor is liable.

Article 23

Safeguarding adjacent properties

23.1. On his own responsibility and at his expense, the contractor shall take all the precautions required by good construction practice and by the prevailing circumstances to safeguard adjacent properties and avoid causing any abnormal disturbance therein.

23.2. The contractor shall indemnify the contracting authority against the financial consequences of all claims by neighbouring landowners or residents to the extent that the contractor is liable and to the extent that the damage to adjacent properties is not the result of a hazard created through the design or method of construction imposed by the contracting authority or the supervisor upon the contractor.

Article 24

Interference with traffic

24.1. The contractor shall ensure that the works and installations do not cause damage to, or obstruct traffic on, communication links such as roads, railways, waterways and aerodromes, save as permitted under the special conditions. He shall, in particular, take account of weight restrictions when selecting routes and vehicles.

24.2. Any special measures which the contractor considers necessary or which are specified in the special conditions or which are required by the contracting authority in order to protect or strengthen sections of roads, tracks or bridges, shall be at the expense of the contractor, whether or not they are carried out by the contractor. The contractor shall inform the supervisor of any special measures he intends to take before carrying them out. The repair of any damage caused to roads, tracks or bridges by the transport of materials, plant or equipment shall be at the expense of the contractor.

Article 25

Cables and conduits

25.1. Where, in the course of carrying out the works, the contractor encounters bench-marks indicating the

course of underground cables, conduits and installations, he shall keep such bench-marks in position or replace them, should execution of the works have necessitated their temporary removal. Such related operations require the authorization of the supervisor.

25.2. The contractor shall be responsible for the preservation, removal and replacement, as the case may be, of the cables, conduits and installations specified by the contracting authority in the contract and for the cost thereof.

25.3. Where the presence of cables, conduits and installations has not been specified in the contract but is revealed by bench-marks and references, the contractor shall be under a general duty of care and similar obligations regarding preservation, removal and replacement to those set out above. In this case, the contracting authority shall compensate him for expenditure, to the extent that such work is necessary for the execution of the contract.

25.4. However, the obligations to remove and replace cables, conduits and installations and the expenditure resulting therefrom shall not be the responsibility of the contractor if the contracting authority decides to accept that responsibility. The same shall apply where this obligation and the expenditure resulting therefrom devolve upon another specialist administration or an agent.

25.5. When any work on the site is likely to cause disturbances in or damage to a public utility service, the contractor shall immediately inform the supervisor in writing, giving a reasonable period of notice so that suitable measures can be taken in time to allow work to continue normally.

Article 26

Setting-out

26.1. The contractor shall be responsible for:

- (a) the accurate setting-out of the works in relation to original marks, lines and levels of reference given by the supervisor;
- (b) the correctness, of the position, levels, dimensions and alignment of all parts of the works; and
- (c) the provision of all necessary instruments, appliances and labour in connection with the foregoing responsibilities.

26.2. If, at any time during the execution of the works, any error appears in the position, levels, dimensions or alignment of any part of the works, the contractor, shall, if the supervisor so requires, at the contractor's cost, rectify such error to the satisfaction of the

supervisor, unless such error is based on incorrect data supplied by the supervisor, in which case the contracting authority shall be responsible for the cost of rectification.

26.3. The checking of any setting-out or of any line or level by the supervisor shall not in any way relieve the contractor of his responsibility for the accuracy thereof and the contractor shall carefully protect and preserve all bench-marks, sight-rails, pegs and other items used in setting-out the works.

Article 27

Demolished materials

27.1. Where the contract includes demolition work, materials and articles obtained therefrom shall, unless the special conditions and/or the law of the state of the contracting authority otherwise provide and subject to the provisions of Article 28, be the property of the contractor.

27.2. Should the special conditions reserve to the contracting authority the right of ownership of materials or all or part of the articles obtained from the demolition work, the contractor shall take all the necessary precautions to ensure that these are preserved. He shall be liable for any destruction of, or damage to, such materials or articles caused by him or his agents.

27.3. Irrespective of the use to which the contracting authority intends to put the materials or articles, in respect of which he reserves the right of ownership, all costs incurred in transporting and storing them and all warehouse charges at the place indicated by the supervisor shall be borne by the contractor for any carriage not exceeding 100 metres.

27.4. Save where the special conditions provide otherwise, the contractor shall, at his expense, progressively remove rubble and other demolition materials, rubbish and debris from the site.

Article 28

Discoveries

28.1. Discoveries of any interest whatsoever made during excavation or demolition work shall be brought immediately to the attention of the supervisor. The supervisor shall decide how such discoveries are to be dealt with, taking due account of the law of the State of the contracting authority.

28.2. The contracting authority reserves the right of ownership of materials found during the excavation

and demolition work carried out on land belonging to him, subject to compensating the contractor for any special efforts.

- 28.3. Artifacts, antiquities and natural, numismatic, or other objects which are of scientific interest, and also rare objects or objects made of precious metals found during excavation or demolition work shall be the property of the contracting authority.
- 28.4. In the event of disagreements, the contracting authority shall have sole authority to decide as to the qualifications set out in Articles 28.1 and 28.3.

Article 29

Temporary works

- 29.1. The contractor shall carry out at his expense all the temporary works to enable the works to be carried out. He shall submit to the supervisor the drawings for temporary works which he intends to use, such as cofferdams, scaffolding, trusses and shuttering. He shall take into account any observations made to him by the supervisor while assuming responsibility for these drawings.
- 29.2. Where the design of particular temporary works is specified in the special conditions to be the responsibility of the contracting authority, the supervisor shall provide the contractor with all drawings necessary in reasonable time to enable the contractor to undertake the temporary works in accordance with his programme. In such cases, the contracting authority shall be solely responsible for the safety and adequacy of the design. However, the contractor shall be responsible for the proper construction.

Article 30

Soil studies

Subject to the special conditions and to the technical specifications, the contractor shall make available to the supervisor, the personnel and equipment necessary for carrying out any soil survey which the supervisor considers reasonably necessary. The contractor shall be compensated for the actual cost of the manpower and equipment used or made available in such work, if not already provided for in the contract.

Article 31

Overlapping contracts

- 31.1. The contractor shall, in accordance with the requirements of the supervisor, afford all reasonable

opportunities for carrying out their work to any other contractors employed by the contracting authority and their workmen, to the workmen of the contracting authority and of any other public authorities who may be employed on or near the site in the execution of any work not included in the contract, or of any contract which the contracting authority may enter into in connection with, or ancillary to, the works.

- 31.2. If, however, the contractor, on the written request of the supervisor, makes available to any such contractor, or public authority, or to the contracting authority, any roads or ways for the maintenance of which the contractor is responsible, or permits the use by any such other persons of the contractor's temporary works, scaffolding or other equipment on the site, or provides any other service of whatsoever nature, which was not provided for in the contract, the contracting authority shall pay to the contractor in respect of such use or service, such sums and/or grant such extension of time, as shall, in the opinion of the supervisor, be reasonable.
- 31.3. The contractor shall not by reason of Article 31 be relieved of any of his obligations under the contract nor shall he be entitled to any claims other than those provided for in Article 31.2.

Article 32

Patents and licences

Save where otherwise provided in the special conditions, the contractor shall indemnify the contracting authority and the supervisor against any claim resulting from the use as specified in the contract of patents, licences, drawings, designs, models, or brand or trade marks, except where such infringement results from compliance with the design or specification provided by the contracting authority and/or the supervisor.

COMMENCEMENT AND DELAYS

Article 33

Commencement orders

- 33.1. The contracting authority shall fix the date on which performance of the contract is to commence, and advise the contractor either in the notification of award of contract or by administrative order issued by the supervisor.
- 33.2. The date for commencing performance shall be not later than 180 days following notification of award of contract unless agreed otherwise by the parties.

*Article 34***Period of performance**

The period of performance shall commence on the date fixed in accordance with Article 33.1 and shall be as stated in the contract, without prejudice to extensions of the period which may be granted under Article 35.

*Article 35***Extension of period of performance**

35.1. The contractor may request an extension to the period of performance if he is or will be delayed in completing the contract by any of the following causes:

- (a) exceptional weather conditions in the State of the contracting authority;
- (b) artificial obstructions or physical conditions which could not reasonably have been foreseen by an experienced contractor;
- (c) administrative orders affecting the date of completion other than those arising from the contractor's default;
- (d) failure of the contracting authority to fulfil his obligations under the contract;
- (e) any suspension of the works which is not due to the contractor's default;
- (f) *force majeure*;
- (g) any other causes referred to in these general conditions which are not due to the contractor's default.

35.2. The contractor shall, within 30 days of becoming aware that delay may occur, notify the supervisor of his intention to make a request for extension of the period of performance to which he may consider himself entitled, and shall, as soon thereafter as is reasonable in the circumstances, deliver to the supervisor full and detailed particulars of the request, in order that such request may be investigated at the time.

35.3. The supervisor shall, by written notice to the contractor after due consultation with the contracting authority and, where appropriate, the contractor, grant such extension of the period of performance as may be justified, either prospectively or retrospectively, or inform the contractor that he is not entitled to an extension.

*Article 36***Delays in performance**

36.1. If the contractor fails to complete the works within the time period(s) specified in the contract, the

contracting authority shall, without formal notice and without prejudice to his other remedies under the contract be entitled to liquidated damages for every day or part thereof which shall elapse between the end of the period specified for performance or extended period of performance under Article 35 and the actual date of completion, at the rate and up to the maximum amount specified in the special conditions. If the works have been the subject of partial acceptance in accordance with Article 59, the liquidated damages specified in the special conditions may be reduced in the proportion which the value of the accepted part bears to the value of the whole of the works.

36.2. If the contracting authority has become entitled to the maximum claim under Article 36 (1) he may, after giving notice to the contractor:

- (a) seize the performance guarantee; and/or
- (b) terminate the contract; and
- (c) enter into a contract with a third party at the contractor's cost for the provision of the balance of the works.

*Article 37***Variations**

37.1. The supervisor shall have power to order any variation to any part of the works necessary for the proper completion and/or functioning of the works. Such variations may include additions, omissions, substitutions, changes in quality, quantity, form, character, kind, position, dimension, level or line and changes in the specified sequence, method or timing of execution of the works. No order for a variation shall have the effect of invalidating the contract, but the financial effect, if any, of all such variations shall be valued in accordance with Articles 37 (5) and 37 (7).

37.2. No variation shall be made except by administrative order, provided that:

- (a) if for any reason, the supervisor shall find it necessary to give an order orally, he shall as soon as possible thereafter confirm the order by an administrative order;
- (b) if the contractor shall confirm in writing an oral order given for the purpose of Article 37 (2) (a) and the confirmation shall not be contradicted in writing forthwith by the supervisor, an administrative order, shall, unless the special conditions stipulate otherwise, be deemed to have been issued for the variation;

- (c) an administrative order for variation shall not be required for increase or decrease in the quantity of any work where such increase or decrease is the result of the quantity exceeding or being less than that stated in the bill of quantities or price schedule.
- 37.3. Save as provided by Article 37 (2) prior to any administrative order for variation, the supervisor shall notify the contractor of the nature and form of such variation. As soon as possible, after receiving such notice, the contractor shall submit to the supervisor a proposal containing:
- (a) a description of the tasks, if any, to be performed or the measures to be taken and a programme for execution; and
 - (b) any necessary modifications to the programme of performance or to any of the contractor's obligations under the contract; and
 - (c) any adjustment to the contract price in accordance with the rules as set out in Article 37.
- 37.4. Following the receipt of the contractor's submission referred to in Article 37 (3), the supervisor shall, after due consultation with the contracting authority and, where appropriate, the contractor, decide as soon as possible whether or not the variation shall be carried out. If the supervisor decides that the variation shall be carried out he shall issue the administrative order stating that the variation shall be carried out at the prices and under the conditions given in the contractor's submission referred to in Article 37 (3) or as modified by the supervisor in accordance with Article 37 (5).
- 37.5. The prices for all variations ordered by the supervisor in accordance with Article 37 (2) and 37 (4) shall be ascertained by the supervisor in accordance with the following principles:
- (a) where work is of similar character and executed under similar conditions to work priced in the bill of quantities or price schedule it shall be valued at such rates and prices contained therein;
 - (b) where work is not of a similar character or is not executed under similar conditions, the rates and prices in the contract shall be used as the basis for valuation so far as is reasonable, failing which, as fair valuation shall be made by the supervisor;
 - (c) if the nature or amount of any variation relative to the nature or amount of the whole of the contract or to any part thereof shall be such that in the opinion of the supervisor any rate or price contained in the contract for any item of work is by reason of such variation rendered unreasonable, then the supervisor shall fix such rate or price as in the circumstances he shall think reasonable and proper;
 - (d) where a variation is necessitated by default or breach of contract by the contractor, any additional cost attributable to such variation shall be borne by the contractor.
- 37.6. On receipt of the administrative order requesting the variation, the contractor shall proceed to carry out the variation and be bound by these general conditions in so doing as if such variation were stated in the contract. The works shall not be delayed pending the granting of any extension of time for completion or adjustment to the contract price. Where the order for a variation precedes the adjustment to the contract price, the contractor shall keep records of the costs of undertaking the variation and of time expended thereon. Such records shall be open to inspection by the supervisor at all reasonable times.
- 37.7. Where on provisional acceptance, an increase or reduction in the total value of the works resulting from an administrative order, or from some other circumstance which is not caused by the contractor's default, exceeds 15% of the contract price, the supervisor shall, after consultation with the contracting authority and the contractor determine any additions to or reduction from the contract price as a consequence of the application of Article 37 (5). The sum so determined shall be based on the amount by which the increase or decrease in value of the works exceeds 15%. The sum shall be notified by the supervisor to the contracting authority and the contractor and the contract price adjusted accordingly.
- Article 38*
- Suspension**
- 38.1. The contractor shall, on the order of the supervisor, suspend the progress of the works or any part thereof for such time or times and in such manner as the supervisor may consider necessary.
- 38.2. During the period of suspension, the contractor shall take such protective measures as may be necessary to safeguard the works, plant, equipment and site against any deterioration, loss or damage. Additional expenses incurred in connection with such protective measures shall be added to the contract price, unless such suspension is:
- (a) otherwise provided for in the contract; or
 - (b) necessary by reason of some default of the contractor; or

- (c) necessary by reason of normal climatic conditions on site; or
 - (d) necessary for the safety or the proper execution of the works or any part thereof insofar as such necessity does not arise from any act or default by the supervisor or the contracting authority or from any of the exceptional risks referred to in Article 21.
- 38.3. The contractor shall not be entitled to such additions to the contract price unless he notifies the supervisor, within 30 days after receipt of the order to suspend the works, of his intention to make a claim for them.
- 38.4. The supervisor, after consultation with the contracting authority and the contractor, shall determine such extra payment and/or extension of the period of performance to be made to the contractor in respect of such claim as shall, in the opinion of the supervisor, be fair and reasonable.
- 38.5. If the period of suspension exceeds 180 days and the suspension is not due to the contractor's default, the contractor may, by notice to the supervisor, request permission to proceed within 30 days or terminate the contract.

MATERIALS AND WORKMANSHIP

Article 39

Work register

- 39.1. A work register shall, unless otherwise provided by the special conditions, be kept on the site by the supervisor, who shall enter in it at least the following information:
- (a) the weather conditions, interruptions of work owing to inclement weather, hours of work, number and type of workmen employed on the site, materials supplied, equipment in use, equipment not in working order, tests carried out *in situ*, samples dispatched, unforeseen circumstances, as well as orders given to the contractor;
 - (b) detailed statements of all the quantitative and qualitative elements of the work done and the supplies delivered and used, capable of being checked on the site and relevant in calculating payments to be made to the contractor.
- 39.2. The statements shall form an integral part of the work register but may, where appropriate, be recorded in separate documents. The technical rules for drawing up the statements shall be as set out in the special conditions.

- 39.3. The contractor shall ensure that statements are drawn up, in good time and in accordance with the special conditions, in respect of work, services and supplies which cannot be measured or verified subsequently; failing this, he shall accept the decisions of the supervisor-unless, at his own expense, he provides evidence to the contrary.
- 39.4. Entries made in the work register as work progresses shall be signed by the supervisor and countersigned by the contractor or his representative. If the contractor objects, he shall communicate his views to the supervisor within 15 days following the date on which the entry or the statements objected to are recorded. Should he fail to countersign or to submit his views within the period allowed, the contractor shall be deemed to agree with the notes shown in the register. The contractor may examine the work register at any time and may, without removing the document, make or receive a copy of entries which he considers necessary for his own information.
- 39.5. The contractor shall, on request, provide the supervisor with the information needed to keep the work register in good order.

Article 40

Quality of works and materials

- 40.1. The works, components and materials shall conform to the specifications, drawings, surveys, models, samples, patterns and other requirements in the contract which shall be held at the disposal of the contracting authority or the supervisor for the purposes of identification throughout the period of performance.
- 40.2. Any preliminary technical acceptance stipulated in the special conditions shall be the subject of a request sent by the contractor to the supervisor. The request shall indicate the reference to the contract, the lot number and the place where such acceptance is to take place, as appropriate. The components and materials specified in the request must be certified by the supervisor as meeting the requirements for such acceptance prior to their incorporation in the works.
- 40.3. Even if materials or items to be incorporated in the works or in the manufacture of components have been technically accepted in this way, they may still be rejected and must be replaced immediately by the contractor if a further examination reveals defects or faults. The contractor may be given the opportunity to repair and make good materials and items which have been rejected, but such materials and items will be accepted for incorporation in the works only if they have been repaired and made good to the satisfaction of the supervisor.

*Article 41***Inspection and testing**

- 41.1. The contractor shall ensure that the components and materials are delivered to the site in time to allow the supervisor to proceed with acceptance of the components and materials. The contractor is deemed to have fully appreciated the difficulties which he might encounter in this respect, and he shall not be permitted to advance any grounds for delay in fulfilling his obligations.
- 41.2. The supervisor shall be entitled, either by himself or his agent, to inspect, examine, measure and test the components, materials and workmanship, and check the progress of preparation, fabrication or manufacture of anything being prepared, fabricated or manufactured for delivery under the contract in order to establish whether the components, materials and workmanship are of the requisite quality and quantity. This shall take place at the place of manufacture, fabrication, preparation or on the site or at such other places as may be specified in the contract.
- 41.3. For the purposes of such tests and inspections, the contractor shall:
- (a) provide to the supervisor, temporarily and free of charge, such assistance, test samples, parts, machines, equipment, tools or materials and labour as are normally required for inspection and testing;
 - (b) agree, with the supervisor, on the time and place for tests;
 - (c) provide access for the supervisor at all reasonable times to the place where the tests are to be carried out.
- 41.4. If the supervisor is not present on the date agreed for tests, the contractor may, unless otherwise instructed by the supervisor, proceed with the tests, which shall be deemed to have been made in the supervisor's presence. The contractor shall forthwith forward duly certified copies of the test results to the supervisor, who shall, if he has not attended the test, be bound by the test results.
- 41.5. When components and materials have passed the tests referred to in Article 41, the supervisor shall notify the contractor or endorse the procedure's certificate to that effect.
- 41.6. If the supervisor and the contractor disagree on the test results, each shall give a statement of his views to the other within 15 days after such disagreement arises. The supervisor or the contractor may require such tests to be repeated on the same terms and conditions or, if either party so requests, by an expert

to be selected by common consent. All test reports shall be submitted to the supervisor who shall communicate the results of these tests without delay to the contractor. The results of the retesting shall be conclusive. The cost of the retesting shall be borne by the party whose views are proved wrong by the retesting.

- 41.7. In the performance of his duties, the supervisor and all persons authorized by him shall disclose only to those persons who are entitled to know of it information which he has obtained by reason of his inspection and testing of the methods of manufacture and operation of the undertaking.

*Article 42***Rejection**

- 42.1. Components and materials which are not of the specified quality shall be rejected. A special mark may be applied to the rejected components or materials. This shall not be such as to alter them or affect their commercial value. Rejected components and materials shall be removed by the contractor from the site within a period which the supervisor shall specify, failing which they shall be removed by the supervisor as of right at the expense and risk of the contractor. Any work incorporating rejected components or materials shall be rejected.
- 42.2. The supervisor shall, during the progress of the works and before the works are taken over, have the power to order or decide:
- (a) the removal from the site, within such time limits as may be specified in the order, of any components or materials which, in the opinion of the supervisor, are not in accordance with the contract;
 - (b) the substitution of proper and suitable components or materials; or
 - (c) the demolition and proper re-execution, or satisfactory repair, notwithstanding any previous test thereof or interim payment therefor, of any work which, in respect of components, materials, workmanship or design by the contractor for which he is responsible, is not, in the opinion of the supervisor, in accordance with the contract.
- 42.3. The supervisor shall, as soon as reasonably practicable, give to the contractor notice in writing of his decision specifying particulars of the alleged defects.
- 42.4. The contractor shall with all speed and at his expense make good the defects so specified. If the contractor does not comply with such order, the contracting

authority shall be entitled to employ other persons to carry out the same and all expenses consequent thereon or incidental thereto may be deducted by the contracting authority from any monies due or which may become due to the contractor.

- 42.5. The provisions of Article 42 shall not affect the right of the contracting authority to claim under Articles 36 and 63.

Article 43

Property in plant and materials

- 43.1. All equipment, temporary works, plant and materials provided by the contractor shall, when brought on the site, be deemed to be exclusively intended for the execution of the works and the contractor shall not remove the same or any part thereof, except for the purpose of moving it from one part of the site to another, without the consent of the supervisor. Such consent shall, however, not be required for vehicles engaged in transporting any staff, labour, equipment, temporary works, plant or materials to or from the site.

- 43.2. The special conditions may provide that all equipment, temporary works, plant and materials on site owned by the contractor or by any company in which the contractor has a controlling interest shall, for the duration of the execution of the works, be:

- (a) vested in the contracting authority; or
- (b) made subject to a lien in favour of the contracting authority; or
- (c) made subject to any other arrangement regarding priority interest or security.

- 43.3. In the event of termination of the contract in accordance with Article 63 due to the contractor's breach of contract, the contracting authority shall be entitled to use the equipment, temporary works, plant and materials on site in order to complete the works.

- 43.4. Any agreement for the hire by the contractor of equipment, temporary works, plant and materials brought onto the site, shall contain a provision that on request in writing made by the contracting authority within 7 days after the date on which the termination under Article 64 becomes effective, and on the contracting authority undertaking to pay all hire charges in respect thereof from such date, the owner thereof will hire such equipment, temporary works, plant or materials to the contracting authority on the same terms as they were hired by the contractor, save

that the contracting authority shall be entitled to permit the use thereof by any other contractor employed by him for completing the works under the provisions of Article 64 (3).

- 43.5. Upon termination of the contract before completion of the works, the contractor shall deliver to the contracting authority any plant, temporary works, equipment or materials the property in which has vested in the contracting authority or been made subject to a lien by virtue of Article 43 (2). If he fails to do so, the contracting authority may take such appropriate action as it deems fit in order to obtain possession of such plant, temporary works, equipment and materials and recover the cost of so doing from the contractor.

PAYMENTS

Article 44

General provisions

- 44.1. Payments shall be made in the national currency except as otherwise stipulated in the contract.
- 44.2. The administrative or technical conditions to which the payment of advances, interim and/or final payments made in accordance with Articles 45 to 56 are subject, shall be as stated in the special conditions.

Article 45

Provisional price contracts

- 45.1. In exceptional cases, where a provisional price contract has been awarded, the amounts payable under the contract shall be calculated as follows:
- (a) as for cost-plus contracts in Article 49 (1) (c); or
 - (b) initially on the basis of provisional prices and, after the conditions for performing the contract are known, as for lump-sum contracts or unit price contracts in Article 49 (1) (a) and (b) respectively, or as in a composite contract.
- 45.2. The contractor shall supply such information as the contracting authority or the supervisor may reasonably require in respect of any matter relating to the contract for the purpose of the calculation. Where agreement cannot be reached on the valuation of the works, the amounts payable shall be determined by the supervisor.

*Article 46***Advances**

46.1. If the special conditions so provide, advances shall be granted to the contractor, at his request, for operations connected with the execution of the works, in the cases listed hereinafter:

- (a) as a lump-sum advance enabling him to meet expenditure resulting from the commencement of the contract;
- (b) if he affords proof of the conclusion of a contract for the purchase or order of materials, plant, equipment, machines and tools, necessary for the execution of the contract, and of any other substantial prior expenses such as the acquisition of patents or study costs.

46.2. The special conditions shall state the amount of the advances which shall not exceed 10 % of the original contract price in respect of the lump-sum advance in Article 46 (1) (a) and 20 % of such prices for all other advances in Article 46 (1) (b).

46.3. No advance shall be granted until:

- (a) the conclusion of the contract;
- (b) provision to the contracting authority by the procedure of the performance guarantee in accordance with Article 15; and by
- (c) provision to the contracting authority by the contractor of a separate directly liable guarantee for the full amount of the advance by the institutions referred to in Article 15 (3), which shall remain effective until the advance has been completely repaid by the contractor out of interim payments under the contract.

46.4. The contractor shall use the advance exclusively for operations connected with the execution of the works. Should the contractor misuse any portion of the advance, it shall become due and repayable immediately and no further advance payments will be made to him.

46.5. Should the advance guarantee cease to be valid and the contractor fail to re-validate it, either a deduction equal to the amount of the advance may be made by the contracting authority from future payments due to the contractor under the contract, or the contracting authority may apply the provisions of Article 15 (6).

46.6. If the contract is terminated for any reason whatsoever, the guarantees securing the advances may be invoked forthwith in order to repay the balance of

the advances still owed by the contractor, and the guarantor shall not delay payment or raise objection for any reason whatever.

46.7. The advance guarantee provided for in Article 46 shall be released as and when advances are repaid.

46.8. Further conditions and procedures for granting and repaying advances shall be as laid down in the special conditions.

*Article 47***Retention sum**

47.1. The sum which shall be retained from interim payments by way of guarantee to meet the contractor's obligations during the maintenance period, and the detailed rules governing that guarantee, shall be stipulated in the special conditions, provided that it shall, in no case, exceed 10 % of the contract price.

47.2. Subject to the approval of the contracting authority, the contractor may, if he so wishes, substitute, not later than the date fixed for the commencement of the works, these retention sums by a retention guarantee issued in accordance with Article 15 (3).

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

*Article 48***Revision of prices**

48.1. Unless otherwise stipulated in the special conditions, and except as provided in Article 48 (4) the contract shall be at fixed prices which shall not be revised.

48.2. Where prices may be revised under the contract, such revision shall take into account variations in the prices of significant local or external elements which serve as a basis for the calculation of the tender price, such as manpower, services, materials and supplies, as well as charges laid down by law or regulation. The detailed rules for the revision shall be as laid down in the special conditions.

48.3. Prices contained in the contractor's tender shall be deemed:

- (a) to have been arrived at on the basis of the conditions in force 30 days prior to the latest date

fixed for submission of tenders; or in the case of direct agreement contracts, on the date of the contract;

- (b) to have taken account of the legislation and the relevant tax arrangements applicable at the reference date fixed in Article 48 (3) (a).

48.4. In the event of changes to, or introduction of, any national or State statute, ordinance, decree or other law, or any regulation or by-law of any local or other public authority, after the date stated in Article 48 (3) which causes a change in the contractual relationship between the parties to the contract, the contracting authority and the contractor shall consult on how best to proceed further under the contract, and may as a result of such consultation decide:

- (a) to modify the contract; or
- (b) on payment of compensation for the resulting imbalance by one party to the other; or
- (c) to terminate the contract by mutual agreement.

48.5. In the event of a delay in the execution of the works for which the contractor is responsible, or at the end of the period of performance revised as necessary in accordance with the contract, there shall be no further revision of prices within the 30 days before provisional acceptance, except for the application of new price indexation, if this is to the benefit of the contracting authority.

Article 49

Measurement

49.1. The following methods shall apply to the valuation of works contracts:

- (a) For lump-sum contracts, the amount due under the contract shall be determined on the basis of the breakdown of the overall contract price, or on the basis of a breakdown expressed as a percentage of the contract price corresponding to completed stages of the works. Where items are accompanied by quantities, these shall be firm quantities for which the contractor has submitted his all-in price, and shall be paid for irrespective of the quantities of work actually carried out.
- (b) For unit price contracts:
 - (i) the amount due under the contract shall be calculated by applying the unit rates to the quantities actually executed for the respective items, in accordance with the contract;

- (ii) the quantities set out in the bill of quantities shall be the estimated quantities of the works, which shall not be taken as the actual and correct quantities of the works to be executed by the contractor in fulfilment of his obligations under the contract;

- (iii) the supervisor shall determine by measurement the actual quantities of the works executed by the contractor, and these shall be paid for in accordance with Article 50. Unless otherwise provided in the special conditions no additions shall be made to the items in the bill of quantities except as a result of a variation in accordance with Article 37 or other provision of the contract entitling the contractor to additional payment;

- (iv) the supervisor shall, when he requires any parts of the works to be measured, give reasonable notice to the contractor to attend, or to send a qualified agent to represent him. The contractor or his agent shall assist the supervisor in making such measurements and shall furnish all particulars required by the supervisor. Should the contractor not attend, or omit to send such agent, the measurement made by the supervisor or approved by him shall be binding on the contractor;

- (v) the works shall be measured net, notwithstanding any general or local custom, except where otherwise provided for in the contract.

- (c) For cost-plus contracts, the amount due under the contract shall be determined on the basis of actual costs with an agreed addition for overheads and profit. The special conditions shall stipulate the information which the contractor is required to submit to the supervisor for the purpose of Article 49 (1) (c) and the manner in which it should be submitted.

49.2. Where an item in the contract is indicated as 'provisional' the provisional sum set aside for it shall not be taken into account in calculating the percentages referred to in Article 37.

Article 50

Interim payments

50.1. Unless otherwise specified in the special conditions, the contractor shall submit an application for interim payment to the supervisor at the end of each period

referred to in Article 50 (7) in a form approved by the supervisor. The application shall include the following items, as applicable:

- (a) the estimated contract value of the permanent works executed up to the end of the period in question;
- (b) an amount reflecting any revision of prices pursuant to Article 48;
- (c) an amount to be withheld as retention sum under Article 47;
- (d) any credit and/or debit for the period in question in respect of plant and materials on site intended for, but not yet incorporated in, the permanent works in the amount and under the conditions set out in Article 50 (2);
- (e) an amount to be deducted on account of the advance repayment under the provisions of Article 46; and
- (f) any other sum to which the contractor may be entitled under the contract.

50.2. The contractor shall be entitled to such sums as the supervisor may consider proper in respect of plant and materials intended for, but not yet incorporated in, the permanent works provided that:

- (a) the plant and materials conform with the specifications for the permanent works and are set out in batches in a way that they may be recognised by the supervisor;
- (b) such plant and materials have been delivered to the site, and are properly stored and protected against loss or damage or deterioration to the satisfaction of the supervisor;
- (c) the contractor's record of requirements, orders, receipts and use of plant and materials under the contract are kept in a form approved by the supervisor and such records are available for inspection by the supervisor;
- (d) the contractor submits with his statement, the estimated value of the plant and materials on site together with such documents as may be required by the supervisor for the purpose of valuation of the plant and materials and providing evidence of ownership and payment therefor; and
- (e) where the special conditions so provide, ownership of the plant and materials referred to in Article 43 shall be deemed to be vested in the contracting authority.

50.3. Approval by the supervisor of any interim payment certified by him in respect of plant and materials pursuant to Article 50 shall be without prejudice to the exercise of any power of the supervisor under the contract to reject any plant or materials which are not in accordance with the provisions of the contract.

50.4. The contractor shall be responsible for any loss or damage to, and for the cost of storing and handling of, such plant and materials on site and shall effect such additional insurance as may be necessary to cover the risk of such loss or damage from any cause.

50.5. Within 30 days of receipt of the said application for interim payment, it shall be approved or amended in such manner that, in the supervisor's opinion, the application reflects the amount due to the contractor in accordance with the contract. In cases where there is a difference of opinion as to the value of an item, the supervisor's view shall prevail. On determination of the amount due to the contractor, the supervisor shall issue to the contracting authority and the contractor an interim payment certificate for the amount due to the contractor and shall inform the contractor of the works for which payment is being made.

50.6. The supervisor may, by an interim payment certificate, make any corrections or modifications to any previous certificate issued by him and shall have power to modify the valuation in or withhold the issue of, any interim payment certificate if the works or any part thereof are not being carried out to his satisfaction.

50.7. Unless the special conditions provide otherwise, the frequency shall be one interim payment per month.

Article 51

Final statement of account

51.1. Not later than 90 days after the issue of the final acceptance certificate referred to in Article 62, the contractor shall submit to the supervisor a draft final statement of account with supporting documents showing in detail the value of the work done in accordance with the contract, together with all further sums which the contractor considers to be due to him under the contract in order to enable the supervisor to prepare the final statement of account. The special conditions may, however, in accordance with Article 51 (6) state that the draft final statement of account and further proceedings related thereto, be dealt with before the issue of the provisional acceptance certificate.

51.2. Within 90 days after receipt of the draft final statement of account and of all information reasonably required for its verification, the supervisor shall prepare the final statement of account, which determines:

- (a) the amount which in his opinion is finally due under the contract; and

- (b) after establishing the amounts previously paid by the contracting authority and all sums to which the contracting authority is entitled under the contract, the balance, if any, due from the contracting authority to the contractor, or from the contractor to the contracting authority, as the case may be.
- 51.3. The supervisor shall issue to the contracting authority or to its duly authorized representative, and to the contractor, the final statement of account showing the final amount to which the contractor is entitled under the contract. The contracting authority or its duly authorized representative and the contractor shall sign the final statement of account as an acknowledgement of the full and final value of the work performed under the contract and shall promptly submit a signed copy to the supervisor. However, the final statement of account shall not include amounts in dispute which are the subject of negotiations, conciliation, arbitration or litigation.
- 51.4. The final statement of account signed by the contractor shall constitute a written discharge of the contracting authority confirming that the total in the final statement of account represents full and final settlement of all monies due to the contractor under the contract, other than those amounts which are the subject of amicable settlement, arbitration or litigation. However, such discharge shall become effective only after any payment due in accordance with the final statement of account has been made and the performance guarantee referred to in Article 15 has been returned to the contractor.
- 51.5. The contracting authority shall not be liable to the contractor for any matter or thing whatsoever arising out of, or in accordance with, the contract or execution of the works, unless the contractor shall have included a claim in respect thereof in his draft final statement of account.
- 51.6. The provisions of Article 51 may be varied by the special conditions having regard to the practices in the State of the contracting authority.
- debt claimed by the sub-contractor out of the sums remaining due to the contractor. The contractor shall remain entirely responsible for the work in respect of which direct payment has been made.
- 52.2. If the contractor gives adequate reasons for refusing to meet all or part of the debt claimed by the sub-contractor, the contracting authority shall only pay to the sub-contractor such sums as are not in dispute. Sums claimed by the sub-contractor in respect of which the contractor has given adequate reasons for his refusal to pay shall be paid by the contracting authority only after the parties have come to an amicable settlement, or after the decision of an arbitrating authority or after a judgment of a court has been duly notified to the supervisor.
- 52.3. Direct payments to sub-contractors shall not exceed the value at contract prices of the services performed by the sub-contractors for which they request payment; the value at contract prices shall be calculated or assessed on the basis of the bill of quantities, the price schedule or the breakdown of the lump sum price.
- 52.4. Direct payments to sub-contractors shall be made entirely in the national currency of the country in which the contract is performed, or partly in such national currency and partly in foreign currency, in accordance with the contract.
- 52.5. Where direct payments to sub-contractors are made in foreign currency, they shall be calculated in accordance with Article 56. They shall not result in any increase in the total amount payable in foreign currency, as stipulated in the contract.
- 52.6. The provisions of Article 52 shall apply subject to the requirements of the law applicable by virtue of Article 54 concerning the right to payment of creditors who are beneficiaries of an assignment of credit or of a collateral security.

Article 52

Direct payments to sub-contractors

- 52.1. When the supervisor receives a claim from a sub-contractor duly approved under Article 7 to the effect that the contractor has not met his financial obligations so far as the sub-contractor is concerned, the supervisor shall give notice to the contractor either to pay the sub-contractor or to inform him of the reasons why payment should not be made. Should such payment not be made, or reasons not be given within the period of notice, the supervisor may, after satisfying himself that the work has been carried out, certify, and the contracting authority shall meet the

Article 53

Delayed payments

- 53.1. Payment to the contractor of the amounts due under each of the interim payment certificates and the final statement of account issued by the supervisor shall be made by the contracting authority within 90 days of such certificate or statement being delivered to the contracting authority. If the period laid down for payment has been exceeded, the contractor shall qualify for interest calculated pro rata on the basis of the number of days delay at the rate specified in the special conditions, subject to a maximum period, also specified therein. The contractor shall be entitled to

such payment without prejudice to any other right or remedy under the contract. In the case of the final statement of account, the interest for the delayed payment shall be calculated on a daily basis at the rate specified in the special conditions.

- 53.2. Any default in payment of more than 120 days from the expiry of the period laid down in Article 53 (1) shall entitle the contractor either not to perform the contract or to terminate it.

Article 54

Payments to third parties

- 54.1. All orders for payments to third parties may be carried out only after an assignment made in accordance with Article 6. The assignment shall be notified to the contracting authority.
- 54.2. Notification of beneficiaries of the assignment shall be the sole responsibility of the contractor.
- 54.3. In the event of a legally binding attachment of the property of the contractor affecting payments due to him under the contract, without prejudice to the time limit laid down in Article 53, the contracting authority shall have 30 days, starting from the day when it receives notification of the definitive lifting of the obstacle to payment, to resume payments to the contractor.

Article 55

Claims for additional payment

- 55.1. If under the contract there are circumstances which the contractor considers entitle him to additional payment, the contractor shall:
- (a) if he intends to make any claim for additional payment, give to the supervisor notice of his intention or make such claim within 15 days after the said circumstances become known to the contractor, stating the reason for his claim; and
 - (b) as soon as is reasonably practicable after the date of such notice but not later than 60 days after such notice, unless otherwise agreed by the supervisor, submit to the supervisor full and detailed particulars of his claim. In any event, such particulars shall be submitted no later than the date of submission of the draft final statement of account. The contractor shall thereafter promptly submit such further particulars as the supervisor may reasonably require to assess the validity of the claim.

- 55.2. When the supervisor has received the full and detailed particulars of the contractor's claim that he requires, he shall, without prejudice to Article 21 (4), after due consultation with the contracting authority and, where appropriate, the contractor, determine whether the contractor is entitled to additional payment and notify the parties accordingly.

- 55.3. The supervisor may reject any claim for additional payment which does not comply with the requirements of Article 55.

Article 56

Payments in foreign currency

Where under the contract the contractor is entitled to payments in foreign currency, the rates of exchange for calculating the payments shall be those prevailing, as determined by the Central Bank of the State of the contracting authority, 30 days prior to the latest date fixed for the submission of tenders for the contract. Such rates of exchange shall not be varied.

ACCEPTANCE AND MAINTENANCE

Article 57

General clauses

- 57.1. Verification of the works by the supervisor with a view to provisional or final acceptance shall take place in the presence of the contractor. The absence of the contractor shall not be a bar to verification on condition that the contractor has been summoned in due form at least 30 days prior to the date of verification.
- 57.2. Should exceptional circumstances make it impossible to ascertain the state of the works or otherwise proceed with their acceptance during the period fixed for provisional or final acceptance, a statement certifying such impossibility shall be drawn up by the supervisor after consultation, where possible, with the contractor. The verification shall take place and a statement of acceptance or rejection shall be drawn up by the supervisor within 30 days following the date on which such impossibility ceases to exist. The contractor shall not invoke these circumstances in order to avoid his obligation to present the works in a state suitable for acceptance.

Article 58

Tests on completion

- 58.1. The works shall not be accepted until the prescribed verifications and tests have been carried out at the expense of the contractor. The contractor shall notify

the supervisor of the date on which such verification and tests may commence.

58.2. Works which do not satisfy the terms and conditions of the contract, or in the absence of such terms and conditions, which are not carried out in accordance with trade practices in the State where the works are located, shall, if required, be demolished and rebuilt by the contractor or repaired to the satisfaction of the supervisor, otherwise this shall be done as of right after due notice at the expense of the contractor, by order of the supervisor. The supervisor may also require the demolition and reconstruction by the contractor, or repair to the satisfaction of the supervisor, under the same conditions of work, in which unacceptable materials have been used, or carried out in the periods of suspension provided for in Article 38.

Article 59

Partial acceptance

59.1. The contracting authority may make use of the various structures, parts of structures or sections of the works forming part of the contract as and when they are completed. Any taking over of the structures, parts of structures or sections of the works by the contracting authority shall be preceded by their partial provisional acceptance. However, works may in cases of urgency be taken over prior to acceptance provided an inventory of outstanding work is drawn up by the supervisor and agreed to by the contractor and the supervisor beforehand. Once the contracting authority has taken possession of a structure, a part thereof or section of the works, the contractor shall no longer be required to make good any damage resulting otherwise than from faulty construction or workmanship.

59.2. The supervisor may, at the request of the contractor and if the nature of the works so permits, proceed with partial provisional acceptance, provided that the structures, parts of structures or sections of the works are completed and suited to the use as described in the contract.

59.3. In the cases of partial provisional acceptance referred to in Article 59 (1) and 59 (2) the maintenance period provided for in Article 62 shall, unless the special conditions provide otherwise, run as from the date of such partial provisional acceptance.

Article 60

Provisional acceptance

60.1. The works shall be taken over by the contracting authority when they have satisfactorily passed the

tests on completion and a certificate of provisional acceptance has been issued or is deemed to have been issued.

60.2. The contractor may apply, by notice to the supervisor, for a certificate of provisional acceptance not earlier than 15 days before the works, in the contractor's opinion, are complete and ready for provisional acceptance. The supervisor shall within 30 days after the receipt of the contractor's application either:

- (a) issue the certificate of provisional acceptance to the contractor with a copy to the contracting authority stating, where appropriate, his reservations, and, *inter alia*, the date on which, in his opinion, the works were completed in accordance with the contract and ready for provisional acceptance; or
- (b) reject the application giving his reasons and specifying the action which, in his opinion, is required of the contractor for the certificate to be issued.

60.3. 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 shall be deemed to have issued the certificate on the last day of that period. The certificate of provisional acceptance shall not be deemed to be an admission that the works have been completed in every respect. If the works are divided by the contract into sections, the contractor shall be entitled to apply for separate certificates for each of the sections.

60.4. Upon provisional acceptance of the works, the contractor shall dismantle and remove temporary structures as well as materials no longer required for use in connection with the performance of the contract. He shall also remove any litter or obstruction and redress any change in the condition of the site as required by the contract.

60.5. Immediately after provisional acceptance, the contracting authority may make use of all the works as completed.

Article 61

Maintenance obligations

61.1. The contractor shall be responsible for making good any defect in, or damage to, any part of the works which may appear or occur during the maintenance period or within 30 days after its expiration and which arises either from:

- (a) the use of defective plant or materials or faulty workmanship or design of the contractor; and/or

- (b) any act or omission of the contractor during the maintenance period.
- 61.2. The contractor shall at his own cost make good the defect or damage as soon as practicable. The maintenance period for all items replaced or renewed shall recommence from the date when the replacement or renewal was made to the satisfaction of the supervisor. If the contract provides for partial acceptance, the maintenance period shall be extended only for the part of the works affected by the replacement or renewal.
- 61.3. If any such defect appears or such damage occurs, during the period referred to in Article 61 (1), the contracting authority or the supervisor shall notify the contractor. If the contractor fails to remedy a defect or damage within the time limit stipulated in the notification, the contracting authority may:
- (a) carry out the works himself, or employ someone else to carry out the works, at the contractor's risk and cost, in which case the costs incurred by the contracting authority shall be deducted from monies due to or from guarantees held against, the contractor, or from both; or
- (b) terminate the contract.
- 61.4. If the defect or damage is such that the contracting authority has been deprived substantially of the whole or a part of the benefit of the works, the contracting authority shall, without prejudice to any other remedy, be entitled to recover all sums paid in respect of the parts of the works concerned together with the cost of dismantling such parts and clearing the site.
- 61.5. In case of emergency, where the contractor cannot be reached immediately or, having been reached, is unable to take the measures required, the contracting authority or the supervisor may have the work carried out at the expense of the contractor. The contracting authority or the supervisor shall as soon as practicable inform the contractor of the action taken.
- 61.6. Where the special conditions stipulate that the maintenance work, necessitated by normal wear and tear, shall be carried out by the contractor, such work shall be paid for from a provisional sum. Deterioration resulting from the circumstances provided for in Article 21 or from abnormal use shall be excluded from this obligation unless it reveals a fault or defect justifying the request for repair or replacement under Article 61.
- 61.7. The maintenance obligations shall be stipulated in the special conditions and technical specifications. If the duration of the maintenance period is not specified, it shall be 365 days. The maintenance period shall commence on the date of provisional acceptance.
- 61.8. After provisional acceptance and without prejudice to the maintenance obligations referred to in Article 61, the contractor shall no longer be responsible for risks which may affect the works and which result from causes not attributable to him. However, the contractor shall be responsible as from the date of provisional acceptance for the soundness of the construction, as laid down in the special conditions or in the law of the State of the contracting authority.
- ### Article 62
- #### Final acceptance
- 62.1. Upon the expiration of the maintenance period, or where there is more than one such period, upon the expiration of the latest period, and when all defects or damage have been rectified, the supervisor shall issue to the contractor a final acceptance certificate and a copy thereof to the contracting authority stating the date on which the contractor completed his obligations under the contract to the supervisor's satisfaction. The final acceptance certificate shall be given by the supervisor within 30 days after the expiration of the above stated period, or as soon thereafter as any works as instructed, pursuant to Article 61, have been completed to the satisfaction of the supervisor.
- 62.2. The works shall not be considered as completed until a final acceptance certificate shall have been signed by the supervisor and delivered to the contracting authority, with a copy to the contractor.
- 62.3. Notwithstanding the issue of the final acceptance certificate, the contractor and the contracting authority shall remain liable for the fulfilment of any obligation incurred under the contract prior to the issue of the final acceptance certificate, which remains unperformed at the time such final acceptance certificate is issued. The nature and extent of any such obligation shall be determined by reference to the provisions of the contract.
- ### BREACH OF CONTRACT AND TERMINATION
- #### Article 63
- #### Breach of contract
- 63.1. Either party commits a breach of contract where he fails to discharge any of his obligations under the contract.

63.2. Where a breach of contract occurs, the party injured by the breach shall be entitled to the following remedies:

- (a) damages; and/or
- (b) termination of the contract.

63.3. Damages may be either:

- (a) general damages; or
- (b) liquidated damages.

63.4. In any case where the contracting authority is entitled to damages, he may deduct such damages from any sums due to the contractor or from the appropriate guarantee.

Article 64

Termination by the contracting authority

64.1. The contracting authority may, at any time and with immediate effect, terminate the contract, except as provided for under Article 64 (2).

64.2. Except as otherwise provided in these general conditions, the contracting authority may, after giving seven days notice to the contractor, terminate the contract and expel the contractor from the site in any of the cases where:

- (a) the contractor fails to carry out the works substantially in accordance with the provisions of the contract;
- (b) the contractor fails to comply within a reasonable time with a notice given by the supervisor requiring him to make good any neglect or failure to perform his obligations under the contract which seriously affects the proper and timely performance of the works;
- (c) the contractor refuses or neglects to carry out administrative orders given by the supervisor;
- (d) the contractor assigns the contract or sub-contracts without the authorization of the contracting authority;
- (e) the contractor becomes bankrupt or insolvent, or has a receiving order made against him, or compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or goes into liquidation;
- (f) any adverse final judgment is made in respect of an offence relating to the professional conduct of the contractor;
- (g) any other legal disability hindering performance of the contract occurs;

(h) any organizational modification occurs involving a change in the legal personality, nature or control of the contractor, unless such modification is recorded in an endorsement to the contract;

(i) the contractor fails to provide the required guarantee or insurance, or if the person providing the earlier guarantee or insurance is not able to abide by his commitments.

64.3. Termination shall be without prejudice to any other rights or powers under the contract of the contracting authority and the contractor. The contracting authority may, thereafter, complete the works himself or conclude any other contract with a third party for the account of the contractor. The contractor's liability for delay in completion shall immediately cease when the contracting authority expels him from the site without prejudice to any liability thereunder that may have already occurred.

64.4. The supervisor shall, upon the issue of the notice of termination of the contract, instruct the contractor to take immediate steps to bring the works to a close in a prompt and orderly manner and to reduce expenditure to a minimum.

64.5. The supervisor shall, as soon as is possible after termination, certify the value of the works and all sums due to the contractor as at the date of termination.

64.6. In the event of termination:

- (a) a report of work performed by the contractor shall be drawn up by the supervisor as soon as possible after inspection of the works, and inventory taken of temporary structures, materials, plant and equipment. The contractor shall be summoned to be present during the inspection and the taking of the inventory. The supervisor shall also draw up statements of emoluments still owed by the contractor to workers employed by him in relation to the contract and of sums owed by the contractor to the contracting authority;
- (b) the contracting authority shall have the option of acquiring in whole or in part temporary structures which have been approved by the supervisor, plant and materials specifically supplied or manufactured in connection with the execution of work under the contract;
- (c) the purchase price of the temporary structures, equipment, plant and materials referred to above shall not exceed the unpaid portion of the expenditure incurred by the contractor, such

expenditure being limited to that required for the performance of the contract under normal conditions;

- (d) the contracting authority may purchase, at market prices, the materials and items supplied or ordered by the contractor and not already paid for by the contracting authority on such conditions as the supervisor considers appropriate.

64.7. The contracting authority shall not be obliged to make any further payments to the contractor until the works are completed, whereupon the contracting authority shall be entitled to recover from the contractor the extra costs, if any, of completing the works, or pay any balance due to the contractor prior to the termination of the contract.

64.8. If the contracting authority terminates the contract, it shall be entitled to recover from the contractor any loss it has suffered up to the maximum amount stated in the contract. If no maximum amount is stated, the contracting authority shall not be entitled to recover more than the part of the contract price corresponding to the value of that part of the works which cannot, by reason of the contractor's failure, be put to the intended use.

64.9. Where the termination is not due to an act or omission of the contractor, the latter shall be entitled to claim in addition to sums owing to him for work already performed, an indemnity for loss suffered.

Article 65

Termination by the contractor

65.1. The contractor may, after giving 14 days notice to the contracting authority, terminate the contract if the contracting authority:

- (a) fails to pay the contractor the amounts due under any certificate issued by the supervisor after the expiry of the time limit stated in Article 53 (2); or
- (b) consistently fails to meet his obligations after repeated reminders; or
- (c) suspends the progress of the works or any part thereof for more than 180 days, for reasons not specified in the contract, or not due to the contractor's default.

65.2. Such termination shall be without prejudice to any other rights of the contracting authority or the contractor under the contract. Upon such termination, the contractor shall, subject to the law of the State of the contracting authority, be entitled to immediately remove his equipment from the site.

65.3. In the event of such termination, the contracting authority shall pay the contractor for any loss or damage the contractor may have suffered. Such additional payment shall not exceed a limit which has to be specified in the contract.

Article 66

Force majeure

66.1. Neither party shall be considered to be in default or in breach of his obligations under the contract if the performance of such obligations is prevented by any circumstances of *force majeure* which arises after the date of notification of award or the date when the contract becomes effective, whichever is the earlier.

66.2. The term *force majeure*, as used herein shall mean acts of God, strikes, lock-outs or other industrial disturbances, acts of the public enemy, wars whether declared or not, blockades, insurrection, riots, epidemics, landslides, earthquakes, storms, lightning, floods, washouts, civil disturbances, explosions, and any other similar unforeseeable events, not within the control of either party and which by the exercise of due diligence neither party is able to overcome.

66.3. Notwithstanding the provisions of Articles 36 and 64, the contractor shall not be liable to forfeiture of his performance guarantee, liquidated damages or termination for default if, and to the extent that, his delay in performance or other failure to perform his obligations under the contract is the result of an event of *force majeure*. The contracting authority shall similarly not be liable, notwithstanding the provisions of Articles 53 and 65, to payment of interest on delayed payments, for non-performance or for termination by the contractor for default, if, and to the extent that, the contracting authority's delay or other failure to perform its obligations is the result of *force majeure*.

66.4. If either party considers that any circumstances of *force majeure* have occurred which may affect performance of his obligations, he shall promptly notify the other party and the supervisor, giving details of the nature, the probable duration and the likely effect of the circumstances. Unless otherwise directed by the supervisor in writing, the contractor shall continue to perform his obligations under the contract as far as is reasonably practicable, and shall seek all reasonable alternative means for performance of his obligations which are not prevented by the *force majeure* event. The contractor shall not put into effect such alternative means unless directed so to do by the supervisor.

66.5. If the contractor incurs additional costs in complying with the supervisor's directions or using alternative means under Article 66 (4), the amount thereof shall be certified by the supervisor.

66.6. If circumstances of *force majeure* have occurred and continue for a period of 180 days then, notwithstanding any extension of time for completion of the works that the contractor may be reason thereof have been granted, either party shall be entitled to serve upon the other 30 days' notice to terminate the contract. If, at the expiry of the period of 30 days, *force majeure* still continues, the contract shall terminate and, in consequence thereof under the law governing the contract, the parties shall be released from further performance of the contract.

Article 67

Decease

67.1. Where the contractor is a natural person, the contract shall be automatically terminated if that person dies. However, the contracting authority shall examine any proposal made by the heirs or beneficiaries if they have notified their wish to continue the contract. The decision of the contracting authority shall be notified to those concerned within 30 days of receipt of such proposal.

67.2. Where the contractor consists of natural persons and one or more of them die, a report shall be agreed between the parties on the progress of the works and the contracting authority shall decide whether to terminate or continue the contract in accordance with the undertaking given by the survivors and by the heirs or beneficiaries, as the case may be.

67.3. In the cases provided for in Article 67 (1) and 67 (2), persons offering to continue to perform the contract shall notify the contracting authority thereof within 15 days of the date of decease.

67.4. Such persons shall be jointly and severally liable, or as otherwise stated in the special conditions, for the proper performance of the contract to the same extent as the deceased contractor. Continuation of the contract shall be subject to the rules relating to establishment of the guarantee provided for in Article 15.

SETTLEMENT OF DISPUTES

Article 68

Settlement of disputes

68.1. The contracting authority and the contractor shall make every effort to amicably settle disputes relating to the contract which may arise between them, or between the supervisor and the contractor.

68.2. The special conditions shall prescribe:

- (a) the procedure for the amicable settlement of disputes;
- (b) the time limits within which the amicable settlement procedure may be invoked after notification of the dispute to the other party and the maximum time limit within which such settlement may be reached, which may not exceed 120 days from the commencement of the adopted procedure;
- (c) the time limits for responding in writing to a request for amicable settlement or to other requests permitted during the course of that procedure and the consequence of failure to comply with those time limits.

68.3. The parties may agree to the settlement of the dispute by conciliation within a specific time limit by a third party after the amicable settlement procedure adopted has failed.

68.4. The amicable settlement or conciliation procedure adopted shall in all cases involve a procedure in which complaints and responses are notified to the other party.

68.5. In the absence of an amicable settlement or settlement by conciliation within the maximum time limits specified, the dispute shall:

- (a) in the case of a national contract, be settled in accordance with the national legislation of the State of the contracting authority; and
- (b) in the case of a transnational contract, be settled, either:
 - (i) if the parties to the contract so agree, in accordance with the national legislation of the State of the contracting authority or its established international practices; or
 - (ii) by arbitration in accordance with the procedural rules adopted in accordance with the Convention.

ANNEX III

GENERAL CONDITIONS FOR SUPPLY CONTRACTS FINANCED BY THE EUROPEAN
DEVELOPMENT FUND (EDF)

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PRELIMINARY PROVISIONS

Article 1

Definitions

- 1.1. The following definitions apply to these general conditions and to the contract:

EEC: the European Economic Community,

ACP States: the African, Caribbean and Pacific States which are signatories to the Convention,

Convention: the relevant Convention between the ACP States and the EEC,

contract: the signed agreement entered into by the parties for the supplies, including all attachments thereto and all documents incorporated therein,

supplier: the party with whom the contracting authority concludes the contract,

contracting authority: the State or the legal person governed by public or private law which concludes the contract, or on behalf of which the contract is concluded, with the supplier,

the State of the contracting authority: the ACP State on whose territory the supply contract is to be executed,

supervisor: the government department, legal person governed by public law, or the natural or legal person designated by the contracting authority in accordance with the law of the State of the contracting authority, who is responsible for directing and/or monitoring the execution of the supply contract, or to whom the contracting authority may delegate rights and/or powers, under the contract,

supervisor's representative: any natural or legal person, designated by the supervisor as such under the contract, and empowered to represent the supervisor in the performance of his functions, and in exercising such rights and/or powers as have been delegated to him. Accordingly, where functions, rights and/or powers of the supervisor have been delegated to the supervisor's representative, references to the supervisor include the supervisor's representative,

supplies: all items which the supplier is required to supply to the contracting authority, including where necessary, service such as installation, testing, commissioning, provision of expertise, supervision, maintenance, repair, training and other such obligations connected with the items to be provided under the contract,

bill of quantities: the document containing an itemized breakdown of the supplies to be provided in a

unit price contract, indicating a quantity for each item and the corresponding unit price,

price schedule: the completed schedule of prices including the breakdown of the overall price submitted by the supplier with his tender modified as necessary, and forming part of the unit price contract,

breakdown of the overall price: the itemized list of rates and prices showing the build-up of the price in a lump sum contract, but not forming part of the contract,

contract price: the sum stated in the contract representing the initial estimate payable for the provision of the supplies or such other sum as ascertained by the final statement of account as due to the supplier under the contract,

drawings: drawings provided by the contracting authority and/or the supervisor, and/or drawings provided by the supplier and approved by the supervisor, for the provision of the supplies,

communications: certificates, notices, orders and instructions issued under the contract,

writing: any handwritten, typewritten or printed communication, including telex, cable and facsimile transmission,

warranty period: the period stated in the contract immediately following the date of provisional acceptance, during which the supplier is required to complete the contract and to remedy defects or faults as instructed by the supervisor,

final acceptance certificate: certificate(s) issued by the supervisor to the supplier at the end of the warranty period stating that the supplier has completed his obligations under the contract,

day: calendar day,

time limits: those periods in the contract which shall begin to run from the day following the act or event which serves as the starting point for those periods. Should the last day of the period fall upon a non-working day, the period shall expire at the end of the first working day following the last day of the period,

administrative order: any instruction or order issued by the supervisor to the supplier in writing regarding the provision of the supplies,

national currency: the currency of the State of the contracting authority,

foreign currency: any permissible currency which is not the national currency and which is indicated in the contract,

provisional sum: a sum included in the contract and so designated for the supply of goods, materials, plant or services, or for contingencies, which sum may be used in whole or in part, or not at all, as instructed by the supervisor,

liquidated damages: the sum stated in the contract as compensation payable by the supplier to the contracting authority for failure to complete the contract or part thereof within the periods under the contract, or as payable by either party to the other for any other specific breach identified in the contract,

general damages: the sum, not stated beforehand in the contract, which is awarded by a court or an arbitration tribunal, or agreed between the parties, as compensation payable to an injured party for a breach of the contract by the other party,

special conditions: the special conditions issued by the contracting authority as part of the invitation to tender, as amended where necessary, and incorporated into the contract, consisting of:

- (a) amendments to these general conditions;
- (b) special contractual clauses;
- (c) technical specifications; and
- (d) any other matter related to the contract.

- 1.2. The headings and titles in these general conditions shall not be taken as part thereof or be taken into consideration in the interpretation of the contract.
- 1.3. Where the context so permits, words importing the singular shall be deemed to include the plural and vice versa and words importing the masculine shall be deemed to include the feminine and vice versa.
- 1.4. Words importing persons or parties shall include firms and companies and any organization having legal capacity.

Article 2

Law and language of the contract

- 2.1. The law of the contract shall be the law of the State of the contracting authority unless otherwise stated in the special conditions.
- 2.2. In all matters which are not covered by these general conditions, the law of the contract shall apply.

- 2.3. The language of the contract and of all communications between the supplier, contracting authority and supervisor or their representatives shall be as stated in the special conditions.

Article 3

Order of precedence of contract documents

Unless otherwise stipulated in the contract, the order of precedence of the contract documents shall be as stated in the special conditions.

Article 4

Notices and written communications

- 4.1. Unless otherwise specified in the special conditions, communications between the contracting authority and/or the supervisor, on the one hand, and the supplier on the other hand, shall be sent by post, cable, telex, facsimile transmission, or personal delivery, to the appropriate addresses designated by those parties for that purpose.
- 4.2. If the sender requires evidence of receipt, he shall state such requirement in the communication and shall demand such evidence of receipt whenever there is a deadline for the receipt of the communication. In any event, the sender shall take all the necessary measures to ensure receipt of his communication.
- 4.3. Wherever in the contract provision is made for the giving or issue of any notice, consent, approval, certificate or decision, unless otherwise specified such notice, consent, approval, certificate or decision shall be in writing and the words 'notify', 'certify', 'approve' or 'decide' shall be construed accordingly. Any such consent, approval, certificate or decision shall not unreasonably be withheld or delayed.

Article 5

Supervisor and supervisor's representative

- 5.1. The supervisor shall carry out the duties specified in the contract. Except as expressly stated in the contract, the supervisor shall not have authority to relieve the supplier of any of his obligations under the contract.
- 5.2. The supervisor may, from time to time, while retaining ultimate responsibility, delegate to the supervisor's representative any of the duties and authority vested in the supervisor and he may at any time revoke such delegation or replace the

representative. Any such delegation, revocation or replacement shall be in writing and shall not take effect until a copy thereof has been delivered to the supplier.

5.3. Any communication given by the supervisor's representative to the supplier in accordance with the terms of such delegation shall have the same effect as though it had been given by the supervisor, provided that:

- (a) any failure on the part of the supervisor's representative to disapprove any supplies shall not prejudice the authority of the supervisor to disapprove such supplies and to give the instructions necessary for the rectification thereof;
- (b) the supervisor shall be at liberty to reverse or vary the content of such communication.

5.4. Instructions and/or orders issued by the supervisor shall be by way of administrative orders. Where applicable, such orders shall be dated, numbered and entered in a register and copies thereof delivered by hand, where appropriate, to the supplier's representative.

Article 6

Assignment

- 6.1. An assignment shall be valid only if it is a written agreement by which the supplier transfers his contract or part thereof to a third party.
- 6.2. The supplier shall not, without the prior written consent of the contracting authority, assign the contract or any part thereof, or any benefit or interest thereunder, except in the following cases:
 - (a) a charge, in favour of the supplier's bankers, of any monies due or to become due under the contract; or
 - (b) assignment to the supplier's insurers, of the supplier's right to obtain relief against any other person liable in cases where the insurers have discharged the supplier's loss or liability.
- 6.3. For the purpose of Article 6 (2), the approval of an assignment by the contracting authority shall not relieve the supplier of his obligations for the part of the contract already performed or the part not assigned.
- 6.4. If the supplier has assigned his contract without authorization, the contracting authority may, without giving formal notice thereof, apply as of right the sanctions for breach of contract provided for in Articles 43 and 44.

- 6.5. Assignees must satisfy the eligibility criteria applicable for the award of the contract.

Article 7

Sub-contracting

- 7.1. A sub-contract shall be valid only if it is a written agreement by which the supplier entrusts performance of a part of his contract to a third party.
- 7.2. The supplier shall not sub-contract without the prior written authorization of the contracting authority. The elements of the contract to be sub-contracted and the identity of the sub-contractors shall be notified to the contracting authority. The contracting authority shall, with due regard to the provisions of Article 4 (3), within 30 days of receipt of the notification, notify the supplier of his decision, stating reasons should he withhold such authorization.
- 7.3. In the selection of sub-contractors preference shall be given by the supplier to natural persons, companies or firms of the State of the contracting authority capable of providing the supplies required on similar terms.
- 7.4. Sub-contractors must satisfy the eligibility criteria applicable for the award of the contract.
- 7.5. The contracting authority shall have no contractual relations with the sub-contractors.
- 7.6. The supplier shall be responsible for the acts, defaults and negligence of his sub-contractors and their agents or employees, as if they were the acts, defaults or negligence of the supplier, his agents or employees. The approval by the contracting authority of the sub-contracting of any part of the contract or of the sub-contractor shall not relieve the supplier of any of his obligations under the contract.
- 7.7. If a sub-contractor has undertaken any continuing obligation extending for a period exceeding that of the warranty period under the contract towards the supplier in respect of the supplies provided by the sub-contractor, the supplier shall, at any time after the expiration of the warranty period, transfer immediately to the contracting authority, at the contracting authority's request and cost, the benefit of such obligation for the unexpired duration thereof.
- 7.8. If the supplier enters into a sub-contract without approval, the contracting authority may, without giving formal notice thereof, apply as of right the sanctions for breach of contract provided for in Articles 43 and 44.

OBLIGATIONS OF THE CONTRACTING AUTHORITY*Article 8***Supply of documents**

- 8.1. Within 30 days of the establishment of the performance guarantee provided for in Article 11, the supervisor shall provide to the supplier, free of charge, a copy of the drawings prepared for the performance of the contract as well as two copies of the specifications and other contract documents. The supplier may purchase additional copies of these drawings, specifications and other documents, insofar as they are available. Upon the issue of the warranty certificate or upon final acceptance, the supplier shall return to the supervisor all drawings, specifications and other contract documents.
- 8.2. Unless it is necessary for the purposes of the contract, the drawings, specifications and other documents provided by the contracting authority shall not be used or communicated to a third party by the supplier without the prior consent of the supervisor.
- 8.3. The supervisor shall have authority to issue to the supplier, administrative orders incorporating such supplementary drawings and instructions as shall be necessary for the proper and adequate execution of the contract and the remedying of any defects therein.

*Article 9***Assistance with local regulations**

- 9.1. The supplier may request the assistance of the contracting authority in obtaining copies of laws, regulations, and information on local customs, orders or by-laws of the country to which the supplies are to be delivered, which may affect the supplier in the performance of his obligations under the contract. The contracting authority may provide the assistance requested to the supplier at the supplier's cost.
- 9.2. The supplier shall submit to the contracting authority in good time such details of the supplies as will enable the contracting authority to obtain all necessary import permits or licences.
- 9.3. The contracting authority shall obtain all import permits or licences required for the supplies, or any part thereof, in reasonable time having regard to the time for delivery of the supplies and completion of the contract.
- 9.4. Subject to the provisions of the laws and regulations on foreign labour of the State in which the supplies are

to be delivered, the contracting authority shall make all efforts necessary, to facilitate the procurement by the supplier of all required visas and permits, including work and residence permits, for the personnel whose service the supplier and the contracting authority consider necessary as well as residence permits for their families.

OBLIGATIONS OF THE SUPPLIER*Article 10***General obligations**

- 10.1. The supplier shall perform the contract with due care and diligence including, where specified, the design, manufacture, delivery to site, erecting, testing and commissioning of the supplies and carrying out any other work including the remedying of any defects in the supplies. The supplier shall also provide all necessary equipment, superintendence, labour and facilities required for the performance of the contract.
- 10.2. The supplier shall comply with administrative orders given by the supervisor. Where the supplier considers that the requirements of an administrative order go beyond the authority of the supervisor or the scope of the contract he shall, on pain of being time-barred, give notice, with reasons, to the supervisor within 30 days after receipt thereof. Execution of the administrative order shall not be suspended because of this notice.
- 10.3. The supplier shall respect and abide by all laws and regulations in force in the State of the contracting authority and shall ensure that his personnel, their dependants, and his local employees also respect and abide by all such laws and regulations. The supplier shall indemnify the contracting authority against any claims and proceedings arising from any infringement by the supplier, his employees and their dependants of such laws and regulations.
- 10.4. If the supplier or any of his sub-contractors, agents or servants offers to give or agrees to offer or to give or gives to any person, any bribe, gift, gratuity or commission as an inducement or reward for doing or forbearing to do any act in relation to the contract or any other contract with contracting authority, or for showing favour or disfavour to any person in relation to the contract or any other contract with the contracting authority, then the contracting authority

may, without prejudice to any accrued rights of the supplier under the contract, terminate the contract in which case the provisions of Articles 43 and 44 hereof shall apply.

10.5. The supplier shall treat all documents and information received in connection with the contract as private and confidential, and shall not, save insofar as may be necessary for the purposes of the execution thereof, publish or disclose any particulars of the contract without the prior consent in writing of the contracting authority or the supervisor after consultation with the contracting authority. If any disagreement arises as to the necessity for any publication or disclosure for the purpose of the contract, the decision of the contracting authority shall be final.

10.6. If the supplier is a joint venture or consortium of two or more persons, all such persons shall be jointly and severally bound to fulfil the terms of the contract according to the law of the State of the contracting authority and shall, at the request of the contracting authority, designate one of such persons to act as leader with authority to bind the joint venture or consortium. The composition or the constitution of the joint venture or consortium shall not be altered without the prior consent of the contracting authority.

Article 11

Performance guarantee

11.1. The supplier shall, within 30 days after the receipt of the notification of the award of contract, furnish to the contracting authority a guarantee for the full and proper performance of the contract. The amount of the guarantee shall be as specified in the special conditions and shall not exceed 10 % of the contract price including any amounts stipulated in riders to the contract, save where the special conditions provide otherwise; however, it may in no case exceed 20 % of such price.

11.2. The performance guarantee shall be held against payment to the contracting authority for any loss resulting from the supplier's failure to fully and properly perform his obligations under the contract.

11.3. The performance guarantee shall be in the format given in the special conditions and may be provided in the form of a bank guarantee, a banker's draft, a certified cheque, a bond provided by an insurance and/or bonding company, an irrevocable letter of credit or a cash deposit made with the contracting authority. If the performance guarantee is to be provided in the form of a bank guarantee, a banker's draft, a certified cheque or a bond, it shall be issued by

a bank or bonding and/or insurance company approved by the contracting authority in accordance with the eligibility criteria applicable for the award of the contract.

11.4. Unless stated otherwise in the special conditions, the performance guarantee shall be denominated in the types and proportions of currencies in which the contract is payable.

11.5. No payments shall be made in favour of the supplier prior to the provision of the guarantee. The guarantee shall continue to remain valid until the contract has been fully and properly performed.

11.6. During the performance of the contract, if the natural or legal person providing the guarantee is not able to abide by his commitments, the guarantee shall cease to be valid. The contracting authority shall give formal notice to the supplier to provide a new guarantee on the same terms as the previous one. Should the supplier fail to provide a new guarantee, the contracting authority may terminate the contract.

11.7. The contracting authority shall demand payment from the guarantee of all sums for which the guarantor is liable under the guarantee due to the supplier's default under the contract, in accordance with the terms of the guarantee and up to the value thereof. The guarantor shall, without delay, pay those sums upon demand from the contracting authority and may not raise any objection for any reason whatsoever. Prior to making any claim under the performance guarantee, the contracting authority shall notify the supplier stating the nature of the default in respect of which the claim is to be made.

11.8. Except for such part as may be specified in the special conditions in respect of after-sales service, the performance guarantee shall be released within 30 days of the issue of the signed final statement of account referred to in Article 33.

Article 12

Insurance

12.1. Without prejudice to Article 37 the special conditions may require that the carriage of supplies shall be covered by an insurance policy the terms of which may be laid down therein. The special conditions may also make provisions for other types of insurance to be borne by the supplier.

12.2. Notwithstanding the obligations of the supplier to insure in accordance with Article 12 (1) the supplier shall be solely liable and shall indemnify the contracting authority and the supervisor against any

claims by third parties for damage to property or personal injuries arising from the execution of the contract by the supplier, his sub-contractors and employees in connection with the contract.

Article 13

Performance programme

- 13.1. If the special conditions so require, the supplier shall submit for the approval of the supervisor a programme of performance of the contract. The programme shall contain at least the following:
- (a) the order in which the supplier proposes to execute the contract including design, manufacture, delivery to place of acceptance, installation, testing and commissioning;
 - (b) the time limits within which submission and approval of the drawings are required;
 - (c) a general description of the methods which the supplier proposes to adopt for executing the contract; and
 - (d) such further details and information as the supervisor may reasonably require.
- 13.2. The approval of the programme by the supervisor shall not relieve the supplier from any of his obligations under the contract.
- 13.3. No material alteration to the programme shall be made without the approval of the supervisor. If, however, the progress of the performance of the contract does not conform to the programme, the supervisor may instruct the supplier to revise the programme and submit the revised programme to him for approval.

Article 14

Detailed breakdown of prices

- 14.1. Where appropriate and within a period of not more than 20 days following the supervisor's reasoned request, the supplier shall provide a detailed breakdown of his rates and prices, where such breakdown is required for any purpose under the contract.
- 14.2. After the notification of award of contract, the supplier shall, where appropriate and within the time limits stated in the special conditions, provide to the supervisor for his information only, a detailed cash flow estimate, in quarterly periods, of all payments which may be due to the supplier under the contract. The supplier shall subsequently supply revised cash flow estimates at quarterly intervals, if so required by

the supervisor. The communication shall not impose any liability whatsoever on the contracting authority or the supervisor.

Article 15

Supplier's drawings

- 15.1. If the special conditions so provide, the supplier shall submit to the supervisor for approval:
- (a) such drawings, documents, samples, and/or models as may be specified in the contract within the time limits laid down therein or in the programme of performance;
 - (b) such drawings as the supervisor may reasonably require for the performance of the contract.
- 15.2. If the supervisor fails to notify his decision of approval referred to in Article 15 (1) within the time limits required by the contract or the approved programme of performance, such drawings, documents, samples or models shall be deemed to be approved at the end of the time limit specified. If no time limit is specified they shall be deemed to be approved 30 days after receipt.
- 15.3. Approved drawings, documents, samples and models shall be signed or otherwise identified by the supervisor and shall not be departed from except as otherwise instructed by the supervisor. Any supplier's drawings, documents, samples or models which the supervisor fails to approve, shall be forthwith modified to meet the requirements of the supervisor and resubmitted by the supplier for approval.
- 15.4. The supplier shall supply additional copies of approved drawings in the form and numbers stated in the contract or in subsequent administrative orders.
- 15.5. The approval of the drawings, documents, samples or models shall not relieve the supplier from any of his obligations under the contract.
- 15.6. The supervisor shall have the right at all reasonable times to inspect all contract drawings, documents, samples or models at the supplier's premises.
- 15.7. Before provisional acceptance of the supplies, the supplier shall supply operation and maintenance manuals together with drawings, which shall be in such detail as will enable the contracting authority to operate, maintain, adjust and repair all parts of the supplies. Unless otherwise stated in the special conditions, the manuals and drawings shall be in the language of the contract and in such forms and numbers as stated in the contract. The supplies shall

not be considered to be completed for the purpose of provisional acceptance until such manuals and drawings have been supplied to the contracting authority.

Article 16

Sufficiency of tender prices

16.1. Subject to any additional provisions which may be laid down in the special conditions, the supplier shall be deemed to have satisfied himself before submitting his tender as to the correctness and sufficiency of the tender and to have taken account of all that is required for the full and proper performance of the contract and to have included in his rates and prices all costs related to the supplies, in particular:

- (a) the costs of transport;
- (b) the costs of handling, packing, loading, unloading, transit, delivery, unpacking, checking, insurance, and other administrative costs in connection with the supplies. The packaging shall be the property of the contracting authority unless the special conditions provide otherwise;
- (c) the cost of documents relating to the supplies where such documents are required by the contracting authority;
- (d) performance and supervision of on-site assembly and/or start up of the delivered supplies;
- (e) furnishing of tools required for assembly and/or maintenance of the delivered supplies;
- (f) furnishing of detailed operation and maintenance manual for each unit of the delivered supplies, as specified in the contract;
- (g) supervision or maintenance and/or repair of the supplies, for a period of time stated in the contract, provided that this service shall not relieve the supplier of any warranty obligations under the contract; and
- (h) training of the contracting authority's personnel, at the supplier's factory and/or elsewhere as specified in the contract.

16.2. Since the supplier is deemed to have determined his prices on the basis of his own calculations, operations and estimates, he shall carry out without additional

charge any work which is the subject of any item whatsoever in his tender for which he neither indicates a unit price nor a firm sum.

Article 17

Patents and licences

Save where otherwise provided in the special conditions, the supplier shall indemnify the contracting authority and the supervisor against any claim resulting from the use, as specified in the contract, of patents, licences, drawings, designs, models, or brand or trade marks, except where such infringement results from compliance with the design or specifications provided by the contracting authority and/or the supervisor.

COMMENCEMENT AND DELAYS

Article 18

Commencement orders

- 18.1. The contracting authority shall fix the date on which performance of the contract is to commence, and advise the supplier either in the notification of award of contract or by administrative order issued by the supervisor.
- 18.2. The date for commencing performance shall be no later than 180 days following notification of award of contract unless agreed otherwise by the parties.

Article 19

Period of performance

- 19.1. The period of performance shall commence on the date fixed in accordance with Article 18 (1) and shall be as stated in the contract, without prejudice to extensions of the period which may be granted under Article 20.
- 19.2. If provision is made for separate periods of performance for supply in separate lots, such periods shall not be aggregated in cases where one supplier is allocated more than one lot.

Article 20

Extension of period of performance

- 20.1. The supplier may request an extension to the period of performance if he is or will be delayed in completing the contract by any of the following causes:

- (a) extra or additional supplies ordered by the contracting authority;
- (b) exceptional weather conditions in the State of the contracting authority which may affect installation or erection of the supplies;
- (c) physical obstructions or conditions which may affect delivery of the supplies, which could not reasonably have been foreseen by a competent supplier;
- (d) administrative orders affecting the date of completion other than those arising from the supplier's default;
- (e) failure of the contracting authority to fulfil his obligations under the contract;
- (f) any suspension of the delivery and/or installation of the supplies which is not due to the supplier's default;
- (g) *force majeure*;
- (h) any other causes referred to in these general conditions which are not due to the supplier's default.

20.2. The supplier shall, within 15 days of becoming aware that delay may occur, notify the supervisor of his intention to make a request for extension of the period of performance to which he considers himself entitled, and shall within 60 days thereafter, except where otherwise agreed between the supplier and the supervisor, deliver to the supervisor full and detailed particulars of the request, in order that such request may be investigated at the time.

20.3. The supervisor shall, by written notice to the supplier after due consultation with the contracting authority and where appropriate, the supplier, grant such extension of the period of performance as may be justified, either prospectively or retrospectively or, inform the supplier that he is not entitled to an extension.

Article 21

Delays in performance

21.1. If the supplier fails to deliver any or all of the goods or perform the services within the time period(s) specified in the contract, the contracting authority shall, without formal notice and without prejudice to his other remedies under the contract, be entitled to liquidated damages for every day or part thereof which shall elapse between the end of the period specified for performance, or extended performance under Article 20, and the actual date of completion, at the rate and up to the maximum amount specified in the special conditions.

21.2. If the contracting authority has become entitled to the maximum claim under Article 21.1 he may, after giving notice to the supplier:

- (a) seize the performance guarantee; and/or
- (b) terminate the contract; and
- (c) enter into a contract with a third party at the supplier's cost for the provision of the balance of the supplies.

Article 22

Variations

22.1. The supervisor shall have power to order any variation to any part of the supplies necessary for the proper completion and/or functioning of the supplies. Such variations may include additions, omissions, substitutions, changes in quality, quantity, form, character, kind, as well as drawings, designs or specifications where the supplies are to be specifically manufactured for the contracting authority, method of shipment or packing, place of delivery, and in the specified sequence, method or timing of execution of the supplies. No order for a variation shall have the effect of invalidating the contract, but the financial effect, if any, of all such variations shall be valued in accordance with Article 22 (5) and 22 (7).

22.2. No variation shall be made except by administrative order, provided that:

- (a) if for any reason, the supervisor shall find it necessary to give an order orally, he shall as soon as possible thereafter confirm the order by an administrative order;
- (b) if the supplier shall confirm in writing an oral order given for the purpose of Article 22 (2) (a) and the confirmation shall not be contradicted in writing forthwith by the supervisor, an administrative order shall be deemed to have been issued for the variation;
- (c) an administrative order for variation shall not be required for increase or decrease in the quantity of any work where such increase or decrease is the result of the quantity exceeding or being less than that stated in the bill of quantities or price schedule.

22.3. Save as provided by Article 22 (2), prior to any administrative order for variation, the supervisor shall notify the supplier of the nature and form of such variation. As soon as possible, after receiving such notice, the supplier shall submit to the supervisor a proposal containing:

- (a) a description of the tasks, if any, to be performed or the measures to be taken and a programme for execution; and
- (b) any necessary modifications to the programme of performance or to any of the supplier's obligations under the contract; and
- (c) any adjustment to the contract price in accordance with the rules as set out in Article 22.

22.4. Following the receipt of the supplier's submission referred to in Article 22 (3), the supervisor shall, after due consultation with the contracting authority and, where appropriate, the supplier, decide as soon as possible whether or not the variation shall be carried out. If the supervisor decides that the variation shall be carried out he shall issue the administrative order stating that the variation shall be carried out at the prices and under the conditions given in the supplier's submission referred to in Article 22 (3) or as modified by the supervisor in accordance with Article 22 (5).

22.5. The prices for all variations ordered by the supervisor in accordance with Articles 22 (2) and 22 (4) shall be ascertained by the supervisor in accordance with the following principles:

- (a) where the task is of similar character and executed under similar conditions to an item priced in the bill of quantities or price schedule it shall be valued at such rates and prices contained therein;
- (b) where the task is not of a similar character or is not executed under similar conditions, the rates and prices in the contract shall be used as the basis for valuation so far as is reasonable, failing which, a fair valuation shall be made by the supervisor;
- (c) if the nature or amount of any variation relative to the nature or amount of the whole of the contract or to any part thereof shall be such that in the opinion of the supervisor any rate or price contained in the contract for any item of work is by reason of such variation rendered unreasonable, then the supervisor shall fix such rate or price as in the circumstances he shall think reasonable and proper;
- (d) where a variation is necessitated by default or breach of contract by the supplier, any additional cost attributable to such variation shall be borne by the supplier.

22.6. On receipt of the administrative order requesting the variation, the supplier shall proceed to carry out the variation and be bound by these general conditions in so doing as if such variation were stated in the

contract. The supplies shall not be delayed pending the granting of any extension of time for completion or adjustment to the contract price. Where the order for a variation precedes the adjustment to the contract price, the supplier shall keep records of the costs of undertaking the variation and of time expended thereon. Such records shall be open to inspection by the supervisor at all reasonable times.

22.7. Where on provisional acceptance, an increase or reduction in the total value of supplies required under the contract resulting from an administrative order, or from some other circumstance which is not caused by the supplier's default, exceeds 15 % of the contract price, the supervisor shall, after consultation with the contracting authority and the supplier determine any additions to or reduction from the contract price as a consequence of the application of Article 22 (5). The sum so determined shall be based on the amount by which the increase or decrease in value of the supplies exceeds 15 %. The sum shall be notified by the supervisor to the contracting authority and the supplier and the contract price adjusted accordingly.

Article 23

Suspension

23.1. The supervisor may, by administrative order, at any time, instruct the supplier to suspend:

- (a) progress of the manufacture of the supplies; or
- (b) delivery of supplies to the place of acceptance at the time specified for delivery in the performance programme or, if no time is specified, at the time appropriate for it to be delivered; or
- (c) the installation of the supplies which have been delivered to the place of acceptance.

23.2. The supplier shall, during suspension, protect and secure the supplies affected at the supplier's warehouse or elsewhere, against any deterioration, loss or damage to the extent possible and as instructed by the supervisor, even if the supplies have been delivered to the place of acceptance in accordance with the contract but whose installation has been suspended by the supervisor.

23.3. Additional expenses incurred in connection with such protective measure shall be added to the contract price. The supplier shall not be entitled to be paid any additional expenses if the suspension is:

- (a) otherwise provided for in the contract; or
- (b) necessary by reason of normal climatic conditions at the place of acceptance; or

- (c) necessary by reason of some default of the supplier; or
- (d) necessary for the safety or the proper execution of the contract or any part thereof insofar as such necessity does not arise from any act or default by the supervisor or the contracting authority.

23.4. The supplier shall not be entitled to such additions to the contract price unless he notifies the supervisor, within 30 days after receipt of the order to suspend progress or delivery, of his intention to make a claim for them.

23.5. The supervisor, after consultation with the contracting authority and the supplier, shall determine such extra payment and/or extension of the period of performance to be made to the supplier in respect of such claim as shall, in the opinion of the supervisor, be fair and reasonable.

23.6. If the period of suspension exceeds 180 days, and the suspension is not due to the supplier's default, the supplier may, by notice to the supervisor, request permission to proceed with the supplies within 30 days, or terminate the contract.

MATERIALS AND WORKMANSHIP

Article 24

Quality of supplies

24.1. The supplies must in all respects satisfy the technical specifications laid down in the special conditions and conform in all respects with the drawings, surveys, models, samples, patterns, and other requirements in the contract which shall be held at the disposal of the contracting authority or the supervisor for the purposes of identification throughout the period of performance.

24.2. Any preliminary technical acceptance stipulated in the special conditions shall be the subject of a request sent by the supplier to the supervisor. The request shall indicate the specification of the materials, items and samples submitted for such acceptance according to the contract, the lot number and the place where acceptance is to take place, as appropriate. The materials, items and samples specified in the request must be certified by the supervisor as meeting the requirements for such acceptance prior to their incorporation in the supplies.

24.3. Even if materials or items to be incorporated in the supplies or in the manufacture of components to be supplied have been technically accepted in this way,

they may still be rejected and must be replaced immediately by the supplier if a further examination reveals defects or faults. The supplier may be given the opportunity to repair and make good materials and items which have been rejected, but such materials and items will be accepted for incorporation in the supplies only if they have been repaired and made good to the satisfaction of the supervisor.

Article 25

Inspection and testing

25.1. The supplier shall ensure that the supplies are delivered to the place of acceptance in time to allow the supervisor to proceed with acceptance of the supplies. The supplier is deemed to have fully appreciated the difficulties which he might encounter in this respect, and he shall not be permitted to advance any grounds for delay in fulfilling his obligations.

25.2. The supervisor shall be entitled either by himself or his agent, from time to time, to inspect, examine, measure and test the components, materials and workmanship, and check the progress of preparation, fabrication or manufacture of anything being prepared, fabricated or manufactured for delivery under the contract in order to establish whether the components, materials and workmanship are of the requisite quality and quantity. This shall take place at the place of manufacture, fabrication or preparation or at the place of acceptance or at such other places as may be specified in the contract.

25.3. For the purposes of such tests and inspections, the supplier shall:

- (a) provide to the supervisor, temporarily and free of charge, such assistance, test samples or parts, machines, equipment, tools, labour, materials, drawings and production data as are normally required for inspection and testing;
- (b) agree, with the supervisor, on the time and place for tests;
- (c) provide access for the supervisor at all reasonable times to the place where the tests are to be carried out.

25.4. If the supervisor is not present on the date agreed for tests, the supplier may, unless otherwise instructed by the supervisor, proceed with the tests, which shall be deemed to have been made in the supervisor's

presence. The supplier shall forthwith forward duly certified copies of the test results to the supervisor, who shall, if he has not attended the test, be bound by the test results.

- 25.5. When components and materials have passed the tests referred to in Article 25, the supervisor shall notify the supplier or endorse the supplier's certificate to that effect.
- 25.6. If the supervisor and the supplier disagree on the test results, each shall give a statement of his views to the other within 15 days after such disagreement arises. The supervisor or the supplier may require such tests to be repeated on the same terms and conditions or, if either party so requests, by an expert to be selected by common consent. All test reports shall be submitted to the supervisor who shall communicate the results of these tests without delay to the supplier. The results of the retesting shall be conclusive. The cost of retesting shall be borne by the party whose views are proved wrong by the retesting.
- 25.7. In the performance of his duties, the supervisor and all persons authorized by him shall disclose only to those persons who are entitled to know of it information which he has obtained by reason of his inspection and testing of the methods of manufacture and operation of the undertaking.

Article 26

Property in the supplies

- 26.1. The special conditions may provide that the supplier, for the purpose of securing payment under Article 32 in respect of any part of the supplies before delivery to the place of acceptance, shall:
- (a) vest that part of the supplies in the contracting authority; or
 - (b) make that part of the supplies subject to a lien in favour of the contracting authority; or
 - (c) make that part of the supplies subject to any other arrangement regarding priority interest or security.
- 26.2. Upon termination of the contract before completion, the supplier shall deliver to the contracting authority any part of the supplies the property in which has vested in the contracting authority or been made subject to a lien by virtue of Article 26 (1). If he fails to do so the contracting authority may take such appropriate action as it deems fit in order to obtain possession of such supplies, and recover the cost of so doing from the supplier.

PAYMENTS

Article 27

General provisions

- 27.1. Payments shall be made in the national currency except as otherwise stipulated in the contract.
- 27.2. The administrative or technical conditions to which the payment of advances, interim and/or final payments made in accordance with Articles 28 to 36 are subject, shall be as stated in the special conditions.

Article 28

Provisional price contracts

- 28.1. In exceptional cases, where all the prices cannot be predetermined, a provisional price contract may be awarded after consultation and agreement between the contracting authority and the supplier. The amount of the contract shall be determined initially on the basis of provisional prices and, after the conditions for performance of the contract are known, by the procedure specified in the special conditions.
- 28.2. The supplier shall supply such information as the contracting authority or the supervisor may reasonably require in respect of any matter relating to the contract for the purpose of the calculation. Where agreement cannot be reached on the valuation of the supplies, the amounts payable shall be determined by the supervisor.

Article 29

Advances

- 29.1. Unless otherwise provided in the special conditions, advances shall be granted to the supplier, at his request, for operations connected with the provision of the supplies as a lump-sum advance.
- 29.2. Subject to the provisions of the special conditions, the total amount of the advances shall not exceed 60 % of the contract price.
- 29.3. No advance shall be granted until:
- (a) the conclusion of the contract;
 - (b) provision to the contracting authority by the supplier of the performance guarantee in accordance with Article 11; and
 - (c) provision to the contracting authority by the supplier of a separate directly liable guarantee for the full amount of the advance by the institutions

referred to in Article 11.3, which shall remain effective for at least 60 days after provisional acceptance of the supplies.

Article 31

Revision of prices

- 29.4. The supplier shall use the advance exclusively for operations connected with the provision of the supplies. Should the supplier misuse any portion of the advance, it shall become due and repayable immediately and no further advance payment shall be made to him.
- 29.5. Should the advance guarantee cease to be valid and the supplier fail to re-validate it, either a deduction equal to the amount of the advance may be made by the contracting authority from future payments due to the supplier under the contract, or the contracting authority may apply the provisions of Article 11 (6).
- 29.6. If the contract is terminated for any reason whatsoever, the guarantees securing the advances may be invoked forthwith in order to repay the balance of the advances still owed by the supplier, and the guarantor shall not delay payment or raise objection for any reason whatever.
- 29.7. The advance guarantee provided for in Article 29 shall not be released before provisional acceptance of the supplies but shall be released within 60 days thereafter.
- 29.8. Further conditions and procedures for granting and repaying advances shall be as laid down in the special conditions.
- 31.1. Unless otherwise stipulated in the special conditions, and except as provided in Article 31 (4), contracts shall be at fixed prices which shall not be revised.
- 31.2. Where prices may be revised under the contract, such revision shall take into account variations in the prices of significant local or external elements which served as a basis for the calculation of the tender price, such as manpower, services, materials and supplies, as well as charges laid down by law or regulation. The detailed rules for the revision shall be as laid down in the special conditions.
- 31.3. Prices contained in the supplier's tender shall be deemed:
- (a) to have been arrived at on the basis of the conditions in force 30 days prior to the latest date fixed for submission of tenders or, in the case of direct agreement contracts, on the date of the contract;
 - (b) to have taken account of the legislation and the relevant tax arrangements applicable at the reference date fixed in Article 31 (3) (a).
- 31.4. In the event of changes to, or introduction of, any national or State statute, ordinance, decree or other law, or any regulation or by-law of any local or other public authority, after the date stated in Article 31 (3) which causes a change in the contractual relationship between parties to the contract, the contracting authority and the supplier shall consult on how best to proceed further under the contract, and may as a result of such consultation decide:
- (a) to modify the contract; or
 - (b) on payment of compensation for the resulting imbalance by one party to the other; or
 - (c) to terminate the contract by mutual agreement.
- 31.5. In the event of a delay in the execution of the contract for which the supplier is responsible or at the end of the period of performance revised as necessary in accordance with the contract, there shall be no further revision of prices within the 30 days before provisional acceptance except for the application of new price indexation, if this is to the benefit of the contracting authority.

Article 30

Retention sums

- 30.1. The sum which shall be retained from interim payments by way of guarantee to meet the supplier's obligations during the warranty period, and the detailed rules governing that guarantee, shall be as stipulated in the special conditions, provided that it shall in no case exceed 10 % of the contract price.
- 30.2. Subject to the approval of the contracting authority, the supplier may, if he so wishes, substitute, not later than the provisional acceptance of the supplies, these retention sums by a retention guarantee issued in accordance with Article 11 (3).
- 30.3. The sum retained or the retention guarantee shall be released within 90 days of the date of final acceptance of the supplies.

*Article 32***Interim payments**

32.1. Unless otherwise specified in the special conditions, the supplier shall submit an application for interim payment to the supervisor at the end of each period referred to in Article 32 (7) in a form approved by the supervisor. The application shall include the following items, as applicable:

- (a) the estimated contract value of the supplies delivered up to the end of the period in question;
- (b) an amount reflecting any revision of prices pursuant to Article 31;
- (c) an amount to be withheld as retention sum under Article 30;
- (d) any credit and/or debit for the period in question in respect of supplies delivered under the contract, but not yet installed or commissioned in the amount and under the conditions set out in Article 32 (2);
- (e) any other sum to which the supplier may be entitled under the contract.

32.2. The supplier shall be entitled to such sums as the supervisor may consider proper in respect of supplies delivered under the contract, but not yet installed or commissioned, provided that:

- (a) the supplies conform to the specification of the contract and are set out in batches in a way that they may be recognized by the supervisor;
- (b) such supplies have been delivered to the place of acceptance, and are properly stored and protected against loss, damage or deterioration to the satisfaction of the supervisor;
- (c) the supplier's record of requirements, orders, receipts and use of goods and materials under the contract are kept in a form approved by the supervisor and such records are available for inspection by the supervisor;
- (d) the supplier submits with his statement, the estimated value of the supplies at the place of acceptance, together with such documents as may be required by the supervisor for the purpose of valuation of the supplies at the place of acceptance, together with such documents as may be required by the supervisor for the purpose of valuation of the supplies and providing evidence of ownership and payment therefor; and
- (e) where the special conditions so provide, ownership of the supplies shall be deemed to be vested in the contracting authority.

32.3. Approval by the supervisor of any interim payment certified by him in respect of goods and materials pursuant to Article 32 shall be without prejudice to the exercise of any power of the supervisor under the contract to reject any goods and materials which are not in accordance with the provisions of the contract. Where the special conditions so provide, upon any such rejection the property in the rejected goods and materials shall immediately revert to the supplier.

32.4. The supplier shall be responsible for any loss or damage to and for the cost of storing, handling of and removing from the place of acceptance, such goods and materials which have been rejected and shall effect such additional insurance as may be necessary to cover the risk of such loss or damage from any cause.

32.5. Within 30 days of receipt of the said application for interim payment, it shall be approved or amended in such manner that, in the supervisor's opinion, it reflects the amount due to the supplier in accordance with the contract. In cases where there is a difference of opinion as to the value of an item, the supervisor's view shall prevail. On determination of the amount due to the supplier, the supervisor shall issue to the contracting authority and the supplier, an interim payment certificate for the amount due to the supplier and shall inform the supplier of the supplies for which payment is being made.

32.6. The supervisor may, by an interim payment certificate, make any corrections or modifications to any previous certificate issued by him and shall have power to modify the valuation in or withhold the issuing of any interim payment certificate if the contract, or any part thereof, has not been executed to his satisfaction.

32.7. The frequency of interim payments shall be laid down in the special conditions in accordance with the characteristics of the supplies.

32.8. The special conditions may require certain interim payments to be fully secured by a guarantee approved in accordance with Article 11.

*Article 33***Final statement of account**

33.1. Not later than 60 days after the issue of the final acceptance certificate referred to in Article 41, the supplier shall submit to the supervisor a draft final statement of account with supporting documents showing in detail the value of the supplies provided in accordance with the contract, together with all further sums which the supplier considers to be due to him

under the contract in order to enable the supervisor to prepare the final statement of account. The special conditions may, however, in accordance with Article 33 (6) state that the draft final statement of account and further proceedings related thereto, be dealt with before the issue of the provisional acceptance certificate.

33.2. Within 60 days after receipt of this draft final statement of account and of all information reasonably required for its verification, the supervisor shall prepare the final statement of account, which determines:

- (a) the amount which in his opinion is finally due under the contract; and
- (b) after establishing the amounts previously paid by the contracting authority and all sums to which the contracting authority is entitled under the contract, the balance, if any, due from the contracting authority to the supplier, or from the supplier to the contracting authority, as the case may be.

33.3. The supervisor shall issue to the contracting authority or its duly authorized representative, and to the supplier, the final statement of account showing the final amount to which the supplier is entitled under the contract. The contracting authority or its duly authorized representative and the supplier shall sign the final statement of account as an acknowledgement of the full and final value of the supplies provided under the contract and shall promptly submit the signed copy to the supervisor. However, the final statement of account shall not include amounts in dispute which are the subject of negotiations, conciliation, arbitration or litigation.

33.4. The final statement of account signed by the supplier shall constitute a written discharge of the contracting authority confirming that the total of the final statement of account represents full and final settlement of all monies due to the supplier under the contract, other than those amounts which are the subject of amicable settlement, arbitration or litigation. However, such discharge shall become effective only after any payment due in accordance with the final statement of account has been made and the performance guarantee referred to in Article 11, has been returned to the supplier.

33.5. The contracting authority shall not be liable to the supplier for any matter or thing whatsoever arising out of, or in connection with, the contract or provision of the supplies, unless the supplier shall have included a claim in respect thereof in his draft final statement of account.

33.6. The provisions of Article 33 may be varied by the special conditions having regard to the practices in the State of the contracting authority.

Article 34

Payment to third parties

- 34.1. All orders for payment to third parties may be carried out only after an assignment made in accordance with Article 6. The assignment shall be notified to the contracting authority.
- 34.2. Notification of beneficiaries of the assignment shall be the sole responsibility of the supplier.
- 34.3. In the event of a legally binding attachment of the property of the supplier affecting payments due to him under the contract, and without prejudice to the time limit laid down in Article 35, the contracting authority shall have 30 days, starting from the day when it receives notification of the definitive lifting of the obstacle to payment, to resume payments to the supplier.

Article 35

Delayed payments

- 35.1. Payment to the supplier of the amounts due under each of the interim payment certificates and the final statement of account issued by the supervisor shall be made by the contracting authority within 90 days of such certificate or statement being delivered to the contracting authority. If the period laid down for payment has been exceeded, the supplier shall qualify for interest calculated pro rata on the basis of the number of days delay at the rate specified in the special conditions subject to a maximum period, also specified therein. The supplier shall be entitled to such payment without prejudice to any other right or remedy under the contract. In the case of the final statement of account, the interest for the delayed payment shall be calculated on a daily basis at the rate specified in the special conditions.
- 35.2. Any default in payment of more than 120 days from the expiry of the period laid down in Article 35 (1) shall entitle the supplier either not to perform the contract or to terminate it.

Article 36

Payments in foreign currency

Where under the contract the supplier is entitled to payments in foreign currency, the rates of exchange for calculating the payments shall be those prevailing, as determined by the Central Bank of the State of the contracting authority, 30 days prior to the latest date fixed for the submission of tenders for the contract. Such rates of exchange shall not be varied.

ACCEPTANCE AND MAINTENANCE

*Article 37***Delivery**

- 37.1. The supplier shall deliver the supplies in accordance with the terms specified in the contract and the supplies shall remain at the risk of the supplier until provisional acceptance.
- 37.2. The supplier shall provide such packaging of the supplies as is required to prevent their damage or deterioration in transit to their final destination as indicated in the contract. The packaging shall be sufficient to withstand, without limitation, rough handling, exposure to extreme temperatures, salt and precipitation during transit and open storage. Package size and weights shall take into consideration, where appropriate, the remoteness of the final destination of the supplies, and the possible absence of heavy handling facilities at all points in transit.
- 37.3. The packaging, marking and documentation within and outside the packages shall comply with such special requirements as shall be expressly provided for in the contract, subject to any variations subsequently ordered by the supervisor.
- 37.4. No supplies shall be shipped or delivered to the place of acceptance until a confirmation in writing has been obtained by the supplier from the supervisor that the supplies may be delivered. The supplier shall be responsible for the delivery at the place of acceptance of all supplies and supplier's equipment required for the purpose of the contract.
- 37.5. Each delivery must be accompanied by a statement drawn up by the supplier. This statement, the form of which shall be as prescribed by the special conditions, shall contain, in particular:
- the date of delivery,
 - the reference number of the contract,
 - the identification of the supplier,
 - particulars of the goods supplied and, where appropriate, details of how they were divided for packing.
- 37.6. Each package must be clearly marked with its order number as shown on the statement referred to in Article 37 (5); in the absence of indications to the contrary, this statement shall contain a list of its contents.
- 37.7. Delivery shall be deemed to have been made when there is written evidence available to both parties that delivery of the supplies has taken place in accordance

with the terms of the contract and the invoice(s) and all such other documentation as specified in the special conditions, have been submitted to the contracting authority. Where the supplies are delivered to an establishment of the contracting authority, the latter shall bear the responsibility of bailee, in accordance with the requirements of the law of the contract, during the time which elapses between delivery for storage and acceptance.

- 37.8. All materials and goods supplied under the contract shall be fully insured, with the contracting authority as beneficiary, against loss or damage incidental to manufacture or acquisition, transportation, storage and delivery in the manner specified in the special conditions.

*Article 38***Verification operations**

- 38.1. The supplies shall not be accepted until the prescribed verifications and tests have been carried out at the expense of the supplier. The inspections and tests may be conducted at the point of delivery and/or at the final destination of the goods.
- 38.2. The supervisor shall, during the progress of the delivery of the supplies and before the supplies are taken over, have the power to order or decide:
- (a) the removal from the place of acceptance, within such time or times as may be specified in the order, of any supplies which, in the opinion of the supervisor, are not in accordance with the contract;
 - (b) the substitution by proper and suitable supplies;
 - (c) the removal and proper re-installation, notwithstanding any previous test thereof or interim payment therefor, of any installation which in respect of materials, workmanship or design by the supplier for which he is responsible, is not, in the opinion of the supervisor, in accordance with the contract;
 - (d) that any work done or goods supplied or materials used by the supplier is or are not in accordance with the contract, or that the supplies or any portion thereof do not fulfil the requirements of the contract.
- 38.3. The supplier shall, with all speed and at his own expense, make good the defects so specified. In case of default on the part of the supplier in carrying out such order, the contracting authority shall be entitled to employ other persons to carry out the orders and all expenses consequent thereon or incidental thereto

shall be recoverable from the supplier by the contracting authority, or may be deducted by the contracting authority from any monies due or which may become due to the supplier.

- 38.4. Supplies which are not of the required quality shall be rejected. A special mark may be applied to the rejected supplies. This shall not be such as to alter them or affect their commercial value. Rejected supplies shall be removed by the supplier from the place of acceptance, if the supervisor so requires, within a period which the supervisor shall specify, failing which they shall be removed as of right at the expense and risk of the supplier. Any work incorporating rejected materials shall be rejected.
- 38.5. The provisions of Article 38 shall not affect the right of the contracting authority to claim under Article 21, nor shall it in any way release the supplier from any warranty or other obligations under the contract.

Article 39

Provisional acceptance

- 39.1. The supplies shall be taken over by the contracting authority when they have been delivered in accordance with the contract, have satisfactorily passed the required tests, or have been commissioned, as the case may be, and a certificate of provisional acceptance has been issued or is deemed to have been issued.
- 39.2. The supplier may apply, by notice to the supervisor, for a certificate of provisional acceptance not earlier than 15 days before the supplies, in the supplier's opinion, are complete and ready for provisional acceptance. The supervisor shall within 30 days after the receipt of the supplier's application either:
- (a) issue the certificate of provisional acceptance to the supplier with a copy to the contracting authority stating, where appropriate, his reservations and, *inter alia*, the date on which, in his opinion, the supplies were completed in accordance with the contract and ready for provisional acceptance; or
 - (b) reject the application giving his reasons and specifying the actions which, in his opinion, are required of the supplier for the certificate to be issued.
- 39.3. Should exceptional circumstances make it impossible to proceed with the acceptance of the supplies during the period fixed for provisional or final acceptance, a statement certifying such impossibility shall be drawn up by the supervisor after consultation, where possible, with the supplier. The certificate of

acceptance or rejection shall be drawn up within 30 days following the date on which such impossibility ceases to exist. The supplier shall not invoke these circumstances in order to avoid the obligation of presenting the supplies in a state suitable for acceptance.

- 39.4. If the supervisor fails either to issue the certificate of provisional acceptance or to reject the supplies within the period of 30 days, he shall be deemed to have issued the certificate on the last day of that period. The certificate of provisional acceptance shall not be deemed to be an admission that the supplies have been delivered in every respect. If the supplies are divided by the contract into lots, the supplier shall be entitled to apply for separate certificates for each of the lots.
- 39.5. Upon provisional acceptance of the supplies, the supplier shall dismantle and remove temporary structures as well as materials no longer required for use in connection with the performance of the contract. He shall also remove any litter or obstruction and redress any change in the condition of the place of acceptance as required by the contract.

Article 40

Warranty obligations

- 40.1. The supplier shall warrant that the supplies are new, unused, of the most recent models and incorporate all recent improvements in design and materials, unless otherwise provided in the contract. The supplier shall further warrant that all supplies shall have no defect arising from design, materials or workmanship, except insofar as the design or materials are required by the specifications, or from any act or omission of the contracting authority, that may develop under use of the supplies in the conditions obtaining in the State of the contracting authority.
- 40.2. Unless otherwise specified in the special conditions, this warranty shall remain valid for 360 days after the supplies or any portion thereof, as the case may be, have been delivered and commissioned at the final destination indicated in the contract, or for 540 days after the date of shipment from the port of loading in the country of origin, whichever period ends earlier. The obligation to maintain the supplies shall be subject to any stipulations in the special conditions and specifications which shall determine the period and conditions thereof.
- 40.3. The supplier shall be responsible for making good any defect in or damage to any part of the supplies which may appear or occur during the warranty period, or within 30 days after its expiration and which arise either:

- (a) from the use of defective materials, faulty workmanship or design of the supplier; or
- (b) from any act or omission of the supplier during the warranty period; or
- (c) in the course of an inspection made by, or on behalf of, the contracting authority.

40.4. The supplier shall at his own cost make good the defect or damage as soon as practicable. The warranty period for all items replaced or repaired shall recommence from the date when the replacement or repair was made to the satisfaction of the supervisor. If the contract provides for partial acceptance, the warranty period shall be extended only for the part of the supplies affected by the replacement or repair.

40.5. If any such defects appear or such damage occurs during the period referred to in Article 40 (3), the contracting authority or the supervisor shall notify the supplier. If the supplier fails to remedy a defect or damage within the time limit stipulated in the notification, the contracting authority may:

- (a) remedy the defect or the damage itself, or employ someone else to carry out the work at the supplier's risk and cost, in which case the costs incurred by the contracting authority shall be deducted from monies due to or from guarantees held against the supplier or from both; or
- (b) terminate the contract.

40.6. In case of emergency where the supplier cannot be reached immediately or, having been reached, is unable to take the measures required, the contracting authority or the supervisor may have the work carried out at the expense of the supplier. The contracting authority or the supervisor shall as soon as practicable inform the supplier of the action taken.

Article 41

After sales service

An after sales service, if required by the contract, shall be provided in accordance with the details stipulated in the special conditions. The supplier shall undertake to carry out or have carried out the maintenance and repair of supplies and to provide a rapid supply of spare parts. The special conditions may specify that the supplier shall be required to provide any or all of the following materials, notifications and documents pertaining to spare parts manufactured or distributed by the supplier:

- (a) such spare parts as the contracting authority may elect to purchase from the supplier, provided that this election shall not relieve the supplier of any warranty obligations under the contract; and
- (b) in the event of termination of production of the spare parts advance notification to the contracting authority to procure needed requirements; and following such termination, furnishing at no cost to the contracting authority, the blueprints, drawings and specifications of the spare parts, if and when requested.

Article 42

Final acceptance

- 42.1. Upon the expiration of the warranty period or where there is more than one such period, upon the expiration of the latest period and when all defects or damage have been rectified, the supervisor shall issue to the supplier a final acceptance certificate and a copy thereof to the contracting authority stating the date on which the supplier completed his obligations under the contract to the supervisor's satisfaction. The final acceptance certificate shall be given by the supervisor within 30 days after the expiration of the warranty period, or as soon thereafter as any rectifications instructed, pursuant to Article 40, have been completed to the satisfaction of the supervisor.
- 42.2. The contract shall not be considered to be fully executed until the final acceptance certificate has been signed by the supervisor and delivered to the contracting authority, with a copy to the contractor.
- 42.3. Notwithstanding the issue of the final acceptance certificate, the supplier and the contracting authority shall remain liable for the fulfilment of any obligation incurred under the contract prior to the issue of the final acceptance certificate, which remains unperformed at the time such final acceptance certificate is issued. The nature and extent of any such obligation shall be determined by reference to the provisions of the contract.

BREACH OF CONTRACT AND TERMINATION

Article 43

Breach of contract

- 43.1. Either party commits a breach of contract where he fails to discharge any of his obligations under the contract.
- 43.2. Where a breach of contract occurs, the party injured by the breach shall be entitled to the following remedies:
 - (a) damages; and/or
 - (b) termination of the contract.

43.3. Damages may be:

- (a) general damages; or
- (b) liquidated damages.

43.4. In any case where the contracting authority is entitled to damages, it may deduct such damages from any sums due to the supplier or from the appropriate guarantee.

Article 44

Termination by the contracting authority

44.1. The contracting authority may, at any time and with immediate effect, terminate the contract, except as provided for in Article 44 (2).

44.2. Except as otherwise provided in these general conditions, the contracting authority may, after giving seven days notice to the supplier, terminate the contract in any of the following cases where:

- (a) the supplier fails to provide the supplies in strict accordance with the provisions of the contract;
- (b) the supplier fails to comply within a reasonable time with a notice given by the supervisor requiring him to make good any neglect or failure to perform his obligations under the contract which seriously affect the proper and timely performance of the contract;
- (c) the supplier refuses or neglects to carry out administrative orders given by the supervisor;
- (d) the supplier assigns the contract or sub-contracts without the authorization of the contracting authority;
- (e) the supplier becomes bankrupt or insolvent, or has a receiving order made against him, or compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or goes into liquidation;
- (f) any adverse final judgment is made in respect of an offence relating to the professional conduct of the supplier;
- (g) any other legal disability hindering performance of the contract occurs;
- (h) any organizational modification occurs involving a change in the legal personality, nature or control of the supplier, unless such modification is recorded in an endorsement to the contract;

- (i) the supplier fails to provide the required guarantee or insurance, or if the person providing the earlier guarantee or insurance is not able to abide by his commitments.

44.3. Termination shall be without prejudice to any other rights or powers under the contract of the contracting authority and the supplier. The contracting authority may, thereafter, conclude any other contract with a third party for the account of the supplier. The supplier's liability for delay in completion shall immediately cease upon termination without prejudice to any liability thereunder that may have already occurred.

44.4. The supervisor shall, upon the issue of the notice of termination of the contract, instruct the supplier to take immediate steps to bring the execution of the supplies to a close in a prompt and orderly manner and to reduce expenditure to a minimum.

44.5. The supervisor shall, as soon as possible after termination, certify the value of the supplies and all sums due to the supplier as at the date of termination.

44.6. In the event of termination:

- (a) the supplier or his representatives being present or duly summoned, a report of supplies delivered and the work performed shall be drawn up by the supervisor as soon as possible, and inventories taken of the materials supplied and unused. A statement shall also be drawn up of sums owed by the supplier to the contracting authority;
- (b) the contracting authority may purchase, at market prices, the materials and items supplied or ordered by the supplier and not already paid for by the contracting authority on such conditions as the supervisor considers appropriate.

44.7. The contracting authority shall not be obliged to make any further payments to the supplier until the supplies are completed, whereupon the contracting authority shall be entitled to recover from the supplier the extra costs, if any, of providing the supplies, or shall pay any balance due to the supplier prior to termination of the contract.

44.8. If the contracting authority terminates the contract, it shall be entitled to recover from the supplier any loss it has suffered up to the maximum amount stated in the contract. If no maximum amount is stated, the

contracting authority shall not be entitled to recover more than the part of the contract price corresponding to the value of that part of the supplies which cannot, by reason of the supplier's failure, be put to the intended use.

- 44.9. Where the termination is not due to an act or omission of the supplier, the latter shall be entitled to claim, in addition to sums owing to him for work already performed, an indemnity for loss suffered.

Article 45

Termination by the supplier

- 45.1. The supplier may, giving 14 days notice to the contracting authority, terminate the contract if the contracting authority:
- (a) fails to pay the supplier the amounts due under any certificate issued by the supervisor after the expiry of the time limit stated in Article 35 (2);
 - (b) consistently fails to meet his obligations after repeated reminders; or
 - (c) suspends the progress of the delivery of the supplies, or any part thereof, for more than 180 days, for reasons not specified in the contract, or not due to the supplier's default;
- 45.2. Such termination shall be without prejudice to any other rights of the contracting authority or the supplier acquired under the contract.
- 45.3. In the event of such termination, the contracting authority shall pay the supplier for any loss or damage the supplier may have suffered. Such additional payment shall not exceed a limit which has to be specified in the contract.

Article 46

Force majeure

- 46.1. Neither party shall be considered to be in default or in breach of his obligations under the contract if the performance of such obligations is prevented by any circumstances of *force majeure* which arises after the date of notification of award or the date when the contract becomes effective, whichever is the earlier.
- 46.2. The term *force majeure*, as used herein shall mean acts of God, strikes, lock-outs or other industrial disturbances, acts of the public enemy, wars whether declared or not, blockades, insurrection, riots, epidemics, landslides, earthquakes, storms, lightning,

floods, washouts, civil disturbances, explosions, and any other similar unforeseeable events, not within the control of either party and which by the exercise of due diligence neither party is able to overcome.

- 46.3. Notwithstanding the provisions of Articles 21 and 44, the supplier shall not be liable to forfeiture of his performance guarantee, liquidated damages or termination for default if, and to the extent that, his delay in performance or other failure to perform his obligations under the contract is the result of an event of *force majeure*. The contracting authority shall similarly not be liable, notwithstanding the provisions of Articles 35 and 45, to payment of interest on delayed payments, for non-performance or for termination by the supplier for default, if, and to the extent that, the contracting authority's delay or other failure to perform its obligations is the result of *force majeure*.
- 46.4. If either party considers that any circumstances of *force majeure* have occurred which may affect performance of his obligations, he shall promptly notify the other party and the supervisor, giving details of the nature, the probable duration and the likely effect of the circumstances. Unless otherwise directed by the supervisor in writing, the supplier shall continue to perform his obligations under the contract as far as is reasonably practicable, and shall seek all reasonable alternative means for performance of his obligations which are not prevented by the *force majeure* event. The supplier shall not put into effect such alternative means unless directed so to do by the supervisor.
- 46.5. If the supplier incurs additional costs in complying with the supervisor's directions or using alternative means under Article 46 (4) the amount thereof shall be certified by the supervisor.
- 46.6. If circumstances of *force majeure* have occurred and continue for a period of 180 days then, notwithstanding any extension of time for completion of the contract that the supplier may by reason thereof have been granted, either party shall be entitled to serve upon the other 30 days' notice to terminate the contract. If at the expiry of the period of 30 days, *force majeure* still continues, the contract shall terminate and, in consequence thereof under the law governing the contract, the parties shall be released from further performance of the contract.

Article 47

Decease

- 47.1. Where the supplier is a natural person, the contract shall be automatically terminated if that person dies. However, the contracting authority shall examine any proposal made by the heirs or beneficiaries if they have

notified their wish to continue the contract. The decision of the contracting authority shall be notified to those concerned within 30 days of receipt of such proposal.

47.2. Where the supplier consists of natural persons and one or more of them die, a report shall be agreed between the parties on the progress of the contract and the contracting authority shall decide whether to terminate or continue the contract in accordance with the undertaking given by the survivors and by the heirs or beneficiaries, as the case may be.

47.3. In the cases provided for in Articles 47 (1) and 47 (2) persons offering to continue to perform the contract shall notify the contracting authority thereof within 15 days of the date of decease.

47.4. Such persons shall be jointly and severally liable, or as otherwise stated in the special conditions for the proper performance of the contract to the same extent as the original supplier. Continuation of the contract shall be subject to the rules relating to establishment of the guarantee provided for in Article 11.

SETTLEMENT OF DISPUTES

Article 48

Settlement of disputes

48.1. The contracting authority and the supplier shall make every effort to amicably settle any dispute relating to the contract which may arise between them, or between the supervisor and the supplier.

48.2. The special conditions shall prescribe:

- (a) the procedure for the amicable settlement of disputes;
- (b) the time limits within which the amicable settlement procedure may be invoked after the time that the dispute is notified to the other party and the maximum time limit within which such settlement may be reached, which may not exceed 120 days from the commencement of the adopted procedure;
- (c) the time limits for responding in writing to a request for amicable settlement or to other requests permitted during the course of that procedure and the consequences of failure to comply with those time limits.

48.3. The parties may agree to the settlement of the dispute by conciliation within a specific time limit by a third party after the amicable settlement procedure adopted has failed.

48.4. The amicable settlement or conciliation procedure adopted shall in all cases involve a procedure in which complaints and responses are notified to the other party.

48.5. In the absence of an amicable settlement or settlement by conciliation within the maximum time limits specified, the dispute shall:

- (a) in the case of a national contract, be settled in accordance with the national legislation of the State of the contracting authority; and
- (b) in the case of a transnational contract, be settled, either:
 - (i) if the parties to the contract so agree, in accordance with the national legislation of the State of the contracting authority or its established international practices; or
 - (ii) by arbitration in accordance with the procedural rules adopted in accordance with the Convention.

ANNEX IV

GENERAL CONDITIONS FOR SERVICE CONTRACTS FINANCED BY THE EUROPEAN
DEVELOPMENT FUND (EDF)

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PRELIMINARY PROVISIONS

Article 1

Definitions

- 1.1. The following definitions apply to these general conditions and to the contract:

EEC: the European Economic Community,

ACP States: the African, Caribbean and Pacific States which are signatories to the Convention,

Convention: the relevant Convention between the ACP States and the EEC,

contract: the signed agreement entered into by the parties for the performance of the services, including all attachments thereto and all documents incorporated therein,

consultant: the party with whom the contracting authority concludes the contract,

contracting authority: the State or the legal person governed by public or private law which concludes the contract, or on behalf of which the contract is concluded, with the consultant,

the State of the contracting authority: the ACP State on whose territory the service contract is to be executed,

supervisor: the government department, legal person governed by public law or the natural or legal person designated by the contracting authority in accordance with the law of the State of the contracting authority, who is responsible for directing and/or monitoring the execution of the service contract, or to whom the contracting authority may delegate rights and/or powers under the contract,

supervisor's representative: any natural or legal person, designated by the supervisor as such under the contract, and empowered to represent the supervisor in the performance of his functions, and in exercising such rights and/or powers as have been delegated to him. Accordingly, where functions, rights and/or powers of the supervisor have been delegated to the supervisor's representative, references to the supervisor include the supervisor's representative,

services: tasks to be performed by the consultant under the contract such as studies, designs, provisions of technical assistance and training,

terms of reference: the statement issued by the contracting authority giving the definition of his requirements and/or the objectives of the services, including, where applicable, the methods and means

to be used by the consultant and/or the results to be achieved by him,

day: calendar day,

time limits: those periods in the contract which shall begin to run from the day following the act or event which serves as the starting point for those periods. Should the last day of the period fall upon a nonworking day, the period shall expire at the end of the first working day following the last day of the period,

contract price: the sum stated in the contract representing the initial estimate payable for the provision of the services or such other sum as ascertained at the end of the contract as due to the consultant under the contract,

project: the project in relation to which the services are to be provided under the contract,

price schedule: the completed schedule of prices, including the breakdown of the overall price submitted by the consultant with his tender, modified as necessary, and forming a part of the unit price contract,

breakdown of the overall price: the itemized list of rates and prices showing the build-up of the price in a lump sum contract, but not forming part of the contract,

drawings: drawings provided by the contracting authority and/or the supervisor, and/or drawings provided by the consultant and approved by the supervisor, for the performance of the services,

writing: any handwritten, typewritten or printed communication, including telex, cable and facsimile transmission,

administrative order: any instruction or order issued by the supervisor to the consultant in writing regarding the performance of the services,

communications: certificates, notices, orders and instructions issued under the contract,

national currency: the currency of the State of the contracting authority,

foreign currency: any permissible currency which is not the national currency and which is indicated in the contract,

general damages: the sum, not stated beforehand in the contract, which is awarded by a court or arbitration tribunal, or agreed between the parties, as compensation payable to an injured party for a breach of the contract by the other party,

liquidated damages: the sum stated in the contract as compensation payable by the consultant to the

contracting authority for failure to perform the contract or part thereof within the periods under the contract, or as payable by either party to the other for any other specific breach identified in the contract,

special conditions: the special conditions issued by the contracting authority as part of the invitation to tender, as amended where necessary, and incorporated into the contract, consisting of:

- (a) amendments to these general conditions;
 - (b) special contractual clauses;
 - (c) technical specifications; and
 - (d) any other matter related to the contract.
- 1.2. The headings and titles in these general conditions shall not be taken as part thereof or be taken into consideration in the interpretation of the contract.
- 1.3. Where the context so permits words importing the singular shall be deemed to include the plural and vice versa and words importing the masculine shall be deemed to include the feminine and vice versa.
- 1.4. Words importing persons or parties shall include firms and companies and any organization having legal capacity.

Article 2

Law and language of the contract

- 2.1. The law of the contract shall be the law of the State of the contracting authority unless otherwise stated in the special conditions.
- 2.2. In all matters which are not covered by these general conditions, the law of the contract shall apply.
- 2.3. The language of the contract and of all communications between the consultant, contracting authority and supervisor or their representatives shall be as stated in the special conditions. All reports, recommendations and dossiers prepared by the consultant under the contract shall also be in the language stated in the special conditions.

Article 3

Order of precedence of contract documents

Unless otherwise stipulated in the contract, the order of precedence of the contract documents shall be as stated in the special conditions.

Article 4

Notices and written communications

- 4.1. Unless otherwise specified in the special conditions, communications between the contracting authority and/or the supervisor on the one hand, and the consultant on the other hand, shall be sent by post, cable, telex, facsimile transmission or personal delivery, to the appropriate addresses designated by those parties for that purpose.
- 4.2. If the sender requires evidence of receipt, he shall state such requirement in his communication and, whenever there is a deadline for the receipt of the communication, he shall demand evidence of receipt of his communication. In any event, the sender shall take all the necessary measures to ensure receipt of the communication.
- 4.3. Wherever in the contract provision is made for the giving or issue of any notice, consent, approval, certificate or decision by any person, unless otherwise specified, such notice, consent, approval, certificate or decision shall be in writing and the words 'notify' 'certify', 'approve' or 'decide' shall be construed accordingly. Any such consent, approval, certificate or decision shall not unreasonably be withheld or delayed.

Article 5

Supervisor and supervisor's representative

- 5.1. The supervisor shall carry out the duties specified in the contract. Except as expressly stated in the contract, the supervisor shall not have authority to relieve the consultant of any of his obligations under the contract.
- 5.2. The supervisor may, from time to time, while retaining ultimate responsibility, delegate to the supervisor's representative any of the duties and authority vested in the supervisor and he may at any time revoke such delegation or replace the representative. Any such delegation, revocation or replacement shall be in writing and shall not take effect until a copy thereof has been delivered to the consultant.
- 5.3. Any communication given by the supervisor's representative to the consultant in accordance with the terms of such delegation shall have the same effect as though it had been given by the supervisor himself, provided that:
- (a) any failure on the part of the supervisor's representative to disapprove any report or part of the services shall not prejudice the authority of the supervisor to disapprove such report or services and to give the instructions necessary for the rectification thereof;

- (b) the supervisor shall be at liberty to reverse or vary the content of such communication.

5.4. Instructions and/or orders issued by the supervisor shall be by way of administrative orders. Where applicable, such orders shall be dated, numbered and entered in a register, and copies thereof, delivered by hand, where appropriate, to the consultant's representative.

Article 6

Assignment

- 6.1. An assignment shall be valid only if it is a written agreement by which the consultant transfers his contract, or part of thereof to a third party.
- 6.2. The consultant shall not, without the prior written consent of the contracting authority, assign the contract or any part thereof, or any benefit or interest thereunder, except in the following cases:
 - (a) by a charge in favour of the consultant's bankers of any monies due or to become due under the contract; or
 - (b) by assignment to the consultant's insurers of the consultant's right to obtain relief against any other person liable in cases where the insurers have discharged the consultant's loss or liability.
- 6.3. For the purpose of Article 6.2, the approval of an assignment by the contracting authority shall not relieve the consultant of his obligations for the part of the contract already performed or the part not assigned.
- 6.4. If the consultant has assigned his contract without authorization, the contracting authority may, without giving formal notice thereof, apply as of right the sanctions for breach of contract provided for in Articles 40 and 41.
- 6.5. Assignees must satisfy the eligibility criteria applicable for the award of the contract.

Article 7

Sub-contracting

- 7.1. A sub-contract shall be valid only if it is a written agreement by which the consultant entrusts performance of a part of his contract to a third party.

7.2. The consultant shall not sub-contract to nor engage another independent consultant to perform any part of the services without the prior written authorization of the contracting authority. The services to be sub-contracted and the identity of the independent consultant shall be notified to the contracting authority. The contracting authority shall, with due regard to the provisions of Article 4.3, within 30 days of receipt of the notification, notify the consultant of his decision, stating reasons, should he withhold such authorization.

7.3. In the selection of sub-contractors and/or other independent consultants, preference shall be given to natural persons, companies or firms of the State of the contracting authority capable of providing the services required on equivalent terms.

7.4. Sub-contractors and/or independent consultant must satisfy the eligibility criteria applicable for the awards of the contract.

7.5. The contracting authority shall have no contractual relations with the sub-contractors and/or independent consultants.

7.6. The consultant shall be responsible for the acts, defaults and negligence of his sub-contractors and/or other independent consultants and their agents or employees, as if they were the acts, defaults or negligence of the consultant, his agents or employees. The approval by the contracting authority of the sub-contracting of any part of the contract or of the engagement by the consultant of other independent consultants or sub-contractors to perform any part of the services shall not relieve the consultant of any of his obligations under the contract.

7.7. If a sub-contractor or independent consultant is found by the contracting authority or the supervisor to be incompetent in discharging his duties, the contracting authority or the supervisor may request the consultant forthwith, either to provide an independent consultant or sub-contractor with qualifications and experience acceptable to the contracting authority as a replacement, or to resume the performance of the services himself.

7.8. If the consultant enters into a sub-contract or engages another independent consultant without prior approval, the contracting authority may, without giving formal notice thereof, apply as of right the sanctions for breach of contract provided for in Articles 40 and 41.

**OBLIGATIONS OF THE CONTRACTING
AUTHORITY***Article 8***Supply of information**

- 8.1. The contracting authority shall supply the consultant as soon as possible with any information and/or documentation at its disposal which may be relevant to the performance of the contract. Such documents shall be returned to the contracting authority at the completion of the services.
- 8.2. The contracting authority shall as far as possible provide the consultant with any assistance in obtaining information relevant to the contract that the latter may reasonably request in order to perform the contract.

*Article 9***Assistance with local regulations**

- 9.1. The consultant may request the assistance of the contracting authority in obtaining copies of laws, regulations, and information on local customs, orders or bye laws of the country where the services are to be performed, which may affect the consultant in the performance of his obligations under the contract. The contracting authority may provide the assistance requested to the consultant at the consultant's cost.
- 9.2. Subject to the provisions of the laws and regulations on foreign labour of the State in which the services are to be performed, the contracting authority shall make all efforts necessary to facilitate the procurement by the consultant of all required visas and permits, including work and residence permits, for the personnel whose services the consultant and the contracting authority consider necessary as well as residence permits for their families.
- 9.3. The contracting authority shall issue to its officials, agents and representatives all such instructions as may be necessary or appropriate to facilitate the prompt and effective implementation of the services.

OBLIGATIONS OF THE CONSULTANT*Article 10***General obligations**

- 10.1. The consultant shall respect and abide by all laws and regulations in force in the State of the contracting

authority and shall ensure that his personnel, their dependents, and his local employees also respect and abide by all such laws and regulations. The consultant shall indemnify the contracting authority against any claims and proceedings arising from any infringement by the consultant, his employees and the dependents of such laws and regulations.

- 10.2. The consultant shall perform the services with due care, efficiency and diligence, in accordance with the best professional practices and in compliance with these general conditions, the terms of reference and the instructions of the supervisor.
- 10.3. The consultant shall comply with administrative orders given by the supervisor. Where the consultant considers that the requirements of an administrative order go beyond the authority of the supervisor or of the scope of the contract, he shall, on pain of being time-barred, give notice, with reasons, to the supervisor within 30 days after receipt thereof. Execution of the administrative order shall not be suspended because of this notice.
- 10.4. If the consultant or any of his sub-contractors, independent consultants, agents or servants offers to give or agrees to offer or to give or gives to any person, any bribe, gift, gratuity or commission as an inducement or reward for doing or forbearing to do any act in relation to the contract or any other contract with the contracting authority, or for showing favour or disfavour to any person in relation to the contract or any other contract with the contracting authority, then the contracting authority may, without prejudice to any accrued rights of the consultant under the contract, terminate the contract, in which case the provisions of Articles 40 and 41 shall apply.
- 10.5. The consultant shall treat all documents and information received in connection with the contract as private and confidential, and shall not, save in so far as may be necessary for the purposes of the performance thereof, publish or disclose any particulars of the contract without the prior consent in writing of the contracting authority or the supervisor after consultation with the contracting authority. If any disagreement arises as to the necessity for any publication or disclosure for the purpose of the contract, the decision of the contracting authority shall be final.
- 10.6. If the consultant is a joint venture or consortium of two or more persons, all such persons shall be jointly and severally bound to fulfil the terms of the contract according to the law of the State of the contracting authority and shall, at the request of the contracting

authority, designate one of such persons to act as leader with authority to bind the joint venture or consortium. The composition or the constitution of the joint venture or consortium shall not be altered without the prior consent in writing of the contracting authority.

Article 11

Code of conduct

- 11.1. The consultant shall at all times act loyally and impartially and as a faithful adviser to the contracting authority in accordance with the rules and/or code of conduct of his profession as well as with appropriate discretion. He shall, in particular, refrain from making any public statements concerning the project or the services without the prior approval of the contracting authority, and from engaging in any activity which conflicts with his obligations towards the contracting authority under the contract. He shall not commit the contracting authority in any way whatsoever without its prior consent in writing, and shall, where appropriate, make this obligation clear to third parties.
- 11.2. For the duration of the contract, the consultant and his employees shall respect the political, cultural and religious practices prevailing in the State of the contracting authority.
- 11.3. The remuneration of the consultant under the contract shall constitute his only remuneration in connection with the contract and neither he nor his personnel shall accept any commission, discount, allowance, indirect payment or other consideration in connection with, or in relation to, or in discharge of, his obligations under the contract.
- 11.4. The consultant shall not have the benefit, whether directly or indirectly, of any royalty or of any gratuity or commission in respect of any patented or protected article or process used in or for the purposes of the contract or the project, unless it is agreed by the contracting authority in writing that he may.
- 11.5. The consultant and his staff shall maintain professional secrecy, for the duration of the contract and after completion thereof. In this connection, except with the prior written consent of the contracting authority, neither the consultant nor the personnel employed or engaged by him shall at any time communicate to any person or entity any confidential information disclosed to them or discovered by them, or make public any information as to the recommendations formulated in the course of or as a result of the services. Furthermore, they

shall not make any use prejudicial to the contracting authority, of information supplied to them and of the results of studies, tests and research carried out in the course and for the purpose of performing the contract.

Article 12

Independence

- 12.1. The consultant shall refrain from any relationship which would compromise his independence or that of his staff. If the consultant fails to maintain such independence, the contracting authority may, without prejudice to compensation for any damage which he may have suffered on this account, terminate the contract forthwith, without giving formal notice thereof.
- 12.2. The consultant shall after the conclusion or termination of the contract, limit his role in connection with the project to the provision of the services. Except with the written permission of the contracting authority, the consultant and any other contractor, consultant or supplier with whom the consultant is associated or affiliated shall be disqualified from the execution of works, supplies or other services for the project in any capacity, including tendering for any part of the project.

Article 13

Specifications and designs

- 13.1. The consultant shall prepare all specifications and designs using accepted and generally recognized systems acceptable to the contracting authority and taking into account the latest design criteria.
- 13.2. The consultant shall ensure that the specifications and designs and all documentation relating to procurement of goods and services for the project are prepared on a impartial basis so as to promote competitive tendering.

Article 14

Indemnification

- 14.1. The consultant shall indemnify, protect and defend, at his expense, the contracting authority, its agents and employees, from and against all actions, claims, losses or damage arising from any act or omission by the consultant in the performance of the services,

including any violation of any legal provisions, or rights of third parties, in respect of patents, trade marks and other forms of intellectual property such as copyrights.

Article 15

Medical and insurance arrangements

- 14.2. The consultant shall indemnify, protect and defend, at his expense, the contracting authority, its agents and employees, from and against all actions, claims, losses or damages arising out of the consultant's failure to perform his obligations under Article 10 provided that:
- (a) the consultant is notified of such actions, claims, losses or damages not later than 30 days after the contracting authority becomes aware of them;
 - (b) the ceiling on the consultant's liability under Article 14 shall be limited to the amount stated in the special conditions, and that such ceiling shall not apply to actions, claims, losses or damages caused by the consultant's wilful misconduct;
 - (c) the consultant's liability under Article 14 shall be limited to actions, claims, losses or damages directly caused by such failure to perform his obligations under the contract and shall not include liability arising from unforeseeable occurrences incidental or indirectly consequential to such failure.
- 14.3. The consultant shall, at his expense, upon request of the contracting authority, remedy any defect in the performance of the services in the event of the consultant's failure to perform his obligation under the contract.
- 14.4. Notwithstanding any contrary provisions in Article 14, the consultant shall have no liability whatsoever for actions, claims, losses or damages occasioned by:
- (a) the contracting authority omitting to act on any recommendation, or overriding any act, decision or recommendation, of the consultant, or requiring the consultant to implement a decision or recommendation with which the consultant disagrees or on which he expresses a serious reservation; or
 - (b) the improper execution of the consultant's instructions by agents, employees or independent contractors of the contracting authority.
- 14.5. The consultant shall remain responsible for any breach of his obligations under the contract for such period after the service have been completed as may be determined by the law of the contract.
- 15.1. The engagement by the contracting authority of the consultant shall be conditional upon the provision of evidence satisfactory to the contracting authority that the consultant and/or his personnel are in good health and are not subject to any disability which may interfere with the performance of the services. The contracting authority may request the consultant and/or his personnel performing the services to undergo a medical examination by a qualified medical practitioner before leaving his or their usual place of residence and shall as soon as is practicable furnish the contracting authority with the medical report resulting therefrom.
- 15.2. For the duration of the contract, the consultant shall obtain medical insurance for himself and other persons employed by him under the contract. Except as may be specified in the contract, the contracting authority shall be under no liability in respect of the medical expenses of the consultant.
- 15.3. The contracting authority shall undertake no responsibility in respect of any life, health, accident, travel and other insurance which may be necessary or desirable for the personnel of the consultant or of his sub-contractors or other independent consultants for the purposes of the services, nor for any members of the families of such persons.
- 15.4. Within 20 days of notification of approval of the contract the consultant shall take out and maintain a full indemnity insurance policy in a sum up to the limit stated in the special conditions and covering, from the start of performance of the contract and throughout its duration, the following aspects:
- (a) the consultant's liability in respect of sickness or industrial accident affecting his employees, including the cost of repatriation on health grounds;
 - (b) loss of, or damage to, the contracting authority's equipment used to perform the contract;
 - (c) civil liability in the event of accidents caused to third parties or to the contracting authority and any employee of that authority arising out of the performance of the contract;
 - (d) accidental death or permanent disability resulting from bodily injury incurred during the contract; and
 - (e) such other insurance as may be specified in the special conditions as required by the laws of the State of the contracting authority.

15.5. The special conditions may also require the consultant to insure against loss or damage to the personal effects of his employees and their families located in the State of the contracting authority.

15.6. The consultant shall furnish proof of the insurance policy and of regular payment of premiums without delay whenever required to do so by the contracting authority or the supervisor.

Article 16

Proprietary rights in reports and documents

16.1. All reports and data such as maps, diagrams, drawings, specifications, plans, statistics, calculations and supporting records or materials acquired, compiled or prepared by the consultant in the performance of the contract shall be confidential and shall be the absolute property of the contracting authority. The consultant shall, upon completion of the contract, deliver all such documents and data to the contracting authority. The consultant may retain copies of such documents and data, but shall not use them for purposes unrelated to his contract without prior written approval of the contracting authority.

16.2. The consultant shall not publish articles relating to the services or refer to them when carrying out any services for others, or divulge information obtained from the contracting authority, without the written consent of the contracting authority.

NATURE OF THE SERVICES

Article 17

The scope of the services

17.1. The consultant shall perform the services under the contract in accordance with the terms of reference.

17.2. The contract may consist of one or more of the following missions:

- project identification and definition study,
- economic or market study,
- pre-feasibility and/or feasibility study,
- project execution study (preliminary or detailed design, and where appropriate final design for execution, preparation of tender dossier),

- supervision of the project,
- management of the execution of the project,
- provision of personnel,
- other forms of technical assistance.

17.3. The special conditions shall state the terms of reference, which shall include, *inter alia*:

- (a) the object and scope of the contract;
- (b) the degree of accuracy to be attained and the different stages or parts of the services; and
- (c) the type and content of reports, statements, plans, calculations, measurements, specifications, estimates and any other document that the consultant is to draw up on completion of each phase or part of the study and on completion of the study itself.

17.4. Where the contract is for technical assistance to the contracting authority and/or supervisor, the consultant is entrusted with an advisory function for the benefit of the contracting authority and/or supervisor in respect of all the technical aspects of the project which may arise out of its execution. The consultant shall not have decision-making responsibility.

17.5. Where the contract is for management of the execution of the project, the consultant shall assume, in accordance with the laws of the State of the contracting authority and, subject to the supervisor's authority, all the duties of management inherent in supervising the execution of a project.

17.6. If under the special conditions the consultant is required to prepare a tender dossier, the dossier shall contain all documents necessary for consulting suitable contractors, manufacturers and suppliers, and for preparing tenders with a view to carrying out the works or providing the supplies or services covered by an invitation to tender. The contracting authority shall provide the consultant with the information necessary for drawing up the administrative part of the tender dossier.

17.7. Where the contract is for supervision of a project, the consultant is entrusted with the direction of the execution stage of the project.

17.8. Notwithstanding Article 12.2, the consultant responsible for the study and/or design stages of the

project may be entrusted with further services in the management and supervision of the project including the provision of technical assistants.

Article 18

Provision of personnel

- 18.1. Where the contract is for the provision of personnel for the execution of a project, the consultant shall provide such personnel in specific fields relating to the execution of the project, in the form of technical assistance in an advisory and/or managerial role. Such personnel shall be under the direct authority of the supervisor.
- 18.2. The services shall be carried out by the personnel specified in the contract for the periods of time indicated therein. The consultant may, with the prior approval of the contracting authority, make minor adjustments to such periods as may be appropriate to ensure the efficient performance of the services, provided that such adjustments will not cause payments made under the contract to exceed the contract price.
- 18.3. The consultant shall be responsible for the quality of the staff which he places at the disposal of the contracting authority.
- 18.4. The consultant shall not make changes in the personnel without the prior approval of the contracting authority. However, the consultant shall provide a replacement with at least equivalent qualifications and experience and acceptable to the contracting authority if:
 - (a) on account of sickness or accident, a member of staff is unable to continue providing his services;
 - (b) any person specified in the contract is found by the contracting authority to be incompetent in discharging or unsuitable for the performance of his duties under the contract;
 - (c) for any other reasons beyond the control of the consultant, it becomes necessary to replace any of his personnel.
- 18.5. The remuneration to be paid for a person provided as a replacement shall not exceed the remuneration which would have been payable to the person replaced.
- 18.6. Except in the case of replacement resulting from death or where the contracting authority requests a replacement not provided for by the contract, the consultant shall bear all the additional costs arising out of or incidental to such replacement. Such costs shall include the costs of the return journey of the replaced member of staff and his family and, if necessary, the expenses arising from the need to maintain simultaneously at the place of work the member of staff to be replaced and his replacement.

Article 19

Staff and equipment

- 19.1. The staff which the consultant uses for the implementation of the contract shall be approved by the contracting authority. The special conditions shall specify the minimum level of training, qualifications and experience of the consultant's personnel and, where appropriate, the specializations required.
- 19.2. References and/or curriculum vitae of each member of the consultant's staff to be employed under the contract shall be submitted to the contracting authority for approval either with the consultant's tender in the case of a tender procedure or, in other cases, before the conclusion of the contract.
- 19.3. The contracting authority shall notify his approval or refusal within 30 days of the appointment of the consultant or the submission under Article 19.2, as the case may be.
- 19.4. Staff approved by the contracting authority shall commence their duties on the date or within the period laid down in the special conditions or, failing this, on the date or within the periods notified to the consultant by the contracting authority.
- 19.5. Save as otherwise provided in the special conditions, the staff of the consultant shall reside close to their place of work. Where part of the services is to be performed outside the State of the contracting authority, the consultant shall keep the supervisor informed of the names and qualifications of staff assigned to that part of the services and of the equipment used.
- 19.6. The consultant shall:
 - (a) forward to the supervisor within 15 days of the award of the contract, the timetable proposed for placement of the staff, specification of their duties and a list of the equipment he intends to use for the services;
 - (b) inform the supervisor in sufficient time of the date of arrival and departure of each member of staff;
 - (c) submit to the supervisor for his approval a timely request for any change of staff and for any alteration to the original timetable or change of equipment.
- 19.7. The consultant shall adopt all measures necessary to provide and continue to provide his staff with the

equipment required to enable them to carry out their specified duties under conditions which are most conducive to efficiency.

Article 20

Trainees

- 20.1. The consultant shall provide training for the duration of the contract for trainees assigned to him by the contracting authority under the terms of the contract.
- 20.2. Instruction by the consultant of such trainees shall not confer on them the status of employees of the consultant. However, they must comply with the consultant's instructions, and with the provisions of Article 11, as if they were employees of the consultant. The consultant may on reasoned request in writing obtain the replacement of any trainee whose work or conduct is unsatisfactory.
- 20.3. Unless otherwise provided in the contract, remuneration for trainees and travel, accommodation and all other expenses incurred by the trainees, shall be borne by the contracting authority.
- 20.4. The consultant shall report at quarterly intervals to the contracting authority on the training assignment. Immediately prior to the completion of the services, the consultant shall draw up a report on the result of the training and an assessment of the qualifications obtained by the trainees with a view to their future employment. The form of such reports and the procedure for presenting them shall be as laid down in the special conditions.

PERFORMANCE OF THE CONTRACT

Article 21

Commencement orders

- 21.1. The contracting authority shall fix the date on which performance of the contract is to commence, and advise the consultant either in the notification of award of contract or by administrative order issued by the supervisor.
- 21.2. The date for commencing performance shall be not later than 180 days following notification of award of the contract unless agreed otherwise by the parties.
- 21.3. Where provision is made for services to be performed outside the State of the contracting authority, the contract shall commence, insofar as such services are

concerned, on the actual date of their performance, which shall not precede the date fixed by the contracting authority.

Article 22

Period of performance

- 22.1. The period of performance shall commence on the date fixed in accordance with Article 21.1 and shall be as stated in the contract without prejudice to extensions of the period which may be granted under Article 23.
- 22.2. If provision is made for separate periods of performance for separate lots, such periods shall not be aggregated in cases where one consultant is allocated more than one lot.
- 22.3. If in the case of technical cooperation projects covering a number of years, the special conditions make provision for several contractual periods, the period of performance shall be fixed taking into consideration the provisions of Article 31 and the parties shall be bound only for the first period. Save where one of the parties wishes to terminate the contract on the expiry of a contract period, the contract shall be renewed by means of successive riders at the end of each period, specifying the measures to be taken by the consultant. The remuneration for the new period shall be fixed by the principles established in the contract.
- 22.4. Any intention not to renew the contract for a further contractual period must be notified to the other party not later than 90 days prior to the expiry of the current contractual period.

Article 23

Extension of period of performance

- 23.1. The consultant may request an extension to the period of performance if he is or will be delayed in completing the contract by any of the following causes:
 - (a) extra or additional services ordered by the supervisor;
 - (b) administrative orders affecting the date of completion other than those arising from the consultant's default;
 - (c) failure of the contracting authority to fulfil his obligations under the contract;
 - (d) any suspension of the services which is not due to the consultant's default;
 - (e) *force majeure*;

- (f) any other causes of delay referred to in these general conditions which are not due to the consultant's default.

23.2. The consultant shall, within 15 days of becoming aware that delay may occur, notify the supervisor of his intention to make a request for extension of the period of performance to which he considers himself entitled and shall within 60 days thereafter, except where otherwise agreed between the consultant and supervisor, deliver to the supervisor full and detailed particulars of the request, in order that such request may be investigated at the time.

23.3. The supervisor shall, by written notice to the consultant after due consultation with the contracting authority and, where appropriate, the consultant, grant such an extension of the period of performance as may be justified, either prospectively or retrospectively or inform the consultant that he is not entitled to an extension.

Article 24

Delays in performance

24.1. If the consultant does not perform the services within the period(s) of performance specified in the contract, the contracting authority shall, without formal notice and without prejudice to his other remedies under the contract, be entitled to liquidated damages for every day, or part thereof, which shall elapse between the end of the period specified for performance or extended period of performance under Article 23 and the actual date of completion, at the rate and up to the maximum amount specified in the special conditions.

24.2. If the contracting authority has become entitled to the maximum claim under Article 24.1 he may after giving notice to the consultant:

- (a) terminate the contract; and
- (b) complete the services at the consultant's cost.

Article 25

Suspension

25.1. The consultant shall, on the order of the supervisor, suspend the performance of the services or any part thereof for such time and in such manner as the supervisor may consider necessary.

25.2. The supervisor, after consultation with the contracting authority and the consultant, shall determine such extension of the period of

performance to be made to the consultant in respect of such claim as shall, in the opinion of the supervisor, be fair and reasonable.

25.3. If the period of suspension exceeds 180 days and the suspension is not due to the consultant's default, the consultant may, by notice to the supervisor, request permission to resume performance of the services within 30 days or terminate the contract.

Article 26

Variations

26.1. The supervisor shall have power, without changing the object or scope of the contract, to order any variation to any part of the services necessary for the proper completion of the services. Such variations may include additions, omissions, substitutions, changes in quality, quantity and changes in the specified sequence, method or timing of execution of the services. No order for a variation shall have the effect of invalidating the contract, but the financial effect, if any, of all such variations shall be valued in accordance with Articles 26.5 and 26.7.

26.2. No variation shall be made except by administrative order, provided that:

- (a) if for any reason, the supervisor shall find it necessary to give an order orally, he shall as soon as possible thereafter confirm the order by an administrative order;
- (b) if the consultant shall confirm in writing an oral order given for the purpose of Article 26.2 (a) and the confirmation shall not be contradicted in writing forthwith by the supervisor, an administrative order shall be deemed to have been issued for the variation.

26.3. Save as provided by Article 26.2, prior to any administrative order for variation, the supervisor shall notify the consultant of the nature and form of such variation. As soon as possible, after receiving such notice, the consultant shall submit to the supervisor a proposal containing:

- (a) a description of the service to be performed or the measures to be taken and a programme for execution; and
- (b) any necessary modifications to the programme of performance or to any of the consultant's obligations under the contract; and
- (c) any adjustment to the contract price in accordance with the rules as set out in Article 26.

26.4. Following the receipt of the consultant's submission referred to in Article 26.3, the supervisor shall, after due consultation with the contracting authority, and where appropriate the consultant, decide as soon as possible whether or not the variation shall be carried out. If the supervisor decides that the variation shall be carried out he shall issue the administrative order stating that the variation shall be carried out at the prices and under the conditions given in the consultant's submission referred to in Article 26.3 or as modified by the supervisor in accordance with Article 26.5.

26.5. The prices for all variations ordered by the supervisor in accordance with Articles 26.2 and 26.4 shall be ascertained by the supervisor in accordance with the following principles:

- (a) where the task is of similar character and executed under similar conditions to an item priced in the price schedule it shall be valued at such rates and prices contained therein;
- (b) where the task is not of a similar character or is not executed under similar conditions, the rates and prices in the contract shall be used as the basis for valuation so far as is reasonable, failing which, a fair valuation shall be made by the supervisor;
- (c) if the nature or amount of any variation relative to the nature or amount of the whole of the contract or to any part thereof shall be such that in the opinion of the supervisor any rate or price contained in the contract for any task is by reason of such variation rendered unreasonable, then the supervisor shall fix such rate or price as in the circumstances he shall think reasonable and proper;
- (d) where a variation is necessitated by default or breach of contract by the consultant, any additional cost attributable to such variation shall be borne by the consultant.

26.6. On receipt of the administrative order requesting the variation, the consultant shall proceed to carry out the variation and be bound by these general conditions in so doing as if such variation were stated in the contract. The services shall not be delayed pending the granting of any extension of time for completion or adjustment to the contract price. Where the order for a variation precedes the adjustment to the contract price, the consultant shall keep records of the costs of undertaking the variation and of time expended thereon. Such records shall be open to inspection by the supervisor at all reasonable times.

26.7. Where on provisional acceptance, an increase or reduction in the total value of the services required under the contract resulting from an administrative order, or from some other circumstance which is not caused by the consultant's default, exceeds 15 % of the contract price, the supervisor shall, after consultation with the contracting authority and the consultant determine any additions to or reduction from the contract price as a consequence of the application of Article 26.5. The sum so determined shall be based on the amount by which the increase or decrease in value of the service exceeds 15 %. The sum shall be notified by the supervisor to the contracting authority and the consultant and the contract price adjusted accordingly.

Article 27

Working hours

The days and hours of work of the consultant in the State of the contracting authority shall be fixed on the basis of the laws, regulations and customs of the State of the contracting authority and the requirements of the services.

Article 28

Leave entitlement

28.1. Where the contract provides for annual leave, the consultant shall, during the period of performance of the contract, be entitled to take annual leave on the terms laid out in Article 28.

28.2. Entitlement to annual leave shall accrue at the rate stated in the contract. Such leave shall be allowable for every full period of six months and any part of a month thereafter during which the consultant is performing the services. Annual leave shall be taken during the period of performance of the contract at a time approved by the supervisor.

28.3. Entitlement to annual leave shall not be commuted into cash, unless in the opinion of the supervisor the requirements of the services are such that annual leave cannot be taken during the period of performance of the contract.

28.4. The consultant shall not be entitled to either sick or casual leave provided, however, that the supervisor may, at his sole discretion whether for compassionate reasons or otherwise, permit the consultant to take unpaid leave during the period of performance of the contract.

*Article 29***Information**

The consultant shall furnish the supervisor with such information relating to the services and the project as the supervisor may at any time request. In this respect, periodic reports, whose subject matter and frequency shall be as laid down in the special conditions, shall be drawn up by the consultant. Implementation difficulties or technical omissions in the terms of reference shall form the subject of special reports.

*Article 30***Records**

- 30.1. The consultant shall keep accurate and systematic records and accounts in respect of the services in such form and detail as is customary in the profession and as shall be sufficient to establish accurately that the costs and expenditures which are referred to in Article 35 have been duly incurred for the performance of the services.
- 30.2. The consultant shall permit the supervisor to inspect, at any reasonable time, the records and accounts relating to the services and to make copies thereof and shall permit the supervisor or any person authorized by the supervisor, at any reasonable time, to audit such records and accounts both during and after provision of the services.

*Article 31***Submission of reports**

- 31.1. Immediately prior to the completion of the services the consultant shall draw up a confidential general report together, where appropriate, with a financial analysis of the project and a critical study of any major problems which may have arisen during the performance of the project.
- 31.2. The report referred to in Article 31.1 shall be forwarded to the supervisor in the number of copies stated in the special conditions, not later than 60 days after the completion of the services by the consultant. Such report shall not bind the contracting authority.
- 31.3. Where the contract is performed in phases, the execution of each phase shall give rise to the preparation of a report by the consultant, save as otherwise provided in the special conditions.
- 31.4. The persons other than the supervisor to whom copies of the reports and documents referred to in Articles 29 and 31 are to be sent and the time limits

within which the consultant shall forward them shall be stated in the special conditions. Such time limits shall take account of periods specified in the special conditions for examining and approving or rejecting reports and documents by the contracting authority.

*Article 32***Approval of reports and documents**

- 32.1. The approval by the contracting authority of reports and documents drawn up and forwarded by the consultant shall certify that they comply with the terms of the contract.
- 32.2. The contracting authority shall, within the time limits laid down in the special conditions, notify the consultant of his decision concerning the documents or reports forwarded to him, giving reasons should he reject the reports or documents, or request amendments.
- 32.3. Where a report or document is approved by the contracting authority subject to amendments to be made by the consultant, the contracting authority shall prescribe a period for making the amendments requested.
- 32.4. Where the contract is performed in phases, the execution of each phase shall be subject to the approval, by the contracting authority, of the preceding phase except where the phases are carried out concurrently.

PAYMENTS*Article 33***General provisions**

- 33.1. The currency or currencies of payments shall be as stated in the contract.
- 33.2. The administrative and technical conditions to which the payment of advances, interim payments or payment of balance are subject, in accordance with Articles 34 to 39, shall be as stated in the special conditions.

*Article 34***Advances**

- 34.1. If the special conditions so provide, advances shall be granted to the consultant, at his request, for operations connected with the execution of the

services, as a lump sum advance enabling him to meet expenditure resulting from the commencement of the contract.

Article 35

Payment procedure

34.2. Subject to the provisions of the special conditions, the total amount of the advances shall not exceed 20 % of the original contract price.

34.3. No advance shall be granted until:

(a) the conclusion of the contract;

(b) provision to the contracting authority by the consultant of a separate directly liable guarantee for the full amount of the advance, established in the form of a bank guarantee, a banker's draft, a certified cheque, a bond provided by an insurance and/or bonding company, an irrevocable letter of credit or a cash deposit. If the guarantee is to be provided in the form of a bank guarantee, a banker's draft, a certified cheque or a bond, it shall be issued by a bank or bonding and/or insurance company approved by the contracting authority in accordance with the eligibility criteria applicable for the award of the contract. In any case, the guarantee shall be valid and remain effective for at least 60 days after acceptance of the final report.

34.3. The consultant shall use the advance exclusively for operations connected with the performance of the services. Should the consultant misuse any portion of the advance, it shall become due and repayable immediately and no further advance payment shall be made to him.

34.5. Should the advance guarantee cease to be valid and the consultant fail to re-validate it, either a deduction equal to the amount of the advance may be made by the contracting authority from future payments due to the consultant under the contract, or if in the opinion of the contracting authority such deduction is impracticable, the contracting authority may terminate the contract.

34.6. If the contract is terminated for any reason whatsoever, the guarantees securing the advances may be invoked forthwith in order to repay the balance of the advances still owed by the consultant, and the guarantor shall not delay payment or raise objection for any reason whatever.

34.7. The advance guarantee provided for in Article 34 shall be released as and when advances are reimbursed.

34.8. Further conditions and procedures for granting and reimbursing advances shall be as laid down in the special conditions.

35.1. The consultant shall be entitled to interim payments or to the payment of the final balance in accordance with the procedures, schedules and time limits stipulated in the contract as and when the services are provided and accepted.

35.2. Remuneration for parts of a month shall be based on a daily rate of one thirtieth of the corresponding monthly unit price. Abatements for any incomplete provision of services shall be made on the basis of the prices laid down in the contract in respect of the part of the services which were not provided.

35.3. For the part of the contract which is based on overall and fixed prices or on unit prices, provision may be made for the payment of interim payments only in respect of services rendered and, in the case of the part of a contract based on the reimbursement of costs, on submission of the appropriate supporting documents.

35.4. The amount of an interim payment shall not exceed 90 % of the value of the services to which it relates; the remaining 10 % thus withheld shall be paid as a final balance.

35.5. The frequency of interim payments shall be as laid down in the special conditions. As a general rule they shall be paid either on a monthly basis or as and when certain phases or parts of the services are completed.

35.6. The conditions to which payments relating to other services entrusted to the consultant shall be subject, shall be as laid down in the special conditions.

35.7. For each payment, the consultant shall send the contracting authority four copies of a written request for payment together with itemized statements, accompanied by receipts, invoices, vouchers and other appropriate supporting materials, of the amounts payable for each month or period.

35.8. Within 30 days of receipt of the said application for interim payment, it shall be approved or amended in such manner that, in the supervisor's opinion, the application reflects the amount due to the consultant in accordance with the contract. In cases where there is a difference of opinion as to the value of an item, the supervisor's view shall prevail. On determination of the amount due to the consultant, the supervisor shall issue to the contracting authority and the consultant an interim payment certificate for the amount due to the consultant and shall inform the consultant of the service for which payment is being made.

35.9. The supervisor may, by an interim payment certificate, make any corrections or modifications to any previous certificate issued by him and shall have power to modify the valuation in or withhold the issue of any interim payment certificate if the services or any part thereof are not being carried out to his satisfaction.

35.10. Payment of the final balance shall be subject to performance by the consultant of all his obligations relating to the execution of all phases or parts of the services and to the approval by the contracting authority of the final phase or part of the services. Final payment shall be made only after the final report and a final statement, identified as such, shall have been submitted by the consultant and approved as satisfactory by the contracting authority. Any amount which the contracting authority has paid, or caused to be paid, in accordance with Article 35 in excess of the consultant's entitlement under the contract, shall be reimbursed by the consultant to the contracting authority within 30 days after receipt by the consultant of notice thereof.

35.11. If any of the following events occurs and persists, the contracting authority may, by written notice to the consultant, suspend in whole or in part, payments due to the consultant under the contract:

- (a) the consultant defaults in the execution of the contract;
- (b) any other condition for which the consultant is responsible under the contract and which, in the opinion of the contracting authority, interferes, or threatens to interfere, with the successful completion of the project or the contract.

Article 36

Travel and transport

36.1. Unless the special conditions provide otherwise, the travel expenses for eligible staff of the consultant and of their spouses and dependent children within the meaning of the law of the country in which the consultant has his registered place of business, shall be borne by the contracting authority. These costs shall be limited to the cost of the most direct practicable route between the usual place of residence and the place where the contract is to be performed.

36.2. Air travel shall be by economy class. Journeys necessitating travel by sea, rail or river shall be made first class. The cost of transporting the luggage of eligible staff between the usual place of residence and

the place where the contract is to be performed shall be borne by the contracting authority within the weight limits stipulated in the special conditions.

36.3. The conditions under which transport cost of documents, equipment and materials may be borne by the contracting authority, shall be as stated in the special conditions.

36.4. In all cases, reimbursement will be subject to submission of supporting documents.

Article 37

Revision of prices

37.1. Unless otherwise stipulated in the special conditions, and except as provided in Article 37.4, contracts shall be at fixed prices which shall not be revised.

37.2. Where the prices may be revised under the contract, such revision shall take into account variation in the prices of significant local or external elements which served as a basis for the calculation of the tender price, such as manpower and other services. The detailed rules for the revision shall be as laid down in the special conditions.

37.2. Prices contained in the consultant's tender shall be deemed:

- (a) to have been arrived at on the basis of the conditions in force 30 days prior to the latest date fixed for the submission of tenders, or in the case of direct agreement contracts, on the date of the contract; and
- (b) to have taken account of the legislation and the relevant tax arrangements applicable at the reference date fixed in Article 37.3 (a).

37.4. In the event of changes to or introduction of any national or State statute, ordinance, decree, or other law, or any regulation or byelaw of any local or other public authority, after the date stated in Article 37.3 which causes a change in the contractual relationship between parties to the contract, the contracting authority and the consultant shall consult on how best to proceed further under the contract, and may as a result of such consultation decide:

- (a) to modify the contract;
- (b) on payment of compensation for the resulting imbalance by one party to the other; or
- (c) to terminate the contract by mutual agreement.

- 37.5. In the event of a delay in the performance of the services for which the consultant is responsible or at the end of the period of performance, revised as necessary in accordance with the contract, there shall be no further revision of prices within the 30 days before completion of the services except for the application of new price indexation, if this is to the benefit of the contracting authority.

Article 38

Delayed payments

- 38.1. Payment to the consultant of the amounts due under each of the interim payment certificates, and the certificate for the final balance issued by the supervisor shall be made by the contracting authority within 90 days of such certificate being delivered to the contracting authority. If the period laid down for payment has been exceeded, the consultant shall qualify for interest calculated *pro rata* on the basis of the number of days delay at the rate specified in the special conditions, subject to a maximum period also specified therein. The consultant shall be entitled to such payment without formal notice and without prejudice to any other right or remedy under the contract. In the case of the final statement of account, the interest for the delayed payment shall be calculated on a daily basis at the rate specified in the special conditions.
- 38.2. Any default in payment of more than 120 days from the expiry of the period laid down in Article 38.1 shall entitle the consultant either not to perform the contract or to terminate it.

Article 39

Payment to third parties

- 39.1. All orders for payments to third parties may be carried out only after an assignment made in accordance with Article 6. The assignment shall be notified to the contracting authority.
- 39.2. Notification of beneficiaries of assignment shall be the sole responsibility of the consultant.
- 39.3. In the event of a legally binding attachment of the property of the consultant affecting payments due to him under the contract and without prejudice to the time limit laid down in Article 38, the contracting authority shall have 30 days, starting from the day when it receives notification of the definitive lifting of the obstacle to payment, to resume payments to the consultant.

BREACH OF CONTRACT AND TERMINATION

Article 40

Breach of contract

- 40.1. Either party commits a breach of contract where he fails to discharge any of his obligations under the contract.
- 40.2. Where a breach of contract occurs, the party injured by the breach shall be entitled to the following remedies:
- (a) damages; and/or
 - (b) termination of the contract.
- 40.3. Damages may be:
- (a) general damages; or
 - (b) liquidated damages.
- 40.4. In any case where the contracting authority is entitled to damages, it may deduct such damages from any sums due to the consultant or from the appropriate guarantee.
- 40.5. Subject to the law of the State of the contracting authority, the contracting authority shall be entitled to compensation for any damage which comes to light after the contract is completed.

Article 41

Termination by the contracting authority

- 41.1. The contracting authority may, at any time and with immediate effect, terminate the contract, except as provided for in Article 41.2.
- 41.2. Except as otherwise provided in these general conditions, the contracting authority may, after giving seven days notice to the consultant, terminate the contract in any of the following cases where:
- (a) the consultant fails to carry out the services substantially in accordance with the contract;
 - (b) the consultant continues to default for a period of 14 days after the contracting authority has given notice to him of suspension of payments under Article 35.11;
 - (c) the consultant fails to comply within a reasonable time with the notice given by the supervisor requiring him to make good the neglect or failure to perform his obligations under the contract which seriously affects the proper and timely performance of the services;
 - (d) the consultant refuses or neglects to carry out administrative orders given by the supervisor;

- (e) the consultant assigns the contract or sub-contracts without the authorization of the contracting authority;
- (f) the consultant becomes bankrupt or insolvent, or has a receiving order made against him, or compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or goes into liquidation;
- (g) any adverse final judgment is made in respect of an offence affecting the professional conduct of the consultant;
- (h) any other legal disability hindering performance of the contract occurs;
- (i) any organizational modification occurs involving a change in the legal personality, nature or control of the consultant, unless such modification is recorded in an endorsement to the contract;
- (j) the consultant fails to maintain his independence in accordance with Article 12.1;
- (k) the consultant fails to provide the required guarantees or insurance, or if the person providing the earlier guarantee or insurance is not able to abide by his commitments.
- 41.3. Termination shall be without prejudice to any other rights or powers under the contract of the contracting authority and the consultant. The contracting authority may, thereafter, complete the services itself, or conclude any other contract with a third party, for the account of the consultant. The consultant's liability for delay in completion shall immediately cease when the contracting authority terminates the contracts without prejudice to any liability thereunder that may have already been incurred.
- 41.4. Upon termination of the contract or when he has received notice thereof, the consultant shall take immediate steps to bring the services to a close in a prompt and orderly manner and to reduce expenditure to a minimum.
- 41.5. The supervisor shall, as soon as is possible after termination, certify the value of the services and all sums due to the consultant as at the date of termination.
- 41.6. The contracting authority shall not be obliged to make any further payments to the consultant until the services are completed, whereupon the contracting authority shall be entitled to recover from the consultant the extra costs, if any, of completing the services, or shall pay any balance due to the consultant.
- 41.7. If the contracting authority terminates the contract, it shall be entitled to recover from the consultant any loss it has suffered up to the maximum amount stated in the contract. If no maximum amount is stated, the contracting authority shall, without prejudice to its other remedies under the contract, be entitled to recover that part of the contract price which is attributable to that part of the services which has not, by reason of the consultant's failure, been satisfactorily completed.
- 41.8. Where the termination is not due to an act or omission of the consultant, the consultant shall be entitled to claim in addition to sums owing to him for work already performed, an indemnity for loss suffered.
- Article 42*
- Termination by the consultant**
- 42.1. The consultant may, after giving 14 days notice to the contracting authority, terminate the contract if the contracting authority:
- (a) fails to pay the consultant the amounts due under any certificate of the supervisor after the expiry of the time limit stated in Article 38.2; or
- (b) consistently fails to meet his obligations after repeated reminders; or
- (c) suspends the progress of the services or any part thereof for more than 180 days for reasons not specified in the contract, or not due to the consultant's default.
- 42.2. Such termination shall be without prejudice to any other rights of the contracting authority or the consultant acquired under the contract.
- 42.3. In the event of such termination, the contracting authority shall pay the consultant for any loss or injury the consultant may have suffered. Such additional payment may not exceed a limit which has to be specified in the contract.
- Article 43*
- Force majeure**
- 43.1. Neither party shall be considered to be in default or in breach of his obligations under the contract if the performance of such obligations is prevented by any circumstances of *force majeure* which arise after the

date of notification of the award or the date when the contract becomes effective, whichever is the earlier.

43.2. The term *force majeure*, as used herein shall mean acts of God, strikes, lock-outs or other industrial disturbances, acts of the public enemy, wars, whether declared or not, blockades, insurrection, riots, epidemics, landslides, earthquakes, storms, lightning, floods, washouts, civil disturbances, explosions, and any other similar unforeseeable events, not within the control of either party and which by the exercise of due diligence neither party is able to overcome.

43.3. Notwithstanding the provisions of Articles 24 and 41, the consultant shall not be liable for liquidated damages or termination for default if, and to the extent that, his delay in performance or other failure to perform his obligations under the contract is the result of an event of *force majeure*. The contracting authority shall similarly not be liable, notwithstanding the provisions of Articles 38 and 42, to termination by the consultant for default, if, and to the extent that, the contracting authority's delay or other failure to perform its obligations is the result of *force majeure*.

43.4. If either party considers that any circumstances of *force majeure* have occurred which may affect performance of his obligations he shall promptly notify the other party and the supervisor giving details of the nature, the probable duration and likely effect of the circumstances. Unless otherwise directed by the supervisor in writing, the consultant shall continue to perform his obligations under the contract as far as is reasonably practicable, and shall seek all reasonable alternative means for performance of his obligations which are not prevented by the *force majeure* event. The consultant shall not put into effect such alternative means unless directed so to do by the supervisor.

43.5. If the consultant incurs additional costs in complying with the supervisor's directions or using alternative means under Article 43.4 the amount thereof shall be certified by the supervisor.

43.6. If circumstances of *force majeure* have occurred and persist for a period of 180 days then, notwithstanding any extension of the period of performance that the consultant may by reason thereof have been granted, either party shall be entitled to serve upon the other 30 days' notice to terminate the contract. If at the expiry of the period of 30 days the situation of *force majeure* persists, the contract shall terminate and in consequence thereof, the parties shall be released from further performance of the contract.

Article 44

Decease

44.1. Where the consultant is a natural person, the contract shall be automatically terminated if that person dies. However, the contracting authority shall examine any proposal made by the heirs or beneficiaries if they have notified their wish to continue the contract. The decision of the contracting authority shall be notified to those concerned within 30 days of receipt of such proposal.

44.2. Where the consultant consists of natural persons and one or more of them die, a report shall be agreed between the parties on the progress of the services and the contracting authority shall decide whether to terminate or continue the contract in accordance with the undertaking given by the survivors and by the heirs or beneficiaries, as the case may be.

44.3. In the cases provided for in Articles 44.1 and 44.2, persons offering to continue to perform the contract shall notify the contracting authority thereof within 15 days of the date of decease.

44.4. Such persons shall be jointly and severally liable, or as otherwise stated in the special conditions, for the proper performance of the contract to the same extent as the consultant. Continuation of the contract shall be subject to the rules relating to establishment of any guarantee provided for in these conditions.

SETTLEMENT OF DISPUTES

Article 45

Settlement of disputes

45.1. The contracting authority and the consultant shall make every effort to amicably settle any dispute relating to the contract which may arise between them, or between the supervisor and the consultant.

45.2. The special conditions shall prescribe:

- (a) the procedure for the amicable settlement of disputes;
- (b) the time limits within which the amicable settlement procedure may be invoked after the time that the dispute is notified to the other party and the maximum time limit within which such settlement may be reached, provided that the time limit prescribed for reaching such

settlement does not exceed 120 days from the commencement of the adopted procedure;

- (c) the time limits for responding in writing to a request for amicable settlement or to other requests permitted during the course of that procedure and the consequence of failure to comply with those time limits.

45.3. The parties may agree to the settlement of the dispute by conciliation within a specific time limit by a third party after the amicable settlement procedure adopted has failed.

45.4. The amicable settlement or conciliation procedure adopted shall in all cases involve a procedure in which complaints and responses are notified to the other party.

45.5. In the absence of an amicable settlement or settlement by conciliation within the maximum time limits specified, the dispute shall:

- (a) in the case of a national contract, be settled in accordance with the national legislation of the State of the contracting authority; and
- (b) in the case of a transnational contract, be settled, either:
 - (i) if the parties to the contract so agree, in accordance with the national legislation of the State of the contracting authority or its established international practices; or
 - (ii) by arbitration in accordance with the procedural rules adopted in accordance with the Convention.

ANNEX V

**PROCEDURAL RULES ON CONCILIATION AND ARBITRATION OF CONTRACTS
FINANCED BY THE EUROPEAN DEVELOPMENT FUND (EDF)**

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I — INTRODUCTORY RULES

Article 3

Article 1

Scope of application

Disputes relating to a contract financed by the European Development Fund (EDF) which, pursuant to the provisions of the general conditions and the special conditions governing the contract, may be settled by conciliation or by arbitration shall be settled in accordance with these procedural rules.

Article 2

Definitions

In these rules, unless the context requires otherwise, the following words and expressions shall have the meaning here assigned to them:

ACP State: a State belonging to the African, Caribbean and Pacific group of States which are signatories to the Convention,

Member State: a Member State of the European Economic Community (EEC),

administrative agency: the agency in the ACP State given the function of settling by administrative methods disputes arising under or in connection with contracts to which the contracting authority is a party,

the tribunal: the arbitral tribunal,

appointing authority: the authority agreed by the parties to an arbitration, or in the absence of such agreement, identified by these rules, as the authority to appoint an arbitrator,

contracting authority: the State or the legal person governed by public or private law which concludes the contract or on behalf of which the contract is concluded,

the Convention: the relevant Convention between the ACP States and the EEC,

the Council of Ministers: the ACP-EEC Council of Ministers referred to in the Convention,

the contract: an EDF contract for works, supplies or services,

claimant: the party which commences arbitration proceedings by giving notice to the other party requesting the arbitration and submitting claims,

respondent: the party to the arbitration against whom claims are made,

party: when used in connection with an arbitration, the claimant or respondent in the arbitration.

Notice and calculation of time

- 3.1. Any notice provided by these rules shall be served by registered letter or physically delivered with a request for a dated acknowledgement of receipt in either case. A notice shall be deemed to have been received on the day it is so delivered.
- 3.2. For the purposes of calculating a period of time under these rules, such period shall begin to run on the day following the day when a notice, communication or proposal, is received. If the last day of such period is an official holiday or a non-working day, at the address mentioned in the notice, communication or proposal, the period shall be extended until the first working day which follows. However, official holidays or non-working days occurring during the running of the period of time shall be included in calculating the period.

Article 4

Exhaustion of internal administrative procedures

- 4.1. A dispute shall not be referred to arbitration under these rules unless all internal administrative procedures provided by the ACP State for settlement of such disputes have been or are deemed to have been, exhausted. Recourse to administrative proceedings shall be deemed to have been exhausted if no final decision has been issued by the administrative agency within 120 days of the receipt of the initial application for settlement by it.
- 4.2. In cases where recourse to administrative procedures by an applicant is, due to the absence of such procedures in the ACP State, not possible, a dispute may be referred to arbitration under these rules only after the applicant has given notice of this compliant to the other party, and no meaningful steps have been taken by that other party to remedy or correct the cause of complaint within 120 days after the receipt of the notice.

Article 5

Conciliation

- 5.1. At any time before a request for arbitration, a person with the right to request the arbitration may request the amicable intervention of the agency financing the contract or the settlement of the dispute by conciliation in accordance with these rules.

- 5.2. If the parties to the dispute agree, the conciliation shall be conducted by a sole conciliator, otherwise it shall be conducted by a committee of three conciliators.
- 5.3. To qualify for appointment as conciliator, the person must have the nationality of one of the signatory States of the Convention.
- 5.4. Where the conciliation is to be conducted by a sole conciliator, the parties to the dispute shall agree on the conciliator. Where the conciliation is to be conducted by a conciliation committee, each of the parties to the dispute shall nominate one of the members of the committee. The third member of the committee who shall be chairman, and who shall be of a nationality other than that of the parties involved, shall be chosen by the other members of the committee.

- 5.5. The party making a request for conciliation shall notify the other party of the request.

The request shall consist of a statement of the case of the applicant and shall be accompanied by copies of relevant papers and documents. The request shall also contain the name and address of the person proposed or nominated as a conciliator.

- 5.6. Within 60 days of receipt of the notice of the request, the other party shall notify the applicant whether he is prepared to accept an attempt at conciliation, and in that event to submit to the applicant a reply to the applicant's case. The reply shall also contain the name and address of the person proposed or nominated by the other party as a conciliator.
- 5.7. Within 30 days of the receipt of the reply, the members of the conciliation committee selected by the parties shall nominate the chairman.
- 5.8. The proceedings of the conciliator or conciliation committee shall be as informal and expeditious as is compatible with a just and objective settlement of the dispute and shall be based on a fair hearing of each party.

Each of the parties may appear in person or be represented by an agent of his choice.

- 5.9. After examining the case, the conciliator or conciliation committee shall submit terms of settlement to the parties.

- 5.10. Should a settlement result, the conciliator or conciliation committee shall draw up and sign a record of the settlement. The record shall be signed by the parties to signify their acceptance thereof. The record of the settlement so signed by the parties shall be binding upon them.

- 5.11. Copies of the record of settlement so signed shall be given to the parties.

- 5.12. Should a settlement not result, the parties shall be at liberty to refer their dispute to arbitration under these rules, in which case, nothing that has transpired in connection with the proceedings before the conciliator or conciliation committee shall in any way affect the legal rights of any of the parties at the arbitration.

- 5.13. No person having sat as a conciliator or a member of a conciliation committee for the settlement of a dispute may be appointed arbitrator for the same matter.

II — THE TRIBUNAL

Article 6

Nationality of arbitrators

To qualify for appointment as an arbitrator, a person must have the nationality of one of the signatory States of the Convention.

Article 7

Number of arbitrators

If the parties agree, the tribunal shall be constituted by one arbitrator only. Such agreement must be reached by the parties within 15 days after receipt by the respondent of the notice commencing the arbitration proceedings as provided for in Article 18. If the parties fail to agree to arbitration by one arbitrator within the time specified, or if they otherwise agree, the tribunal shall be constituted by three arbitrators.

Article 8

Appointment of sole arbitrator

- 8.1. If a sole arbitrator is to be appointed, the parties shall agree on that arbitrator or upon the appointing authority for making the appointment thereof within 60 days after the commencement of the arbitration proceedings as laid down in Article 18.

- 8.2. Where:

- (a) the parties are unable to agree either on the arbitrator or on the appointing authority within the specified 60 days; or
- (b) the appointing authority agreed by the parties refuses to act, or fails to appoint the arbitrator,

within 60 days of receipt of the parties' request therefore,

either party may request the most senior in rank from amongst the judges of the International Court of Justice at the Hague who are nationals of the ACP States and the Member States to exercise the powers of the appointing authority.

Article 9

Appointment of three arbitrators

9.1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who shall be the presiding arbitrator of the tribunal.

9.2. The appointment by each party of an arbitrator shall be made within 60 days from the date of the agreement between the parties that the tribunal be constituted by three arbitrators, or the date when the constitution of the tribunal by a sole arbitrator was, in terms of Article 7.1, excluded.

9.3. If:

- (a) within 30 days after the appointment by each party of his arbitrator, the two appointed arbitrators have not chosen the third arbitrator; or
- (b) within 30 days after the receipt of the notification of the appointment by one party of an arbitrator the other party has not notified the first party of the arbitrator he has appointed,

the required arbitrator shall upon request by either party, be appointed by the appointing authority.

9.4. The appointing authority shall be agreed by the parties not later than 60 days after the particular failure which gives rise to the need to invoke that authority. If after the expiration of that period an appointing authority has not been agreed by the parties, either party may request the most senior in rank from amongst the judges of the International Court of Justice at the Hague who are nationals of the ACP States and the Member States to exercise the powers of the appointing authority.

Article 10

Appointments by the appointing authority

10.1. When an appointing authority is requested to appoint an arbitrator, the party which makes the request shall send to the appointing authority a copy of the notice of

arbitration specified in Article 18.1 and a copy of the contract under or in connection with which the dispute has arisen. The appointing authority may require from either party such information as he deems necessary to fulfil his function.

10.2. Either party may propose names of persons suitable for appointment as arbitrators to the appointing authority. Where such proposal is made, the full names, addresses and nationalities of the persons proposed shall be given, together with a description of their qualifications.

10.3. The appointing authority shall appoint the arbitrator or arbitrators as promptly as possible. In making the appointment, the appointing authority shall:

- (a) have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator of a nationality other than the nationalities of the parties, and of high moral standing, who has a recognized competence in the field of law, technical knowledge or finance applicable to the matters in dispute; and
- (b) unless both parties agree otherwise, or the appointing authority decides in his discretion that the procedure is not appropriate for the particular case, use the following list procedure:
 - (i) the appointing authority shall communicate to both parties an identical list containing at least three names of persons qualified for appointment as arbitrators in terms of Articles 6.1 and 10.3 (a);
 - (ii) within 30 days after the receipt of this list, each party may return the list to the appointing authority after deleting the name or names to which he objects, and numbering the remaining names on the list in the order of his preference. If the list is not returned or no alteration is made in the order in which the names appear in the original list, the names on that list shall be deemed to have been approved by the party concerned in the order in which they appear;
 - (iii) upon receipt of the list returned by both parties, or after the expiration of the time limit for the return, whichever is the earlier, the appointing authority shall within 30 days appoint the arbitrator from amongst the names approved or deemed to be approved, on the list and in accordance with the order of preference indicated by the parties;
 - (iv) if for any reason the appointment cannot be made according to this procedure, the appointing authority may appoint a

suitable arbitrator, having due regard to the interest of the parties, the nature of the dispute and, where applicable, the fact that one of the parties is a State.

Article 11

Challenge of arbitrators

- 11.1. A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any facts or circumstances likely to give rise to justifiable doubts or suspicion as to his impartiality or independence. A person appointed arbitrator shall disclose such facts or circumstances to the parties unless they have already been informed by him of these circumstances.
- 11.2. 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. However a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.
- 11.3. A party who intends to challenge an arbitrator shall send a notice of his challenge in writing, stating the reasons therefor to the tribunal, the challenged arbitrator and the other party. The notice shall be sent within 15 days of the constitution of the tribunal or of the appointment of the challenged arbitrator, whichever is later, or within 15 days after the circumstances justifying the challenge become known to the party making the challenge.
- 11.4. Where a challenge made by one party is agreed by the other party, or where the challenged arbitrator withdraws from office, the authority of that arbitrator in the arbitration proceedings shall forthwith terminate. But neither the agreement of the parties to the challenge, nor the withdrawal from office of the challenged arbitrator, implies an acceptance of the validity of the grounds of the challenge issued.
- 11.5. If the other party does not agree to the challenge, or if the challenged arbitrator does not withdraw, a decision on the challenge shall be made as follows:
 - (a) where the appointment of the arbitrator was made by an appointing authority, by that authority;
 - (b) where the appointment of the arbitrator was not made by an appointing authority, by the other members of the tribunal, if there are such others;

- (c) in all other cases, or in case of disagreement between the other members of the tribunal, by an appointing authority designated or to be designated in accordance with the procedure provided in Article 9.4.

The decision of the authority specified herein shall be final.

Article 12

Replacement of arbitrator

- 12.1. In the following cases, a substitute arbitrator shall be appointed in accordance with the procedure laid down in Articles 8, 9 and 10 which is applicable to the appointment of the particular arbitrator being replaced:
 - (a) a challenge to an arbitrator has been agreed to by the other party; or
 - (b) a challenged arbitrator has withdrawn from office; or
 - (c) notwithstanding the absence of agreement of the other party, or a refusal by the challenged arbitrator to withdraw, a challenge to an arbitrator is sustained; or
 - (d) an arbitrator dies during the course of the arbitration proceedings; or
 - (e) for any other reason, an arbitrator fails to act or it becomes impossible *de jure* or *de facto* for him to perform his functions.
- 12.2. If an arbitrator is replaced, any hearing held previously may, at the discretion of the tribunal, be repeated, and any decision or order made in the course of the proceedings may be set aside by the tribunal.

III. — THE ARBITRATION PROCEEDINGS

Article 13

General provisions

- 13.1. Subject to these rules, the tribunal may conduct the arbitration in such manner as it considers appropriate.
- 13.2. The tribunal shall conduct the arbitration as expeditiously and with such due regard for the saving of costs as is consistent with doing justice between the parties. The parties shall be treated with equality, and at any stage of the proceedings each of them shall be given a full opportunity of presenting his case.
- 13.3. If either party so requests at any stage of the proceedings, the tribunal shall hold hearings for presentation of evidence by witnesses, including

expert witnesses, or for oral argument. In the absence of such a request, the tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

- 13.4. All documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party. No such document or information may be used in support of a party's case unless there is proof that it has been communicated to the other party.

Article 14

Applicable law and procedural rules

- 14.1. The tribunal shall apply the law of the State of the contracting authority to the matters in dispute, unless otherwise specified in the contract, in which case the tribunal shall apply the law so specified. In all cases, the tribunal shall decide in accordance with the terms of the contract, and may take into account the usages of the trade applicable to the transaction.
- 14.2. Where the applicable law is silent on any specific point, the tribunal shall apply the conflict of laws rules resulting from the law applicable to the contract. The tribunal may not decline to make an award on the ground that the law is silent or obscure on the point.
- 14.3. Notwithstanding the provisions of Articles 5.1 and 14.1, if the parties expressly so authorize the tribunal in the course of the arbitration proceedings, it shall decide as amicable compositor or *ex aequo et bono*.
- 14.4. The entire arbitration proceedings shall be conducted in accordance with these rules. In the absence of agreement between the parties, any procedural matter which is not provided for in these rules shall be decided by the tribunal, which shall ensure in particular, in such a case, that the principle of equality between the parties is observed.

Article 15

Language of the proceedings

- 15.1. Arbitration proceedings shall be conducted and the arbitration award made in the language of the contract, the terms or execution of which gave rise to the dispute.
- 15.2. The tribunal may order that any documents annexed to the statement of claim or statement of defence,

and any other document or exhibit submitted in the course of the proceedings, and which are not drawn up in the language of the proceedings, shall be accompanied by a certified translation into the language of the proceedings.

Article 16

Venue of the proceedings

- 16.1. Arbitration proceedings shall be conducted in the ACP State in which the contract was awarded or performed. However, the tribunal may, with the agreement of the parties and for good cause, decide to conduct the arbitration in some other place. In deciding on such other place, the tribunal shall have regard to the circumstances of the case, including the costs involved, the convenience of the parties, and the potential adverse effect of the procedural rules of an alternative venue on the parties and the proceedings.
- 16.2. Subject to Article 16.1, the tribunal may hold some hearings and meetings at any place it deems appropriate, having regard to the circumstances of the case.
- 16.3. The tribunal may meet at any place it deems appropriate for the inspection of the works, goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

Article 17

Representation and assistance

The parties may be represented and/or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party and to the tribunal. Such communication must specify whether the person named is appointed for the purpose of representation or assistance.

Article 18

Commencement of arbitration proceedings

- 18.1. The claimant in an arbitration shall give to the respondent a notice of arbitration. Such notice shall be time-barred unless it is given not later than 90 days after the receipt of the decision closing the final administrative proceedings taken in the ACP State, or, where no such administrative procedures are available, not later than 90 days after the expiry of the 120 days provided for in Article 4.2 for the remedy of a complaint notified to the other party.

18.2. Arbitration proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

18.3. The notice of arbitration shall include the following:

- (a) a demand that the dispute be referred to arbitration;
- (b) the names and addresses of the parties and their nationality at the time of the notice;
- (c) a reference to the contract out of or in relation to which the dispute arises, and the particular clause or clauses in the contract being invoked or challenged;
- (d) the general nature of the claim and the amount involved, if any;
- (e) the relief or remedy sought;
- (f) a brief statement, with dates, of any administrative proceedings or of the notice given of complaints, and the outcome of such steps;
- (g) a proposal as to the number of arbitrators (i. e., one or three).

18.4. The notice of arbitration may also include:

- (a) the name of the person and/or the authority proposed for appointment as a sole arbitrator and/or appointing authority referred to in Article 8.1;
- (b) the notification of the appointment by the claimant of an arbitrator referred to in Article 9.1;
- (c) the statement of claim referred to in Article 19.

Article 19

Statement of claim

19.1. Unless the statement of claim was contained in the notice of arbitration, within a time limit to be determined by the tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract shall be annexed thereto.

19.2. The statement of claim, signed and dated by the claimant and/or his duly authorized representative, shall include the following particulars:

- (a) the names and addresses of the parties;
- (b) a statement of the facts supporting the claim;

(c) the points at issue;

(d) the relief or remedy sought.

The claimant shall either annex to his statement of claim all documents he deems relevant or add a reference to the documents or other evidence he will submit.

Article 20

Statement of defence

20.1. Within a time limit to be determined by the tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

20.2. The statement of defence shall reply to the particulars of the statement of claim given in compliance with Article 19.2 (b), (c) and (d). The respondent shall either annex to his statement the documents on which he relies for his defence or add a reference to the documents or other evidence he will submit.

20.3. In this statement of defence, or at a later stage in the arbitration proceedings, if the tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract, or rely on a claim arising out of the same contract for the purpose of a set-off.

20.4. The provisions of Article 19.2 shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

Article 21

Amendments to the claim or defence

During the course of the arbitration proceedings either party may amend or supplement his claim or defence unless the tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or the undue harm that it would cause to the other party.

Article 22

Pleas to the jurisdiction of the tribunal

22.1. The tribunal shall have the power to rule on objections to its jurisdiction.

22.2. The tribunal shall have the power to determine the existence or the validity of the contract. A decision by the tribunal that the contract is null and void shall not affect the validity of the arbitration clause in the contract or the agreement to submit the dispute to arbitration, and therefore, shall not affect the application of these rules.

22.3. A plea that the tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. This provision shall also apply to new claims and counter-claims admitted in the course of the proceedings.

22.4. In general, the tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the tribunal may proceed with the arbitration and then rule on such a plea in its final award.

Article 23

Further written statements

The tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and, if so, the manner in which they shall be presented, and shall fix the time limits for communicating such statements.

Article 24

Time limits

The time limits fixed by the tribunal for the communication of written statements (including the statement of claim and statement of defence) shall not, in each case, exceed 45 days. However, the tribunal may extend the time limits if it concludes that an extension is justified.

Article 25

Evidence

25.1. Each party shall bear the burden of proving the fact relied on to support his claim or defence.

25.2. The tribunal may, if it considers it appropriate, require the parties to deliver to the tribunal and to the other party, within such time limit as the tribunal shall decide, a summary of the documents and other evidence which that party offers to present in support of the facts in issue set out in his statement of claim or statement of defence.

25.3. At any time during the proceedings, the tribunal may require the parties to produce documents, exhibits or other evidence within such time limit as the tribunal shall determine.

Article 26

Oral proceedings

26.1. In the event of an oral hearing, the tribunal shall give the parties adequate advance notice of the date, time and place thereof.

26.2. If witnesses are to be heard, each party shall communicate to the tribunal and to the other party, at least 15 days before the hearing, the names and addresses of the witnesses he intends to call, the subjects upon and the languages in which such witnesses will give their testimony.

26.3. The tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing.

26.4. Hearings shall be held in camera unless the parties agree otherwise. The tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The tribunal is free to determine the manner in which witnesses are examined, without prejudice to the right of each party, at its request, to question witnesses presented by the other party.

26.5. Evidence of witnesses may also be presented in the form of sworn written statements signed by them. However, at the request of either party and with the leave of the tribunal, such witnesses may be heard at a hearing where the parties shall have the opportunity to be present and to question the witnesses.

26.6. The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Article 27

27.1. At the request of either party, the tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation, preservation or safe-custody of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. The tribunal may also order the deposit of a sum of money or the provision of a security to guarantee the whole or any part of the amounts in dispute. In the event of failure to do so, the tribunal shall be entitled to draw such conclusions as may logically be imputed to such failure.

27.2. Such interim measures may be established in the form of an interim award. The tribunal shall be entitled to require security for the costs of such measures.

*Article 28***Experts**

- 28.1. The tribunal may appoint one or more independent experts to examine and report to it, in writing on specific issues to be determined by the tribunal. A party shall have the right to object to an expert on the ground of competence and partiality and if such objection is sustained by the tribunal that expert shall withdraw. A copy of the expert's terms of reference, established by the tribunal, shall be communicated to the parties.
- 28.2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the tribunal for decision.
- 28.3. Upon receipt of the expert's report, the tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.
- 28.4. At the request of either party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to question him. At this hearing either party may call expert witnesses in order to testify on the points at issue. The provisions of Article 26 shall apply to such proceedings.

*Article 29***Default**

- 29.1. If, within the time limit fixed by the tribunal, the claimant has failed to communicate his statement of claim without showing sufficient cause for such failure, the tribunal shall issue an order for the termination of the proceedings. If, within the time limit fixed by the tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the tribunal shall, after allowing for the particular constraints applying to the respondent, order that the proceedings continue and may make an award even if a defence has by then not been submitted.
- 29.2. If one of the parties, duly notified under these rules, fails to appear at a hearing, without showing sufficient

cause for such failure, the tribunal may proceed with the arbitration.

- 29.3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established time limit, without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it, taking due account of the failure and the bearing it has on the case.

*Article 30***Closure of hearings**

- 30.1. The tribunal may inquire of the parties if they have any further evidence to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearing closed.
- 30.2. The tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

*Article 31***Waiver of rules**

A party who refrains from promptly raising an objection to any noncompliance with the provisions of or requirements under these rules shall be deemed to have waived his right to object.

IV. — THE AWARD*Article 32***Decision**

- 32.1. When there are three arbitrators, an award or other decision of the tribunal shall be made by a majority of the arbitrators. However, if there is no majority, the presiding arbitrator shall have a casting vote, but shall give reasons for exercising that vote.
- 32.2. In the case of questions of procedure, when there is no majority or when the tribunal so authorizes, the presiding arbitrator may decide on his own, subject to review, if any, by the tribunal.

*Article 33***Time, scope, form and effect of the award**

- 33.1. The arbitration award shall be made as soon as possible after the hearing or receipt of evidence of the material which the parties wish to put before the tribunal.
- 33.2. In addition to making a final award, the tribunal shall be entitled to make interim, interlocutory, or partial awards.
- 33.3. The award shall be made in writing and shall be final and binding on the parties. The parties shall carry out the award without delay. Each ACP State or Member State shall recognize as binding every award made pursuant to these rules and shall ensure that it is enforced in its territory, as if it were a final judgment of one of its own courts or tribunals.
- 33.4. The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
- 33.5. An award shall be signed and duly certified by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
- 33.6. The award may be made public only with the consent of both parties.
- 33.7. Copies of the award signed and certified by the arbitrators shall be communicated to the parties by the tribunal.

*Article 34***Enforcement of the award**

- 34.1. In order to obtain the recognition and enforcement of the award in the territory of a signatory State of the Convention, the party concerned must present a certified copy of the award to the authority which that State has designated for the purpose. The order for enforcement shall be appended to the presented copy without any verification other than that of the authenticity of the copy.
- 34.2. Each signatory State shall, within 180 days from the entry into force of these rules, inform the President of the Council of Ministers of the authority which it has designated for this purpose and shall keep him informed of any changes. The President of the Council

of Ministers will transmit such information to the Secretary General of the ACP General Secretariat and to the President of the Commission without delay.

- 34.3. The enforcement of the award shall be regulated by the law relating to the enforcement of judgments which is in force in the State in whose territory the enforcement is to be carried out.

*Article 35***Settlement or other grounds for termination**

- 35.1. If, before the award is made, the parties agree on a settlement of the dispute by other means, the tribunal shall either issue an order for the termination of the proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an award on the agreed terms. The tribunal is not obliged to give reasons for such an award.
- 35.2. If, before the award is made, the continuation of the proceedings becomes unnecessary or impossible for any reason other than settlement under Article 35.1, the tribunal shall inform the parties that unless any objection is received within 30 days, it will issue an order terminating the proceedings. Should either party object within the said 30 days, the tribunal shall not issue such an order until it has heard the parties and determined that there are no justifiable grounds for objection.
- 35.3. Copies of the order for termination of the proceedings or of the award on the agreed terms, signed by the arbitrators, shall be communicated by the tribunal to the parties. Where an award on the agreed terms is made, the provisions of Articles 33.3 and 33.5 to 33.7 shall apply.

*Article 36***Interpretation of the award**

- 36.1. Within 60 days after the receipt of the award, either party, with notice to the other party, may request that the tribunal give an interpretation of the award. Where a new issue is discovered after the time limit provided has expired, the 60 days shall run from the date the new issue is discovered, provided that the maximum time limit for a request based on the discovery of a new issue shall not exceed 120 days from the date of the award.

- 36.2. The interpretation shall be given in writing as soon as possible after the receipt of the request. The interpretation shall from part of the award and the provisions of Article 33.2 to 33.6 shall apply.

Article 37

Correction of the award

- 37.1. Within 60 days after the receipt of the award, either party, with notice to the other party, may request the tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of a similar nature. The tribunal may within 30 days after the communication of the award make such corrections on its own initiative.
- 37.2. Such corrections shall be in writing, and the provisions of Article 33.2 to 33.6 shall apply.

Article 38

Additional award

- 38.1. Within 60 days after the receipt of the award, either party, with notice to the other party, may request the tribunal to make an additional award as to claims presented in the proceedings but omitted from the awards.
- 38.2. If the tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within 60 days after the receipt of the request.
- 38.3. When the additional award is made, the provisions of Article 33.2 to 33.6 shall apply.

Article 39

Fees

- 39.1. The fees of the tribunal shall be reasonable in amount, taking into account the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.
- 39.2. If an appointing authority has been agreed upon by the parties or designated by these rules, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

- 39.3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party fixing its costs request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

- 39.4. In the cases referred to in Articles 39.2 and 39.3, when a party so requests and the appointing authority consents to draw up a proposal for fees, the tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the tribunal concerning the fees.

Article 40

Costs

- 40.1. The tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:
- (a) the fees of the tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Article 39;
 - (b) the travel and other expenses incurred by the arbitrators;
 - (c) the costs of expert advice and of other assistance required by the tribunal;
 - (d) the travel and other expenses of witnesses to the extent such expenses are approved by the tribunal;
 - (e) the costs for legal representation and assistance of the successful party if such costs were claimed during the proceedings, and only to the extent that the tribunal determines that the amount of such costs is reasonable;
 - (f) any fees and expenses of the appointing authority.
- 40.2. Except as provided in Article 40.3, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- 40.3. With respect to the costs of legal representation and assistance referred to in Article 40.1 (e), the tribunal,

taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

- 40.4. When the tribunal issues an order for the termination of the proceedings or makes an award on the agreed terms, it shall fix the costs of arbitration referred to in Article 40.1 in the text of that order of award.
- 40.5. No additional fees may be charged by a tribunal for interpretation or correction or completion of its award under Articles 36 to 38.

Article 41

Deposit of costs

- 41.1. The tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in Article 40.1 (a), (b) and (c).
- 41.2. During the course of the arbitration proceedings, the tribunal may request supplementary deposits from the parties for valid reasons.
- 41.3. If an appointing authority has been agreed upon by the parties or designated by these rules, and when a party so requests and the appointing authority consents to perform the function, the tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make comments to the tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.
- 41.4. If the required deposits are not paid in full within 30 days after receipt of the request, the tribunal shall inform the parties in order that one or other of them may make the required payment. If such payment is not made, the tribunal may nevertheless decide to continue with, or order the suspension or termination of, the proceedings.
- 41.5. After the award has been made, the tribunal shall render an account to the parties of the deposits received and return any unexpended balance to the parties.