

Proposal for a Council Decision on the position to be adopted by the Community in the ACP-EC Council of Ministers regarding the implementation of Articles 28, 29 and 30 of Annex IV to the Cotonou Agreement

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(Submitted by the Commission on 12 April 2002)

EXPLANATORY MEMORANDUM

Articles 28, 29 and 30 of Annex IV to the ACP-EC Partnership Agreement signed in Cotonou on 23 June 2000 provide for the ACP-EC Council of Ministers to adopt a number of decisions in connection with the implementation of contracts financed by the European Development Fund.

1. General regulations for contracts

Article 28 of Annex IV to the Cotonou Agreement provides that the award of contracts financed from the resources of the European Development Fund shall be governed by Annex IV and the procedures to be adopted by decision of the Council of Ministers following a recommendation by the ACP-EC Development Finance Cooperation Committee. These procedures must comply with the provisions of Annex IV and the Community's procurement rules for cooperation with third countries.

On 10 November 1999 the Commission adopted a Manual of Instructions for contracts concluded in the line of Community cooperation with third countries. It covers service, supply and works contracts and establishes simplified contract award procedures applicable to all Community cooperation programmes with third countries except — initially — contracts financed by the European Development Fund.

With the exception of some Articles in Annex IV, which implement specific aspects of the ACP-EC partnership (e.g. preferences and emergency aid contracts), the provisions of Annex IV broadly resemble those of the Manual.

As required by the said Article 28, the proposed new general regulations submitted to the ACP-EC Council of Ministers therefore comply with both the Manual and the specific requirements of the ACP-EC partnership set out in other Articles of Annex IV. The regulations may be revised to ensure that they are consistent with the rules applicable to other external Community cooperation programmes whilst at the same time taking account of the particular nature of the ACP-EC partnership.

2. General conditions applicable to all contracts

Article 29 of Annex IV to the Cotonou Agreement provides that performance of works, supply and service contracts financed from the resources of the European Development Fund shall be governed by the general conditions applicable to contracts financed by the Fund which shall be adopted by decision of the Council of Ministers upon the recommendation of the ACP-EC Development Finance Cooperation Committee.

By its Decision No 3/90 of 29 March 1990, the ACP-EC Council of Ministers adopted general conditions for works, supply and service contracts financed by the European Development Fund. They have been used since then to the satisfaction of the ACP States, the Commission and traders.

On the basis of these general conditions for EDF contracts, the Commission then drew up general conditions for works, service and supply contracts financed by the European Community. They apply to all cooperation programmes involving the Community and third countries except - initially - those financed by the European Development Fund. The new conditions represent progress compared with those annexed to Decision No 3/90 but they are still in the process of being revised to take account of experience gained in their first year of application. It is therefore not yet appropriate to apply them to contracts financed by the European Development Fund.

It is therefore proposed that the ACP-EC Council of Ministers extend application of the conditions adopted by Decision No 3/90 of 29 March 1990 since they are still appropriate to ACP-EC cooperation. When the general conditions applicable to contracts financed by the European Community have been revised, a draft decision substituting the new texts for those annexed to Decision No 3/90 will be forwarded to the ACP-EC Council.

3. Settlement of disputes

Article 30 of Annex IV of the Cotonou Agreement provides that any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services during the performance of a contract financed by the European Development Fund shall be settled by arbitration in accordance with procedural rules to be adopted by decision of the Council of Ministers upon the recommendation of the ACP-EC Development Finance Cooperation Committee.

By Decision No 3/90 of 29 March 1990 the ACP-EC Council of Ministers adopted a Regulation on a conciliation and arbitration procedure for contracts financed by the European Development Fund. This Regulation which is specific to projects financed by the Fund, has been used since then to the satisfaction of the ACP States, the Commission and traders.

It is therefore proposed that the ACP-EC Council of Ministers extend application of the rules governing the conciliation and arbitration procedure for contracts financed by the European Development Fund in the form adopted by Decision No 3/90 of 29 March 1990.

4. Follow-up

To assist in the introduction of the abovementioned Manual of Instructions, the Commission departments concerned drew up a Practical Guide to awarding European Community external aid contracts. The Guide contains detailed explanations of the procedures referred to in the Manual and shows specimens of the documents that have to be used at various stages of the procedure. Commission staff and personnel in the recipient countries have also been given training.

A similar approach will be followed to assist in the application of the new general regulations on contracts financed by the European Development Fund. A practical guide specifically on such contracts is to be drawn up. It will include specimens of the relevant documents. Seminars and other types of training will be provided to ensure that those concerned are better informed about the procedures to be followed.

The Commission therefore proposes that the Council adopt the annexed proposal.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 310 and the second paragraph of Article 300(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

- (1) Article 28 of Annex IV to the Cotonou Agreement provides that the award of contracts financed from the resources of the European Development Fund shall be governed by Annex IV and the procedures to be adopted by decision of the Council of Ministers following a recommendation by the ACP-EC Development Finance Cooperation Committee.
- (2) Article 29 of Annex IV to the Cotonou Agreement provides that performance of works, supply and service contracts financed from the resources of the European Development Fund shall be governed by the general conditions applicable to contracts financed by the Fund which shall be adopted by decision of the Council of Ministers upon the recommendation of the ACP-EC Development Finance Cooperation Committee.
- (3) Article 30 of Annex IV of the Cotonou Agreement provides that any dispute arising between the authorities

of an ACP State and a contractor, supplier or provider of services during the performance of a contract financed by the European Development Fund shall be settled by arbitration in accordance with procedural rules to be adopted by decision of the Council of Ministers upon the recommendation of the ACP-EC Development Finance Cooperation Committee.

- (4) The Community must agree its position within the ACP-EC Council of Ministers with a view to adoption by the latter of a Decision on the implementation of Articles 28, 29 and 30 of the abovementioned Annex IV,

HAS DECIDED AS FOLLOWS:

Article 1

The position on the implementation of Articles 28, 29 and 30 of Annex IV to the Cotonou Agreement to be adopted by the Community within the ACP-EC Council of Ministers shall be based on the annexed draft decision of the ACP-EC Council of Ministers.

Article 2

Minor amendments to the draft decision may be agreed without a further Council decision first having to be adopted.

Proposal for a Decision of the ACP-EC Council of ministers regarding the implementation of Articles 28, 29 and 30 of Annex IV to the Cotonou Agreement

THE ACP-EC COUNCIL OF MINISTERS,

Having regard to the ACP-EC Partnership Agreement signed in Cotonou on 23 June 2000, and in particular Articles 28 to 30 of Annex IV thereto,

Having regard to the Opinion of the ACP-EC Development Finance Cooperation Committee referred to in the said Articles,

Whereas:

- (1) Article 28 of Annex IV to the Cotonou Agreement provides that the award of contracts financed from the resources of the European Development Fund shall be governed by Annex IV and the procedures to be adopted by decision of the Council of Ministers following a recommendation by the ACP-EC Development Finance Cooperation Committee.
- (2) Article 29 of Annex IV to the Cotonou Agreement provides that performance of works, supply and service contracts financed from the resources of the European Development Fund shall be governed by the general conditions applicable to contracts financed by the Fund which shall be adopted by decision of the Council of Ministers upon the recommendation of the ACP-EC Development Finance Cooperation Committee.
- (3) Article 30 of Annex IV of the Cotonou Agreement provides that any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services during the performance of a contract financed by the European Development Fund shall be settled by arbitration in accordance with the procedural rules to be adopted by decision of the Council of Ministers upon the recommendation of the ACP-EC Development Finance Cooperation Committee.
- (4) Provision should be made for applying the general regulations, the general conditions and the rules governing the conciliation and arbitration procedure referred to in the previous recitals to contracts financed from the resources of the ninth European Development Fund and any future Fund.
- (5) New general regulations complying with the Community rules on the award of public contracts should be adopted and applied to cooperation with third countries, as required by the abovementioned Article 28.
- (6) By contrast, the general conditions applicable to contracts and the rules governing the conciliation and arbitration procedure adopted by the ACP-EC Council of Ministers by Decision No 3/90 of 29 March 1990 are still appropriate to ACP-EC cooperation and it is therefore desirable to extend the period of application of the texts in question.

(7) Provision should be made for a procedure for adapting the general regulations and general conditions to ensure that they are consistent with the rules applicable to other European Community external cooperation programmes, whilst taking into account the specific nature of the ACP-EC partnership.

(8) Certain measures such as seminars and a practical guide to the award of contracts should be introduced to familiarise those concerned with the abovementioned general regulations and general conditions,

HAS DECIDED AS FOLLOWS:

Article 1

General regulations

The preparation and awarding of contracts financed from the resources of the European Development Fund shall be governed by the annexed general regulations on works, supply and service contracts financed by the European Development Fund.

Article 2

General conditions

Except where otherwise stated in Article 29 of Annex IV to the ACP-EC Partnership Agreement, the performance of contracts financed from the resources of the European Development Bank shall be governed by:

- (a) the general conditions for works contracts financed by the European Development Fund,
- (b) the general conditions for supply contracts financed by the European Development Fund, or
- (c) the general conditions for service contracts financed by the European Development Fund

in the form adopted by Decision No 3/90 of the ACP-EC Council of Ministers of 29 March 1990.

Article 3

Review

The general regulations and general conditions may be reviewed by decision of the ACP-EC Council of Ministers to ensure that they are consistent with the rules applicable to other European Community external cooperation programmes, whilst taking the specific nature of the ACP-EC partnership into account.

*Article 4***Dispute settlement**

Disputes regarding contracts financed from the resources of the European Development Fund which, under the general regulations and general conditions governing such contracts, must be settled in accordance with the conciliation and arbitration procedure for the said contracts, shall be settled in accordance with the procedure adopted by Decision No 3/90 of the ACP-EC Council of Ministers of 29 March 1990.

*Article 5***Application**

Except where the ACP-EC Council of Ministers decides otherwise, the general regulations and general conditions referred to in Articles 1 and 2 shall apply to contracts financed from the resources of the ninth European Development Fund. They shall also apply to contracts financed

from any future Fund under the ACP-EC Partnership Agreement.

*Article 6***Entry into force**

This Decision shall enter into force on the same date as the ACP-EC Partnership Agreement.

*Article 7***Implementing Measures**

The ACP States, the Member States of the European Community and the Community shall be required to take the necessary measures for the application of this Decision, each acting on their own behalf. In particular, the ACP States and the Commission shall take whatever follow-up measures are necessary to facilitate the application of the general regulations and general conditions referred to in Articles 1 and 2.

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

PART I

BASIC RULES GOVERNING ALL CONTRACTS

1. INTRODUCTION

The award of service, supply and works contracts financed by the resources of the European Development Fund (EDF) shall be governed by these general regulations.

These general regulations comprise the principles and conditions for participation in contracts, instructions to tenderers, and the principles and conditions for the award of contracts.

The performance of service, supply and works contracts shall be governed by:

- (a) the general conditions applicable to each category of contracts financed by the EDF, or
- (b) in the case of cofinanced projects and programmes, or where derogation to third parties has been granted or in other appropriate cases, such other general conditions as may be agreed by the ACP States concerned and the Community, i.e.:

- the general conditions prescribed by the national legislation of the ACP State concerned or its established practices regarding international contracts, or

- any other international general conditions for contracts, and

- (c) the special conditions.

The general conditions governing a particular category of contract comprise contractual clauses of and administrative, financial, legal and technical nature relating to the performance of contracts.

The special conditions applicable to each contract comprise amendments to the general conditions, special contractual clauses, technical specifications and any other matter related to the contract.

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

2. ELIGIBILITY FOR CONTRACTS

The provisions governing who may participate in tender procedures and contracts are termed 'eligibility criteria'. Hence the rule on the nationality of natural and legal persons and the origin of supplies.

2.1. The rule on nationality and origin

(a) Participation in invitations to tender and in the award of the contracts financed by the EDF shall be open on equal terms to:

- natural persons, companies or firms or public or semi-public agencies of the ACP States and the Member States,
- cooperative societies and other legal persons governed by public or private law, of the Member States and/or the ACP States and
- joint ventures or groupings of companies or firms of ACP States and/or of Member States.

This nationality rule also applies to the experts proposed by service providers taking part in tender procedures or service contracts financed by the Community.

For the purposes of verifying compliance with the nationality rule, the tender dossier requires tenderers to state the country of which they are nationals by presenting the documents usual under that country's law.

(b) All supplies purchased under a supply contract must originate in the Community and/or the ACP States. The same goes for supplies and equipment purchased by a contractor for works or service contracts if the supplies and equipment are destined to become the property of the project once the contract is completed.

In this context, the definition of the concept of 'originating products' shall be assessed by reference to the relevant international agreements⁽¹⁾ and supplies originating in the Community shall include supplies originating in the Overseas Countries, Territories and departments.

In his tender, a tenderer must state the origin of supplies. Contractors must present a certificate of origin to the contracting authority when bringing supplies into the ACP State, when provisional acceptance of the supplies takes place or when the first invoice is presented. Which of these options is to apply will be specified in the contract concerned.

Origin certificates must be made out by the competent authorities of the supplies' or supplier's country of origin and comply with the international agreements to which that country is a signatory.

It is up to the contracting authority of the ACP State to check that there is an origin certificate. Where there are serious doubts about origin, it will be for the Commission's departments in Brussels to decide on the course of action.

⁽¹⁾ Especially in comparison with the Protocol 1 included in Annex V of the ACP-EU Partnership Agreement.

2.2. Exceptions to the rule on nationality and origin

In order to ensure the optimum cost-effectiveness of the system, natural or legal persons from non-ACP developing countries may be authorized to participate in contracts financed by the Community at the request of the ACP States concerned. The ACP States concerned shall, on each occasion, provide the Head of Delegation with the information needed for the Community to decide on such derogation, with particular attention being given to:

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

Participation by third countries in contracts financed by the Community may also be authorised:

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

In exceptional cases and in agreement with the Commission, consultancy firms with experts who are nationals of third countries may participate in service contracts.

Moreover, during the execution of operations and subject to the requirement to inform the Head of Delegation, the contracting authority shall decide on:

- (a) purchase of goods, irrespective of their origin, on the local market;
- (b) use of construction equipment and machinery not originating in the Member States or ACP States provided there is no production of comparable equipment and machinery in the Community and the ACP States.

2.3. Grounds for exclusion from participation in contracts

Natural or legal persons are not entitled to participate in competitive tendering or be awarded contracts where:

- (a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (b) they are the subject of proceedings for a declaration of bankruptcy, for winding-up, for administration by the courts, for an arrangement with creditors or for any similar procedure provided for in national legislation or regulations;
- (c) they have been convicted of an offence concerning professional conduct by a judgment which has the force of *res judicata*;
- (d) they are guilty of grave professional misconduct proven by any means which the contracting authority can justify;
- (e) they have not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country where they are established;
- (f) they have not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country where they are established;
- (g) they are guilty of serious misrepresentation in supplying the information required by the contracting authorities as a condition of participation in a tender procedure or contract;
- (h) they have been declared to be in serious breach of contract for failure to comply with obligations in connection with another contract with the same contracting authority or another contract financed with Community funds;
- (i) they are in one of the situations allowing exclusion referred to in section 7 ('Ethics clauses') in connection with the tender or contract.

Candidates (in the first stage of a restricted tender procedure) must supply with their applications a sworn statement that they do not fall into any of the categories listed above.

Tenderers (in the second stage of a restricted tender procedure or in the single stage of an open tender procedure) must supply with their tenders the proof usual under the law of the country where they are established that they do not fall into categories (a), (b), (c), (e) or (f) listed above. The date on the evidence or documents provided must be no earlier than 180 days before the deadline for submission of tenders. Tenderers must, in addition, provide a sworn statement that their situations have not altered in the period that has elapsed since the evidence in question was drawn up.

2.4. Participation on equal terms

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

- (a) ensure publication of invitations to tender in the *Official Journal of the European Communities*, the Internet, the Official Journals of all the ACP States and any other appropriate information media;
- (b) eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms;
- (c) encourage co-operation between the companies and firms of the Member States and of the ACP States;
- (d) ensure that all the award criteria are specified in the tender dossier;
- (e) ensure that the tender selected conforms to the requirements of the tender dossier and meets the award criteria stated therein.

3. CONTRACT AWARD PROCEDURES

The basic principle governing the award of contracts is competitive tendering. The purpose is twofold:

- (a) to ensure the transparency of operations and
- (b) to obtain the desired quality of services, supplies or works at the best possible price.

There are several different procedures for awarding contracts, each allowing for a different degree of competition:

3.1. Open procedure

The open procedure involves an open invitation to take part in competitive tendering. The contract is given maximum publicity through the publication of a notice in the *Official Journal of the European Communities*, in the Official Journals of all the ACP States, on the Internet and in any other appropriate media.

Under the open procedure, any natural or legal person wishing to tender receives, upon request, the tender dossier (which may have to be paid for), in accordance with the procedures laid down in the procurement notice. When the tenders received are examined, the contract is awarded by conducting the selection procedure (i.e. verification of the eligibility and of the financial, economic, technical and professional standing of tenderers) and the award procedure (i.e. comparison of tenders), in accordance with section 4, 'Selection and award criteria'. No negotiation is allowed.

3.2. Restricted procedure

Under the restricted procedure, the contracting authority invites a limited number of candidates to tender. Before launching a tender procedure, it will draw up a shortlist of candidates selected as a result of their qualifications on the basis of a published procurement notice.

The selection procedure, by which the long list (all candidates responding to the published notice) is cut down to a shortlist, involves examining responses to, in most cases, a procurement notice published in the *Official Journal of the European Communities*, on the Internet, in the Official Journals of all the ACP States and in any other appropriate media.

In the second stage of the procedure, the contracting authority invites tenders from shortlisted candidates, sending them the tender dossier. The successful tenderer is chosen by the award procedure once the tenders have been analysed (see section 4, 'Selection and award criteria'). No negotiation is allowed.

3.3. Simplified procedure

Under the simplified procedure, the contracting authority consults candidates of its choice and establishes contract conditions with them on the basis of the specifications. At the end of the procedure, the contracting authority selects the most economically advantageous tender.

3.4. Framework contracts

Under the framework contract arrangements, the Commission launches a restricted tender procedure, selects the candidates, examines the framework bids made, and draws up a list of potential contractors on whom it can call to supply experts for specific assignments in the areas of specialisation put out to tender.

For each individual contract (assignment), the contracting authority invites the contractors on the list to submit an offer within the bounds of their framework contracts. It then selects the most economically advantageous tender.

3.5. Direct labour operations (programme estimate)

In case of direct labour operations, projects and programmes shall be implemented through public or semi-public agencies or departments of the ACP State or States concerned (direct labour) or by the person responsible for executing the operation.

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

3.6. Humanitarian and emergency assistance

Contracts under humanitarian and emergency assistance shall be undertaken in such a way as to reflect the urgency of the situation. To this end, for all operations relating to humanitarian and emergency assistance undertaken by the ACP State, the latter may, in agreement with the Head of Delegation, authorise:

- (a) the conclusion of contracts by direct agreement using a negotiated procedure,
- (b) the performance of direct labour operations,
- (c) implementation through specialised agencies and
- (d) direct implementation by the Commission.

The Community shall administer and implement the humanitarian and emergency assistance operations it undertakes under its procedures permitting operations that are rapid, flexible and effective.

3.7. Tendering arrangements

The arrangements for competitive tendering and publicising contracts for works, supplies and services depend on the contract value. They are set out in Annex I.

In the case of mixed contracts covering a combination of works, supplies or services, the contracting authority, in agreement with the Commission, determines the award procedure to be used. This will depend on which of the components (works, supplies or services) predominates, an assessment which will be made on the basis of its value and strategic importance relative to the contract as a whole.

No contract may be split simply to evade compliance with the procedures set out in these general regulations. If there is any doubt about how to estimate the value of the contract, the contracting authority must consult the Head of Delegation on the matter before embarking on the procurement procedure.

Whatever the procedure used, the contracting authority must ensure that conditions are such as to allow fair competition. Wherever there is an obvious and significant disparity between the prices proposed and the services offered by a tenderer, or a significant disparity in the prices proposed by the various tenderers (especially in cases in which publicly-owned companies, non-profit associations or non-governmental organisations are taking part in a tender procedure alongside private companies), the contracting authority must carry out checks and request any additional information necessary. The contracting authority must keep such additional information confidential. Tenderers must routinely state that their financial offers cover all their costs, including overheads.

3.8. Preferences

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

- (a) for works contracts of a value of less than EUR 5 000 000, tenderers of the ACP States, provided that at least one quarter of the capital stock and management staff originates from one or more ACP States, shall be accorded a 10 % price preference where tenders of an equivalent economic, technical and administrative quality are compared;
- (b) for supply contracts, irrespective of the value of the supplies, tenderers of the ACP States who offer supplies of at least 50 % in contract value of ACP origin, shall be accorded a 15 % price preference where tenders of equivalent economic, technical and administrative quality are compared;
- (c) in respect of service contracts, preference shall, where tenders of equivalent economic and technical quality are compared, be given to:
- experts, institutions or consultancy companies or firms from ACP States,
 - offers submitted by an ACP firm in a consortium with European partners, and
 - offers presented by European tenderers with ACP sub-contractors or experts.
- (d) where subcontracting is envisaged, preference shall be given by the successful tenderer to natural persons, companies and firms of ACP States capable of performing the contract required on similar terms; and
- (e) the ACP State may, in the invitation to tender, propose to the prospective tenderers the assistance of other ACP States' companies or firms or national experts or consultants selected by mutual agreement. This co-operation may take the form either of a joint venture, or of a subcontract or of on-the-job training of trainees.

4. SELECTION AND AWARD CRITERIA

Whether contracts are awarded by open or restricted procedure, the following operations are always performed:

- (a) Selection procedure based on selection criteria published in the procurement notice:
- verification of the eligibility of tenderers or candidates as laid down in section 2, 'Eligibility for contracts',
 - verification of the financial and economic standing of tenderers or candidates,
 - verification of the technical and professional capacities of tenderers, candidates and their managerial staff.

The procurement notice or the tender dossier must specify the reference criteria for these checks.

- (b) Comparison of tenders on the basis of the award criteria stipulated in the procurement notice or tender dossier, using price and other pre-established criteria enabling the most economically advantageous tender to be identified.

Under the open procedure, both (a) and (b) are carried out when tenders are examined.

Under the restricted procedure, (a) is carried out during the first stage, when candidatures are examined (drawing-up of a shortlist), and (b) during the second stage (invitation to tender), when tenders are examined.

5. TENDER PROCEDURE WITH 'SUSPENSION CLAUSE'

In exceptional and duly justified cases, tender procedures may be published with a 'suspension clause'. This means that a tender procedure is issued before a financing decision is issued or a financing agreement signed between the Commission and the ACP State; the award of that contract is therefore subject to the conclusion of the financing agreement and the provision of funding.

Because of its implications, the existence of a suspension clause must be explicitly mentioned in the procurement notice.

The tender procedure will invariably be cancelled if the Commission's decision-making procedure is not completed or the financing agreement is not signed.

6. CANCELLATION OF AWARD PROCEDURES

If a contract award procedure is cancelled, all tenderers must be notified in writing and as soon as possible of the reasons for the cancellation. Cancellation may occur where:

- (a) the tender procedure has remained unsuccessful, i.e. no qualitatively or financially worthwhile tender has been received or there is no response at all;
- (b) the economic or technical data of the project have been fundamentally altered;
- (c) exceptional circumstances, or *force majeure*, render normal performance of the contract impossible;
- (d) where all technically compliant tenders exceed the financial resources available;
- (e) where there have been serious irregularities in the procedure, in particular where these have prevented normal competition.

After cancelling a tender procedure, the contracting authority may decide:

- (a) to launch a new tender procedure;

(b) to open negotiations with one or more tenderers who comply with the selection criteria and have submitted technically compliant tenders, provided that the original terms of the contract have not been substantially altered;

(c) not to award the contract.

Whatever the case, the final decision is taken by the contracting authority with the agreement of the Commission.

7. ETHICS CLAUSES

Any attempt by a candidate or tenderer to obtain confidential information, enter into unlawful agreements with competitors or influence the committee or the contracting authority during the process of examining, clarifying, evaluating and comparing tenders will lead to the rejection of his candidacy or tender and may result in administrative penalties.

Without the contracting authority's prior written authorisation, a contractor and his staff or any other company with which the contractor is associated or linked may not, even on an ancillary or subcontracting basis, supply other services, carry out works or supply equipment for the project. This prohibition also applies to any other programmes or projects that could, owing to the nature of the contract, give rise to a conflict of interest on the part of the contractor.

When putting forward a candidacy or tender, the candidate or tenderer must declare that he is affected by no potential conflict of interest, and that he has no particular link with other tenderers or parties involved in the project. Should such a situation arise during performance of the contract, the contractor must immediately inform the contracting authority.

The contractor must at all times act impartially and as a faithful adviser in accordance with the code of conduct of his profession. He must refrain from making public statements about the project or services without the contracting authority's prior approval. He may not commit the contracting authority in any way without its prior written consent.

For the duration of the contract, the contractor and his staff must respect human rights and undertake not to offend the political, cultural and religious mores of the recipient state.

The contractor may accept no payment connected with the contract other than that provided for therein. The contractor and his staff must not exercise any activity or receive any advantage inconsistent with their obligations to the contracting authority.

The contractor and his staff are obliged to maintain professional secrecy for the entire duration of the contract and after its completion. All reports and documents drawn up or received by the contractor are confidential.

The contract shall govern the contracting parties' use of all reports and documents drawn up, received or presented by them during the execution of the contract.

The contractor shall refrain from any relationship likely to compromise his independence or that of his staff. If the supplier ceases to be independent, the contracting authority may, regardless of injury, terminate the contract without further notice and without the supplier having any claim to compensation.

The Commission reserves the right to suspend or cancel project financing if corrupt practices of any kind are discovered at any stage of the award process and if the contracting authority fails to take all appropriate measures to remedy the situation. For the purposes of this provision, 'corrupt practices' are the offer of a bribe, gift, gratuity or commission to any person as an inducement or reward for performing or refraining from any act relating to the award of a contract or implementation of a contract already concluded with the contracting authority.

More specifically, all tender dossiers and contracts for works, supplies and services must include a clause stipulating that tenders will be rejected or contracts terminated if it emerges that the award or execution of a contract has given rise to unusual commercial expenses.

Such unusual commercial expenses are commissions not mentioned in the main contract or not stemming from a properly concluded contract referring to the main contract, commissions not paid in return for any actual and legitimate service, commissions remitted to a tax haven, commissions paid to a recipient who is not clearly identified or commissions paid to a company which has every appearance of being a front company.

The contractor undertakes to supply the Commission on request with supporting evidence regarding the conditions in which the contract is being executed. The Commission may carry out whatever documentary or on-the-spot checks it deems necessary to find evidence in cases of suspected unusual commercial expenses.

Contractors found to have paid unusual commercial expenses on projects funded by the Community are liable, depending on the seriousness of the facts observed, to have their contracts terminated or to be permanently excluded from receiving Community funds.

Failure to comply with one or more of the ethics clauses may result in the exclusion of the candidate, tenderer or contractor from other Community contracts and in penalties. The individual or company in question must be informed of the fact in writing.

8. APPEALS

Tenderers believing that they have been harmed by an error or irregularity during the award process may petition the contracting authority directly and informing the Commission. The contracting authority must reply within 90 days of receipt of the complaint.

Where informed of such a complaint, the Commission must communicate its opinion to the contracting authority and do all it can to facilitate an amicable solution between the complainant (tenderer) and the contracting authority.

If the above procedure fails, the tenderer may have recourse to procedures established under the national legislation of the State of the contracting authority.

European citizens also have the right to complain to the European Ombudsman, who investigates complaints of maladministration by the European Community institutions.

Should the contracting authority fail to adhere to the contract award procedures provided for in these general regulations, the Commission reserves the right to suspend, withhold or recover funding for the contracts under suspicion.

PART II

SPECIFIC RULES GOVERNING SERVICE CONTRACTS

9. INTRODUCTION

Technical and economic support in the course of cooperation policy involves recourse to outside know-how on the basis of service contracts, most of them for studies or technical assistance.

Study contracts include studies for the identification and preparation of projects, feasibility studies, economic and market studies, technical studies, evaluations and audits.

Study contracts generally specify an outcome, i.e. the contractor must provide a given product: the technical and operational means by which he achieves the specified outcome are irrelevant. These are, therefore, lump-sum contracts and the contractor will be paid only if the specified outcome is achieved.

Technical assistance contracts are used where a service provider is called on to play an advisory role, to manage or supervise a project, to provide the experts specified in the contract or to procure works, supplies or services for and on behalf of the contracting authority.

Technical assistance contracts often only specify the means, i.e. the contractor is responsible for performing the tasks entrusted to him in the terms of reference and ensuring the quality of the services provided. Payment for these contracts is dictated by

the resources and services actually provided. The contractor does, however, have a duty of care under the contract: he must warn the contracting authority in good time of anything that might affect the proper execution of the project.

Some service contracts may, however, combine both types, specifying both the means and the outcome.

The contracting authority, which is always specified in the procurement notice, is the authority empowered to conclude the contract. Service contracts are concluded by the ACP State with which the Commission as a general rule draws up a financing agreement.

The contracting authority and the Head of Delegation will draw up shortlists in close consultation with each other. The Commission shall prepare and send to the contracting authority the international tender dossiers for approval and launching of the procedure. The contracting authority must submit the other tender dossiers to the Head of Delegation for approval before issuing them. On the basis of decisions thus approved and in close consultation with the Head of Delegation, the contracting authority is responsible for launching all the tender procedures, receiving tenders, chairing tender-examination sessions and deciding on the results of tender procedures. The contracting authority then submits the result of this examination and the contract award proposal to the Head of Delegation for approval. Once the award is approved, the contracting authority will sign the contracts and notify the Head of Delegation accordingly. As a general rule, the Head of Delegation will be represented when tenders are opened and evaluated and must always be formally invited.

The ACP States may also request the Commission to negotiate, draw up, conclude and implement service contracts on their behalf directly or through its relevant agency.

Audit and evaluation contracts and framework contracts are always concluded by the Commission acting for and on behalf of the ACP State or States concerned.

'Service provider' describes any natural or legal person offering services. A service provider who has applied to take part in a restricted or simplified procedure is termed a 'candidate'; a service provider submitting a tender is termed a 'tenderer'.

10. AWARD PROCEDURES

10.1. **Contracts of EUR 200 000 or more**

10.1.1. *Restricted procedure*

As a rule, all service contracts worth EUR 200 000 or more have to be awarded by international restricted tender procedure following publication of a contract forecast and a procurement notice as laid down in section 11.1, 'Publicity'.

10.1.2. *Negotiated procedure*

With the prior agreement of the Commission, service contracts may be awarded in the following situations using a negotiated procedure:

- (a) Where unforeseeable events oblige the contracting authority to act with an urgency incompatible with the periods laid down for the restricted or simplified procedures described in sections 11 and 12.2. The circumstances invoked to justify extreme urgency must in no way be attributable to the contracting authority. In this context, the latter shall enter freely into such discussions as it may consider appropriate with the prospective tenderers whom it has short-listed in agreement with the Head of Delegation and award the contract to the tenderer whom it has selected.
- (b) Where services are being provided by public entities or non-profit institutions or associations; non-profit institutions or associations cannot automatically be presumed to be contractors with no profit motive, and cannot therefore always be dealt with through a negotiated procedure — the latter is admissible only where the aim of the contract is not motivated by economic or commercial considerations, and would include cases in which the operation was institutional in nature or sought, for example, to provide individuals with social assistance.
- (c) In the case of contracts extending activities already under way; there are two scenarios for this:
 - complementary services not included in the main contract but which, because of unforeseen circumstances, are necessary to perform the contract. This provision is subject to the following conditions: (i) the supplementary services must be technically or economically inseparable from the main contract without causing major inconvenience to the contracting authority, and (ii) the estimated cost must not exceed 50 % of the value of the main contract;
 - additional services repeat services performed by the supplier under an earlier contract. This provision is subject to two conditions: (i) the earlier contract must have been awarded after publication of a procurement notice and (ii) the possibility of further services being procured by negotiated procedure and their estimated cost must have been clearly indicated in the notice published for the earlier service contract. Such further services could, for example, include the second phase of a study or operation. The contract can be extended only once, with its maximum value and duration not exceeding that of the earlier contract.
- (d) Where the tender procedure has remained unsuccessful, i.e. where no qualitatively or financially worthwhile tender has been received; in such cases, after cancelling the tender

procedure, the contracting authority may negotiate with one or more tenderers of its choice, from among those that took part in the tender procedure, provided that the initial conditions of the tender procedure are not substantially altered (see section 6, 'Cancellation of award procedures'). The Commission's approval must be sought first.

- (e) Where the contract concerned follows a design competition and must, under the rules applying, be awarded to the or a winner. In the latter case, all winners must be invited to participate in the negotiations.

10.2. **Contracts under EUR 200 000**

10.2.1. *Framework contracts and simplified procedure*

Contracts of a value of under EUR 200 000 may be awarded either under the framework contract procedure or under a simplified procedure involving at least three candidates. This does not apply to cases in which section 10.1.2 provides for the negotiated procedure.

11. INTERNATIONAL RESTRICTED TENDER PROCEDURES (FOR CONTRACTS OF EUR 200 000 OR MORE)

11.1. **Publicity**

In order to ensure the widest possible participation in competitive tendering and the requisite transparency, the Commission must publish contract forecasts and procurement notices for all service contracts of EUR 200 000 or over.

11.1.1. *Publication of contract forecasts*

Once a year, the Commission must publish forecasts of service contracts to be put out to tender for the twelve months following publication and, once every three months, any amendments to the above forecasts.

The contract forecasts must give a brief indication of the subject, content and value of the contracts concerned. Given that they are forecasts, publication does not bind the Commission to finance the contracts proposed, and suppliers are not expected to submit expressions of interest at that stage.

The contract forecasts are published in the *Official Journal of the European Communities*, on the Internet and in any other appropriate media.

11.1.2. *Publication of service procurement notices*

In addition to forecasts, all service contracts of EUR 200 000 or more must also be the subject of a restricted tender procedure procurement notice published in the *Official Journal of the European Communities*, in the Official Journals of all the ACP States, on the Internet and in any other appropriate media. A minimum of 30 days must be allowed to elapse between the publication of the indicative notice and the procurement notice.

The notice must state clearly, precisely, and completely what the subject of the contract is, and who the contracting authority is. It must specify the maximum budget available for the intended operation and the forecast timetable of activities. It must provide would-be service providers with the information they need to determine their capacity to fulfil the contract in question. The time allowed for candidates to submit their tenders must be sufficient to permit proper competition. The minimum deadline for submitting tenders is 30 days from the date of the notice's publication in the *Official Journal of the European Communities* and on the Internet. The actual deadline will be determined by the contract's size and complexity.

The procurement notice published locally must be identical to those published in the *Official Journal of the European Communities* and on the Internet and appear at the same time. The Commission is responsible for publication in the *Official Journal of the European Communities* and on the Internet, while the ACP States must see to any local publication.

11.2. Establishment of shortlists

Would-be service providers must accompany their candidatures (individually or as part of a consortium) with the information required in the notice so that their capacity to fulfil the contract in question can be assessed. The selection procedure involves:

- eliminating candidates who are ineligible (see section 2, 'Eligibility for contracts') or fall into one of the situations described in section 7, 'Ethics clauses',
- checking that the candidates' financial situation (financial and economic standing) is sound, as backed up, for example, by balance sheets and turnover for the previous three years,
- verifying the candidates' technical and professional capabilities, backed up (i) where applicable, by the candidates' average annual staffing levels and the size and professional experience of their management and (ii) by the references to the main services supplied in the field in question over the previous years.

After examination of the responses to the procurement notice, the service providers offering the best guarantees for the satisfactory performance of the contract will be shortlisted. The shortlist should contain a minimum of four candidates and a maximum of eight. Every procurement notice should specify a maximum and minimum number of candidates to be shortlisted.

Once a shortlist has been approved by the contracting authority and the Head of Delegation, shortlisted service providers or consortia may no longer form alliances or subcontract to each other for the contract in question.

The contracting authority may allow subcontracting with other suppliers provided that the tenderer's tender clearly provides

for it, that the subcontractor complies with the eligibility conditions set out in section 2, 'Eligibility for contracts', and section 7, 'Ethics clauses', and that subcontracting does not account for an excessive proportion of the tender. The tender dossier must stipulate what the proportion is.

Candidates not selected will be informed of that fact. Candidates who are selected will receive a letter of invitation to tender and the tender dossier. At the same time, the final list will be posted on the Internet.

11.3. Drafting and contents of the tender dossier

It is vital that tender documents be carefully drafted not only for the sound functioning of the award procedure but also for the proper execution of the contract.

These documents must contain all the provisions and information that candidates invited to tender need to present their tenders: the procedures to follow, the documents to provide, cases of non-compliance, award criteria and their weightings, stipulations regarding subcontracting, etc.

The Commission is responsible for drawing up these documents. The contracting authority will send only the short-listed candidates a letter of invitation to tender accompanied by the approved tender dossier comprising the following documents:

- instructions to tenderers, which must include:
 - (i) the type of contract,
 - (ii) the award criteria and their weightings,
 - (iii) whether interviews are possible and when they are likely to be held,
 - (iv) whether variants are allowed,
 - (v) whether, and in what proportion, subcontracting is permitted,
 - (vi) the maximum budget available for the contract and
 - (vii) the currency of the tenders,
- the shortlist of candidates (stipulating that they cannot form alliances),
- the general conditions for service contracts financed by the EDF,
- special conditions, which amplify, supplement or derogate from the general conditions and, where they conflict, override them,
- terms of reference, with a forecast schedule for the contract and forecast dates from which the main experts must be available,
- price schedule (for completion by the tenderer),

- tender form,
- contract form,
- guarantee form from a bank or similar institution for payment of advances.

11.4. Award criteria

The criteria for the award of the contract serve to identify the most economically advantageous tender. These criteria cover both the technical quality and price of the tender.

The technical criteria allow the quality of technical offers to be assessed. The two main types of technical criteria are the methodology and the curriculum vitae (CV) of the experts proposed. The technical criteria may be divided into subcriteria. The methodology, for example, may be examined in the light of the terms of reference, the optimum use of the technical and professional resources available in the recipient country, the work schedule, the appropriateness of the resources to the tasks, the support proposed for experts in the field etc. CVs may be awarded points for such criteria as qualifications, professional experience, geographical experience, language skills, etc.

Each criterion is allotted a number of points out of 100 distributed between the different subcriteria. Their respective weightings depend on the nature of the services required and are determined on a case-by-case basis in the tender dossier.

The points must be related as closely as possible to the terms of reference describing the services to be provided and refer to parameters that are easy to identify in the tenders and, if possible, quantifiable.

The tender dossier must contain details of the technical evaluation grid, with its criteria and subcriteria and their weightings.

11.5. Additional information during the procedure

The tender dossier should be clear enough to prevent candidates invited to tender from having to request additional information during the procedure. If the contracting authority, either on its own initiative or in response to the request of a candidate, provides additional information on the tender dossier, it must send such information in writing to all other candidates at the same time.

Tenderers may submit questions in writing up to 21 days before the deadline for submission of tenders. The contracting authority must reply to all tenderers' questions at least 11 days before the deadline for receipt of tenders.

11.6. Deadline for the submission of tenders

Tenders must reach the contracting authority at the address and, at the very latest, the date and time indicated in the

letter of invitation to tender. The period for submission must be sufficient to guarantee the quality of tenders and so permit truly competitive tendering. Experience shows that too short a period prevents candidates from tendering or causes them to submit incomplete or ill-prepared tenders.

The minimum period between the dispatch of the letter of invitation to tender and the deadline for receipt of tenders is 50 days. However, in urgent cases, with prior authorisation from the Commission, periods may be shorter.

11.7. Period during which tenders are binding

Tenderers are bound by their tenders for the period specified in the letter of invitation to tender. This period must be sufficient to allow the contracting authority to examine tenders, approve the contract award proposal, notify the successful tenderer and conclude the contract. The period of validity of tenders is fixed at 90 days from the deadline for the submission of tenders.

In exceptional cases, before the period of validity expires, the contracting authority may ask tenderers to extend the period for a specific number of days, which may not exceed 40.

The successful tenderer must maintain his tender for a further 60 days from the date of notification of award.

11.8. Submission of tenders

Tenders must be submitted in accordance with the double envelope system, i.e. in an outer parcel or envelope containing two separate, sealed envelopes, one bearing the words 'Envelope A — technical offer' and the other 'Envelope B — financial offer'.

Any infringement of these rules (e.g. unsealed envelopes or references to price in the technical offer) is to be considered a breach of the rules, and will lead to rejection of the tender.

This system enables the technical offer and the financial offer to be evaluated successively and separately: it ensures that the technical quality of a tender is considered independently of the price.

The outer envelope should carry:

- the address for submission of tenders specified in the tender dossier,
- the reference of the tender procedure to which the tenderer is responding,
- where applicable, the numbers of the lots tendered for,
- the words 'not to be opened before the tender-opening session' in the language of the tender dossier.

11.9. Opening of tenders

On receiving tenders, the contracting authority must register them and provide a receipt for those delivered by hand. The envelopes containing the tenders must remain sealed and be kept in a safe place until they are opened.

Tenders are opened and evaluated by a committee made up of an odd number of members (at least three) possessing the technical and administrative capacities necessary to give an informed opinion on the tenders. The members of the committee must sign a declaration of impartiality.

The Head of Delegation must be informed automatically. He is present as an observer at the tender-opening session and receives a copy of each tender.

Only tenders contained in envelopes received by the date and time indicated in the tender dossier are considered for evaluation.

Initially only the technical offers are opened. The sealed envelopes containing the financial offers are retained by the contracting authority once signed by members of the committee.

The committee checks the compliance of tenders with the instructions given in the tender dossier. Any formal errors or major restrictions affecting performance of the contract or distorting competition result in the rejection of the tender concerned.

Minutes are taken of the tender-opening session and signed by all members of the evaluation committee. They must state:

- the date, time and place of the session,
- the persons present,
- the names of the tenderers who submitted tenders within the stipulated deadline,
- whether tenders were submitted using the double-envelope system,
- whether the originals of the tenders were duly signed, and whether technical offers were sent in the requisite number of copies,
- the names of any tenderers whose tenders were found to be non-compliant at the opening session,

- the names of any tenderers who withdrew their tenders.

11.10. Evaluation of tenders

11.10.1. Evaluation of technical offers

Before tenders are opened, the chairman of the committee checks that all members are familiar with the technical evaluation grid set out in the tender dossier to make sure that tenders are evaluated by the different members of the committee in a consistent manner.

The committee then opens the technical offers, the financial offers remaining sealed. The committee's members receive copies of the technical offers. When evaluating technical offers, each member awards each offer a score out of a maximum 100 points in accordance with the technical evaluation grid (setting out the technical criteria, subcriteria and weightings) laid down in the tender dossier (see section 11.4, 'Award criteria'). In no circumstances may the committee or its members change the technical evaluation grid communicated to the tenderers in the tender dossier.

In practice, it is recommended that tenders be scored for a given criterion one after another, rather than scoring each tender for all criteria before moving on to the next. Where the content of a tender is incomplete or deviates substantially from one or more of the technical award criteria laid down in the tender dossier, the tender is automatically rejected and no points awarded.

If the tender dossier expressly permits variants, such variants are scored separately.

On completion of the technical evaluation, the points awarded by each member are compared at the committee's session. Besides the numerical score, a member must explain the reasons for his choice and defend his scores before the committee. The committee discusses each technical offer and each member awards it a final score. The aggregate final score is the arithmetic average of the individual scores.

If interviews were provided for in the tender dossier, the committee may, after writing up its provisional conclusions and before definitively concluding its evaluation of the technical offers, decide to interview the key members of the team of experts proposed in technically compliant tenders. In this case the experts are interviewed by the committee, preferably collectively in the case of a team, at intervals close enough to permit comparison. Interviews must follow a standard format agreed beforehand by the committee and applied to all experts or teams called to interview. Tenderers must be given at least ten days' advance notice of the date and time of the interview. Where a tenderer is prevented from attending an interview by *force majeure*, he is given another appointment.

On completion of these interviews, the evaluation committee, without modifying either the composition or the weighting of the criteria laid down in the technical evaluation grid, decides whether it is necessary to adjust the scores of the experts who have been interviewed. Any adjustments must be substantiated.

This procedure entails considerable costs both for tenderers and the contracting authority and should therefore be used with restraint. It must be recorded in a report, which may lead to revision of the initial technical evaluation of the tender. The need for interviews must be accepted by the Head of Delegation. The indicative timetable for these interviews must be given in the tender dossier.

Once the committee has established each technical offer's final score (the arithmetic average of the scores awarded by each member), any tender falling short of the 80-point threshold is automatically rejected. If no tender achieves 80 points or more, the tender procedure is cancelled.

The committee considers only tenders that have obtained at least 80 points. Of these tenders, the best technical offer is then awarded 100 points. The others receive points calculated using the following formula:

Points = (initial score of the tender in question/initial score of the best technical offer) × 100.

11.10.2. *Evaluation of financial offers*

Upon completion of the technical evaluation, the envelopes containing the financial offers for tenders which were not eliminated during the technical evaluation are opened and signed by the committee at the session. At the session, the committee checks that the financial offers contain no arithmetic errors. Any arithmetic errors are corrected without prejudice to the tenderer.

Comparison of the financial offers takes account of all contract expenses (fees, direct or lump-sum costs, etc.) with the exception of expenses repayable on presentation of proof of payment. The tender dossier, which includes a price schedule, requires the tenderer to classify these costs. The committee must nevertheless check the conformity of this classification and correct it where necessary. Fees are set by the tenderer alone.

Financial offers exceeding the maximum budget allocated for the contract are eliminated.

The lowest financial offer receives 100 points. The others are awarded points by means of the following formula:

Points = (lowest financial offer/financial offer being considered) × 100.

11.11. **Award of the contract**

11.11.1. *Choice of contractor*

The most economically advantageous tender is established by weighing technical quality against price on an 80/20 basis. This is done by multiplying:

- the scores awarded to the technical offers by 0,80,
- the scores awarded to the financial offers by 0,20.

The resulting technical and financial scores are then added together, and the contract is awarded to the tender achieving the highest score.

Where two tenders are acknowledged to be equivalent, preference shall be given:

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

The entire procedure (technical and price evaluation) is recorded in minutes to be signed by all members of the committee and approved by the contracting authority. The latter submits the result of the tender evaluation and a contract award proposal to the Head of Delegation for approval.

The Head of Delegation shall approve within 30 days the contracting authority's proposal for the placing of all service contracts, including direct agreement contracts and emergency assistance contracts.

The entire evaluation procedure, including notification of the successful tenderer, must be completed while the tenders are still valid. It is important to bear in mind that the successful tenderer might be unable to maintain his tender (availability of experts) if the evaluation procedure takes too long.

The entire tender procedure, from the drawing-up of the shortlist to the notification of the successful tenderer, is strictly confidential. The committee's decisions are collective and its deliberations must remain secret. The committee members are bound to secrecy.

The evaluation reports and minutes, in particular, are for official use only and may be divulged neither to tenderers nor to any party outside the authorised departments of the ACP State or States concerned, the Commission and the supervisory authorities (Court of Auditors, etc.).

11.11.2. Notification of award of contract

After the Commission has given its formal approval and before the period of validity of tenders expires, the contracting authority notifies the successful tenderer in writing that his tender has been accepted. It must also send the other candidates a standard letter informing them that their tenders have been unsuccessful. This letter states any shortcomings in the addressee's tender, the detailed score achieved by that tender and the aggregate scores achieved by the other tenderers.

Where a contract is awarded under a financing agreement, the contracting authority must not notify the successful tenderer unless the financing agreement has been concluded (see section 5, 'Tender procedure with suspension clause').

Once the contract has been signed, the Commission publishes the results of the tender procedure (contract award notice) in the *Official Journal of the European Communities*, on the Internet and in any other appropriate media. Post-award notices must state the number of tenders received, the date of award of the contract, the name and address of the successful tenderer and the contract price.

11.11.3. Signing of the contract

Once signed by the contracting authority the contract is sent to the successful tenderer, who must countersign and return it within 30 days of receipt.

The contract must be dated. It cannot cover earlier services or enter into force before the date on which it is signed. The parties are bound by the contract from the moment it is signed. Hence the importance of carefully selecting the date.

11.12. Approval of experts

Where the Commission acting for and on behalf of an ACP State concludes a contract, the Head of Delegation is required to notify the ACP State of the name of the successful tenderer and obtain its approval of the experts proposed. Such a request is not a request for approval of the Commission's evaluation.

The ACP State may not withhold its approval unless it submits duly substantiated and justified objections to the proposed experts in writing to the Head of Delegation within 30 days of the date of the request for approval.

11.13. Provision and replacement of experts

Where the tender procedure involves the provision of technical assistance staff, the contractor is bound to provide the staff

specified in the tender. This specification may take various forms. Whatever the form, the key staff (head of project, long-term experts, project administrator, accountant, etc.) to be provided by the contractor must be identified and named in the contract.

Should a company and/or proposed experts deliberately conceal the fact that all or some of the team proposed in their tender are unavailable from the date specified in the tender dossier for the start of the assignment, they may be excluded from the tender procedure by the committee. Should the contracting authority and the Commission learn that such facts have been concealed after the contract has been awarded, they may decide either to cancel the award of the contract and recommence the tender procedure or to award the contract to the tender awarded second place by the committee. Such behaviour may lead to a tenderer's exclusion from other Community contracts.

However, the contract must not only identify the key staff to be provided but specify the qualifications and experience required of them. This is important if the contractor wishes to replace staff after the contract has been signed and concluded. This situation may arise before performance of the contract has even begun or while it is in progress. In both cases, the contractor must first obtain the contracting authority's written approval by substantiating his request for replacement. The contracting authority has 30 days from the date of receipt of the request in which to reply.

The contractor must, on his own initiative, propose a replacement where:

- (a) a member of staff dies, falls ill or suffers an accident;
- (b) it becomes necessary to replace a member of staff for any other reasons beyond the contractor's control (e.g. resignation etc.).

In the course of performance, the contracting authority may also submit a substantiated written request for a replacement where it considers a member of staff incompetent or unsuitable for the purposes of the contract.

Where a member of staff has to be replaced, the replacement must possess at least equivalent qualifications and experience and his remuneration may in no circumstances exceed that of the expert replaced. Where the contractor is unable to provide a replacement possessing equivalent qualifications and/or experience, the contracting authority may either terminate the contract, if it feels that its performance is jeopardised, or, if it feels that this is not the case, accept the replacement, in which case the latter's fees are to be negotiated downwards to reflect the proper level of remuneration.

Any additional expenses resulting from the replacement of staff are borne by the contractor. Where an expert is not replaced immediately and some time elapses before the new expert takes up his functions, the contracting authority may ask the contractor to assign a temporary expert to the project pending the new expert's arrival or to take other steps to bridge the gap. Whatever the case may be, the contracting authority will make no payment for the period of absence of the expert or his replacement (whether temporary or permanent).

12. PROCEDURES FOR THE AWARD OF CONTRACTS UNDER EUR 200 000

12.1. Framework contract

For service contracts under EUR 200 000 and with a performance period of under 12 months, the contracting authority may opt to use framework contracts.

Under this procedure, the Commission, acting for and on behalf of all the beneficiary countries of the external aid of the Community, uses a restricted tender procedure (see section 11 above) with lots covering several different areas of technical specialisation to draw up lists of potential service providers valid for three to five years. This saves having to draw up a shortlist of service providers for each ensuing contract.

For the purposes of specific contracts under EUR 200 000 and with a performance period of under 12 months, the Commission, acting for and on behalf of the ACP State concerned, sends the profile(s) of the expert(s) required to three service providers bound by a framework contract and figuring on the shortlist for the lot relating to the requisite area of specialisation.

The three companies approached have eight days in which to propose experts matching the profile sought at a rate within the bracket agreed when the framework contract was concluded. The Commission chooses the most economically advantageous tender and notifies the chosen contractor.

To ensure fair competition between companies shortlisted for each lot of the framework contract, the Commission should make sure that it consults them in rotation.

12.2. Simplified procedure

If recourse to the framework contract is unsuccessful or not possible, the contracting authority may award a service contract under EUR 200 000 by simplified procedure, without publication.

The contracting authority draws up a list of at least three service providers of its choice, drawing in particular on data in the Commission's databases of experts and consultancy firms. The candidates are sent a letter of invitation to tender accompanied by a tender dossier.

Tenders must reach the contracting authority at the address given in the letter of invitation to tender and by the date

and time specified. The chosen candidates must be allowed at least 30 days from the dispatch of the letter of invitation to tender in which to submit their tenders.

Tenders must be sent in two envelopes, one containing the technical offer and the other the financial offer.

Tenders are opened and evaluated by a committee possessing the requisite technical and administrative capacities. The members of the committee must sign a declaration of impartiality. After evaluating the tenders, the committee identifies the most economically advantageous tender on the basis of technical quality and price. If the contracting authority receives fewer than three compliant tenders, the procedure must be cancelled and started again.

However the contracting authority may place orders for services of a value of EUR 5 000 or less on the basis of a single quote.

PART III

SPECIFIC RULES GOVERNING SUPPLY CONTRACTS

13. INTRODUCTION

Supply contracts concern the design, manufacture, delivery, assembly and commissioning of goods together with any other tasks specified in the contract, e.g. maintenance, repairs, training and after-sales services.

'Supplier' describes any natural or legal person furnishing supplies. A supplier submitting a tender is known as a 'tenderer' and one applying to take part in a simplified procedure as a 'candidate'.

The contracting authority, which is always specified in the procurement notice, is the authority empowered to conclude the contract. Supply contracts are concluded by the ACP State with which the Commission draws up a financing agreement.

The Commission shall prepare and send to the contracting authority the international tender dossiers for approval and launching of the procedure. The contracting authority must submit the other tender dossiers to the Head of Delegation for approval before issuing them. On the basis of decisions thus approved and in close consultation with the Head of Delegation, the contracting authority is responsible for launching all the tender procedures, receiving tenders, chairing tender-examination sessions and deciding on the results of tender procedures. The contracting authority then submits the result of this examination and the contract award proposal to the Head of Delegation for approval. Once the award has been approved, the contracting authority signs the contracts and notifies the Head of Delegation accordingly. The Head of Delegation is normally represented when tenders are opened and evaluated and must always be formally invited.

14. AWARD PROCEDURES

14.1. Contracts above EUR 150 000

14.1.1. Open procedure

As a rule, supply contracts are the subject of an international open tender procedure following publication of a procurement notice.

14.1.2. Negotiated procedure

However, with the prior agreement of the Commission, the supply contracts may be awarded by negotiated procedure in the following situations:

- (a) Where unforeseeable events oblige the contracting authority to act with an urgency incompatible with the periods laid down for the open or simplified procedures described in sections 15, 16 and 17. The circumstances invoked to justify extreme urgency must in no way be attributable to the contracting authority. In this context, the latter shall enter freely into such discussions as it may consider appropriate with the prospective tenderers whom it has short-listed in agreement with the Head of Delegation and award the contract to the tenderer whom it has selected.
- (b) Where the nature or particular characteristics of the supplies warrant, e.g. where performance of the contract is exclusively reserved for the holders of patents or licences to use patents.
- (c) For additional deliveries by the original supplier intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the recipient to acquire goods having different technical characteristics which would result in either incompatibility or disproportionate technical difficulties in operation and maintenance.
- (d) Where a tender procedure has been unsuccessful, i.e. where no qualitatively or financially worthwhile tender has been received. In such cases, after cancelling the tender procedure, the contracting authority may, with the prior approval of the Commission, negotiate directly with one or more suppliers chosen by it from among those that took part in the tender procedure, provided that the initial requirements of the tender dossier are not substantially altered (see section 6, 'Cancellation of award procedures').

14.2. Contracts between EUR 30 000 and EUR 150 000

14.2.1. Local open procedure

In this case, supply contracts are awarded by an open procedure in which the procurement notice is published only in the ACP State or States concerned. The Commission publishes the references of such tender procedures (dossier number, country, contracting authority and type of contract) on the Internet with the address of the Delegation from which firms can obtain further information.

14.2.2. Negotiated procedure

With the Commission's agreement, the contracting authority may award supply contracts by negotiated procedure in the situations given in section 14.1.2.

14.3. Contracts under EUR 30 000

14.3.1. Simplified procedure

Supply contracts under EUR 30 000 are awarded by simplified procedure. Three suppliers must be consulted, but no procurement notice need be published. However, the contracting authority may place orders for supplies of a value of EUR 5 000 or less on the basis of a single quote.

15. INTERNATIONAL OPEN TENDER PROCEDURE (FOR CONTRACTS ABOVE EUR 150 000)

15.1. Publicity

In order to ensure the widest possible participation in competitive tendering and the requisite transparency, a procurement notice must be published for every open tender procedure.

15.1.1. Publication of supply procurement notices

The procurement notice is published in the *Official Journal of the European Communities*, in the Official Journals of all the ACP States, on the Internet and in any other appropriate media. The Commission is responsible for publication in the *Official Journal of the European Communities* and on the Internet, while the ACP States must see to local publication.

The notice must identify clearly, precisely, and completely the contracting authority and the subject of the contract. The procurement notice published locally must be identical to the procurement notice published in the *Official Journal of the European Communities* and on the Internet and appear at the same time.

The tender dossier for the contract in question is sent to would-be suppliers by the contracting authority or the Commission (delegations, offices in the Member States or headquarters).

15.2. Drafting and contents of the tender dossier

It is vital that tender documents be carefully drafted not only for the sound functioning of the award procedure but also for the proper execution of the contract.

These documents must contain all the provisions and information that tenderers need to present their tenders: the procedures to follow, the documents to provide, cases of non-compliance, award criteria, etc.

Responsibility in this regard falls to the Commission, which shall send to the contracting authority the tender dossier for approval and launching of the procedure. The tender dossier must contain the following documents:

- instructions to tenderers, which must include:
 - (i) the contract award criteria,
 - (ii) whether variants are authorised and
 - (iii) the currency of the tender,
- the general conditions for supply contracts financed by the EDF,
- special conditions, which amplify, supplement or derogate from the general conditions and, where they conflict, override them,
- technical annexes, containing plans, technical specifications and provisional timetable for performance,
- price schedule (for completion by the tenderer),
- tender form,
- contract form,
- guarantee forms from a bank or similar institution for:
 - the tender (1-2 % of the budget available for the contract),
 - the payment of advances,
 - performance (10 % of the contract value).

Unless warranted by the nature of the contract, technical specifications mentioning products of a given brand or origin and thereby favouring or excluding certain products are prohibited. However, where products cannot be described in a sufficiently clear or intelligible manner, they may be named as long as they are followed by the words 'or equivalent'.

15.3. Selection and award criteria

The selection criteria concern the tenderer's capacity to execute similar contracts. In certain cases, where the contract includes works or installation services, the tender dossier may include selection criteria concerning the tenderer's technical capabilities.

The award criteria applied to technically compliant tenders are price and, where proposals are requested for after-sales services and/or training, the quality of such proposals.

15.4. Additional information during the procedure

The tender dossier should be clear enough to prevent contractors from having to request additional information

during the procedure. If the contracting authority, either on its own initiative or in response to a request from a tenderer, provides additional information on the tender dossier, it must send such information in writing to all tenderers at the same time.

If it proves impossible to identify potential tenderers in the case of an open tender procedure, a notice setting out the changes to the tender dossier must be published as laid down in section 15.1.1, 'Publication of supply procurement notices'. The deadline for the submission of tenders may be extended to allow tenderers to take account of the change.

Tenderers may submit questions in writing up to 21 days before the deadline for submission of tenders. The contracting authority must reply to all tenderers' questions at least 11 days before the deadline for receipt of tenders.

15.5. Deadline for the submission of tenders

Tenders must reach the contracting authority at the address and, at the very latest, the date and time indicated in the tender dossier. The period for submission must be sufficient to guarantee the quality of tenders and so permit truly competitive tendering. Experience shows that too short a period prevents candidates from tendering or causes them to submit incomplete or ill-prepared tenders.

The minimum period between the date of publication of the procurement notice and the deadline for receipt of tenders is 60 days. In exceptional cases, and with the prior authorisation of the Head of Delegation, periods may be shorter.

15.6. Period during which tenders are binding

Tenderers are bound by their tenders for the period specified in the tender dossier. This period must be sufficient to allow the contracting authority to examine the tenders, approve the contract award proposal, notify the successful tenderer and conclude the contract. The period of validity of tenders is fixed at 90 days from the deadline for the submission of tenders.

In exceptional cases, before the period of validity expires, the contracting authority may ask tenderers to extend the period for a specific number of days, which may not exceed 40.

The successful tenderer must maintain his tender for a further 60 days from the date of notification of award.

15.7. Submission of tenders

Technical and financial offers must be placed in separate sealed envelopes within a package or outer envelope bearing:

- the address for submission of tenders indicated in the tender dossier,

— the reference of the tender procedure to which the tenderer is responding,

— where applicable, the numbers of the lots tendered for,

— the words 'not to be opened before the tender-opening session' written in the language of the tender dossier.

15.8. Opening of tenders

On receiving tenders, the contracting authority must register them and provide a receipt for those delivered by hand. Envelopes must remain sealed and be kept in a safe place until they are opened.

Tenders are opened and evaluated by a committee made up of an odd number of members (at least three) possessing the technical and administrative capacities necessary to give an informed opinion on tenders. The members must sign a declaration of impartiality.

The evaluation committee opens the tenders in public at the place and time fixed in the tender dossier. The following are announced at the tender-opening session: the names of the tenderers, the tender prices, the provision of the requisite tender guarantee and any other formality which the contracting authority thinks appropriate.

The Head of Delegation must be informed automatically. He is present as an observer at the tender-opening session and receives a copy of each tender.

Only tenders in envelopes received by the date and time indicated in the tender dossier are considered for evaluation.

The purpose of the tender-opening session is to check that the tenders are complete, that the requisite tender guarantee has been provided, that the documents have been duly signed and that the tenders are generally in order.

Minutes are taken of the tender-opening session. They are signed by all members of the evaluation committee and state:

— the date, time and place of the session,

— the persons present,

— the names of the tenderers who have replied within the deadline,

— whether tenders have been submitted in sealed envelopes,

— whether tenders have been duly signed and the requisite number of copies sent,

— the tender prices,

— the names of tenderers whose tenders were found to be non-compliant at the opening session,

— the names of any tenderers who withdrew their tenders,

— any declarations made by the tenderers.

15.9. Evaluation of tenders

Before conducting a detailed evaluation of the tenders, the contracting authority checks that they comply with the essential requirements of the tender dossier.

A tender is deemed to comply if it satisfies all the conditions, procedures and specifications in the tender dossier without substantially departing from or attaching restrictions to them. Substantial departures or restrictions are those which affect the scope, quality or execution of the contract, differ widely from the terms of the tender dossier, limit the rights of the contracting authority or the tenderer's obligations under the contract or distort competition for tenderers whose tenders do comply.

Tenders which do not comply with the tender dossier must be rejected by the contracting authority and may not subsequently be made to comply by undergoing corrections or having discrepancies or restrictions removed.

Having evaluated the tenders, the committee rules on the technical admissibility of each tender, classifying it as technically compliant or non-compliant. Where contracts include after-sales service and/or training, the technical quality of such services is also assessed during the technical evaluation.

Once the technical evaluation has been completed, the committee checks that the tenders contain no arithmetic errors. Any errors are corrected without prejudice to the tenderer.

15.10. Award of the contract

15.10.1. Choice of contractor

(a) Price is the sole criterion for awarding supply contracts not involving after-sales services. All non-compliant offers having already been eliminated, the contract is awarded to the tenderer submitting the least expensive, compliant tender.

(b) Where a supply contract includes services such as after-sales and/or training, the technical evaluation must take account of the quality of such services. All non-compliant offers having already been eliminated, the contract is awarded to the tender that is most economically advantageous in terms of the technical quality of the services offered and the price proposed.

In either case, if the tender selected exceeds the budget allocated for the contract, the provisions of section 14.1.2 (d) apply.

The rule described in section 3.8 (b), 'Preferences', must be applied. Moreover, where two tenders are acknowledged to be equivalent, preference shall be given:

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

The entire evaluation procedure must be recorded in an evaluation report to be signed by all the members of the committee. This report must state why tenders were deemed technically non-compliant and how they fell short of the technical specifications laid down. The contracting authority then transmits the evaluation report and a contract award proposal to the Head of Delegation for approval.

The Head of Delegation shall approve within 30 days the contracting authority's proposal for the placing of direct agreement contracts, emergency assistance contracts and all other supply contracts with a value less than EUR 1 000 000.

For all other supply contracts not covered by the above, the Head of Delegation shall approve within 30 days the contracting authority's proposal for the placing of the contract wherever the following conditions are fulfilled:

- the tender selected is the lowest of those conforming to the requirements of the tender dossier,
- the tender selected meets all the selection criteria stated in the tender dossier and
- the tender selected does not exceed the sum earmarked for the contract.

Where the conditions are not fulfilled, the Head of Delegation shall forward the proposal to the Commission who shall decide thereon within 60 days of the receipt of the Head of

Delegation. Where the price of the selected tender exceeds the sum earmarked for the contract, the Commission shall, upon giving approval to the award, make the necessary financial commitment.

The entire evaluation procedure, including notification of the successful tenderer, must be completed while the tenders are still valid. It is important to bear in mind that the successful tenderer might be unable to maintain his tender if the evaluation procedure takes too long.

The entire tender procedure up to the notification of the successful tenderer is strictly confidential. The committee's decisions are collective and its deliberations must remain secret. The members of the committee are bound to secrecy.

The evaluation reports and minutes, in particular, are for official use only and may be divulged neither to tenderers nor to any party outside the authorised departments of the ACP State or States concerned, the Commission and the supervisory authorities (Court of Auditors, etc.).

15.10.2. Notification of award of contract

After the Commission has given its formal approval and before the period of validity expires, the contracting authority notifies the successful tenderer in writing that its tender has been accepted. It must also send the other tenderers a standard letter informing them that their tenders have been unsuccessful. This letter states whether tenders were technically compliant and indicates any technical shortcomings.

Where a contract is awarded under a financing agreement, the contracting authority must not notify the successful tenderer unless the financing agreement has been concluded (see section 5, 'Tender procedure with suspension clause').

Once the contract has been signed, the Commission publishes the results of the tender procedure (contract award notice) in the *Official Journal of the European Communities*, on the Internet and in any other appropriate media. Post-award notices must state the number of tenders received, the date of award of the contract, the name and address of the successful tenderer and the contract price.

15.10.3. Signing of the contract

Once signed by the contracting authority the contract is sent to the successful tenderer, who must countersign it within 30 days of receipt and return it with the performance guarantee.

The contract must be dated. It cannot cover earlier services or enter into force before the date on which it is signed by the parties. The parties are bound by the contract from the moment it is signed, hence the importance of carefully selecting the date.

16. LOCAL OPEN TENDER PROCEDURE (FOR CONTRACTS BETWEEN EUR 30 000 AND EUR 150 000)

In this case, the procurement notice is published only in the ACP State or States concerned. The Commission publishes the references of such tender procedures (dossier number, country, contracting authority and type of contract) on the Internet with the address of the Delegation from which firms can obtain further information.

Note that a local open tender procedure must provide other eligible suppliers with the same opportunities as local firms. No conditions seeking to restrict the participation of other eligible suppliers are allowed (e.g. obliging such firms to be registered in the recipient country or to have won contracts there in the past).

In this procedure, there must be a minimum of 30 days between the date of publication of the procurement notice in the local press and the deadline for receipt of tenders.

The measures applicable to an international open procedure, as described in section 15, apply by analogy to the local open procedure.

17. SIMPLIFIED PROCEDURE (FOR CONTRACTS UNDER EUR 30 000)

The contracting authority may award contracts under EUR 30 000 by simplified procedure, without publication. It must consult at least three firms of its choice.

The contracting authority draws up a list of at least three firms. The candidates receive a letter of invitation to tender accompanied by the relevant technical specifications. No tender guarantee is required in this case.

Tenders must reach the contracting authority at the address, and, at the very latest, the date and time indicated in the letter of invitation to tender.

The contracting authority has an evaluation report drawn up on the tenders received, stating the technical compliance and contractual terms of the tenders. If the contracting authority receives fewer than three compliant tenders, the procedure must be cancelled and started again.

However, the contracting authority may place orders for supplies of a value of EUR 5 000 or less on the basis of a single quote.

PART IV

SPECIFIC RULES GOVERNING WORKS CONTRACTS

18. INTRODUCTION

Works contracts are concluded between a contractor and a contracting authority for the execution of works or the building of a structure.

'Contractor' describes any natural or legal person carrying out the works. A contractor submitting a tender is known as a

'tenderer' and one invited to take part in a restricted tender procedure or simplified procedure as a 'candidate'.

The contracting authority, which is always specified in the procurement notice, is the authority empowered to conclude the contract. Works contracts are concluded by the ACP State with which the Commission draws up a financing agreement.

The Commission shall prepare and send to the contracting authority the international tender dossiers for approval and launching of the procedure. The contracting authority must submit the other tender dossiers to the Head of Delegation for approval before issuing them. On the basis of decisions thus approved and in close consultation with the Head of Delegation, the contracting authority is responsible for launching all the tender procedures, receiving tenders, chairing tender-examination sessions and deciding on the results of tender procedures. The contracting authority then submits the result of this examination and the contract award proposal to the Head of Delegation for approval. Once the award has been approved, the contracting authority signs the contracts and notifies the Head of delegation accordingly. The Head of Delegation is normally represented when tenders are opened and evaluated and must always be formally invited.

19. AWARD PROCEDURES

19.1. Contracts above EUR 5 000 000

19.1.1. Open procedure

The general rule for the award of works contracts is the international open tender procedure following publication of a procurement notice.

19.1.2. Negotiated procedure

With the prior agreement of the Commission, works contracts may be awarded by negotiated procedure. This may be done in the following situations:

- (a) Where unforeseeable events oblige the contracting authority to act with an urgency incompatible with the periods laid down for the open, restricted or simplified procedures described in sections 20, 21 and 22. The circumstances invoked to justify the extreme urgency must in no way be attributable to the contracting authority. In this context, the latter shall enter freely into such discussions as it may consider appropriate with the prospective tenderers whom it has short-listed in agreement with the Head of Delegation and award the contract to the tenderer whom it has selected.
- (b) For additional works not included in the first contract but which have, through unforeseen circumstances, become necessary for the carrying-out of the works described therein, provided that the award is made to the contractor already carrying out such work:

- where such works cannot be technically or economically separated from the main contract without major inconvenience to the recipient,
- where such works, although separable from the execution of the original contract, are absolutely necessary to its completion.

However, the aggregate cost of contracts awarded for additional works must not exceed 50 % of the amount of the main contract.

- (c) Where the tender procedure has been unsuccessful, i.e. where no qualitatively or financially worthwhile tender has been received. In such cases, after cancelling the tender procedure, the contracting authority may, with the prior approval of the Commission, negotiate directly with one or more tenderers chosen by it from among those that took part in the tender procedure, provided that the initial terms of the contract are not substantially altered (see section 6, 'Cancellation of award procedures').

19.2. Contracts between EUR 300 000 and EUR 5 000 000

19.2.1. Local open procedure

Such contracts are awarded after an open tender procedure published locally, a procedure in which the procurement notice is published only in the ACP State or States concerned. The Commission publishes the references of such tender procedures (dossier number, country, contracting authority and type of contract) on the Internet with the address of the Delegation from which firms can obtain further information.

19.2.2. Negotiated procedure

With the agreement of the Commission, the contracting authority may also award works contracts by negotiated procedure in the situations given in section 19.1.2.

19.3. Contracts under EUR 300 000

19.3.1. Simplified procedure

Works contracts under EUR 300 000 are awarded by simplified procedure. Three contractors must be consulted, but no procurement notice need to be published.

20. INTERNATIONAL OPEN TENDER PROCEDURE (FOR CONTRACTS ABOVE EUR 5 000 000)

20.1. Publicity

In order to ensure the widest possible participation in competitive tendering and the requisite transparency, a procurement notice must be published for every open tender procedure.

20.1.1. Publication of works procurement notices

The procurement notice is published in the *Official Journal of the European Communities*, in the Official Journals of all the ACP

States, on the Internet and in any other appropriate media. The Commission is responsible for publication in Europe while the ACP States must see to local publication.

The notice must identify clearly, precisely, and completely the contracting authority and the subject of the contract. The procurement notice published locally must be identical to the procurement notice published in the *Official Journal of the European Communities* and on the Internet and appear at the same time.

The contracting authority must send tender dossiers to would-be tenderers. Because of their size and printing costs, tender dossiers for works contracts are usually sent out for a flat fee by the consultancy firm responsible for compiling them. The consultancy firm in question must sign an undertaking of secrecy.

The tender dossier will also be available for consultation at the premises of the contracting authority and the Commission (delegation, offices in the Member States or headquarters).

20.2. Drafting and contents of the tender dossier

It is vital that tender documents be carefully drafted not only for the sound functioning of the award procedure but also for the proper execution of the contract.

These documents must contain all the provisions and information that tenderers need to present their tenders: the procedures to follow, the documents to provide, cases of non-compliance, award criteria, etc.

Responsibility in this regard falls to the Commission, which shall send to the contracting authority the tender dossier for approval and launching of the procedure. The tender dossier must contain the following documents:

- instructions to tenderers, which must include:
 - (i) the selection and award criteria,
 - (ii) whether variants are allowed and
 - (iii) the currency of the tender,
- the general conditions for works contracts financed by the EDF,
- special conditions, which amplify, supplement or derogate from the general conditions and, where they conflict, override them,
- technical annexes, containing plans, technical specifications and provisional timetable for performance,
- price schedule (for completion by the tenderer) and breakdown,
- tender form,
- contract form,

- guarantee forms from a bank or similar institution for:
 - the tender (1-2 % of the budget available for the contract),
 - the payment of advances,
 - performance (10 % of the contract value).

20.3. Selection and award criteria

The selection criteria concern the tenderer's capacity to execute similar contracts, with particular reference to works executed in recent years.

Following selection and the elimination of all non-compliant offers, the sole criterion for award is the tender price.

20.4. Additional information during the procedure

The tender dossier should be clear enough to prevent contractors from having to request additional information during the procedure. If the contracting authority, either on its own initiative or in response to a request from a tenderer, provides additional information on the tender dossier, it must send such information in writing to all tenderers at the same time.

If it proves impossible to identify potential tenderers in the case of an open procedure, a notice setting out the changes to the tender dossier must be published as laid down in section 20.1.1, 'Publication of works procurement notices'. The deadline for the submission of tenders may be extended to allow tenderers to take account of the change.

Tenderers may submit questions in writing up to 21 days before the deadline for submission of tenders. The contracting authority must reply to all tenderers' questions at least 11 days before the deadline for receipt of tenders.

20.5. Deadline for submission of tenders

Tenders must reach the contracting authority at the address and, at the very latest, the date and time indicated in the tender dossier. The period for submission must be sufficient to guarantee the quality of tenders and so permit truly competitive tendering. Experience shows that too short a period prevents candidates from tendering or causes them to submit incomplete or ill-prepared tenders.

The minimum period between the date of publication of the procurement notice and the deadline for receipt of tenders is 90 days. In exceptional cases, and with the prior authorisation of the Head of Delegation, periods may be shorter.

20.6. Period during which tenders are binding

Tenderers are bound by their tenders for the period specified in the tender dossier. This period must be sufficient to allow the

contracting authority to examine the tenders, approve the contract award proposal, notify the successful tenderer and conclude the contract. The period of validity of tenders is fixed at 90 days from the deadline for the submission of tenders.

In exceptional cases, before the period of validity expires, the contracting authority may ask tenderers to extend the period for a specific number of days, which may not exceed 40.

The successful tenderer must maintain his tender for a further 60 days from the date of notification of award.

20.7. Submission of tenders

Technical and financial offers must be placed in separate sealed envelopes within a package or outer envelope bearing:

- the address for submission of tenders indicated in the tender dossier,
- the reference of the tender procedure to which the tenderer is responding,
- where applicable, the numbers of the lots tendered for,
- the words 'not to be opened before the tender-opening session' written in the language of the tender dossier.

20.8. Opening of tenders

On receiving tenders, the contracting authority must register them and provide receipt of delivery for those delivered by hand. Envelopes must remain sealed and be kept in a safe place until they are opened.

Tenders are opened and evaluated by a committee made up of an odd number of members (at least three) possessing the technical and administrative capacities necessary to give an informed opinion on tenders. The members must sign a declaration of impartiality.

The evaluation committee opens the tenders in public at the place and time fixed in the tender dossier. The following are announced at the tender-opening session: the names of the tenderers, the tender prices, the provision of the tender guarantee required and any other formality which the contracting authority thinks appropriate.

The Head of Delegation must be informed automatically. He is present as an observer at the tender-opening session and receives a copy of each tender.

Only tenders in envelopes received by the date and time indicated in the tender dossier are considered for evaluation.

The purpose of the tender-opening session is to check that the tenders are complete, that the requisite tender guarantee has been provided, that the documents have been duly signed and that the tenders are generally in order.

Minutes are taken of the tender-opening session. They are signed by all members of the evaluation committee and state:

- the date, time and place of the session,
- the persons present,
- the names of the tenderers who have replied within the deadline,
- whether tenders have been submitted in sealed envelopes,
- whether tenders have been duly signed and the requisite number of copies sent,
- the tender prices,
- the names of tenderers whose tenders were found to be non-compliant at the opening session,
- the names of any tenderers who withdrew their tenders,
- any declarations made by the tenderers.

20.9. Evaluation of tenders

Before conducting a detailed evaluation of the tenders, the contracting authority checks that they comply with the essential requirements of the tender dossier.

A tender is deemed to comply if it satisfies all the conditions, procedures and specifications in the tender dossier without substantially departing from or attaching restrictions to them. Substantial departures or restrictions are those which would affect the scope, quality or implementation of the contract, differ widely from the terms of the tender dossier, limit the rights of the contracting authority or the tenderer's obligations under the contract or distort competition for tenderers whose tenders do comply.

Tenders which do not comply with the tender dossier must be rejected by the contracting authority and may not subsequently be made to comply by undergoing corrections or having discrepancies or restrictions removed.

Having evaluated the tenders, the committee rules on the technical admissibility of each tender, classifying it as technically compliant or non-compliant.

Once the technical evaluation has been completed, the committee checks that the tenders contain no arithmetic errors; any errors are corrected without prejudice to the tenderer.

20.10. Award of the contract

20.10.1. Choice of contractor

The successful tenderer is the one submitting the 'most economically advantageous' tender, i.e. the least expensive tender classified as 'technically compliant' during technical evaluation. This must be declared the successful tender if it is equal to or lower than the budget allocated for the contract.

If the chosen tender exceeds the budget allocated for the contract, the provisions set out in section 19.1.2 (c) apply.

The rule described in section 3.8 (a), 'Preferences', must be applied. Moreover, where two tenders are acknowledged to be equivalent, preference shall be given:

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

The entire evaluation procedure must be recorded in an evaluation report to be signed by all the members of the committee. This report must state why tenders were deemed technically non-compliant and how they fell short of the technical specifications laid down. The contracting authority then transmits the evaluation report and the contract award proposal to the Head of Delegation for approval.

The Head of Delegation shall approve within 30 days the contracting authority's proposal for the placing of direct agreement contracts, emergency assistance contracts and all other works contracts with a value less than EUR 5 000 000.

For all other works contracts not covered by the above, the Head of Delegation shall approve within 30 days the contracting authority's proposal for the placing of the contract wherever the following conditions are fulfilled:

- the tender selected is the lowest of those conforming to the requirements of the tender dossier,
- the tender selected meets all the selection criteria stated in the tender dossier and
- the tender selected does not exceed the sum earmarked for the contract.

Where the conditions are not fulfilled, the Head of Delegation shall forward the proposal to the Commission who shall decide thereon within 60 days of the receipt of the Head of Delegation. Where the price of the selected tender exceeds the sum earmarked for the contract, the Commission shall, upon giving approval to the award, make the necessary financial commitment.

The entire evaluation procedure, including notification of the successful tenderer, must be completed while the tenders are still valid. It is important to bear in mind that the successful tenderer might be unable to maintain his tender if the evaluation procedure takes too long.

The entire tender procedure up to the notification of the successful tenderer is strictly confidential. The committee's decisions are collective and its deliberations must remain secret. The members of the committee are bound to secrecy.

The evaluation reports and minutes, in particular, are for official use only and may be divulged neither to tenderers nor to any party outside the authorised departments of the ACP State or States concerned, the Commission and the supervisory authorities (Court of Auditors, etc.).

20.10.2. Notification of award of contract

After the Commission has given its formal approval and before the period of validity of tenders expires, the contracting authority notifies the successful tenderer in writing that his tender has been accepted. It must also send the other tenderers a standard letter informing them that their tenders have been unsuccessful. This letter states whether tenders were technically compliant and indicates any technical shortcomings.

Where a contract is awarded under a financing agreement, the contracting authority must not notify the successful tenderer unless the financing agreement has been concluded (see section 5, 'Tender procedure with suspension clause').

Once the contract has been signed, the Commission publishes the results of the tender procedure (contract award notice) in the *Official Journal of the European Communities*, on the Internet and in any other appropriate media. Post-award notices must state the number of tenders received, the date of award of the contract, the name and address of the successful tenderer and the contract price.

20.10.3. Signing of the contract

Once signed by the contracting authority the contract is sent to the successful tenderer, who must countersign it within 30 days of receipt and return it with the performance guarantee.

The contract must be dated. It cannot cover earlier services nor enter into force before the date on which it is signed by the

parties. The parties are bound by the contract from the moment it is signed, hence the importance of carefully selecting the date.

21. LOCAL OPEN TENDER PROCEDURE (FOR CONTRACTS BETWEEN EUR 300 000 AND EUR 5 000 000)

In this case, the procurement notice is published only in the ACP State or States concerned. The Commission publishes the references of such tender procedures (dossier number, country, contracting authority and type of contract) on the Internet with the address of the Delegation from which firms can obtain further information.

Note that a local open tender procedure must provide other eligible contractors with the same opportunities as local firms. No conditions seeking to restrict the participation of other eligible contractors are allowed (e.g. obliging such firms to be registered in the recipient country or to have won contracts there in the past).

In this procedure, there must be a minimum of 60 days between the date of publication of the procurement notice in the local press and the deadline for receipt of tenders.

The measures applicable to an international open procedure, as described in section 20, apply by analogy to the local open procedure.

22. SIMPLIFIED PROCEDURE (FOR CONTRACTS UNDER EUR 300 000)

The contracting authority may award contracts under EUR 300 000 by simplified procedure, without publication. It must consult at least three firms of its choice.

The contracting authority draws up a list of at least three firms. The candidates receive a letter of invitation to tender accompanied by the relevant technical specifications.

Tenders must reach the contracting authority at the address, and, at the very latest, the date and time indicated in the letter of invitation to tender. The chosen candidates must be allowed at least 30 days from the dispatch of the letter of invitation to tender in which to submit their tenders.

Tenders are opened and evaluated by an evaluation committee possessing the requisite technical and administrative capacities. Tenders are evaluated as they would be in an open tender procedure. If the contracting authority receives fewer than three compliant tenders, the procedure must be cancelled and started again.

However, the contracting authority may place orders for works of a value of EUR 5 000 or less on the basis of a single quote.

ANNEX I

COMPETITION RULES

| SERVICES | SUPPLIES | WORKS |
|--|--|---|
| <p style="text-align: center;">$x \geq \text{EUR } 200\,000$</p> <p>International restricted tender procedure 4 to 8 service providers invited</p> | <p style="text-align: center;">$x > \text{EUR } 150\,000$</p> <p>International open tender procedure</p> | <p style="text-align: center;">$x > \text{EUR } 5\,000\,000$</p> <p>International open tender procedure</p> |
| | <p style="text-align: center;">$\text{EUR } 30\,000 \leq x \leq \text{EUR } 150\,000$</p> <p>Local open tender procedure</p> | <p style="text-align: center;">$\text{EUR } 300\,000 \leq x \leq \text{EUR } 5\,000\,000$</p> <p>Local open tender procedure</p> |
| <p style="text-align: center;">$x < \text{EUR } 200\,000$</p> <ol style="list-style-type: none"> 1. Framework contract, or 2. Simplified procedure with consultation of at least 3 service providers 3. $x \leq \text{EUR } 5\,000$: a single quote | <p style="text-align: center;">$x < \text{EUR } 30\,000$</p> <ol style="list-style-type: none"> 1. Simplified procedure with consultation of at least 3 suppliers 2. $x \leq \text{EUR } 5\,000$: a single quote | <p style="text-align: center;">$x < \text{EUR } 300\,000$</p> <ol style="list-style-type: none"> 1. Simplified procedure with consultation of at least 3 contractors 2. $x \leq \text{EUR } 5\,000$: a single quote |

ANNEX II

DEFINITIONS

Community: The European Community.

EDF: The European Development Fund.

ACP States: The African, Caribbean and Pacific States signatories of the ACP-CE Partnership Agreement signed in Cotonou on 23 June 2000.

Member State: Member States of the European Community.

Commission: The Commission of the European Communities.

Head of Delegation: The representative of the Commission in the ACP States.

Contracting authority: The State or the public or private legal person concluding the contract, as provided for in the financing agreement.

Study contract: A service contract between a service provider and the contracting authority concerning, for example, identification and preparatory studies for projects, feasibility studies, economic and market studies, technical studies, evaluations and audits.

Technical assistance contract: A contract between a service provider and the contracting authority under which the service provider exercises an advisory role, directs or supervises a project, provides the experts stipulated in the contract or acts as a procurement agent.

Supply contract: A contract between a supplier and the contracting authority for the purchase, lease, hire or hire-purchase, with or without an option to buy, of goods. It may also cover such tasks as installation, servicing, repairs, training and after-sales service.

Works contract: A contract between a construction firm and the contracting authority for the execution of works or the building of a structure.

Hybrid contract: A contract between the contracting authority and a service provider, supplier or construction firm covering two or more of the following: works, supplies and services.

Framework contract: A fixed-term contract for the provision of an undetermined volume of a specific category of services or supplies.

Candidate: Any natural or legal person or group thereof applying to take part in a restricted procedure.

Tenderer: Any natural or legal person or group thereof submitting a tender with a view to concluding a contract.

Contractor: The tenderer selected at the end of the procedure for the award of the contract.

Open procedure: Procedure in which any natural or legal person or group thereof may submit a tender in response to a procurement notice.

Restricted procedure: Procedure in which, after publication of a procurement notice, only candidates invited by the contracting authority may submit a tender.

Simplified procedure: Procedure without prior publication of a procurement notice, in which only candidates invited by the contracting authority may submit tenders.

Negotiated procedure: Procedure without prior publication of a procurement notice, in which the contracting authority consults the candidate or candidates of its choice and negotiates the terms of the contract with one or more of them (see sections 10.1.2, 14.1.2, 14.2.2 and 19.1.2).

Direct labour operations: Projects and programmes implemented through public or semi-public agencies or departments of the ACP State or States concerned or by the person responsible for executing the operation.

Relevant media: Publication in the *Official Journal of the European Communities* and on the Internet is obligatory for all contracts covered by these general regulations. Publication in the Official Journals of the ACP States and, if need be, specialised publications is necessary.

Tender dossier: The dossier, either prepared by the Commission and sent to the contracting authority for approval and launching of the procedure (international tenders) or submitted by the contracting authority for approval to the Head of Delegation before issuing it (all the other tenders) and containing all the documents needed to prepare and submit a tender.

General conditions: The general contractual provisions setting out the administrative, financial, legal and technical clauses governing the execution of contracts.

Special conditions: The special conditions laid down by the contracting authority as an integral part of the tender dossier, including amendments to the general conditions, clauses specific to the contract, the terms of reference (for a service contract) or technical specifications (for a supply or works contract) and any other point regarding the contract.

Terms of reference: The document drawn up by the contracting authority setting out its requirements and/or objectives in respect of the provision of services, specifying, where relevant, the methods and resources to be used and/or results to be attained.

Evaluation committee: A committee made up of an odd number of members (at least three) possessing the technical and administrative capacities necessary to give an informed opinion on tenders.

Day: Calendar day.

Period: A period begins the day after the act or event chosen as its starting point. Where the last day of a period is not a working day, the period expires at the end of the next working day.

Conflict of interests: Any event influencing the capacity of a candidate, tenderer or contractor to give an objective and impartial professional opinion, or preventing it, at any moment, from giving priority to the interests of the contracting authority. Any consideration relating to possible contracts in the future or conflict with other commitments, past or present, of a candidate, tenderer or contractor. These restrictions also apply to subcontractor and employees of the candidate, tenderer or contractor.

Most economically advantageous tender: The best tender by the criteria laid down for the contract in question, e.g. quality, technical properties, aesthetic and functional qualities, after-sales service and technical assistance, delivery date or performance period, the price or lowest price. These criteria must be published in the procurement notice or stated in the tender dossier.
