

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

Commission Proposal on the General Conditions for public works contracts
financed by the European Development Fund

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Commission Proposal on the General Conditions for public works contracts financed by the European Development Fund.

Article 22 of Protocol No 2 to the Lomé Convention on the application of financial and technical cooperation stipulates that

"The general provisions and conditions applicable to the placing and performance of public works contracts financed by the Fund shall be the subject of common rules adopted, on a proposal by the Commission, by a decision of the Council of Ministers at its second meeting following the date of entry into force of the Convention."

This provision is not an innovation. Its substance is exactly the same as that of the corresponding provision in the second Yaoundé Convention (Article 16 of Protocol No 6), which resulted in Decision No 42/71 of the Association Council of 30 November 1971 on the general conditions for public works and supply contracts financed by the European Development Fund (OJ No L 39 of 14 February 1972). These general conditions were applied, following their incorporation in the national laws of the Associated States, to all EDF-financed contracts signed subsequent to the entry into force of the said conditions.

However, the enlargement of the Association through the signing of the Lomé Convention meant that the conditions had to be adapted. In addition to the substantive problems arising from the application of the general conditions in forty-six ACP countries with widely differing legal traditions, the need to broaden the scope of the general conditions to include service contracts called into question the structure of the old conditions. This being so, it was felt that it would be better to draw up three draft sets of general conditions - one each for works contracts, supply contracts and service contracts.

The draft general conditions for works contracts having been finalized by the Commission, the purpose of this Communication is to present the draft to the Council in order to pave the way for an offer from the Community to the ACP States and a decision by the EEC-ACP Council of Ministers, which should normally be taken at its second meeting.

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Like the old general conditions the draft has been checked against the most up-to-date Member State regulations governing public contracts and against the Community rules regarding the opening-up of competition for contracts.

Also, the Conditions of Contract for Works of Civil Engineering Construction used by the Fédération Internationale des Ingénieurs-Conseils (FIDIC) were considered more systematically, and as a result certain additions were made to the existing provisions without affecting the unity of the document.

Lastly, after more than four years' experience with the AASM general conditions it was possible to identify a few shortcomings and to remedy them by amending or adapting certain provisions.

Before giving a few brief details of the document's structure, it is considered appropriate to set out the general guidelines governing these draft general conditions for works contracts.

1. Political guidelines

(a) The considerations of competition and equality of conditions for participation which gave rise to the AASM general conditions (see SEC(69)224 final of 24 January 1969: Draft general conditions for public works contracts financed by the European Development Fund - Commission Communication to the Council) are still relevant and constitute the principal justification for the present draft general conditions.

In this connection an important provision of the draft should be emphasized, namely the question of the opening of tenders in public (Article 43).

This matter was discussed in detail by the Member States and the AASM when the AASM general conditions were negotiated. Certain AASM countries were against the opening of tenders in public for political reasons connected with the fact that firms would be bound to bring pressure to bear on the relevant ministries with a view to obtaining the contract. For their part the Member States emphasized the merits of the opening of tenders in public as a guarantee that the operations would be conducted in a proper manner. The negotiations ended with both sides accepting a compromise which allowed the AASM to apply their own rules or practices in the matter of works contracts. However, the Association Council drew attention in a recital of the abovementioned Decision 42/71 to the fact that it was "important that the public opening of tenders should gradually become the rule in respect of all categories of invitations to tender".

The present draft accordingly establishes the rule whereby tenders for works contracts are to be opened in public.

(b) The draft general conditions also reflect the Lomé guidelines. The provisions involved here are mainly those concerning preferences for national firms in Article 6 of the draft. First, there is the accelerated procedure for issuing invitations to tender for minor works which are not of interest to international competition. Then there is the 10% price preference granted to national firms of the ACP States for contracts worth less than 2 million ECU. Lastly, there is the preference given, in the case of tenders acknowledged to be equivalent, to the firm permitting the greatest possible utilization of the physical and human resources of the ACP States. These provisions have been transposed from Article 20 of Protocol No 2 to the Lomé Convention.

2. Community guidelines

(a) In the section on procedures for the placing of contracts, the draft takes account of the Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ No L 185 of 16 August 1971). Since the provisions of the present general conditions are closely related to the rules laid down by the Council Directive, it seemed useful to carry out a certain amount of harmonization. In this connection

the introduction of an article on rules in the technical field (Article 18) and a number of provisions relating to the procedures for restricted invitations to tender with preselection (Articles 19, 21, 26) represents an improvement of that part of the draft.

(b) The Community's concern to introduce a generally applicable unit of account by means of which it could give specific expression to its actions and policies, namely the European unit of account, had a direct influence on the rules for contract payments laid down in Article 37 of the draft. Tenders still have to be expressed in national currency (Article 36) but the tenderer may request that a portion of the amount of the tender be payable in ECU convertible at the option of the tenderer into the currency of a Member State or ACP State as specified in the contract. These rules are in accordance with Article 45 of the Financial Regulation of the EDF (Financial Regulation of 27 July 1976 applicable to the fourth European Development Fund, OJ No L 229 of 20 August 1976).

3. Application of the general conditions in cases of cofinancing

It is desirable that the general conditions should apply also to contracts financed in conjunction with other providers of funds. The supplementary nature of Community aid and the greater coordination of aid generally suggest that cofinancing operations will probably increase in the future.

With this in view, particular attention was given to the phrasing of certain provisions, notably those relating to participation by firms of third countries (Article 5 of the draft, which links up with Article 56 of the Lomé Convention). The only point on which it is not possible to compromise - at least as regards the wording of the provision in Article 5 - concerns the preferences granted to national firms of the ACP States (Article 6). However, as experience has shown, such a provision should not be considered an insuperable barrier to the application of the general conditions in the event of a partner in a cofinancing operation adopting different rules in the field of preferences.

In another context, certain IBRD practices have been incorporated into the draft general conditions in order to facilitate cofinancing operations with that body. These include the provisional deposit (Article 67) and the reference date to be

adopted for the conversion rate applicable in respect of payments in foreign currency (Article 37).

4. Legal guidelines

(a) The application of the general conditions in English-speaking and French-speaking countries raises the awkward question of the legal framework for the rules and practices relating to contracts financed by the State or the public authorities. It hardly need be stressed that the legal framework in the former AASM, virtually all of which are French-speaking countries using the continental system of law, is quite different from the legal framework in the new English-speaking countries, which use the common law system. However, the difficulty should not be exaggerated. Certain legal procedures and institutions are different, but once the practical problems to which this gives rise have been identified a technique often used in the draft - namely reference to national law - enables a practical and satisfactory solution to be found. The merits of this reference technique should be stressed, since it constitutes an indispensable safety valve without which no draft general conditions would be viable and, furthermore, because it ensures that the legal system of the ACP State concerned is not impinged upon.

(b) The co-existence of these two legal systems gives rise to a second problem: namely, that of balancing the rights and obligations of the parties to the contract. In almost all the AASM the rules governing public contracts reveal the influence of the administrative law of the former metropolises (France and Belgium). Under these rules the prerogatives of the administration are established by the inclusion in contracts of provisions that lie outside the province of common law. The tradition in the United Kingdom, and hence in the English-speaking ACP States, is that contracts awarded by the public authorities are contracts under private law where the administration acts as a private individual, which means that the parties are placed on an absolutely equal footing. The desire to maintain a balance between the parties was in fact already reflected in the old general conditions, which contained provisions safeguarding the rights of the contractor wherever the prerogatives of the administration were affirmed. Accordingly, it is in the wording rather than in the substance that this concern for balance is expressed in the draft of the new general conditions. However, on important points such as the compensation to be accorded to the contractor in the case of exceptional risks (Article 130), or the matter of taking into account variations in the volume or the

nature of work (Articles 104, 105 and 106) resulting from circumstances which are not attributable to the contractor, firms are given more substantial guarantees.

5. Economic and social context

The influence of the worldwide inflation which has been a feature of the past three years is clearly visible in certain solutions adopted in the draft of the new general conditions.

(a) The principle embodied in the old general conditions whereby advances other than the lump-sum advance cannot be revised is abandoned in favour of a case-by-case approach determined in the Special Conditions. Experience had shown that it was no longer in the interests of contractors to request advances, for the fact that these advances were not revised worked out more expensive for them than the interest they would have had to pay if they had borrowed from banks. However, the application of the principle of non-revision can quite easily be adjusted or even made systematic in the Special Conditions if economic conditions become more stable again.

(b) Since the system of payment in foreign currency with an exchange shortfall guarantee has not always resulted in fairness (e.g. payments made in weak currencies), the draft has made the system of payment in foreign currency considerably more flexible by allowing contractors to receive payments not only in the currency of the country where they have their registered place of business with an exchange shortfall guarantee but also in ECU convertible into the currency of a Member State or ACP State as in the contract (Article 37). The right of transfer is also affirmed (Article 39).

(c) The draft embodies the principle of direct payment to sub-contractors, which is something the latter have repeatedly called for. This measure - which has already been incorporated in the national laws of certain Member States and ACP States - constitutes a guarantee for those small and medium-sized firms which are more seriously affected by the economic crisis.

6. Operational context

A serious effort has been made to improve the layout and tighten up on terminology. In view of complaints from users regarding the difficulty of finding one's way about in the provisions common to works and supply contracts and in the provision relating specifically to each of these types of contract, the old general conditions have been split up into separate documents, one of which is this draft relating to works contracts.

The result is that items dealing with the same subject are grouped together in logical and chronological order, which makes it easier to understand the texts. Moreover, the fact that each article now has a title makes it easier to locate items.

Greater accuracy in terminological usage and definitions is another feature of the new general conditions for works contracts. The term "administration" has been replaced by three different concepts: the contracting authority, the works supervisor and the engineer. The contracting authority is the body with which the contractor deals regarding any matters of ownership or responsibility; it is responsible for payments and it is the body which applies the most severe sanctions (rescission, placing under direct management of the administration). However, the contracting authority delegates all powers for dealing with problems connected with the actual performance of the contract to the works supervisor and the engineer. The works supervisor is responsible for taking the most important decisions, whereas the engineer has the task of dealing with all day-to-day problems arising on the site.

7. Rules governing works supervision and the use of consultants

Given the wider international context of these general conditions it was necessary to lay down the rules governing works supervision, particularly for cases where that task was performed by a consultant. This is an important matter because it has repercussions on many articles of the draft.

The old AASM general conditions made no distinction between works supervision performed by the administration itself or by a consultant insofar as the authority responsible for managing and supervising the works, which was represented by "the official responsible for directing performance of the contract", came under the contracting administration. One should hasten to add that this way of tackling the problem did not of course deprive the administration of the

opportunity of calling in a consultancy firm to do the job under a special service contract. However, in keeping with the philosophy behind this approach, the consultancy firm, while providing the necessary technical assistance, became as it were part of the administration, which thus retained its supervisory function.

Although this approach - which still has a lot of support - was retained it seemed advisable not to rule out other possibilities. It was therefore necessary to allow greater latitude in the texts, firstly to enable works supervision to be carried out both by the administration and by a consultant, and secondly to permit the necessary flexibility in the delegation of powers to a consultant responsible for works supervision.

This objective has been achieved in the draft general conditions without radically altering the texts by means of:

- (a) the definition in Article 4 of the concepts "works supervisor" and "engineer", the works supervisor being either an administrative department, a legal person (consultancy firm) or a natural person (consulting engineer); the engineer is always expressly designated either by his function or by his name;
- (b) systematic designation throughout the texts of the person - i.e., the works supervisor or the engineer - who enjoys the prerogatives given to the administration by the general conditions;
- (c) the obligation imposed upon the contracting authority to inform the contractor in the letter of contract of the identities of the works supervisor and the engineer and of the engineer's powers (in particular those delegated to him) regarding the performance of the contract (Articles 49 and 59 of the draft).
- (d) the affirmation of the engineer's competence to deal with the contractor and to act as the preliminary examining authority in the amicable settlement of disputes (Article 57). The text states that an attempt to reach an amicable settlement shall be conducted before the various administrative authorities responsible, and the first of these is always the engineer. If there are no organized administrative channels for seeking satisfaction the contractor's complaints will be notified to the engineer. Within the framework

of the powers delegated to him by the works supervisor or the contracting authority, the engineer will then decide how the matter is to be resolved or refer it to the higher authority.

These provisions make the rules governing works supervision both extremely flexible and highly precise and supervision has been more clearly integrated into the everyday relations between the parties to the contract as a result.

8. Structure of the document

Apart from the fact that certain items are grouped together, mainly as a result of the provisions common to works and supply contracts having been removed, the basic structure of the document has not changed.

The first part contains regulations, from which it is not possible to derogate. It is therefore binding on both the contracting authority and the firm. It fixes the basic rules of the contract and the procedures for placing and awarding contracts. It is therefore the repository of the guarantees to which firms are entitled for their participation in contracts.

The second part is made up of the contractual provisions, from which it is possible to derogate in the light of the requirements peculiar to each contract.

9. Conclusion

To sum up, it may be said that the draft general conditions for works contracts, while retaining a close affinity with the old AASM general conditions as regards the basic structure and the majority of the provisions, have been adapted where necessary so that they can be applied in the new context of the ACP States. The legal, economic, social, technical and formal changes that have been made should give the general conditions a wider international dimension and improve their operation.

This will make the document a more effective instrument of the competition policy conducted in connection with the execution of projects financed by the EDF and, furthermore, a valuable administrative tool for those Commission departments which are responsible for ensuring that projects are properly executed from the technical and financial points of view.

**GENERAL CONDITIONS FOR WORKS CONTRACTS
FINANCED BY THE EUROPEAN DEVELOPMENT FUND**

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TITLE I
REGULATIONS
CHAPTER I
PRINCIPLES AND DEFINITIONS

Article 1

Conditions

Public works contracts financed by the European Development Fund shall be governed by:

- 1. These general conditions;
- 2. The Special Conditions.

Article 2

General conditions

These general conditions comprise:

- 1. Regulations laying down the principles and conditions for the preparation and award of contracts; no derogation may be made from these provisions.
- 2. General contractual provisions of an administrative and technical nature, relating to the performance of contracts. These provisions shall apply to all contracts and reference shall be made to them in the Special Conditions.

Article 3

Special Conditions

The Special Conditions comprise:

- (a) special contractual clauses applicable to each contract;

- (b) all references to the technical specifications applicable to contracts relating to the same type of works;
- (c) an indication of those contractual provisions referred to in Article 2(2) which are not applicable in view of the special requirements of the contract concerned.

Article 4

Definitions

For the purpose of implementing these general conditions the following definitions shall apply:

1. **Contract:** any contract for valuable consideration, concluded between a contracting authority and a contractor (a natural or legal person), the object of which is the building of infrastructural works or immovable property, in which the provision of supplies is only of secondary importance and the assessment of the value of supplies is included in the cost of the work.
2. **Member States:** the Member States of the European Economic Community;
3. **ACP States:** the African, Caribbean and Pacific States which are recipients of aid from the European Development Fund;
4. **Contracting authority:** the State, regional or local authority, body or any legal person governed by public law which concludes the contract or on behalf of which the contract is concluded;
5. **Works supervisor:** the administrative department or the natural or legal person designated by the contracting authority as having responsibility for the performance of the contract;
6. **Engineer:** the person designated by name by the works supervisor to direct or supervise the performance of the contract;
7. **Engineer's representative:** any person designated by name by the engineer to supervise the performance of the contract and, where specially authorized by the engineer, to participate in directing the performance of the contract;
8. **Tenderer:** any natural or legal person submitting a tender with a view to concluding a contract;

9. Contractor: the tenderer with whom the contract is concluded;
10. Price schedule: the document containing, in the case of a unit price contract, an itemized breakdown of the works to be carried out, together with a statement of the unit prices applicable to the undertaking in respect of each of the various items in question.
11. Bill of quantities: the document containing, in the case of a unit price contract, an itemized breakdown of the works to be carried out, indicating an estimated quantity for each item and the corresponding unit price as given in the price schedule. The total expenditure shall be assessed by applying the unit prices to the estimated quantities and adding together the various sums thus obtained.

The estimated quantity shall be a quantity stated by the contracting authority in the bill of quantities. It shall be a quantitative estimate of the work to be carried out and shall constitute a factor in determining the unit price to be applied to the quantities actually carried out.

12. Breakdown of the overall price: the document containing, in the case of an overall price contract, an itemized breakdown of the works to be carried out. This itemized breakdown shall be compiled by the contracting authority on the basis of the nature of the works to be carried out, with or without a statement of quantities. A firm price shall be given for each separate item. The total expenditure or overall price shall be calculated by adding together the various firm prices in question.

Where items are accompanied by quantities, the latter shall be firm quantities,

The firm quantity shall be the quantity for which the contractor has submitted an overall price, which shall be paid to him irrespective of the quantity actually carried out.

Article 5

Equality of conditions for participation

1. Without prejudice to Article 56(3) of the Lomé Convention concerning third countries, any natural or legal person having the nationality of a Member State or an ACP State shall be eligible to participate on equal terms in tendering procedures and contracts financed by the European

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Development Fund.

2. Tenders shall be compared on equal terms in order to avoid any obstacle to participation in tendering procedures and the award of contracts.

To this end, documents inviting tenders may not contain any specification such as may give rise to discrimination between tenderers.

Article 6

Preferences for national firms

1. Contracts may be awarded by means of an accelerated procedure for issuing invitations to tender involving shorter time limits for the submission of tenders where the works involved, because of their scale, are mainly of interest to firms of the ACP States,

This accelerated procedure shall be applied to invitations to tender whose value is estimated at less than 2 million European units of account. Time limits for the submission of tenders shall be fixed in accordance with the rules in force in the beneficiary ACP State.

2. For contracts whose value is less than 2 million European units of account a 10% price preference shall be taken into account in favour of the ACP States where tenders of equivalent economic and technical quality are compared.

This preference shall be confined to national firms of the ACP States within the meaning of the national laws of those States, provided that their residence for tax purposes and main business are established in an ACP State and that a significant share of the capital and management staff are supplied by one or more ACP States.

3. Where two tenders are acknowledged to be equivalent on the basis of the criteria set out in Article 46(1), preference shall be given to the one which permits the greatest possible utilization of the physical and human resources of the ACP States.

Article 7

Competition

Contracts shall be awarded on the basis of competition.

Article 8

Agreed prices

1. Contracts shall be placed on the basis of agreed prices. These prices may be unit prices or an overall price.
2. The fact that contracts are to be placed at an agreed price shall not preclude prices being revised in the light of specific fiscal, economic or social factors. The price revision procedures shall be expressly laid down in the contract documents.
3. In addition, and by way of exception, contracts may be placed without prices being fixed by agreement:
 - (a) for work of a complex nature or involving a new technique presenting considerable technical hazards which necessitate the commencement of work before all the conditions of execution can be determined;
 - (b) in the event of exceptional, unforeseeable circumstances, where the contracts relate to urgent work whose nature and the means of execution are difficult to determine.

Article 9

Payment for services rendered

1. Contracts may not provide for instalments on account except where a service has been rendered and accepted.

Instalments on account shall be allowed in respect of the following, according to the provisions laid down in the contract:

- (a) work done by the contractor, as and when such work is completed;
- (b) supplies provided for the performance of the contract and inspected by the engineer.

2. Nevertheless, advances may be granted in accordance with the conditions and procedures laid down in these general conditions.
3. The payment of advances and instalments on account does not have the character of final payment; the recipient shall be liable to the payer for the full amount of the advance or instalment until final settlement of the contract.

Article 10

Annulment of a tendering procedure

1. Before placing the contract, the contracting authority may:
 - (a) notwithstanding the completion of a procedure prior to the conclusion of the contract, either decide not to place the contract or order that the procedure be recommenced if necessary using another method;
 - (b) in the event of the contract comprising two or more lots, award only certain of the lots and, possibly, decide that the others are to be the subject of another contract or other contracts, if necessary using another method.
2. The annulment of a tendering procedure provided for in paragraph 1 may take place only in the following cases:
 - if no tender is received which meets the conditions set out in the invitation to tender dossier;
 - if no tender is received which satisfies the criteria for the award of the contract as set out in Article 46(1);
 - if the economic or technical data of the project have been fundamentally altered;
 - if exceptional circumstances render normal performance of the contract impossible;
 - if the tenders received do not correspond to the financial resources earmarked for the contract;
 - if the tenders received contain serious irregularities resulting in particular in interference with the normal play of market forces, or
 - if no competition is present.
3. In the event of annulment of a tendering procedure, tenderers who are still bound by their tenders shall be informed thereof by the contracting authority. Tenderers shall not be entitled to compensation.

Article 11

Amendment of the contract

The contracting authority may unilaterally modify the initial project in the course of performance of the contract, provided that it does not change the purpose of the contract and that it gives fair compensation where appropriate.

Article 12

Classification of contracts

Contracts may be classified as follows, according to the way in which the prices are determined:

- overall price contracts;
- unit price contracts;
- repayment contracts, and
- composite contracts.

1. In an overall price contract the agreed price covers all the works or services which are the subject of the contract.

2. In a unit price contract the works or services are broken down into separate items and the proposed unit price stated for each item.

The unit prices shall be agreed. The price of the contract shall be determined by applying the unit prices to the quantities of works or services provided for.

3. In a repayment contract the works or services carried out are paid for after inspection by the engineer, on the basis of the cost price and the supplements in lieu of profit.

4. In a composite contract the prices are fixed by two or more of the methods referred to under 1, 2 and 3.

Article 13

Fixing of prices in provisional price contracts

In the cases provided for in Article 8(3), the contract shall be concluded:

1. on a repayment basis in accordance with Article 12, point 3; or
2. on the basis of provisional prices initially and then of agreed prices. The agreed prices shall be determined not later than the time at which the conditions for performing the contract are known; or
3. partly on a repayment basis and partly on an agreed prices basis.

Article 14

Checking of prices

1. If the Special Conditions so provide, the contracting authority may ask tenderers to supply any information enabling an assessment to be made of the prices tendered.
2. The contractor shall be obliged to supply any information enabling the settlement prices to be checked in the cases provided for in Article 13.

Article 15

Computation of time limits

The time limits referred to in these general conditions, the Special Conditions and the contract documents shall run from the beginning of the day following the date of the act or deed which serves as the point of commencement for the said time limits.

Where the time limit is fixed in days, it shall expire at the end of the last day of the period laid down.

Where the time limit is fixed in months, it shall end on the day having the same number as the day on which it began. In the event of the last month of a time-limit fixed in months not having a day with the same number as the date on which it began, the time limit shall end on the last day of that month.

In the last day of a time limit falls on a Sunday or a public holiday established by law, the time limit shall be extended until the end of the next working day.

CHAPTER II

PROCEDURE FOR PREPARATION AND PLACING OF CONTRACTS

Article 16

Methods of placing contracts

Contracts shall be placed on an invitation to tender. By way of exception, they may be placed by mutual agreement in the cases provided for in Article 55.

I. CONTRACTS BASED ON INVITATION TO TENDER

Article 17

Types of invitation to tender

An invitation to tender shall be open or restricted.

An open invitation to tender shall consist of a public invitation to tender; any interested firm may tender.

A restricted invitation to tender used in those cases referred to in Article 19 of Protocol No. 2 of the Lomé Convention shall be open only to those applicants which the contracting authority decides to consult.

Such consultation may follow a preselection procedure decided on with particular reference to the special nature or the quantity of the works or services to be carried out, as set out in Article 18 of Protocol No. 2 of the Lomé Convention.

1. Rules in the technical field

Article 18

Technical specifications and standards

1. The technical specifications and the description of testing, checking, acceptance and calculation methods which appear in the documents relating to each contract may be defined by reference to national or international standards.
2. Unless such specifications are justified by the subject of the contract, it shall be prohibited to incorporate in the documents relating to each contract technical specifications which mention products of a specific make or source or a particular process and, which therefore favour or eliminate certain firms. In particular, it shall be prohibited to indicate trade marks, patents or types, or a specific origin or production. However, if such indication is accompanied by the words "or equivalent", it shall be authorized in cases where the contracting authority is unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to the parties concerned.

2. Rules governing publication

Article 19

Notice of invitation to tender

A contracting authority wishing to place a contract by open tendering procedure or by restricted tendering procedure with preselection shall make known its intention by means of a notice.

1. In an open tendering procedure the notice of invitation to tender shall state in particular :
 - (a) the subject of the contract, in particular the nature and extent of the services to be provided and the general nature of the work; if the contract is subdivided into several lots: the order of magnitude of the different lots and the possibility of tendering for one, for several, or for all of the lots; the possibility of

submitting variations where authorized; if the notice concerns an invitation to tender with competition which, in addition to the execution of works, also involves the preparation of a project, only the information needed by firms to understand the purpose of the contract and to tender accordingly;

- (b) the location of the works, the source of financing and the period of performance;
 - (c) the contracting authority and, more particularly, the address of the department placing the contract;
 - (d) the place where the invitation to tender dossier may be inspected and the terms on which it may be acquired;
 - (e) the final date for the receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;
 - (f) the period, reckoned from the final date for the receipt of tenders, during which tenderers shall remain bound by their tenders; except in special cases, this period shall be of three months' duration;
 - (g) the date, time and place of the opening of the tenders, together with a statement to the effect that the tenders will be opened in public in accordance with Article 43(1);
 - (h) possibly, an approximate estimate of the work total;
 - (i) the address of the departments from which firms may obtain any further information it would be in their interest to obtain;
2. In a restricted tendering procedure with preselection, the notice shall state in particular :
- (a) the information given in paragraph 1(a), (b), (c) and (g);

- (b) the terms on which the dossier may be acquired;
- (c) the final date for the receipt of requests to participate, the address to which they must be sent and the language in which they must be written;
- (d) possibly, the final date for the issue of invitations to tender by the contracting authority;
- (e) the information to be given in the request to participate, in the form of statements and documents concerning the firm's situation and the economic and technical conditions which the contracting authority requires firms to fulfil in order to be selected; these requirements shall be those specified in Article 25.

Article 20

Publication of notices

1. In the case of an open invitation to tender, the notice shall be published in accordance with such rules as to ensure the widest distribution of information. To this end it shall be published in the Official Journal of the European Communities and the official gazette of the ACP State in assistance with Article 18 (2) (a) of Protocol No. 2 of the Lomé Convention.
2. In the case of a restricted invitation to tender, if a preselection procedure is envisaged, the notice of invitation to tender shall set out the terms of the procedure and shall be published in accordance with paragraph 1.

Article 21

Invitation to tender

In a restricted procedure with preselection, the candidates selected in accordance with Article 26 shall receive an invitation to tender stating in particular:

- (a) the information given in Article 19(1)(e), (f) and (g);
- (b) a reference to the notice mentioned in Article 19(2).

Article 22

Time limit for the submission of tenders

1. In an open tendering procedure, four months shall elapse between the date of publication of the notice of invitation to tender and the final date for the receipt of tenders.

Nevertheless, this period may be reduced or extended depending on the subject of the contract or pursuant to Article 6(1).

2. In a restricted tendering procedure, the period between the date of the invitation to tender and the final date fixed for the receipt of tenders shall be determined on a case-by-case basis according to the subject of the contract.

3. The invitation to tender dossier

Article 23

Contents of the invitation to tender dossier

The invitation to tender dossier must contain the following:

1. the notice of invitation to tender, or the notice of preselection and the invitation to tender;
2. the Special Conditions, the annexes thereto, and a model tender;
3. for a unit price contract: an outline price schedule and an outline bill of quantities;
4. for an overall price contract: an outline breakdown of the overall price;
5. by way of information, and without being binding upon the contracting authority, a Note of General Information brought up to date at the time of publication or distribution of the invitation to tender and containing, in particular, the following points:
 - geographical notes;
 - notes on the climate;
 - monetary and banking system;
 - access routes;

- location of the site;
- customs and tax regulations, in order to enable the tenderer to calculate their incidence on the amount of his tender, and
- wage scales, including an indication of minimum wage levels laid down by national law or customary in the place where the contract is to be performed, corresponding to the main local categories of labour required for the work.

4. Quantitative criteria for participation

Article 24

Standing and ability required of tenderers

1. Any natural or legal person as defined in Article 5(1) who is able to prove that he meets the necessary legal, technical and financial requirements may participate in invitations to tender within the framework of the procedures laid down for that purpose by these general conditions.
2. The following natural or legal persons shall not be entitled to participate in an invitation to tender:
 - (a) any who are bankrupt;
 - (b) any who are in a situation of suspension of payments established by judgment of a court other than 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) any against whom legal proceedings have been instituted involving a declaration of suspension of 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) any who have been convicted, under a final judgment, of any offence affecting their professional conduct;
 - (e) any who are guilty of serious misrepresentation with regard to information required for participation in an invitation to tender.
 - (f) any whom it has been decided to exclude pursuant to Article 134(2)(e).

Article 25

Proof of standing and ability

In order to provide proof of his standing and ability, the tenderer shall, if the Special Conditions so require, supply the following:

1. any document dated less than three months previously, drawn up in accordance with the tenderer's national law,
 - certify that he meets the conditions set out in Article 5(1),
 - certifying that none of the situations referred to in Article 24(2)(a), (b), (c) and (d) applies to him;
2. references certifying to the financial resources available to him for the performance of the contract;
3. in the case of a company or firm, a copy of its memorandum and articles of association or any other document relating to its constitution, together with the credentials of the person authorized to enter into commitments on its behalf;
4. a statement setting out his technical resources, indicating work which he has carried out or in the execution of which he has participated; he shall attach to this statement any certificates relating to and assessing his activities and, where applicable, certificates issued by a qualifying and classifying body approved by the administration of the Member State or ACP State of which he is a national or in which he has a permanent branch;
5. a statement indicating the staff and equipment he intends to use to fulfil the contract;
6. any relevant information about his producers, suppliers and the origin of his equipment and materials.

Article 26

Preselection of candidates

In a restricted procedure with preselection, the contracting authority

shall select, on the basis of the information given pursuant to Article 19(2)(e), the candidates it shall invite to tender.

5. Detailed rules for the drawing up of tenders

Article 27

Language

The tender shall be drawn up in the language stipulated in the invitation to tender.

Article 28

Signature and number of copies

The tender shall be signed by the tenderer or by his agent. It shall be drawn up in a single original bearing the word 'original'. The Special Conditions shall state in addition the number of copies to be supplied by the tenderer. Copies shall be signed in the same way as the original and shall bear the word 'copy'.

Article 29

Agents

Tenders submitted by agents must state the name or names of the principal or principals on whose behalf they are acting. No agent may represent more than one tenderer. Agents shall attach to the tender the notarial act or deed which empowers them to act on behalf of tenderers. Signatures to a deed executed under seal must be authenticated.

Article 30**Consortia**

Where the tender is submitted by a consortium, without legal personality, made up of a number of natural or legal persons, it shall be signed by each of those persons, who shall, unless otherwise specified in the Special Conditions, accept joint and several liability and appoint one of their number to represent the consortium vis-à-vis the contracting authority.

The representative or representatives of such consortium must, insofar as each is concerned, provide the proof required under Article 25, as if they were themselves the tenderer.

Article 31**Alterations and amendments**

Any erasures, interlineations, additions or amendments, whether in the tender or in its annexes, which could influence the basic terms of the contract, such as prices, time limits and technical conditions, shall be subject to alterations approved and signed by the tenderer or his agent.

Article 32**Correction of errors and omissions**

1. Where the invitation to tender for an overall price contract contains an outline breakdown of the overall price, the tenderer shall rectify any omissions in that document and correct such errors as he may find in the firm quantities.
2. In the case of a unit price contract, the tenderer may rectify any omissions in the outline bill of quantities and correct such errors as he may find in the estimated quantities, provided that the Special Conditions authorize such amendments and that the proposed rectification amounts to at least 10% of the item under consideration.
3. The amendments referred to in paragraphs 1 and 2 shall be based on the plans, the Special Conditions and the tenderer's knowledge or personal findings. The tenderer shall attach to his tender a note setting out the reasons for such amendments.

Article 33**Calculation of the bill of quantities**

The tenderer shall insert the requisite information in the outline bill of quantities or the outline breakdown of the overall price, make the necessary calculations, sign the document and attach it to his tender, in which he shall mention the overall amount of the bill of quantities or the breakdown of the overall price.

Article 34**Accuracy of unit prices**

Unit prices must be determined in such a way as to correspond to the relative value of each item in relation to the total amount of the tender. They must in particular not be of such a nature as to distort the comparison of tenders or to result in the payment of instalments on account which are clearly disproportionate to the normal value of the services rendered.

Article 35**Taxation**

The price offered by the tenderer shall include all entry duties, charges and taxes payable in the ACP State in connection with the performance of the contract. In this connection the tenderer shall refer to the "Note of General Information" mentioned in Article 23, point 5, and to his own investigations.

Article 36**Wording of tenders**

1. Tenders shall be expressed in the currency of the beneficiary ACP State.
2. The total amount of the tender and the unit prices in the price schedule shall be written out in full. The same applies to the overall amount of each item of the bill of quantities if the Special Conditions so require.

Where a price is stated in figures and in words and there is a discrepancy between the two, the price expressed in words shall be authentic.

Article 37

Currency of payment and exchange shortfall guarantee

Payments shall be made in the national currency of the beneficiary ACP State. However, the tenderer may request in his tender that a specified percentage, for which reasons shall be given, of the nominal amount of his tender be paid in the currency of the Member State or ACP State of which he is a national or in which he has his registered place of business, on the basis of the rate of exchange laid down in the final subparagraph hereof. He may also express the said percentage in European units of account on the basis of the rate of exchange laid down in the final subparagraph thereof.

When a percentage of the tender is expressed in European units of account, payments relating to this percentage shall be made, where relevant, in the currency of the Member State or ACP State laid down in the contract, on the basis of the equivalent value of the European unit of account the day preceding payment.

The rates of exchange referred to in the second subparagraph hereof shall be those in force on the first working day of the month preceding that in which the date fixed for opening the tenders falls. However, the Special Conditions may provide that the exchange rates shall be those in force on the day the tenders are opened.

6. Obligations of the State

Article 38

Temporary residence permit

For the purpose of carrying out studies in preparation for the drawing up of tenders, the ACP State shall grant a temporary residence permit to any person, participating in an invitation to tender, or his agent. This permit shall expire at the end of a period of one month following the publication of the name of the successful tenderer by the contracting authority in accordance with customary practice in the ACP State.

Article 39

Right of transfer

Subject to observance of the beneficiary ACP State's exchange regulations, the contractor shall be entitled to transfer sums due to him directly or indirectly in connection with performance of the contract.

The timing and amount of the transfer request or requests shall be at the contractor's discretion.

Transfers shall be made in the currency of the Member State or ACP State of which the contractor is a national or in which he has his registered place of business, at the rate of exchange in force in the beneficiary ACP State on the day the transfer is made.

7. Submission and opening of tenders.**Article 40****Submission of tenders**

The tender, the annexes to it stipulated in the Special Conditions and the supporting documents referred to in Article 25 shall be placed in a sealed envelope bearing the address indicated in the notice of invitation to tender or in the invitation to tender, the reference to the notice of invitation to tender in reply to which the tender is being submitted, where appropriate the numbers of the lots tendered for and the following words: not to be opened before the meeting for the opening of tenders, written in the language of the invitation to tender dossier.

In the case of a restricted invitation to tender with preselection, however, the supporting documents referred to in Article 25 shall not be required unless otherwise stipulated in the Special Conditions.

Envelopes containing tenders must be sent by post or submitted by any other means. The tenderer may request advice of delivery.

On receipt, the envelopes, which must not bear any reference to the tenderer, 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 must remain sealed until they are opened under the conditions set out in Article 43.

Article 41**Withdrawals, additions and amendments**

Any tender may be withdrawn, supplemented or amended prior to the final date fixed for the receipt of tenders.

Withdrawals, additions or amendments shall be stated in writing and signed by the tenderer or his agent.

On pain of rendering the tender null and void, amendments and additions must indicate precisely the purpose and the extent of the desired change.

Withdrawal must be unconditional.

The provisions of Articles 31 and 40 relating to tenders shall be applicable to withdrawals, additions or amendments.

If a tenderer who has withdrawn his tender submits a fresh one in the proper manner, he may refer therein to the documents attached to the first tender which he intends to use in support of the second.

Article 42

Period during which tenders are binding

Tenderers shall be bound by their tenders, where necessary corrected by the Committee responsible for the examination of tenders in accordance with Article 45(2) and (3), during the period laid down in the notice of invitation to tender, or the invitation to tender.

If, during this period, the contracting authority considers that it is not in a position to make a choice, it may propose by registered letter that the period be extended. The agreement of the tenderers must be conveyed to the contracting authority by registered letter.

Article 43

Opening of tenders

1. The envelopes containing the tenders, withdrawals, amendments or additions shall be opened in public at the place, on the date and at the time fixed in the notice of invitation to tender, by a Committee whose composition shall be determined by the ACP State.

Only those envelopes which have been received in accordance with the conditions specified in Articles 40 and 41, not later than the final date fixed for the receipt of tenders can be taken into consideration, without prejudice to the provisions of paragraph 2.

Minutes of the envelope-opening operations shall be drawn up, giving details of:

- the number and condition of the envelopes received;
- the identity of the tenderers;
- the documents contained in the envelopes;
- the amounts of the tenders;
- any amendments or withdrawals of tenders.

The Minutes shall be signed by the Chairman, who shall also endorse the documents contained in the envelopes. These Minutes may not be made public or communicated to any tenderer.

The Chairman of the Committee shall then read aloud the names of the tenderers, the amounts of the tenders, price changes and withdrawals. After this announcement the Committee shall continue its work in camera.

2. Envelopes arriving after the final date fixed for the receipt of tenders shall be taken into consideration only if:

- (a) they were posted by registered mail not later than ten days before the final date fixed for the receipt of tenders; and
- (b) they reach the Chairman of the Committee responsible for the examination of tenders before he declares the meeting open.

If possible, envelopes which arrive late shall be entered in the register by the Committee in accordance with Article 40.

Article 44

Invalidity of tenders

Without prejudice to the invalidity of any tender the provisions of which conflict with the essential requirements of these general conditions, in particular those set out in Article 31, the Committee may consider tenders which do not conform to the provisions of Articles 24 to 41 and 51 to 53, which express reservations

or the substance of which clearly does not correspond to reality, to be irregular and, hence, null and void.

Article 45

Work of the Committee responsible for the examination of tenders

1. Before classifying the tenders, the Committee shall eliminate candidates not qualified to tender or whose qualifications are judged inadequate, in accordance with the provisions of Articles 24 and 25.

The reasons for acceptance or rejection given by the Committee shall be mentioned in the Minutes provided for in Article 46(2).

2. The Committee shall then check the results of the arithmetical calculations contained in the tenders. It shall correct obvious material errors or mistakes in calculation and, in case of doubt, ask the tenderer by registered letter to give further details of his tender.

The contracting authority shall not be held liable should errors escape notice.

Tenderers may not take advantage of possible defects of form in their tenders, nor of any errors they may contain or any omissions.

3. a) Where a tenderer has altered the quantity of one or more items in the bill of quantities or the breakdown of the overall price in application of Article 32, the Committee shall check such alterations, rectify them according to its own calculations and apply them to the other tenders.

Should the Committee not be in a position to verify by its own calculations the changes in quantities proposed for an item in a unit price contract, the correction of which has been authorized by the Special Conditions, it shall reduce to the initial estimated quantity tenders containing quantities greater than the said initial estimated quantity, and shall leave unchanged any reductions made by tenderers.

In cases where an estimated quantity is reduced, the Committee shall be entitled to decide:

- that the estimated quantity thus reduced shall become a firm quantity for the tenderer making the reduction,
- that the unit price given in the bill of quantities for a quantity that has become a firm quantity may not be used as the basis for the calculation of costs necessitated by modifications ordered in the course of performance of the contract.

If the tenderer who has made the reduction becomes the contractor, he shall be informed of these decisions when he is notified that his tender has been accepted.

b) Where a tenderer, in application of Article 32, has rectified omissions in the bill of quantities or the breakdown of the overall price, the Committee shall ascertain whether the correction was justified and, where necessary, rectify it according to its own calculations.

If the other tenderers have not proposed prices for the items omitted, the price of each such item shall be calculated as follows in order to enable the tenders to be classified and shall be mentioned for the purpose of correcting the tender which is to be accepted:

L: being the amount (rectified where appropriate by the Committee) corresponding to the item omitted and included in the bill of quantities or the breakdown of the overall price submitted by the tenderer who drew attention to the omission;

X: being the overall amount, rectified where appropriate in accordance with paragraphs (2) and (3)(a), of the bill of quantities or the breakdown of the overall price submitted by the same tenderer, excluding items omitted;

Y: being the overall amount, rectified where appropriate in accordance with paragraphs (2) and (3)(a), of the bill of quantities or the breakdown of the overall price submitted by a tenderer who has not drawn attention to the omission, excluding items omitted; the partial sum S to be added to amount Y shall be calculated by the following formula:

$$S = \frac{L \cdot Y}{X}$$

Where a number of tenderers have drawn attention to the same omission, factors L and X in the above formula shall be calculated by taking the arithmetical mean of values L and X as they appear in the bill of quantities or the breakdown of the overall price submitted by the tenderers in question.

In each case the unit price of an omitted item shall be calculated by dividing the partial sum S by the corresponding quantity, rectified where appropriate by the Committee.

In calculating the price of an omitted item, the Committee may ignore a tender in which the price proposed for the omitted item is abnormal.

In that case, if no tenderer has proposed a normal price for the omitted item, the contracting authority may award the contract without taking into account the item in question; the price of the said item shall be settled by mutual agreement with the tenderer selected as the contractor before his tender is accepted.

c) Where the Committee, on the basis of Article 34, finds that the unit prices of a tender are apparently abnormal, it shall ask the tenderer concerned by registered letter to furnish an explanation of his unit prices.

8. Selection of contractor and drawing up of the contract

Article 46

Selection of contractor

1. Without prejudice to the provisions of Article 6, the Committee shall recommend to the contracting authority the most economically advantageous tender, taking into account in particular the price, utilization cost, and technical value of the works and the financial guarantees.

2. The deliberations of the Committee shall be recorded in Minutes which may not be made public or communicated to any tenderer. These Minutes shall be endorsed by the members of the Committee.

By way of information, the contracting authority shall notify the tenderer it has selected of its choice by registered letter with advice of delivery, to be posted before the expiry of the period laid down in Article 42.

The tenderer selected shall remain bound by his tender for a further period of 60 days following the date of signature of the advice of delivery.

The contracting authority shall also notify the other tenderers by registered letter that their tenders have been unsuccessful.

The contracting authority is not obliged to state the reasons for its choice.

The name of the tenderer selected and the overall amount of his tender shall be published by the contracting authority.

3. The contracting authority shall not enter into any discussion with tenderers, save to request them to specify or supplement the content of their tenders.

Article 47

Notification of acceptance of contract

1.(a) The contract shall be concluded when the tenderer is notified that his tender has been accepted. Notification must be given at the latest within the period of 60 days laid down in Article 46(2);

(b) The notification shall be given by registered letter with advice of delivery. It shall be deemed to have been given on the date of signature of the advice of delivery by the tenderer.

2. Upon expiry of the period laid down in paragraph 1(a), if notification of acceptance of the contract has not been given, the tenderer selected shall be free to withdraw by means of a registered letter with advice of delivery.

Should the date of the belated notification of acceptance of the contract be the same as that of the selected tenderer's withdrawal, the withdrawal shall be deemed to precede the notification.

In the event of withdrawal by the tenderer selected, the other tenderers may be approached according to the order in which their tenders are classified or a fresh procedure for the invitation of tenders may be initiated or, if necessary, a contract by mutual agreement may be negotiated if the contract corresponds to one of the cases referred to in Article 55.

3. If the tenderer has not availed himself of the option of withdrawal provided for in paragraph 2 before notification of acceptance of the contract has been given, he shall be bound by such notification. However, if such notification is given more than three months after the expiry of the period laid down in paragraph 1, the tenderer shall be bound only if he records his agreement by registered letter within a period of 15 days from the date of notification of acceptance of the contract.

Article 48

Instrument of contract: letter of contract

The instrument of the contract shall be the registered letter with advice of delivery referred to in Article 47(1)(b). This letter shall constitute the letter of contract.

Article 49

Contents of the letter of contract

The letter of contract shall include in particular:

- A list of the documents relating to the contract, together with their references, and in particular the general conditions, the Special Conditions and its annexes, the tender, the price schedule and the bill of quantities or the breakdown of the overall price,
- any derogations from these documents by the contract,
- the contractual performance period,
- the amount of the contract and the manner of payment,
- the decisions taken by the contracting authority pursuant to Article 45,
- the designation of the engineer, the works supervisor to whom he is responsible and his powers regarding the performance of the contract,
- all particulars necessary for determining the obligations arising from the contract other than those appearing in the documents referred to in the first indent.

Article 50**Order of precedence of the documents relating to the contract**

The order of precedence of the documents relating to the contract which are listed in the letter of contract shall be established by the Special Conditions.

9. Special cases**Article 51****Grouping into lots**

1. Should it be decided to divide up an invitation to tender for economic and technical reasons, account shall be taken of the advantage of grouping the works into homogeneous lots which are as large as possible.

The Special Conditions shall stipulate the number of lots, the nature or size of each lot and shall indicate, where appropriate, the minimum and maximum number of lots for which a given tenderer may tender.

A tender shall be submitted in respect of each lot.

However, the tenderer may submit a tender relating to several lots, provided that he tenders therein for each lot separately. This condition need not be observed, however, if the lots are identical.

Unless the Special Conditions prescribe otherwise, the tenderer may supplement his tenders by referring to the overall rebate he would grant in the event of amalgamation of certain lots for which he has submitted individual tenders.

2. Each lot shall be the subject of a separate contract.

However, the Special Conditions may lay down that lots apportioned to the same tenderer, even if they differ, shall form a single contract, the period of performance of which it shall specify.

3. Where works lots are apportioned to different contractors, the Special Conditions may provide for the designation of one contractor to act as joint agent to ensure coordination in the carrying out of the works in question.

The Special Conditions shall stipulate whether the lots are the subject of separate contracts or whether they are grouped together in a single contract.

The contractors shall designate one of their number to act as joint agent. Unless the Special Conditions provide otherwise, he shall be jointly and severally liable with them for the execution of the lot or lots apportioned to each.

Article 52

Variations

If the invitation to tender has made provision for the submission of variant solutions, the Special Conditions must specify the subject, limits and basic conditions thereof; in particular, it must state whether or not the submission of variations exempts the tenderer from submitting a tender for the administrative solution.

Variant solutions may not derogate from the requirements of the general conditions. They shall be binding on the competitor in his capacity as originator of the project.

The submission of any variant solution must comprise:

(a) for unit price contracts:

- an individual tender for the variation,
- the draft of the amendments to the Special Conditions necessitated by the variation submitted by the tenderer,
- the price schedule as modified by the variation,
- the bill of quantities as modified by the variation,
- the specification of works provided for in the contracting authority's draft but not affected by the variant solution,
- the specification of works affected by the variant solution,
- a technical note on the conception of the variation and, where appropriate, a summary of the calculations.

If the variant solution is adopted by the contracting authority, the specification of the works to which it relates shall become a term of the contract and fixed.

However, this specification shall cease to be so in respect of variations in quantities which implementation of the administrative solution would in any case have entailed as a result of the alteration of the basic assumptions.

(b) for overall price contracts:

- an individual tender for the variation,
- the draft of the amendments to the Special Conditions necessitated by the variation submitted by the tenderer,
- the breakdown of the overall price,
- a technical note on the conception of the variation and where appropriate, a summary of the calculations.

Article 53

Invitation to tender with competition

1. The invitation to tender may take the form of a competition.
2. A competition procedure shall be adopted where special investigations are justified for technical, aesthetic or financial reasons.
3. The competition shall take place on the basis of a schedule drawn up by the contracting authority.
4. The competition shall be for the preparation of a project and its execution.
5. The Committee responsible for the examination of tenders shall be called 'the board'. The composition of this board shall be laid down in the competition schedule.
6. The award of the contract shall be decided by the contracting authority after receiving the opinion of the board.

The schedule may make provision for prizes to be awarded for the best-placed projects after the one adopted for execution. Such prizes shall be specified by the schedule and awarded to the originators of the said projects in

accordance with the order established by the board. Prizes may be withheld if the projects are not judged satisfactory.

7. The schedule shall establish precisely the respective rights of the contracting authority and the competitors to the ownership and use of the projects.

8. The notice of invitation to tender with competition and the compilation of the dossier must comply with the provisions of Articles 19, 20 and 23.

9. The preparation of tenders, the procedure for the examination, their classification and the notification of acceptance of the project adopted shall comply with the corresponding provisions relating to invitations to tender without competition, save where the schedule provides otherwise.

II. Mutual agreement contracts

Article 54

Definition and characteristics of mutual agreement contracts

1. A contract shall be termed a mutual agreement contract where the contracting authority enters freely into such discussions as it may consider useful and awards the contract to the firm which it has accepted.

2. The contracting authority shall be bound to arrange a competition, as far as possible and by all appropriate means, for firms capable of carrying out the work which is the subject of such contract.

3. The contracting authority shall be bound to apply the provisions of Article 18.

Article 55

Cases where a mutual agreement procedure may be followed

Contracts by mutual agreement may be negotiated:

1. where the minor importance of the subject of the contract does not warrant recourse to the normal procedure of prior competition;
2. in the absence of tenders, or in the event of irregular tenders being submitted following the adoption of an invitation to tender procedure, or if the tenders submitted are unacceptable, insofar as the terms of the original contract are not substantially altered;
3. for works the execution of which is reserved for persons holding patents or licences for inventions, improvements or importation in respect of those works, or for works which can only be obtained from a single firm;
4. for works the execution of which may, for reasons of technical necessity or substantial prior investment, be entrusted to one specific firm only;
5. where the works only take the form of research, tests, studies or improvements;
6. for works where, in cases of emergency, an invitation to tender procedure would take too long;
7. where the prices submitted are not governed by the normal play of market forces;
8. for additional works contracts which cannot, for technical and economic reasons, be separated from the principal contract or the cost of which does not exceed 20% of that contract;
9. for works contracts in which, pursuant to Article 13, the prices can be determined only provisionally.

Article 56

Instrument of the mutual agreement contract

The instrument of a mutual agreement contract shall be a registered letter with advice of delivery, by which the contracting authority accepts the tender submitted by the firm.

The letter of contract shall comply with Article 49.

Chapter III - Settlement of disputes

Article 57

Amicable settlement of disputes

No dispute arising either between the contracting authority and a tenderer in connection with the procedure for the placing of a contract or between the contracting authority and the contractor resulting from the interpretation or performance of a contract shall be referred to arbitration unless an attempt has first been made to settle the dispute amicably.

Where the complainant is the contractor or a tenderer, the attempt to reach an amicable settlement shall be conducted before the various administrative authorities responsible if the national law applicable makes provision for the possibility of review by administrative procedure. If national law does not provide for such possibility, the attempt to reach an amicable settlement shall be initiated by notification of the complaints to the engineer in the case of a dispute concerning the interpretation or performance of a contract, or to the contracting authority in the case of a dispute concerning the procedure for the award of a contract.

Where the complainant is the contracting authority, the attempt to reach an amicable settlement shall in all cases involve a procedure under which complaints are notified to the opposing party (the contractor or tenderer).

The amicable settlement stage shall be deemed to be at an end if no final decision has been taken within a period of four months from the date of the application for a review or of the notification of the complaints.

Article 58

Arbitration

If the procedures laid down in Article 57 have been exhausted and the attempt to reach an amicable settlement has failed, the dispute shall be settled by

arbitration in accordance with the rules of arbitration adopted by the ACP-EEC Council of Ministers, as laid down in Article 23 of Protocol No. 2 of the Lomé Convention.

The rules of arbitration provided for in the preceding paragraph shall fix the period within which the request for settlement of a dispute must be submitted to the arbitrating authority on pain of being time-barred.

The parties to a dispute arising in connection with the award or performance of contracts concluded prior to the entry into force of these general conditions may also agree to submit such dispute to the arbitration procedure referred to in the two preceding paragraphs.

TITLE II

CONTRACTUAL, ADMINISTRATIVE AND TECHNICAL PROVISIONS

I - Preliminary provisions

Article 59

The engineer

The engineer shall be made known to the contractor in the letter notifying him of award of the contract.

This letter of contract shall also state the powers of the engineer in accordance with Article 49.

Article 60

The engineer's representative

The engineer's representative(s) responsible for supervising performance of the contract shall be made known by the engineer to the contractor by an order of the administration. If the engineer delegates to his representative(s) some of his powers for directing performance of the contract he shall inform the contractor by means of an order of the administration of the powers thus delegated.

Article 61

Free access to the site

The contractor shall ensure that the engineer or his representative(s) has or have free access to the place where the works under the contract are carried out, and shall provide them with any information that they may require. In the performance of their duties, the engineer or his representative(s) shall be subject to the obligations laid down in the last paragraph of Article 98.

Article 62

Address for service of the contractor

The contractor shall have an address for service close to the works and shall notify the contracting authority of that address. Should he fail to fulfil this obligation within two months of notification of award of the contract, all notifications concerning the contract shall be valid where these are sent to the address specified for this purpose in the Special Conditions.

After final acceptance of the works, the contractor shall be relieved of this obligation. Should he fail to inform the contracting authority of his new address, notifications concerning the contract, made to the address given in the Special Conditions, shall be valid.

Article 63

Superintendence of the works by the contractor

The contractor shall himself superintend the works or he shall appoint a representative to do so, such appointment to be submitted to the engineer for approval; in any event he shall be responsible for ensuring that the works are carried out satisfactorily and, in particular, that the technical specifications and orders of the administration are adhered to by sub-contractors.

The representative shall be deemed to have his address at the address for service given by the contractor.

The engineer shall be entitled to demand the replacement of the representative at any time.

Article 64

Assignment, sub-contracting and sub-ordering

1. An assignment shall be an agreement by which the contractor transfers his contract to a third party.

A sub-contract shall be an agreement by which the contractor entrusts performance of a part of his contract to a third party.

A sub-order shall be an order made to a third party by the contractor or by that third party himself to another third party, with a view either to the manufacture of intermediate items or materials to be incorporated in the works carried out or to the performance of certain operations affecting the carrying out of such works.

2. The contractor may not assign or sub-contract the contract without the express authorization of the contracting authority. Assignees or sub-contractors must meet the conditions set out in Article 5(1).

Sub-orders may be placed freely. Nevertheless, the Special Conditions may stipulate that the prior authorization of the contracting authority is required in respect of certain sub-orders.

3. Subject to the application of Article 119 the contracting authority shall acknowledge no legal connection with the sub-contractors and persons with whom sub-orders are placed.

The engineer may avail himself of the rights laid down in Article 96 with regard to services carried out or provided by sub-contractors or persons with whom sub-orders are placed.

4. If, without being authorized to do so, the contractor has assigned his contract, concluded a sub-contract or placed a sub-order for which authorization was necessary, the contracting authority may, without giving formal notice thereof, apply as of right the measures provided for in Article 134 point 2.

Article 65

Document and items to be supplied to the contractor

1. After notification of acceptance of the contract has been given, the works supervisor shall provide the contractor, free of charge, with a checked and, where necessary, corrected copy of the tender, the Special Conditions and the annexes thereto.

At the request of the contractor, the works supervisor shall forward to him free of charge and postage paid an additional copy of the documents referred to in the preceding subparagraph, together with a complete set of copies of the plans drawn up by the said works supervisor for the performance of the contract. The works supervisor shall be responsible for ensuring that such copies are in conformity with the originals.

2. The Special Conditions shall state the additional documents and items which may be placed at the disposal of the contractor at his request, in order to facilitate his work.

Upon expiry of a period of eight days following the provision of these documents and items, the contractor shall be deemed to have checked that they conform with those which served as the basis for the invitation to tender and which are retained by the works supervisor for the purposes of acceptance of the works.

The Special Conditions shall specify the date and conditions for the return of these documents and items.

3. The contractor may purchase additional copies of these plans, documents and items, in so far as they are available.

4. The works supervisor may not hand over these plans, documents and items prior to the establishment of the deposit or the commitment of the directly liable guarantor provided for in Article 67.

Article 66

Documents to be supplied by the contractor

1. Programme of performance

The contractor shall draw up and submit for the approval of the engineer the programme for performance of the contract, in accordance with the detailed rules laid down in the Special Conditions.

2. Detailed breakdown of prices.

If necessary, and within a period of not less than fifteen days, the contractor must be able to provide at any time, at the engineer's request, a detailed breakdown of all or some of his prices.

3. Detailed plans; documents and items

The detailed plans which the contractor must draw up and submit for the approval of the engineer shall be referred to in the Special Conditions, as shall the documents and items which must be submitted to the engineer for endorsement or acceptance.

Unless otherwise specified in the Special Conditions, these detailed plans, documents and items may not be reproduced or used by the contracting authority for another purpose nor communicated to third parties.

4. Time limits for submission and approval or acceptance

The special conditions shall specify the time limit within which the programme of performance must be submitted to the engineer for approval. They may set time limits within which the contractor must submit all or part of the detailed plans, documents and items. They shall also state the time limit for approval or acceptance by the engineer of the programme of performance, detailed plans, documents and items.

5. Delay in submission, approval or acceptance

Any delay by the contractor in submitting the programme, the detailed breakdown of prices or the detailed plans, documents and items may, without formal notice being given, result in the application of liquidated damages for each day of delay, the rate for which shall be determined in the Special Conditions.

Any delay by the engineer in approving or accepting the programme, detailed plans, documents or items shall, at the substantiated request of the contractor, result in an extension of the period of performance equal to the length of the delay. If such extension of the period of performance does not make good the injury suffered by the contractor, the latter may claim a longer extension of the period of performance and/or possibly an indemnity.

The Special Conditions may provide that the start of performance of the contract shall be subject to the submission of the programme or of all or part of the detailed plans, documents and items, and to the approval or acceptance thereof, without this provision affecting the initial date of the contractual period.

II. Guarantees of contract

Article 67

Provisional deposit

The Special Conditions may stipulate, where appropriate, that tenderers establish a provisional deposit as an earnest of their tenders.

The provisional deposit may be replaced by a guarantee given by a directly liable guarantor.

The conditions governing the establishment of the deposit or the persons empowered to act as directly liable guarantors shall be as stipulated in Article 68(2).

Provisional deposits shall be returned or the guarantors whose guarantees replace such deposits released as soon as the contractor is designated. As regards the successful tenderer, however, the return of the provisional deposit or the release of the guarantor shall take place only when the final deposit has been established; the provisional deposit may serve as a contribution towards the final deposit.

Article 68

Guarantee of contract by means of a deposit or a directly liable guarantor

1. Unless the Special Conditions provide otherwise, the contractor shall be obliged to establish a deposit or, if he so wishes, provide a directly liable guarantor to guarantee recovery of the sums which he owes under the contract.

The amount of the deposit or the commitment of the directly liable guarantor may not exceed 3% of the original amount of the contract, increased where appropriate by the amount given in the riders where the contract does not provide for a maintenance period and by 20% where the contract does provide for a maintenance period.

Within the above limits, and in accordance with the provisions of the Special Conditions, the deposit or the commitment of the directly liable guarantor may be established progressively as the contract is performed.

2. The deposit shall be established in the currency in which the contract is expressed. It shall be paid in accordance with national regulations.

The directly liable guarantor shall be any body under public or private law established in an ACP State or a Member State or possibly in a third country in the cases provided for in Article 56(3) of the Lomé Convention which is able to provide such a guarantee or is empowered to do so by the authorities under whose control it operates.

3. Save where there are special provisions in the Special Conditions, the establishment of the deposit or the commitment of the directly liable guarantor must take place within one month of the date of notification of acceptance of the contract.

No payment may be made in favour of the contractor prior to the establishment of the deposit or the commitment of the directly liable guarantor.

Article 69

Failure to establish a deposit or to provide a directly liable guarantor

If the contractor fails to produce proof of the establishment of the deposit or the commitment of the directly liable guarantor within the period laid down in Article 68(3), the contracting authority shall be entitled to apply as of right the measures provided for in Article 134, point 2.

Before applying these measures, the works supervisor shall send the contractor a registered letter giving formal notice regarding the establishment of the deposit or the commitment of the directly liable guarantor. Such formal notice shall set a new time limit which may not be less than ten calendar days and which shall take effect from the date of dispatch of the letter.

Article 70

Right of the contracting authority over the deposit or directly liable guarantor

1. The contracting authority reserves the right to require payment at any time from the deposit of all sums which the contractor owes under the contract.

The deposit shall continue to be applied to meet the obligations of the contractor until the contract has been performed in full.

Should a deposit guaranteeing performance of the contract cease to be established in full and should the contractor fail to make good the deficit, a deduction equal to the amount of the latter may be made from future payments and used to re-establish the deposit.

2. The directly liable guarantor shall pay off the sums due from the contractor under the contract, without being able to defer payment or raise any objection for any reason whatsoever.

During the performance of the contract, if the directly liable guarantor is not able to abide by its commitments, the contracting authority shall treat it as terminated. It shall invite the contractor to provide a new guarantor which shall undertake liability within the same limits as the previous one.

Should the contractor fail to provide a new guarantor, the contracting authority may cause the provisions of Article 69 to be applied.

Article 71

Return of deposit or release of the directly liable guarantor

1. The deposit shall be returned or the directly liable guarantor released by means of a cancellation order issued by the contracting authority within one month following the date of final acceptance of the works, insofar as the contractor has by that date fulfilled his obligations.

Upon the expiry of this period, the liability of the guarantor shall cease, even when no cancellation order has been given, unless the works supervisor has stated in a registered letter addressed to the guarantor that the contractor has not fulfilled all his obligations. In this case, the guarantor may be discharged only by a cancellation order issued by the contracting authority.

2. However, in the light of the characteristics of the contract, the Special Conditions may provide that one half of the deposit be returned or one half of the commitment of the directly liable guarantor be released within one month of the date of the provisional acceptance.

In this case, paragraph 1 shall apply to that part of the deposit not yet returned or to that part of the commitment of the directly liable guarantor not yet released.

Article 72**Sums retained by way of guarantee**

The Special Conditions may stipulate that a deduction shall be made from partial payments by way of guarantee of sums which the contractor is acknowledged as owing under the obligations arising in connection with the maintenance period.

If the Special Conditions provide for a guarantee of this kind, the return of the deposit or the release of the directly liable guarantor, referred to in Article 71(1), must take place within one month of the date of provisional acceptance, insofar as the contractor has by that date fulfilled his obligations.

The Special Conditions shall specify the amount and lay down the detailed rules for the guarantee, and shall state whether it may be replaced by a directly liable guarantor for the same amount on the terms set out in Article 68(2).

Article 73

Insurance

Within 15 days following notification of the award of the contract, the contractor shall take out insurance, to take effect from the actual commencement of the works and to remain in force throughout the performance of the contract, covering his liability with regard to accidents at work and civil liability in the event of accidents caused to third parties as a result of the works; he shall be obliged to furnish proof of regular payment of premiums each time he is required to do so.

III. General obligations

Article 74

Basic rules for the determination of prices

1. The contractor shall be deemed to have prepared his tender on the basis of the data, in particular hydrological, climatic and physical data, provided in the invitation to tender. However, as a result of his own investigations and the on-the-spot visits organized by the contracting authority in cases where the importance of the works so justifies, he shall be deemed to have ascertained, as far as possible, before filing his tender, the characteristics of the location, the nature of the work, the quantities to be produced, the amount of the materials to be provided, the ways and means of access to the building sites, the necessary equipment, and, in a general manner, to have obtained all information concerning risks, hazards and circumstances likely to influence his tender.

2. The prices tendered shall be deemed to take account of all that is required for performance, in particular:

- any works whatsoever which, by their nature, are dependent upon or bound up with those defined in the approved plans and which are described, in addition, by the requirements of the Special Conditions and the bill of quantities,
- all works, measures and expenses relating to execution of the contract, even if, in a contract for which a bill of quantities is drawn up, they are not the subject of an item in the bill of quantities.

3. Since the contractor is deemed to have determined his prices on the basis of his own calculations, operations and estimates, he must carry out, free of charge, any work which is the subject of any item whatsoever, for which he neither indicates a unit price nor a firm sum.

4. In the case of an overall price contract the details included by the contracting authority in the outline breakdown of the overall price are given solely for purposes of information and may be invoked, if necessary, only to make good any inadequacy in the Special Conditions and in the approved plans.

Since the contractor is deemed to have determined the amount of his tender on the basis of his own calculations, operations and estimates, after the final date fixed for filing tenders he shall no longer be allowed to enter any claim concerning possible errors or omissions in the outline breakdown of the overall price furnished by the contracting authority.

Should the plans contain discrepancies, the contractor may claim to have provided for the contingency which is most advantageous to him, unless the outline breakdown of the overall price gives more precise details on the matter.

Article 75

Observance of laws and regulations

The contractor shall comply with national law and regulations governing works contracts, especially those concerning building, highways, hygiene, and the protection of work.

Article 76

Policing of sites

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

2. He shall ensure that sites are policed as long as work is in progress, and shall be responsible for taking the necessary steps, both in the interests of his servants, agents of the contracting authority and third parties, to prevent any loss or accident which may result from carrying out the works.

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 own expense all lighting, protection, fencing and security equipment that proves necessary for the proper performance of the works, or that is required by the engineer or his representative.

4. If during the performance of the contract urgent measures are necessary to obviate any risk of accident or damage or to assure security following any accident or damage, the works supervisor or the engineer may invite the contractor to do what is necessary.

If the contractor is unwilling or unable to undertake these measures, the works supervisor shall carry out the work under direct management of the administration, at the expense of the contractor to the extent that he is liable.

Article 77

Obstacles to traffic

The contractor shall ensure that the works and installations of his firm cause neither difficulties nor obstacles to traffic on roads, railways, waterways, aerodromes etc., save as permitted by the Special Conditions.

Article 78

Safeguarding of adjacent properties

On his own responsibility and at his expense, the contractor shall take all the precautions required by building practice and by the special circumstances to safeguard neighbouring properties and to avoid causing any disturbance therein and shall indemnify the contracting authority against the financial consequences of all claims by neighbouring landowners or residents to the extent that he is liable.

Article 79**Disturbance to a public utility service**

Any work which the engineer indicates to the contractor, or which appears of itself as being capable of causing damage or disturbance to a public utility service shall be the subject of a notice issued by the contractor, with acknowledgement of receipt, and lodged with the operating body, at least 10 calendar days prior to commencement of the works.

Article 80**Contractor's transport**

The contractor must avoid causing damage to bridges, roads and tracks serving the site, as a result of his transport operations. He must, in particular, take account of weight restrictions when selecting routes and vehicles, in order to avoid causing any damage going beyond what is deemed normal, to the abovementioned bridges, roads and tracks.

Any special measures which prove necessary to protect or strengthen sections of roads, tracks or bridges, shall be the responsibility of the contractor. Before carrying out any transport operations the latter must inform the engineer or his representative of the measures he intends to take.

Article 81**Cables and conduits**

Where, in the course of carrying out the works, the contractor encounters benchmarks indicating the course of underground cables, conduits and installations, he shall be required to keep such benchmarks in position or to replace them should execution of the works have necessitated their temporary removal.

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 plans and documents.

Where the presence of cables, conduits and installations has not been specified in the contract plans and documents but is revealed by benchmarks and references, the contractor shall be bound by a general duty of care and similar obligations regarding preservation, removal and replacement. 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.

However, the obligation 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 the same itself. The same shall apply where this obligation and the expenditure resulting therefrom devolve upon another specialist administration or an agent.

Damage caused by the contractor to cables, conduits and installations which have not been notified, or marked, and of which he could not reasonably have been aware, shall be regarded as resulting from a circumstance covered in Article 130(2).

Article 82

Outline of works

Before starting to carry out the works the contractor shall produce an outline of the work and shall set up an adequate number of benchmarks to which the relative height of the various parts of the work must be exactly related. He shall have pegs, stakes, profile battens, etc., positioned wherever the engineer or his representative shall judge it necessary.

When these operations are completed he shall inform the engineer or his representative thereof in writing. The latter shall verify them without delay and, where necessary, shall rectify them in the presence of the contractor or his representative.

The verification carried out by the engineer or his representative shall not relieve the contractor of his obligations as regards the accuracy of the outline of the works. In cases of error the contractor shall, if so required, carry out the necessary rectifications at his own expense. However, if the error results from incorrect data supplied by the engineer or his representative, the

contracting authority shall be responsible for the rectification.

The contractor shall see to it that pegs, stakes, profile battens etc. remain in the position and at the height thus fixed; he shall be responsible, in any event, for the consequences which could result from their being moved or disturbed.

The contractor shall place the pegs, lines, boards, stakes, set-squares, profile battens, water and spirit levels, levelling rods, chains, etc., at the disposal of the engineer or his representative, on each occasion that it needs them, together with all the articles necessary for the operations which have to be carried out so that it may be ascertained that the works are being carried out in accordance with the approved plans and the conditions of the contract.

The engineer or his representative may select from among the contractor's staff, and with the latter's consent, the workmen most capable of assisting him in the operations in question. The contractor shall bear the cost of the wages of these workmen.

Article 83

Occupation of land or premises

1. Use of land belonging to the contracting authority

Apart from the actual building land, the contractor shall himself procure the land he considers necessary for carrying out the works. If the contracting authority proposes to provide him with such land, wholly or in part, this shall be stipulated in the Special Conditions or in the contract plans.

The contractor may not make use of land procured for him by the contracting authority, without written permission.

2. Use of premises belonging to the contracting authority

If premises are placed at his disposal for any use whatsoever, the contractor shall keep them in a good state of preservation while he is in occupation and shall restore them to their original state, on completion of the contract, if called upon to do so.

No payment may be claimed for improvements resulting from installation work carried out by the contractor of his own accord, if the contracting authority decides to retain them.

Article 84

Materials obtained from demolition

Where the contract includes demolition work, materials and articles obtained therefrom shall be the property of the contractor subject to the provisions of Article 85.

Should the Special Conditions depart from this rule and 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 necessary precautions to ensure that these are preserved. He shall be answerable for any destruction of or damage to such materials caused by him or his servants.

Irrespective of the use to which the contracting authority intends to put the materials or articles, in respect of which it reserves the right of ownership, all costs incurred in storing them at the place indicated by the engineer shall be borne by the contractor for their transport over a distance not exceeding 100 metres.

Save where the Special Conditions otherwise provide, the contractor shall progressively remove rubble and other demolition materials, rubbish and debris in accordance with the instructions of the engineer.

Article 85

Discoveries while work is in progress

The contracting authority reserves the right of ownership of materials found during excavation and demolition work carried out on land belonging to it, subject to compensating the contractor for any special efforts.

Discoveries of any interest whatsoever made during the excavations or demolition work shall be immediately brought to the attention of the engineer.

Objets d'art, antiques, natural history, numismatic, or other objects which are of scientific interest, and also rare objects or objects made of precious materials found in these excavations or in this demolition work shall be the property of the contracting authority and shall be held at the disposal of the engineer.

In the event of dispute, the engineer shall have sole authority to make a decision as to the characteristics set out in the second and third paragraphs.

Article 86

Temporary works and soil studies

1. Temporary works

The contractor shall carry out at his expense all the temporary works to enable the construction work to be carried out.

He shall submit the plans for such temporary works, such as coffer-dams, scaffolding, trusses, shuttering etc., which he intends to use, to the engineer. He shall take account of any observations made to him, while assuming sole responsibility for these plans.

2. Soil studies

Subject to the Special Conditions, the contractor shall hold at the disposal of the engineer the personnel and equipment necessary for carrying out any soil survey which the engineer deems useful. He shall be compensated for the cost of the manpower and equipment used in such work.

Article 87

Overlapping contracts

Where other contracts have to be carried out on the same site or in the same building, the contractor shall comply with orders given to him by the engineer, so as to enable the contracts to be carried out.

Article 88

Simultaneous contracts

1. Subject to the application of such rules governing legal compensation as may be established by national law or usage, each works contract and its performance by the contractor shall be independent of all other contracts of which the contractor is holder.
2. Any difficulties arising with regard to one contract may in no case entitle the contractor to amend or delay performance of other contracts; similarly, the contracting authority may not take advantage of such difficulties to suspend payments due under another contract.

Article 89

Suspension of works for climatic reasons

The engineer may suspend execution of the works for a certain period, where he considers that they cannot be carried out without difficulty by reason of climatic conditions or the results thereof.

During the periods of suspension, the contractor shall take, at his own expense, all protective measures to safeguard works and materials.

The periods of suspension may in no case be aggregated with the periods of postponement provided for in Article 124.

Article 90

Patents and licences

The contractor shall indemnify the contracting authority against any claim resulting from the use, during the performance of the contract, of patents, licences, drawings, models, or factory or trade marks.

Where the contracting authority gives a description of all or part of the works, without referring to the existence of a patent, licence, drawing, model, trade mark or trade name whose use is necessary for execution of such works, it shall bear all costs and

charges; in that event it shall indemnify the contractor against any claim by the holder resulting from such use.

Article 91

Staff

The agents and workmen employed by the contractor must be sufficient in number, and each must have the qualities necessary to ensure steady progress and satisfactory execution of the works. The contractor shall immediately replace all persons indicated by the engineer as capable of jeopardizing satisfactory execution of the works.

The general bases of remuneration and the general working conditions as laid down by national law shall apply to staff on the work-site.

Where it is duly ascertained that there is a delay in the payment of wages and salaries and the allowances and contributions laid down by national law, the contracting authority may, as of right, and after giving notice to the contractor, pay arrears of wages and salaries, allowances and contributions out of amounts due to the contractor or, failing this, by deducting the amount due from the deposit, or by obtaining a contribution from the directly liable guarantor.

Article 92

Contractor's Equipment

The undertaking's equipment at the site shall be deemed to be for the purpose of carrying out the works. The contractor shall not be entitled to remove it without the written consent of the engineer; he may however show that the said equipment is no longer required for carrying out the works.

IV. Commencement of the works - Period of performance - Administrative Orders

Article 93

Order to commence performance of contract

The contracting authority may not fix the date on which performance of the contract is to commence later than the 120th day following notification of acceptance of the contract.

The order to commence performance of the contract shall result either from the notification of acceptance of the contract or from an administrative order.

Where the order to commence performance of the contract results from the notification of acceptance of the contract, a period of 20 days must elapse between the notification of acceptance of the contract and the beginning of the contractual period of performance.

Where the order to commence performance of the contract results from an administrative order, a period of at least 20 days must elapse between the date of notification of the administrative order and the beginning of the contractual period of performance.

If the date fixed for the commencement of performance of the contract does not fall within the period of 120 days provided for in the first paragraph, the contractor may demand the rescission of the contract and/or reparation for the damage he has suffered. The contractor shall forfeit this right unless he makes use of it not later than 30 days following expiry of the period of 120 days.

Article 94

Period of performance

The contractual period of performance shall be fixed by the Special Conditions.

Article 95

Administrative Orders

Administrative orders must be in writing. They shall be dated, numbered and entered in a register.

The contractor shall comply in all points with administrative orders drawn up by the engineer or his representative.

Where the contractor considers that the requirements of an administrative order go beyond the obligations under the contract, he must, on pain of being time barred, submit notice thereof in writing to the engineer within 15 days. Execution of the administrative order shall not be suspended because of the objection.

V. Inspection and supervision**Article 96****Work record - Daily statements of materials used
and work done**

1. A work record shall be kept on each building site by the engineer or his representative who shall enter in it, in particular, the following information:

- (a) An indication of the atmospheric 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 despatched, unforeseen circumstances etc., as well as orders given to the contractor which are purely occasional and of little importance;
- (b) Detailed daily statements of all the quantitative and qualitative elements of the work done and the supplies effected, capable of being checked on the site and relevant in calculating payments to be made to the contractor.

The daily statements shall form an integral part of the work record but they may, where appropriate, be recorded in separate documents.

The technical rules for drawing up the daily statements shall be set out in the Special Conditions.

2. The contractor shall ensure that daily statements are drawn up, in good time and in accordance with the provisions of the Special Conditions, in respect of work, services and supplies which cannot be traced or verified subsequently; failing this, he must accept the decisions of the engineer unless, at his own expense, he provides evidence to the contrary.

3. Entries made as work progresses in the work record, shall be signed by the engineer or his representative and countersigned by the contractor or his representative.

The contractor shall communicate his views to the engineer by registered letter within 15 calendar days of 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 record.

The contractor may examine the work record at any time and may, without removing the document, make or receive a copy of entries which he considers necessary for his own information.

4. At the request of the engineer or his representative, the contractor shall provide him with the information needed to keep the work record in good order.

Article 97 Quality of works

The works and objects or materials to be supplied must correspond in all points to the technical specifications laid down in the Special Conditions. They must conform in all respects with the plans, drawings, surveys, models, samples, patterns, etc., which have been held at the disposal of the contractor for identification, in accordance with the Special Conditions, during the period of one month following the date of notification of acceptance of the contract.

Where materials and objects to be supplied are defined at the same time by plans, samples and models, and if the Special Conditions contain no stipulation to the contrary, the plan shall determine the form of the object, its dimensions and the material from which it is made; the model shall be taken into consideration only in respect of the finished article and the sample in respect of the quality of the material.

Article 98 Supervision and inspection of goods

The engineer may arrange for the supervision and inspection of anything being prepared and manufactured for delivery in accordance with the contract.

To this end, it may apply such tests as it considers necessary from among those provided for in these contractual clauses, supplemented or amended, where appropriate, by the Special Conditions, in order to establish whether the materials and objects are of the requisite quality and quantity. It may require the replacement or repair, as the case may be, of items which do not conform with the contract, even after their installation.

The contractor may not rely on the fact that such supervision and inspection have been exercised in order to avoid his responsibility in the event of the works being rejected by reason of any defect.

The contractor shall place at the disposal of the engineer, provisionally and free of charge, the patterns and instruments specified in the Special Conditions which are considered necessary for verifying and inspecting the works to be carried out and the objects to be supplied.

The engineer or his representatives who are kept informed by reason of their supervision and inspection of the methods of manufacture and operation of the undertakings, shall be under an obligation not to disclose such information except to those members of the administration who need to know of it.

Article 99

Checking of materials and supplies

1. Supply and acceptance of materials and supplies

The contractor shall be required to take the necessary steps to ensure that the materials and supplies are conveyed to the site in good time and that the engineer has the necessary equipment and time at his disposal to proceed with the acceptance formalities, irrespective of the state of the means of communication and the mode of transport used. Since the contractor is deemed to have fully appreciated the difficulties which he might encounter in this respect, he shall not be permitted to advance any grounds for delay in taking such steps, without prejudice to Article 130.

Materials and supplies may not be used unless they have first been accepted by the engineer or his representative.

2. Tests

The tests required for technical verification of materials and supplies shall be laid down in the Special Conditions. These shall specify whether the tests are to take place:

- a) on the work site or at the place of delivery,
- b) at the manufacturer's factories,
- c) in the contracting authority's laboratories,
- d) in laboratories approved by the contracting authority.

In the case of verification on site or at the place of delivery as provided for under a), the contractor shall place at the disposal of the engineer, at his own expense, the workmen and the tools and articles normally used on sites, needed for the verification and acceptance of the materials and supplies.

In the case of verification at the factory as provided for under b), the test samples or parts which shall be ready for testing, shall be made available to the engineer within five calendar days of being marked for that purpose. The tests shall be carried out in the presence of the engineer or his representative; the contractor shall bear the cost of preparing parts, test samples, and the costs of the tests themselves.

In the case of verification in the laboratories as provided for under c) and d), immediately after the parts to be tested or the substances to be used in preparing the test samples have been selected and marked for testing by the engineer or his representative, they shall be sent by the contractor, free of charge, to the laboratory responsible for the tests, under the supervision of the engineer or his representative.

The contracting authority shall bear the costs of preparing parts and test samples. It shall also bear the cost of tests carried out in its laboratories or in an approved laboratory, with the exception of tests which should have been carried out by the contractor in the manufacturer's factories. The residue of test samples, broken parts and surplus samples shall remain the property of the contracting authority. The contractor may be present when the tests are carried out in one of the contracting authority's laboratories or in a laboratory approved by the contracting authority.

In all cases the markings must be present until the time of testing.

Where tests carried out to ascertain the quality of supplies involve the destruction of certain parts or certain quantities of materials, these must be replaced by the contractor, at his expense.

The extent to which the tests may involve such destruction shall be indicated in the Special Conditions.

3. Test period

The period which extends from the date of despatch to the date of arrival in the establishment responsible for testing shall not be included in the period laid down in the Special Conditions for notifying the contractor of the decision of approval or rejection.

4. Verifications

Weighing required to verify the articles and materials for which theoretical weights or weight tolerances are laid down shall be carried out at the contractor's factory; the contractor shall place the weighing instruments at the disposal of the engineer or his representative, free of charge, in accordance with Article 97.

The same shall apply in the case of duly verified measuring equipment and test machinery required for the tests provided for in the contractor's factories and on site.

5. Check tests

In the event of an objection by one or other party to the results of the tests, each of the parties shall be entitled to request a check test. This shall be carried out in a laboratory selected by common consent from the laboratories approved by the contracting authority.

If the objection concerns an item which is incapable of exact evaluation, each of the parties shall be entitled to request an expert opinion. The expert shall be selected by common consent. The expert shall conduct his examination at a place nominated by the expert and approved by the contracting authority.

The report drawn up by the laboratory or by the expert shall be submitted to the engineer, who shall communicate it, without delay, to the contractor by registered mail. The results of the check test or the expert opinion shall be conclusive.

The costs of the check test or the expert opinion shall be borne by the party for whom the result is unfavourable.

6. Period for check tests

Under penalty of being time-barred, the contractor shall address the request for a check test or an expert opinion to the engineer by registered letter not later than the fifteenth calendar day following the day on which the decision of rejection is notified.

Paragraph 3 shall apply to the period for notifying the decision of acceptance or rejection resulting from the check test or the expert opinion.

7. Extension of the period of performance

An extension of the period of performance may be granted to the contractor where the check test or the expert opinion is in his favour.

8. Materials and supplies which have been accepted

Materials and supplies which have been accepted and which are on site may not be removed without the authorization of the engineer.

9. Rejects

Materials and supplies which are not of the required quality shall be rejected.

A special mark may be applied to the latter; this may not be such as to alter the supplies, nor may it modify their commercial value.

Materials and supplies which have been rejected shall be removed by the contractor from the sites, if the engineer so requires, within a period which he shall specify, failing which they shall be removed as of right at the expense and risk of the contractor.

Making use of rejected materials and supplies shall result in a refusal to accept the works.

Article 100

Preliminary technical acceptance

1. If the Special Conditions lay down technical conditions for the acceptance of materials or supplies which the contractor must incorporate in connection with the works to be carried out or for the manufacture of objects that he must supply, such materials or supplies must be certified to be up to requirements by the engineer prior to their incorporation in the works.

The same shall apply if the Special Conditions make provision for the manufacture of one or more standard items and for the examination of samples before manufacture is to commence.

Any preliminary technical acceptance shall be the subject of a request sent by registered post by the contractor to the engineer; such request shall be made in accordance with the forms laid down by the engineer, who must act upon it within the period provided for in the Special Conditions.

The request shall indicate the specification of the materials, supplies, items and samples submitted for acceptance and shall also indicate the reference to the contract letter and possibly the lot number and the place where acceptance is to take place.

Even if materials, supplies or items to be incorporated in the works to be executed or in the manufacture of objects to be supplied 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.

2. The Special Conditions shall make provision for all the procedures relating to preliminary technical acceptance, in particular, the period of time during which the engineer must take his decision to accept or reject materials, supplies, standard items and samples.

Article 101 Identification

The Special Conditions may require all articles and supplies, where possible, to bear the contractor's mark or any other means of identification in a specified place.

Article 102 Fraud and faulty workmanship

If fraud or faulty workmanship is suspected, the contractor may be required, either while work is in progress or before final acceptance, to demolish the works carried out and to rebuild them. The costs of such demolition and reconstruction shall be borne by the contractor or the contracting authority, according to whether the suspicion is confirmed or not.

VI. Modifications to the contract

Article 103 Unforeseen work and modifications to the contract

Where the contracting authority, without varying the object of the contract, considers it necessary to carry out unforeseen work or to make alterations in the works the contractor shall comply with the administrative orders he receives in this respect.

The cost of such work shall be determined in accordance with Article 118.

Within the limits of a proportion laid down by the Special Conditions, which may not exceed 5% of the amount of the contract, the contracting authority may carry out all or part of these works by force account.

The detailed rules governing the work done by force account and, in particular, payment for services arising therefrom, shall be set out in the Special Conditions.

Article 104

Increase in the volume of work

In the event of an increase in the volume of work required by the works supervisor or resulting from circumstances which are not caused either by the contractor's negligence or by any action on his part, the contractor may not object where such increase, calculated on the basis of the original prices, does not exceed one fifth of the amount originally provided for in the contract, unless the Special Conditions otherwise provide. In that case, the contractor shall, on application, be entitled to an extension of the contractual period of performance; he must give reasons for the length of the extension he requires.

Where the increase, calculated in the same manner, exceeds one fifth, the contractor may, when the final statement is drawn up, request compensation for any loss incurred by him as a result of the modifications to the original project. He shall also be entitled to an extension of the contractual period of performance.

Where this increase, calculated in the same manner, exceeds one third, the contractor shall be entitled to refuse to carry out any work over and above this fraction. In this case he shall inform the works supervisor of his decision by registered letter within a period of two months of the administrative order stipulating that increase.

Where the increase specified in the preceding paragraph is the result of circumstances which are caused neither by the contractor's negligence nor by any action on his part and provided that the increase was not the subject of an administrative order, the contractor shall give notice of his decision within two months of the date on which the circumstances arose or of the date on which they should normally have come to his notice.

Article 105

Reduction in the volume of work

In the event of a reduction in the volume of work required by the works supervisor or resulting from circumstances which are not caused either by the contractor's negligence or by any action on his part, the contractor may not object where such reduction, calculated on the basis of the original prices, does not exceed one fifth of the amount originally provided for in the contract, unless the Special Conditions otherwise provide.

Where the reduction, calculated in the same manner, exceeds one fifth, the contractor may, when the final statement is drawn up, request compensation for any loss incurred by him as a result of the modifications to the original project.

Where this reduction, calculated in the same manner, exceeds one third, the contractor shall, within a period of two months of the administrative order stipulating such reduction, submit a request to the engineer for compensation for the loss incurred by him as a result of the modifications to the original project.

Where the reduction specified in the preceding paragraph is the result of circumstances which are not caused either by the contractor's negligence or by any action on his part and provided that the increase was not the subject of an order of the administration, the contractor shall submit his request for compensation within two months of the date on which the circumstances arose or of the date on which they should normally have come to his notice.

Where within two months following the lodging of the request for compensation, no agreement has been reached with the works supervisor as to the amount of the compensation, the contractor shall be entitled to rescind the contract and to receive compensation for any loss caused by such rescission.

Article 106

Changes in the quantities of the various items in the bill of quantities

1. Without prejudice to Articles 104 and 105, where the contract contains a bill of quantities showing, for each item, the quantities of the various works and their respective prices, and where the alterations required by the works supervisor or resulting from circumstances, which are caused neither by the contractor's negligence nor by any action on his part, modify the quantities of certain of these works in such a way that the quantity shown for any item differs upwards or downwards by at least a fifth, the contractor may, when the final statement is drawn up, request compensation for any loss incurred by him as a result of such modifications to the original project.
2. Where the price schedule shows items with prices for reference purposes only, for which no quantity is indicated in the bill of quantities, paragraph 1 may not be invoked by the contractor.

Article 107

Substantial variations

1. Without prejudice to Articles 104, 105 and 106, where, independently of any amendment made by the works supervisor to the contract, any volume of work actually carried out, which is covered by an item in the bill of quantities and which is provided with a separate unit price, exceeds four times the estimated volume or is less than one half of such volume, the contracting authority or the contractor may request revision of this price and/or the original time limits.

This revision shall be subject to it being shown that the estimated quantities have been modified in such a way that the price and/or the time limits no longer correspond with the new situation thus created.

Where the works supervisor and the contractor are unable to agree on the new unit price, the works supervisor shall determine this as of right, without prejudice to any rights of the contractor.

2. Paragraph 1 may also be invoked where, in the case of a particular item in the bill of quantities, the variation in the quantity of work carried out by comparison with the estimated quantity entails an upward or downward variation in excess of 20% of the volume calculated on the basis of the original prices.

VII. Payment of contracts

Article 108

General provisions

The Special Conditions shall determine the administrative or technical conditions to which the payment of advances, instalments or payment of balance is subject, in accordance with the rules of entitlement set out below.

Article 109

Payment of a contract for which the price is not fixed

Where the prices of works or the exact conditions for determining them are not immediately evident from the provisions of the contract, the latter must, for the purpose of making its funds available and the payment of instalments, state a provisional price which is either an overall price or a price corresponding with the various elements of the services or the technical stages of execution.

Article 110

Advances

1. Advances may be granted to the contractor for operations preparatory to the execution of the works which are the subject of the contract, 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 plant, machines or tools;
- c) if he affords proof of the conclusion of a contract for the purchase or order or supplies - materials, raw materials, manufactured articles, etc. - necessary for the execution of the contract and of any other substantial prior expenses such as the acquisition of patents and study costs.

2. The amount of the advances may not exceed 10% of the original amount of the contract in respect of the lump-sum allowance and 20% for all other advances.
3. The particular conditions for granting and reimbursing advances shall be laid down in the Special Conditions.
4. No advance may be made before the contractor has furnished proof of the establishment of the deposit or the commitment of the directly liable guarantor as stipulated in Article 68(1).
5. Any advance granted must be guaranteed in its entirety by the commitment of a directly liable guarantor satisfying the conditions of Article 68(2).

Article 111

Reimbursement of advances

Reimbursement of the lump-sum advance referred to in Article 110(1) a) shall be made by means of a deduction from the instalments and, if necessary, from the balance owing to the contractor. It shall begin when the amount of sums due under the contract has reached 60% of the original amount of the latter. It must be completed when 80% of this amount has been reached.

Reimbursement of the advances referred to in Article 110(1) b) and c) shall be made by means of a deduction from the instalments and possibly from the balance owing to the contractor in accordance with the procedure laid down in the Special Conditions. Reimbursement of such advances must be completed at the latest when the amount of sums due under the contract has reached 90% of the original amount of the latter.

In all case of rescission of the contract, for any reason whatsoever, the contractor must immediately reimburse the uncleared balance of the advances.

The directly liable guarantor provided for in Article 110(5) shall be released as and when the advances are reimbursed.

Article 112
Partial payments

Under the conditions laid down in the Special Conditions, the contracting authority must make partial payments to the contractor if the latter furnishes proof that he has carried out one of the following services:

1. delivery at the building site or place of manufacture of materials which are to form part of the works stipulated in the contract, provided that they have been fully acquired and paid for by the contractor, that they have been recognized as conforming to the requirements of the contract and that they are set out in batches in such a way that they may be checked by the engineer;
2. performance of operations intrinsic to the carrying out of works and inspected by the engineer.

Article 113
Ownership of materials

Materials for which partial payments have been made shall remain the property of the contractor who may in no circumstances make use of them for other works.

However, the Special Conditions may lay down that, to set off partial payments, the ownership of the materials corresponding to such partial payments shall be transferred to the contracting authority. In this case, the contractor shall, nevertheless, assume the responsibility of trustee in respect of these materials, in accordance with the requirements of national law.

Article 114
Revision of prices

1. The Special Conditions shall state whether the contract is at fixed prices which may not be revised or whether prices may be revised.
2. Where prices may be revised under a contract, revision shall take place either at the request of the contractor or on the initiative of the contracting authority, in accordance with the detailed rules for revision laid down in the Special Conditions. These detailed rules may take into account a variation in the prices of important factors in the establishment of the prices in the tender, such as manpower, services, materials and supplies, as well as of charges laid down by law or administration action.
3. Prices contained in the contractor's tender shall be deemed to have been arrived at on the basis of the conditions in force on the reference date. Unless otherwise specified in the Special Conditions, this date shall be the first working day of the month preceding that in which the final date for the receipt of tenders occurs.
4. In the event of a delay in execution of the works, which is attributable to the contractor, during the period between the contractual date for the completion of the works and the actual date of completion (provisional acceptance) a restricted revision shall take place on the basis of the official indices or prices in force in the final month of the period of the contract, subject to the reservation that the later indices may be applied if they are advantageous to the contracting authority.

Article 115
Revision threshold

The revision of prices shall be governed by the degree of variation of prices, which must be not less than the percentage of variation laid down in the Special Conditions. This percentage shall form the revision threshold.

Once this threshold has been reached, the variation of prices shall be fully taken into account.

Article 116**Price revision and repayment of advances**

Where advances have been granted and where, pursuant to Article 111, they are reimbursed by deduction from sums due by way of partial payment or from the balance, the Special Conditions shall state whether the price revision clause shall apply to the amount of the instalment or the balance for works carried out or else to the difference between the initial amount of that instalment or balance and the amount of the advance to be deducted.

Article 117**Payment in respect of price revision**

The periods for settling sums due in respect of price revision shall be laid down in the Special Conditions.

Article 118**Rules for payment**

1. Payment of both the instalments and the balance of the contract shall be made only when the contractor has produced a statement of account, dated, signed and supported by a detailed work progress report which, according to the contractor, justifies the requested payment.

This progress report, compiled on the basis of the daily statements provided for in Article 96, may include:

a) quantities carried out in excess of the estimated quantities contained in the bill of quantities of a unit price contract;

b) additional works performed in accordance with an administrative order made by the works supervisor or the engineer;

c) works carried out at prices not yet agreed between the parties.

2. The engineer shall verify and where necessary correct the work progress report. Should such report, pursuant to paragraph 1 c) contain quantities the unit prices for which have not yet been agreed by the parties, the works supervisor shall as of right determine the prices, without prejudice to the rights of the contractor, on the basis of the prices in the contract or those set out in the breakdown of prices, or by analogy with the most nearly comparable works or, where necessary, on the basis of prices current in the country in question.

After receiving each statement of account the engineer shall prepare a payment certificate at the earliest opportunity, setting out the amount which he considers effectively due, and shall inform the contractor of the works for which payment is being made.

3. Payment of sums due to the contractor shall be made within 60 calendar days of the date of receipt of the statement of account, except in cases where the Special Conditions provide for a shorter period.

Article 119

Payments direct to sub-contractors

At the request of a sub-contractor or on his own initiative, the engineer may, when a payment certificate is being drawn up, verify that the contractor has met all his financial obligations to sub-contractors in respect of sub-contracted services for which the contractor has previously received payment.

If it is duly found that a payment has not been made, unless the contractor can put forward reasons which are acknowledged by the engineer to justify withholding payment, the works supervisor may pay direct to the sub-contractors

the sums owed to them by the contractor and may recover the amount thereof from any sum due or falling due to the contractor.

Direct payments to sub-contractors shall be made, after the contractor has been informed, in accordance with the following provisions:

- a) sub-contractors must submit a dated and signed statement of account, supported by a detailed work progress report which, in the opinion of the sub-contractors, gives reason for the requested payment. This statement of account must be expressed in national currency and shall state, where appropriate, the proportion payable in foreign currency; reasons must be given for this proportion;
- b) direct payments to sub-contractors may in no case 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 price schedule or bill of quantities or the breakdown of the overall fixed price;
- c) direct payments to sub-contractors shall be made in the national currency of the country in which the contract is performed, or partly in such national currency and partly in the currency of the Member State or the country of which the sub-contractor is a national or in which he has his registered place of business. If no provision is made in the contract for payment in the latter currency, payment shall be made entirely in national currency.

Where direct payments to sub-contractors are made in foreign currency, they shall be calculated on the basis of the parities laid down in the contract.

They may not result in any increase in the overall amount payable in foreign currency, as stipulated in the contract.

The provisions relating to direct payment, to sub-contractors shall apply subject to the requirements of national law concerning the right to payment of creditors who are beneficiaries of an assignment of credit or a collateral security.

Article 120

Payment in the event of attachment

In the event of a judgment ordering attachment against the contractor, and without prejudice to the period laid down in Article 118, the contracting authority shall be given a period of 15 calendar days, starting from the day when it receives notification of the lifting of the obstacle to payment, to resume payments to the contractor.

Article 121

Interest in respect of delay in payments

If the period laid down for payment has been exceeded, although the contract has not given rise to dispute, the contractor shall benefit fully and without formal notice from interest calculated pro rata on the basis of the number of calendar days' delay at the rediscount rate of the issuing institute of the ACP State, increased by 1% per annum.

This supplement to the rate shall be increased to 4.5% per year as from the 71st day of delay.

However, payment of the interest on delay shall be subject to the submission by the contractor, not later than to 60th calendar day following the day for payment of the balance of the contract, of a written request having the effect of a statement of account.

A remission of the liquidated damages for delay occurring after payment of the balance may not be regarded as constituting the payment of a new balance and shall not re-open the period provided for in the preceding paragraph.

Article 122

Payment for the benefit of third parties

Without prejudice to Articles 91 and 119, all orders for payment to third parties may be carried out only after an assignment of credit or a collateral security.

The assignment of credit must be notified to the official responsible for authorizing disbursements by registered letter with acknowledgement of receipt. The rules applicable to the transfer of credit shall be those of the State in which the transfer is effected.

The assignment of collateral security must be notified to the official responsible for payments by registered letter with acknowledgement of receipt. The rules applicable to the assignment shall be those of the ACP State in which the contract is performed.

Article 123

Notification of third parties

The contractor and the assignees of credit and collateral securities may, during the performance of the contract, seek from the works supervisor either a summary progress report of the work carried out, accompanied by an estimate which shall not be binding upon the contracting authority, or a detailed account of the contractor's entitlement; they may also request a statement of the advances and instalments paid and a detailed report on information received relating to the contract.

If a creditor, giving evidence of his capacity as such, should make such a request by registered letter, the contracting authority shall be obliged to notify him, at the same time as the contractor, of all amendments to the contract which affect the guarantee resulting from the assignment of credit or collateral security.

Beneficiaries of assignment of credit and collateral securities may not call for any information other than that provided for in the first and second paragraphs, nor may they intervene in the performance of the contract.

VIII. Developments affecting performance of the contract

Article 124

Cessation or postponement of performance of contract

1. Where the contracting authority unilaterally orders the final cessation of performance of the contract, the latter shall be rescinded forthwith. The contractor shall be entitled to an indemnity for any injury which he may have suffered by reason of such rescission for which he is not responsible.

2. Where the contracting authority orders the postponement of the contract, for reasons not specified in the Special Conditions, for more than six months either before or after commencement of the contract, the contractor shall be entitled to rescind the contract and shall be entitled to an indemnity for any injury which he may have suffered.

The same shall apply in the case of successive postponements, the total duration of which exceeds six months, even if performance of the contract has been resumed in the meantime.

The request for rescission shall be valid only if it is submitted by registered letter by the contractor within two months of the date of receiving the administrative order leading to postponement of performance of the contract for more than six months, or as from the expiry of the sixth month of postponement, if such order has not fixed the duration of the postponement.

If performance of the contract has commenced, the contractor may require that acceptance of services should take place forthwith.

If the contractor limits his request to an indemnity, it must be submitted by registered letter not later than 60 days after provisional acceptance of all the works.

3. Where the contracting authority orders the postponement of performance of the contract for less than six months, the contractor shall be entitled to an indemnity for any injury suffered. He must submit his request by registered letter not later than 60 days after provisional acceptance of all the works.

4. During the period of the postponements, the contractor shall take all such protective measures as may be necessary to safeguard the portion of the contract already executed.

Expenses incurred in connection with such protective measures shall be reimbursed to the contractor, without prejudice to the indemnity which he may claim in accordance with paragraphs 2 and 3.

Article 125

Decease

1. Where the contract is given to one natural person, it shall be automatically rescinded if that person dies.

However, the contracting authority shall examine any proposal made by the heirs if they have notified it of their intention to continue the contract. The decision of the contracting authority shall be notified to those concerned within one month of receipt of such proposal.

2. Where the contract is given to several 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 rescind or continue the contract in accordance with the undertaking of the survivors and of the heirs, as the case may be.

3. In the cases provided for in paragraphs 1 and 2, persons offering to continue to perform the contract shall notify the contracting authority thereof by registered letter within ten days of the date of decease.

The nature of their liability shall be determined in accordance with the first paragraph of Article 30, supplemented where appropriate by the Special Conditions.

Continuation of the contract shall be subject to the rules relating to establishment of the deposit or the commitment of the directly liable guarantor in accordance with Article 68.

Article 126

Specific grounds for rescission

1. Without prejudice to the measures provided for in Article 134, the contracting authority may rescind the contract in the following cases:

- bankruptcy of the contractor,

- any situation involving suspension of payments, other than bankruptcy, established by judgment of a court and resulting, in accordance with his national law in the total or partial loss of the contractor's right to administer and dispose of his property,
- any final judgment of a court or tribunal of the ACP State justifying the rescission of public contracts in accordance with national law,
- any other legal disability hindering performance of the contract,
- any organizational modification that must be notified to the contracting authority involving a change in the legal personality of the contractor, unless such modification is recorded in an endorsement to the contract.

2. In the event of rescission:

a) The contractor or his representatives being present or duly convened, a report of work performed shall be drawn up as soon as possible, and inventories prepared of materials supplied, and of the plant and site installations of the undertaking.

Statements shall also be drawn up of emoluments still owed by the contractor to workers employed on the building site, 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 engineer,
- materials specially constructed in connection with the execution of work under the contract and which cannot be re-used.

c) The purchase price of the temporary structures and materials referred to above shall be equal to the unpaid portion of the expenditure incurred by the contractor, such expenditure being limited, where necessary, to that corresponding to the normal performance of the contract.

d) The contracting authority shall purchase at market prices the materials and items supplied or ordered on conditions that the engineer considers appropriate.

3. However, the contracting authority may without waiting for the definitive

settlement, and if it is so requested, pay the contractor up to 80% of the credit balance shown by the provisional settlement. Conversely, if the provisional settlement shows a credit balance in favour of the contracting authority, the latter may require the contractor to return 80% of the amount of such balance.

IX. Acceptance and maintenance period

Article 127

Use of works by the contracting authority

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

However, if the Special Conditions so allow, the contracting authority may make use of the various structures forming part of the contract as and when they are completed, on condition that an inventory is drawn up as appropriate.

Should the contracting authority take over the work, this shall not count as provisional acceptance.

Once the contracting authority has taken possession of a structure or a part thereof, the contractor shall no longer be required to make good damage resulting from use.

Article 128

Acceptance

1. Verification and testing

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

2. Rejection of works

Works which do not satisfy the terms and conditions of the contract or which are not carried out in accordance with trade practices shall be demolished and rebuilt by the contractor; otherwise this shall be done, as of right at his expense, by order of the works supervisor or the engineer, in one or other of the ways indicated in Article 134(2).

The works supervisor or the engineer may also require the demolition and reconstruction by the contractor, under the same conditions as those laid down in the preceding sub-paragraph, of structures in which materials have been used which have not been accepted, or of those carried out in a period of suspension, as laid down in Article 89.

3. Provisional acceptance

The contractor must advise the engineer of the completion of the works, by registered letter.

Within 30 calendar days of the date of receipt of the communication from the contractor, or within a longer period if so provided in the Special Conditions, the engineer shall draw up a statement of provisional acceptance of the works or of rejection, and shall forward a copy thereof to the contractor.

If this time-limit is exceeded, and the delay is not attributable to the contractor, the contracting authority shall become liable to pay him compensation equal to 0.5% per week of delay on the amounts, payment of which is dependent upon provisional acceptance, up to a limit of 5% of the total of such sums.

However, the payment of this compensation shall be subject to submission by the contractor of a request in writing within 30 days from the date of dispatch of the copy of the statement of provisional acceptance.

Works which are subject to provisional acceptance shall, unless the contrary is proved, be deemed to have been so accepted on the completion date indicated by the contractor in his registered letter.

After completion of the works the contractor must dismantle the site and remove temporary structures as well as materials no longer required for use in connection with performance of the contract. He must also remove any goods in storage, litter or redress any change in the condition of the premises, resulting solely from the requirements of performing the contract.

4. Final acceptance

Upon expiry of the maintenance period laid down in Article 129 the engineer shall draw up, as soon as possible, and within a maximum of 30 days, a statement of final acceptance of the works or of rejection and shall forward a copy thereof to the contractor.

In the case of a statement of rejection of the works, it shall be incumbent upon the contractor subsequently to give notice to the engineer, by registered letter, that all the works of the undertaking are ready for final acceptance, and acceptance of the works shall take place within 30 calendar days from receipt of the registered letter.

5. Clauses applicable in respect of both provisional and final acceptance

Verification of works with a view to provisional or final acceptance shall take place in the presence of the contractor. The absence of the latter shall not be a bar to acceptance on condition that he has been summoned in due form by registered letter posted at least 30 calendar days prior to the date of acceptance.

Should one or more of the exceptional circumstances referred to in Article 130 make it impossible to ascertain the state of the works during the period of 30 days fixed for provisional or final acceptance, a statement certifying such impossibility shall be drawn up after summoning the contractor. The statement of acceptance or rejection shall be drawn up within 30 calendar days from the date on which such impossibility ceases to exist.

The contractor shall not be entitled to invoke these circumstances in order to avoid the obligation of presenting the works in a state suitable for acceptance.

Article 129

Maintenance period: maintenance, repair and replacement

1. Without prejudice to the special provisions relating to the acceptance of works, the contractor shall be obliged during the maintenance period to carry out maintenance, repair and replacement covering all services under the contract, subject to normal conditions of use.

Deteriorations resulting from the circumstances provided for in Article 130 or from abnormal use shall be excluded from this obligation unless they reveal a fault or defect such as to justify the request for repair or replacement.

The obligation to maintain may be the subject of stipulations in the Special Conditions and of technical specifications which shall determine the period and conditions thereof.

Where the Special Conditions or the contract provide for a maintenance period, they may fix the duration, thereof. If not otherwise specified, the duration of this period shall be one year.

The maintenance period shall commence on the date of provisional acceptance.

Where necessary, the maintenance period shall be extended by the time during which it has not been possible to use a product or an element of the contract because of deterioration for reasons for which the contractor must assume responsibility.

All items provided in replacement shall be subject to the full maintenance period.

2. The contractor shall repair or replace at his own expense any item which has deteriorated or fails to function in the course of normal use during the maintenance period.

3. Any statement regarding deterioration or failure to function must be made in the form of a report drawn up by the engineer or by any other representative authorized by the contracting authority before the expiry of the maintenance period. A copy of the report shall be sent to the contractor within one month.

4. Should the interests of the service so require, and particularly in cases of emergency, the works supervisor may have the repairs carried out at the expense of the contractor, the latter having been duly informed by the copy of the report.

X. Claims and exceptional risks

Article 130

Claims by the contractor and exceptional risks

1. The contractor may avail himself of facts alleged against his contracting partner and which would involve him in delay and/or detriment in order to obtain, where appropriate, an extension of the periods of performance, the revision or rescission of the contract and/or an indemnity based on the injury suffered.

2. The contractor shall not normally be entitled to make any amendment to the contractual conditions as a result of circumstances in which his contracting partner had no part.

However, a derogation from this principle shall be justified by circumstances which the contractor could not reasonably foresee when the tender was submitted or the contract concluded, which he could not avoid and the consequences of which he was unable to avert even though he had taken all necessary steps to that end.

Where such circumstances make it impossible to perform the contract, the contractor shall be entitled to have the contract rescinded.

Where the circumstances do not make it impossible to perform the contract, the contractor shall be entitled to an extension of the periods of performance and/or an indemnity based on the injury suffered, or to the revision of the contract.

The contractor may invoke the default of a sub-contractor or supplier only in so far as they avail themselves of circumstances which the contractor would have been able to invoke in a similar situation.

3. The contractor shall be obliged to report to the engineer, by registered letter, the facts and circumstances referred to in paragraphs 1 and 2 as soon as he should normally have knowledge thereof and not later than 30 days after their occurrence.
4. Claims by the contractor must, under penalty of being time-barred, be made by registered letter within the following periods:
 - a) before expiry of the contractual time-limits in order to obtain an extension of the periods of performance or rescission of the contract;
 - b) in order to obtain a variation of the contract or an indemnity, not later than 60 days after provisional acceptance of all works.
5. Paragraphs 1 to 4 above shall not apply to facts and circumstances resulting in an increase or reduction in the volume of work or a change in the quantities of the various items in the bill of quantities, which are the subject of special arrangements pursuant to Articles 104 to 107.
6. No claim may be submitted after signature of the final statement except in the case of error, omission, wrong or duplicated entry or where Article 131 applies.

Article 131

Remission of damages for delay

1. The contractor shall have the right to obtain remission of the damages for delay referred to in Article 134 point 1 c):
 - a) in whole or in part, if he proves that the delay is due wholly or in part to acts by the contracting partner or to the circumstances referred to in Article 130 1 and 2;

b) partially, if the contracting authority considers that the amount of the damages is disproportionate to the minimal importance of the works thus delayed, provided however that the works carried out are capable of being used normally and that the contractor has made every effort to complete his services in the shortest possible time.

2. The contractor must, under penalty of being time-barred, submit any request for the remission of damages by registered letter within a period of 60 days from the payment of the balance.

XI. Non-performance of contract and sanction therefor

Article 132

Non-performance of contract by contractor

Non performance of the contract by the contractor occurs:

1. where the work is not carried out in accordance with the provisions of the contract;
2. where the work is not completed within the contractual period of performance or where at any time it is not proceeded with, in any respect whatsoever, so as to be capable of being entirely completed within this period;
3. where the contractor departs from written instructions given by his contracting partner.

Article 133

Finding of non-performance attributable to the contractor

Non-performance of the contract shall be established by means of an entry in the work record.

This entry shall constitute formal notice to put an end to the failure to perform the contract.

Within 15 days of the date of entry in the work record, the contractor shall be obliged to submit the grounds of his defence to the engineer by registered letter. At the end of this period, silence on his part shall be deemed to constitute admission of the facts established.

The engineer shall give a ruling on the defence submitted by the contractor, without delay, and shall inform him of its decision by registered letter.

Article 134

Sanction for breach of contract on the part of the contractor

If no reasons for breach of contract are accepted or furnished within the period laid down in Article 133, the contractor may be subject to one or more of the measures defined in, and governed by the following paragraphs:

1. Damages

- a) Special damages for specific failures in performing the contract;
- b) Liquidated damages per calendar day for any breach, to be made good forthwith.

The same shall be applied as from the date on which the breach of contract is established by an entry in the work record in accordance with Article 133, up to and including the date on which the breach is made good by the contractor or in default by the contracting authority;

- c) Liquidated damages for delay where the breach of contract results from non-completion of the contract within the contractual time limits. Notwithstanding Article 133, the said liquidated damages shall be due without formal notice;
- d) General damages for any form of non-performance of the contract other than those laid down under a), b) and c).

The amount of and the detailed procedures relating to these damages shall be stipulated in the Special Conditions.

2. Measures to be taken as of right

These measures shall be the following:

- a) execution of all or part of the works under direct management of the administration;
- b) outright rescission of all or part of the contract without compensation payable by the contractor;
- c) rescission of all or part of the contract, decided against the contractor, with compensation payable by the contractor;
- d) conclusion of a contract with a third party, for the account of the contractor, after prior rescission of the original contract;
- e) temporary or permanent exclusion from the award of contracts.

3. Rules for the application of measures taken as of right

Any decision relating to the application of measures taken as of right shall be adopted by the contracting authority and notified to the contractor by registered letter.

In applying one or other of these measures, the engineer shall take any appropriate steps to ensure the protection or satisfactory execution of the works.

In the event of works being undertaken under direct management of the administration or a contract with a third party for the account of the contractor, the engineer, after summoning the contractor by registered letter, shall inspect the works, draw up an inventory of plant and materials and make out a statement of the wages and salaries due and the amounts owed by the contractor under the contract.

In the event of works being undertaken under direct management of the administration, the works supervisor shall be entitled to use the contractor's equipment in order to complete the performance of the contract. Where works are undertaken under direct management of the administration, the contractor shall be authorized to observe the operations without, however, being able to interfere in the execution of instructions given by the engineer. Direct management by the administration may be terminated if the contractor furnishes proof of the necessary means to resume the work and to bring it to a satisfactory conclusion.

Additional expenses resulting from direct management by the administration or from the contract with a third party for the account of the contractor shall be borne by the latter.

If direct management by the administration or the contract with a third party for the account of the contractor results in a reduction in expenses, the contractor may not claim any part of the profit thus derived, which shall be the property of the contracting authority.

4. Rules governing concurrence of sanctions for non-performance of the contract

For the application of the measures laid down in points 1 and 2, the following rules shall be applied:

- a) a single failure to perform the contract may only give rise to the application of a single penalty;
- b) direct management by the administration may be combined with liquidated damages for delay and with exclusion;
- c) outright rescission may be combined with exclusion and liquidated damages for delay relating to the period prior to the date of rescission;
- d) rescission decided against the contractor may be combined with exclusion and liquidated damages for delay relating to the period prior to the date of rescission;
- e) a contract with a third party for the account of the contractor may be combined with exclusion;
- f) exclusion may be combined with any of the sanctions for non-performance.

Article 135

Recovery of damages

Recovery of damages, disbursements or expenses resulting from the application of the measures provided for in points 2 and 3 of Article 131 shall be effected by deduction from the sums due to the contractor, from the deposit, or by contribution from the directly liable guarantor.

XII. Responsibility of the contractor after acceptance

Article 136

Responsibility of the contractor after acceptance

Without prejudice to the obligations laid down in Article 129, the contractor shall no longer be responsible, after provisional acceptance, for risks which may affect the works which are the subject of the contract 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 structures, as laid down in national law.

