

## II

(Acts whose publication is not obligatory)

## COUNCIL

## COUNCIL DECISION

of 24 July 1973

amending the Decision of 29 September 1970 on the association of the Overseas Countries and Territories with the European Economic Community

(73/313/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the EEC, and in particular Article 136 thereof;

Having regard to the Internal Agreement<sup>(1)</sup> on the Financing and Administration of Community Aids, signed at Yaoundé on 29 July 1969, and in particular Article 1 thereof;

Whereas it had not been possible, in the Council Decision of 29 September 1970<sup>(2)</sup> on the association of the Overseas Countries and Territories with the European Economic Community, amended by the Decision of 18 October 1971<sup>(3)</sup>, to lay down the general clauses and conditions applicable to the award and execution of public works and supply contracts financed by the European Development Fund in the Associated Overseas Countries and Territories and the French Overseas Departments;

Whereas the necessary provisions have since been drawn up and should be inserted in this Decision provided that, in accordance with Article 119 of the

Act<sup>(4)</sup> concerning the Conditions of Accession and the adjustments to the Treaties, they do not apply to the relations between the new Member States and the Associated Overseas Countries and Territories and the French Overseas Departments;

Whereas the Council, by adopting this Decision, emphasises its concern to see the public opening of tenders gradually become the rule for all categories of invitations to tender,

HAS DECIDED AS FOLLOWS:

*Article 1*

The following shall be substituted for Article 14 of Annex VI to the Decision of 29 September 1970:

‘The general clauses and conditions applicable to the award and execution of public works contracts financed by the Fund in the Countries and Territories shall be adopted in Annex XI.’

*Article 2*

The following shall be substituted for Article 26 of the Decision of 29 September 1970:

<sup>(1)</sup> OJ No L 282, 28. 12. 1970, p. 47.

<sup>(2)</sup> OJ No L 282, 28. 12. 1970, p. 83.

<sup>(3)</sup> OJ No L 243, 29. 10. 1971, p. 27.

<sup>(4)</sup> OJ No L 73, 27. 3. 1972, p. 14.

'The provisions of this Title and of Annexes V, VI, VII, X and XI to this Decision shall also apply to the French Overseas Departments.'

*Article 3*

An Annex XI shall be added to the Decision of 29 September 1970, the text of which is annexed to the present Decision.

Done at Brussels, 24 July 1973.

*Article 4*

This Decision shall apply to all public works and supply contracts financed by the Community, and concluded as from 1 October 1973.

*Article 5*

This Decision shall be published in the *Official Journal of the European Communities*.

*For the Council*

*The President*

I. NØRGAARD

## ANNEX

## ANNEX XI

GENERAL CONDITIONS FOR PUBLIC WORKS AND SUPPLY CONTRACTS  
FINANCED BY THE EUROPEAN DEVELOPMENT FUND

Applied to contracts financed in the Associated Overseas Countries and Territories

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## TITLE I

### PROVISIONS RELATING TO PUBLIC WORKS AND SUPPLY CONTRACTS FINANCED BY THE EUROPEAN DEVELOPMENT FUND

#### CHAPTER I PRINCIPLES AND DEFINITIONS

##### *Article 1*

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

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

##### *Article 2*

These general conditions shall comprise:

1. Regulations laying down the principles and conditions for the preparation and award of contracts; no derogation may be made from these provisions;

2. General administrative and technical contractual clauses relating to the performance of contracts. These clauses shall apply to all contracts and reference shall be made to them in the Special Conditions.

##### *Article 3*

The Special Conditions shall comprise:

- (a) special contractual clauses applicable to each contract;
- (b) all references to technical conditions applicable to contracts relating to the same type of works or supplies;
- (c) an indication of those contractual provisions of the general conditions which are not applicable, taking into account the special requirements of the contract concerned.

*Article 4*

For the purpose of implementing these general conditions, irrespective of the manner in which contracts are awarded, the following definitions shall apply:

1. *Contract*: any contract awarded by the State, any regional or local authority or any legal person governed by public law, having as its objective the construction of works or the provision of supplies;

— *Works contracts*

Contracts, the object of which is the building of infrastructural works or immovable property, in which the provision of supplies is only of secondary importance and the assessment of the value of supplies is included in the cost of the work;

— *Supply contracts*

Contracts, the object of which is the provision of movable property which may be used either in its existing state or in conjunction with works, the nature and value of which are of secondary importance in relation to the main object of the contract;

2. *Member States*: the Member States of the European Economic Community;
3. *Associated States*: the Overseas Countries of Territories associated with the European Economic Community and the French Overseas Departments which are recipients of aid from the European Development Fund;
4. *Administration*: the State, regional or local authority or any legal person governed by public law on behalf of which or whom the contract is concluded;
5. *Tenderer*: any natural or legal person submitting a tender with a view to concluding a contract;
6. *Contractor*: the tenderer with whom the contract is concluded;
7. *Price list*: the document containing the statement of the unit prices applicable to the undertaking in respect of each of the various categories of work to be carried out;
8. *Itemized estimate*: the document containing a breakdown, item by item, of the firm or estimated quantities together with a definite price, and an assessment of the total expenditure obtained either

by determining the value of each item for overall price contracts, or by applying unit prices to the quantities planned for the same items for unit price contracts.

The firm quantity shall be the quantity stated by the administration in the itemized estimate and for which the contractor has submitted an overall price, which shall be paid to him irrespective of the quantity actually supplied.

The estimated quantity shall be a quantity stated by the administration in the itemized estimate. It shall be a quantitative estimate of the work to be carried out and shall be a contributory factor in determining the unit price to be applicable to the quantities actually supplied.

*Article 5*

1. Any natural or legal person having the nationality of a Member State or Associated State shall be eligible to participate on equal terms in contracts financed by the European Development Fund.

2. The tenders shall be adjudicated on equal terms in order to avoid any obstacle to participation in invitations to tender and the allocation of contracts.

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

3. Works contracts may however be awarded by an accelerated procedure for inviting tenders when, by reason of the small amount involved, they are of principal interest to the undertakings of a benefiting Associated State or another Associated State in the same region.

4. Invitations to tender for supply contracts may lay down the degree of protection to be provided for in the adjudication of tenders of an equal economic and technical quality, in order to encourage the participation of the industrial or small craft undertakings of the benefiting Associated State or another Associated State in the same region.

*Article 6*

Contracts concluded by the administration shall be awarded on a competitive basis.

*Article 7*

1. The contracts concluded by the administration shall be awarded at an agreed price.

2. The fact that contracts are to be awarded at an agreed price shall not preclude prices being revised in keeping with specific fiscal, economic or social factors. The procedures for revising the prices shall be expressly laid down in the contract documents.

3. In addition, and by way of exception, contracts may be awarded without prices being fixed by agreement:

(a) for work or supplies of a complex nature or involving a new technique presenting considerable technical hazards which necessitate commencing work before all the conditions for completing it can be determined;

(b) in the event of exceptional, unforeseeable circumstances, when the contracts relate to work or supplies which are urgent, and for which it is impossible to determine the nature and the means of execution.

*Article 8*

1. Contracts may not provide for part payments except where a service has been given and accepted. According to the provisions laid down in the contract, part payments shall also be allowed in respect of supplies provided for the execution of the contract and inspected by the administration.

Nevertheless, advances may be granted in accordance with the conditions and procedures laid down in these general terms and conditions.

2. Payments for the work carried out by the contractor shall be made either by instalment or as a final payment as and when the work is completed.

*Article 9*

The payment of advances or instalments shall not be regarded as final payments; the recipient shall owe them until final settlement of the contract.

*Article 10*

1. Before awarding the contract, the administration may:

(a) notwithstanding the completion of a procedure prior to the conclusion of the contract, either decide not to award the contract or order recommencement of the procedure, if necessary using another method;

(b) in the event of the contract comprising two or more lots, only award some lots and, possibly, decide that the other lots will be the subject of another contract or other contracts, if necessary using another method.

2. The annulment of the procedure for inviting tenders, provided for in paragraph 1 (a) and (b) may only be applied in the following cases:

— if no tender is received which meets the conditions set out in the invitation to tender;

— if the economic or technical data of the project have been fundamentally altered;

— if exceptional circumstances render normal performance of the contract impossible;

— if the tenders received do not correspond to the financial resources set for the contract, or

— if the tenders received contain serious irregularities preventing competition from functioning normally.

3. In the event of the procedure for inviting tenders being annulled, the tenderers shall not be entitled to compensation.

*Article 11*

While the contract is being executed, the administration may unilaterally amend the initial project, provided that it does not change the purpose of the contract and that it gives fair compensation where appropriate.

*Article 12*

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

— overall price contracts;

— unit price contracts;

— repayment contracts, and

— composite contracts.

1. In an *overall price contract* the agreed price covers all the services provided for in the contract.

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

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

3. In a *repayment contract* the works or services carried out are paid for by the administration, after inspection by them, on the basis of the cost price and the supplements in lieu of profit.
4. In a *composite contract* the prices are fixed by two or more of the methods referred to under 1, 2 and 3.

#### *Article 13*

In the cases provided for in Article 7 (3), the contract shall be concluded:

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

#### *Article 14*

1. If the invitation to tender so provides, the administration may ask tenderers to supply any information which will allow it to assess the prices tendered.

2. The contractor shall be obliged to supply the administration with any information to enable the settlement price in the cases provided for in Article 13 to be verified.

#### *Article 15*

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

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

Where the time limit is fixed in months, it shall end on the day having the same number as the day on which it began. In the event of the last month of a

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

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

## CHAPTER II

### PROCEDURE FOR PREPARATION AND AWARD OF CONTRACTS

#### *Article 16*

Contracts shall be awarded on invitation to tender. By way of exception, they may be awarded by mutual agreement in the cases provided for in Article 53.

#### Section I

### CONTRACTS BASED ON INVITATION TO TENDER

#### *Article 17*

The invitation to tender shall be open or restricted.

The open invitation to tender shall involve a public invitation to competition.

The restricted invitation to tender shall be made only to those applicants which the administration decides to consult, possibly following a preselection procedure decided on with particular reference to the special nature or the quantity of the services to be carried out.

#### Publication

#### *Article 18*

1. The notice of open invitation to tender, drawn up by the administration, shall be published in accordance with the rules appropriate for providing the widest distribution of information.

2. In the event of a restricted invitation to tender, if a preselection procedure is envisaged, the notice of invitation to tender shall set out the terms of the procedure and shall be published in accordance with paragraph 1.

#### *Article 19*

The notice of invitation to tender shall state in particular:

1. the nature of the invitation to tender;

2. the purpose of the contract; the location of the works and supplies, its source of financing and the time limit within which it is to be executed;
3. the administration on behalf of which the contract is to be concluded;
4. the place where the invitation to tender may be inspected and the terms on which it may be made available;
5. the place at which and the time limit within which the tenders are to be received;
6. the time-limit, reckoned from the final date set for the receipt of tenders, during which tenderers shall remain bound by their tenders; except in special cases, this time limit shall be of three months;
7. the date, time and place of opening of the tenders;
8. the conditions for taking part in the invitation to tender;
9. the possibility of submitting variations when authorized and
10. possibly, in the case of works contracts, the approximate estimate of the work total.

#### The invitation to tender

##### Article 20

The invitation to tender must contain the following:

1. the notice of the invitation to tender;
2. the Special Conditions, the annexes thereto, and a sample tender;
3. for a unit price contract: an outline price list and an outline itemized estimate;
4. for an overall price contract: an outline of the breakdown of the overall price;
5. by way of information, and without being binding upon the administration, a 'General Information Sheet' brought up-to-date at the time of publication or distribution of the invitation to tender and containing, in particular, the following points:
  - geographical notes;
  - notes and the climate;
  - monetary system and organization of banks;

- means of access;
  - situation of the works site;
  - customs and fiscal regulations, in order to allow the tenderer to calculate their incidence on the amount of his tender, and
  - wage scales, including an indication of minimum wage levels laid down by national law or customary in the place where the contract is to be performed, corresponding to the main local categories of labour required for the work;
6. the address of the relevant departments from which the tenderer may obtain any additional information which it would be in his interest to obtain.

##### Article 21

Four months in the case of works contracts and three months in the case of supply contracts shall elapse between the date of publication of the notice of invitation to tender and the final date for the receipt of tenders.

Nevertheless, this period may be reduced or extended to correspond with the nature of the invitation to tender and the subject of the contract.

##### Article 22

1. Any natural or legal person who is a national of a Member State or of an Associated State and able to prove that he meets the necessary legal, technical and financial requirements, may participate in the invitation to tenders.

In the case of supply contracts, participation in the invitation to tenders is also open to any natural or legal person who is a national of a third country and who can prove that he is in possession of a contract by virtue of which, at the date of the invitation to tender, he is sole agent for products originating in the Member States or the associated countries.

2. The following natural or legal persons shall not be entitled to participate in the invitation to tender:

- (a) any who are bankrupt;
- (b) any who are in a situation of suspension of payments established by judgment of a court other than bankruptcy, and resulting, in accordance with their national laws, in the total or partial loss of the right to administer and dispose of their property;
- (c) any against whom legal proceedings have been instituted involving a declaration of suspension

of payments and which may result, in accordance with their national laws, in a declaration of bankruptcy or in any other situation entailing the total or partial loss of the right to administer and dispose of their property;

- (d) any who have been convicted, under a final judgment, of any offence affecting their professional conduct;
- (e) any who are guilty of serious misrepresentation with regard to information required for participation in the invitation to tender.

#### Article 23

In order to provide proof of his standing and ability, the tenderer shall, if the administration so requires, supply the following:

1. any document dated not more than three months previously, which establishes, in accordance with his national law, that he meets the conditions listed in Article 22 (1), and that none of the situations referred to in Article 22 (2) (a), (b), (c) and (d) applies to him;
2. references certifying to the financial resources available to him for the purpose of executing the contract and, in the case of a company or firm, a copy of its articles of association and the credentials of the person authorized to enter into commitments on its behalf;
3. a statement setting out his technical resources, indicating work which he has carried out and supplies which he has delivered or in the execution of which he has participated; he shall attach to this statement any certificates referring to and assessing his activities and, where applicable, certificates issued by a qualifying and classifying body approved by the administration of the Member State or associated country of which he is a national or in which he has a permanent branch;
4. a statement concerning the labour force and equipment that he intends to use to fulfil the contract;
5. any relevant information about his producers, suppliers and the origin of his supplies.

#### Article 24

For the purpose of carrying out studies in preparation for the tenders, the associated country shall grant a temporary residence permit to any person, or his agent, participating in an invitation to

tender. This permit shall expire at the end of a period of one month following the publication of the name of the successful competitor by the administration.

#### Article 25

The tender, which shall be drawn up in the language prescribed in the invitation to tender, shall be signed by the tenderer or by his agent. It shall be drawn up in a single original bearing the word 'original'.

The special conditions shall state in addition the number of copies to be supplied by the tenderer. The copies shall be signed in the same way as the original and shall bear the word 'copy'.

#### Article 26

Tenders submitted by agents must state the name of the principal or principals on whose behalf they are acting. No agent may represent more than one tenderer. The agents shall attach to the tender the probative instrument or the informally executed document which empowers them to act on behalf of the tenderers. The signatures to the deed under private seal must be legalized.

#### Article 27

Where the tender is submitted by a group without legal personality, made up of several natural or legal persons, it shall be signed by each of those persons, who shall accept joint and several liability and appoint one of their number to represent the group *vis-à-vis* the administration.

The representative or representatives of this group must, in so far as each is concerned, provide the proof required under Article 23, as if they were themselves the tenderer.

#### Article 28

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

#### Article 29

1. Where the invitation to tender for a works contract contains an outline itemized estimate, the latter shall specify whether the quantities indicated

for each item are firm or estimated quantities. The tenderer shall make good any omissions in the itemized estimate and correct such errors as he may find in the firm quantities, taking into account the plans, the special conditions, his knowledge or personal findings. He shall attach to his tender a note setting out the reason for such amendments.

He shall adopt a similar procedure for the correction of the estimated quantities in respect of which the specific conditions authorize such a correction, provided that the proposed rectification amounts to at least 10 % of the item under consideration.

The administration has the right to decide:

- (a) that the estimated quantity thus reduced becomes binding upon the originator of the reduction;
- (b) that the unit price stated in the itemized estimate for the quantity which has become firm does not constitute the basis for determining the deductions necessitated by modifications ordered during the performance of the contract.

The contractor who is the author of the reduction shall be informed of these decisions when notification is given of approval of the contract.

2. The tenderer shall include the requisite information in the itemized estimate, make the necessary calculations, sign the document and attach it to his tender, in which he shall mention the overall amount of the itemized estimate.

3. The unit prices must be determined in such a way as to correspond with the relative value of each item in relation to the total amount of the tender. They must in particular not be of such a nature as to distort the comparison of tenders or to result in the payment of part payments which are clearly disproportionate to the normal value of the services rendered.

#### *Article 30*

1. Tenders relating to supply contracts shall state the unit price, the amount per article and the total amount of each lot.

Where the invitation to tender contains an itemized estimate, the tenderer shall include therein the requisite information, make the necessary arithmetical calculations, sign the document and attach it to his tender, in which he shall mention the overall amount of the itemized estimate.

Save where there is express authorization in the Special Conditions the quantities referred to in the itemized estimate may not be amended by the tenderer, regardless of whether such quantities are firm or estimated.

2. A supply contract for which the itemized estimate comprises only items with constant quantities shall constitute an overall price undertaking.

If the itemized estimate does not refer to any quantity, or if the quantities therein are only estimated, in particular where the Special Conditions provide for a certain margin in respect of the quantities to be supplied, or where the administration reserves the right to adapt its orders to its requirements, the contract shall be a unit price contract.

#### *Article 31*

Tenders in respect of public works contracts shall be expressed in the currency of the country.

#### *Article 32*

Tenders in respect of supply contracts shall be expressed either in the currency of the country or in the currency of the Member State or Associated State of which the tenderer is a national or in which he has his registered place of business, or in the currency of the Member State or Associated State in which the supplies are produced.

#### *Article 33*

For the comparison of tenders, prices submitted in a currency other than the currency of the country shall be converted on the basis of the parity declared to the International Monetary Fund.

However, in the absence of a declared parity or in the event of the application to current payments of rates of exchange which diverge from this parity by a margin greater than that authorized by the International Monetary Fund, prices of tenders will be compared on the basis of the rates of exchange applicable for current payments.

These parities or rates of exchange shall be those in force on the first working day of the month preceding the month in which the date fixed for the opening of tenders occurs.

*Article 34*

With regard to public works contracts, the price offered by the tenderer shall include all entry duties, charges and taxes payable in the Associated State in connection with the performance of the contract as defined in the 'General Information Sheet' referred to in item 5 of Article 20.

*Article 35*

With regard to supply contracts, the tenderer shall, when calculating his tender, exclude stamp duty and registration duty on contracts. Customs duties, entry duties and indirect charges on the import into or manufacture of the supplies in the Associated State shall be those referred to in Article 3 of Annex X.

*Article 36*

The total amount of the tender and the unit prices in the price list shall be written out in full. The same applies to the overall amount of each item of the itemized estimate if the Special Conditions so require.

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

*Article 37*

Persons tendering for a public works contract shall specify in their tender the percentage of the price of the tender for which they request payment, on the basis of the parities defined in Article 33, in the currency of the Member State or Associated State of which they are nationals or in which they have their registered place of business. They must be able to give reasons justifying the choice of this percentage.

Settlement of supply contracts shall be made in the currency of the tender.

**Grouping into lots***Article 38*

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

The Special Conditions shall stipulate the number of lots, the nature or size of each lot and shall indicate, where appropriate, the minimum and maximum

number which may be offered by one and the same tenderer.

A tender shall be submitted in respect of each lot.

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

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

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

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

3. Where works or supply lots are apportioned to different contractors, the Special Conditions may provide for the nomination of one contractor as joint agent to ensure coordination in the carrying out of such works or supplies.

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

The allottees shall appoint one of their number to be the joint agent. He shall be jointly and severally liable with them for the performance of the lot or lots apportioned to each.

**Submission of tenders***Article 39*

1. The tender, together with its annexes as laid down in the Special Conditions, shall be placed in a sealed envelope called the inner envelope.

This envelope, and the supporting documents referred to in Article 23, shall be put into another sealed envelope, called the outer envelope, bearing the address indicated in the notice of invitation to tender, the reference to the notice of invitation to tender to which it is a reply, where appropriate the number of the lots referred to and the following words: 'to be opened only during an envelope-opening session', drafted in the language of the invitation to tender.

Envelopes containing tenders must be sent by post or transmitted by any other means. The tenderer may request an acknowledgement.

On receipt, the envelopes, which must not bear any reference to the tenderer, shall be entered in a special register in the order of their arrival. The registration number and the date and time of arrival shall be recorded on the envelope. These envelopes must remain sealed until they are opened under the conditions referred to in Article 42.

2. With regard to supply contracts, the supporting documents referred to in Article 23 shall be placed in the inner envelope.

#### *Article 40*

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

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

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

Withdrawal must be unconditional.

The provisions of Articles 28 and 39 relating to tenders shall be applicable to withdrawals, additions or amendments.

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

#### *Article 41*

Tenderers shall be bound by their tenders, where necessary corrected by the administration in accordance with Article 44 (2) and (3), during the period laid down in the notice of invitation to tender.

If, during the period, the administration considers that it is not in a position to make a choice, it may propose, by means of a registered letter, the extension of such period. The agreement of the tenderers must be conveyed to the administration by registered letter.

### Opening of tenders

#### *Article 42*

1. The envelopes containing the tenders, withdrawals, amendments or additions shall be

opened at the place, on the date and at the time fixed in the notice of invitation to tender, by a committee whose composition and operating procedures shall be laid down by the Associated State.

Only those envelopes may qualify which have been received in accordance with the conditions specified in Articles 39 and 40 not later than the final date fixed for the receipt of tenders, without prejudice to the provisions of paragraph 3.

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

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

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

2. With regard to supply contracts, the envelopes shall be opened during a public session, at the conclusion of which the Chairman of the Committee shall read aloud the names of the tenderers, the amounts of the tenders, price amendments and withdrawals. After this announcement the Committee shall continue its work in camera.

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

- (a) they were posted by registered mail no later than ten days before the final date fixed for the receipt of tenders; and
- (b) they reach the Chairman of the Committee responsible for opening the envelopes before he has declared the session open.

If possible, envelopes which arrive late shall be entered in the register by the Committee in accordance with Article 39.

#### *Article 43*

Without prejudice to the invalidity of any tender, the provisions of which might conflict with the essential requirements of these general conditions, in particular

those set out in Article 28, the Committee may consider tenders which do not conform with the provisions of Articles 22 to 40, which express reservations or the elements of which clearly do not correspond with reality, to be irregular and, hence, to be null and void.

#### Selection of contractor

##### *Article 44*

1. Before classifying the tenders, the Committee shall eliminate candidates not qualified to tender or whose qualifications are judged insufficient, in accordance with the provisions of Articles 22 and 23.

The reasons for acceptance or rejection given by the Committee shall be mentioned in the Minutes provided for in Article 45 (2).

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

The administration shall not be held responsible as a result of the existence of errors which have not been detected.

The tenderers may not take advantage of possible defects of form in the tender, nor of any errors or omissions that it may contain.

3. (a) Where a tenderer has amended the quantity of one or more items in the itemized estimate in application of Article 29, the Committee shall check such amendments, rectify them according to its own calculations and apply them to the other tenders.

Should the Committee not be in a position to verify by its own calculations the amendments to the quantities submitted for an item in a unit price contract, the special conditions for which have authorized the correction, it shall reduce to the proposed initial quantity tenders containing quantities greater than the proposed initial quantity, and shall leave unchanged any reductions made by the tenderers, without prejudice to the provisions of Article 29 (1) (a) and (b);

(b) Where a tenderer, in application of Article 29 (1), has rectified omissions in the itemized

estimate, the Committee shall establish that the correction was justified and, where necessary, rectify it according to its own calculations.

Tenderers who have not rectified omissions shall be invited by registered letter to complete their tenders, taking into consideration the correction that has been allowed;

(c) Where the Committee, on the basis of Article 29 (3), finds the unit prices of a tender to be apparently abnormal, it shall invite the tenderer concerned by registered letter to furnish an explanation of his unit prices.

##### *Article 45*

1. The Committee shall recommend the most economically advantageous tender to the administration, taking into account, in particular, the price of the services, the cost of their utilization, their technical value and the financial guarantees.

2. The discussions of the Committee shall be the subject of Minutes which may not be made public or communicated to any candidate. These Minutes shall be endorsed by the members of the Committee.

By way of information, the administration shall notify the tenderer it has selected of its choice by registered letter, with acknowledgement of receipt, to be posted before the expiry of the period laid down in Article 41.

The selected tenderer shall remain bound by his offer for a further period of 40 days following the date of signature of the acknowledgement of receipt.

The administration shall also notify the other tenderers by registered letter of the rejection of their tenders.

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

The name of the contractor and the overall amount of his tender shall be published by the administration.

3. The administration shall not enter into any discussion with the candidates, save to request them to specify or supplement the terms of their tenders.

4. Where the administration decides not to proceed with an invitation to tender it shall notify the tenderers thereof. It is not obliged to give reasons for its decision.

## Variations

### Article 46

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

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

Submission of any variant solution must include:

#### (a) *for unit price contracts:*

- an individual tender for each variation,
- the draft amendments to the special conditions necessitated by the variation submitted by the tenderer,
- the price list as modified by the variation,
- the itemized estimate as modified by the variation,
- the preliminary survey of works provided for in the administration draft but not affected by the variant solution,
- the preliminary survey of works affected by the variant solution,
- a technical note on the concept of the variation and, where appropriate, summary of the calculations.

If the variant solution is adopted by the administration, the preliminary survey of works to which it relates shall become a term of the contract and fixed. However, this preliminary survey shall cease to be so in respect of variations in quantities which the implementation of the administrative solution would in any case have entailed as a result of the alteration of the basic suppositions;

#### (b) *for overall price contracts:*

- an individual tender for each variation,
- the draft amendments to the Special Conditions necessitated by the variation submitted by the tenderer,

- the breakdown of the overall amount,
- a technical note on the concept of the variation and, where necessary, a summary of the calculations.

## Notification of acceptance of contract

### Article 47

1. (a) The contract shall be concluded when the tenderer is notified that his tender has been accepted. This notification must be within the period of 40 days laid down in Article 45 (2) at the latest;
- (b) This notification shall be made by registered letter with acknowledgement of receipt. It shall be deemed to have been made by the mere act of posting the letter;
- (c) The letter of contract shall include in particular:
  - a list of the documents relating to the contract, together with their references,
  - all departures of the contract from these documents,
  - the contractual performance period,
  - the amount of the contract and the manner of payment,
  - the decisions taken by the administration pursuant to Article 29,
  - the designation of the official instructed to direct performance of the contract, the administration to which he belongs and his authority regarding the performance of the contract,
  - all other factors necessary for determining the obligations arising from the contract.

2. After the expiry of the period laid down in paragraph 1 (a), if notification of acceptance of the contract has not been given, the tenderer selected shall be free to withdraw from the undertaking. This withdrawal shall be addressed to the administration by registered letter with acknowledgement of receipt.

Should the date of the belated notification of acceptance of the contract be the same as that of the

selected tenderer's withdrawal, the withdrawal shall be deemed to precede the notification.

In the event of withdrawal by the selected tenderer, the administration may apply in turn to the other tenderers according to the order of classification of their tenders or initiate a new procedure for the invitation of tenders or, if necessary, negotiate a contract by mutual agreement if the contract corresponds to one of the cases referred to in Article 53.

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

#### Invitation to tender with competition

##### *Article 48*

The invitation to tender may take the form of a competition.

A competition procedure shall be adopted where special investigations are justified for technical, aesthetic or financial reasons.

The competition shall take place on the basis of a schedule drawn up by the administration.

##### *Article 49*

1. The competition shall be for the preparation of a project and for its execution.

2. The committee instructed to examine tenders shall be called 'the board'. The composition of this board shall be laid down in the competition schedule.

3. The award of the contract shall be decided by the administration after receiving the opinion of the board.

The schedule may make provision for projects which receive the best classifications; after the project adopted for the contract, to be granted prizes. Such prizes shall be laid down in the schedule and allotted to the authors of such projects in accordance with the order drawn up by the board. Prizes may be withheld if the projects are not adjudged satisfactory.

4. The schedule shall establish precisely the respective rights of the administration and the competitors to the ownership and use of the projects.

##### *Article 50*

The notice of invitation to tender with competition and the compilation of the file must comply with the provisions of Articles 18, 19 and 20.

##### *Article 51*

The preparation of tenders, the procedure for their scrutiny, their classification and the notification of approval of the plan adopted shall comply with the corresponding provisions relating to invitation to tender without competition, save which the schedule otherwise provides.

#### Section II

#### MUTUAL AGREEMENT CONTRACTS

##### *Article 52*

1. The contract shall be designated a contract by mutual agreement where the administration enters freely into such discussions as it may consider useful and allots the contract to the undertaking or supplier whom it has accepted.

2. The administration shall be bound to arrange a competition, as far as possible and by all appropriate means, for undertakings or suppliers capable of carrying out the service which is the subject of such contract.

##### *Article 53*

Contracts by mutual agreement may be negotiated:

1. where the minor importance of the subject of the contract does not justify recourse to the normal procedure of prior competition;
2. where no regular tenders have been received or where only unacceptable prices have been proposed;
3. for works or supplies the execution or manufacture of which is reserved exclusively for persons holding patents or licences for inventions, improvements or importation, or for works or supplies which can only be obtained from a single undertaking or supplier;
4. for works or supplies the execution of which may, for reasons of technical necessity or

significant prior investment, be entrusted to one specific undertaking or supplier only;

5. where the works or supplies are carried out only in the form of research, tests, studies or improvements;
6. for works or supplies for which, in cases of emergency, compliance with the time limits of the procedure for invitation of tenders is impossible;
7. where the prices submitted are, in fact, outside the normal play of market forces;
8. for additional works or supply contracts which cannot, for technical and economic reasons, be separated from the principal contract or the cost of which does not exceed 20 % of that contract;
9. for works or supply contracts in which, pursuant to Article 13, the prices can be determined only provisionally;
10. in cases where, pursuant to Article 47, the tenderer has withdrawn his tender.

#### Instrument of contract

##### *Article 54*

The instrument of a contract by mutual agreement shall be a registered letter with acknowledgement of receipt, by which the administration accepts the tender of the undertaking or supplier.

The letter of contract shall comply with Article 47 (1) (c).

### CHAPTER III

#### SETTLEMENT OF DISPUTES

##### *Article 55*

1. Any dispute arising either between the administration and a tenderer in connection with the procedure for the award of a contract or between the administration and the contractor resulting from the interpretation or execution of a contract shall be settled by arbitration in accordance with the rules of arbitration adopted by the Council of the European Communities acting unanimously on the basis of a draft from the Commission.

No dispute may be submitted to arbitration until all possibility of review by administrative procedure, as laid down by national law have been exhausted. Such possibilities shall be deemed to have been exhausted if no final decision by the administration has been taken within a period of four months from the date when the application for a review was lodged by the tenderer or contractor.

The rules of arbitration provided for in the first subparagraph shall fix the period during which the request for a dispute to be settled must be introduced under penalty of preclusion, before the arbitrating authority.

2. The parties to a dispute arising in connection with the award or performance of contracts concluded prior to the entry into force of these general conditions may also agree to submit such dispute to the arbitration procedure referred to in paragraph 1.

## TITLE II

### CONTRACTUAL, ADMINISTRATIVE AND TECHNICAL CLAUSES

#### CHAPTER I

#### CLAUSES COMMON TO ALL CONTRACTS

##### Section I

#### PERFORMANCE OF CONTRACTS

##### Official responsible for directing performance of the contract

##### *Article 56*

The official responsible for directing performance of the contract shall be made known by the

administration to the contractor in the letter notifying him of award of the contract. This letter of contract shall also state, in accordance with Article 47 (1) (c), the authority of the official responsible for directing performance of the contract.

##### *Article 57*

The contractor shall ensure that the official responsible for directing performance of the contract has free access to the place where the services of the contract are performed, and shall provide him with any information that he requires. In the performance of his duties, the official responsible for directing performance of the contract shall be subject to the

same obligations as those laid down for the representative of the administration in the last paragraph of Article 61.

#### Plans, documents and objects

##### *Article 58*

1. After giving notification of acceptance of the contract, the administration shall provide the contractor, free of charge, with a verified and where relevant corrected copy of the tender, the Special Conditions and the annexes thereto.

At the request of the contractor, the administration shall forward to him free of charge and postage paid a complete set of copies of the plans it has drawn up with a view to the performance of the contract. The administration shall be responsible for the conformity of such copies with the originals.

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

3. After the expiry of eight days following the provision of these documents and objects, the contractor shall be deemed to have verified that they conform with those which served as the basis for the invitation to tender and which are held by the administration for use in connection with the acceptance of the works and supplies.

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

5. The contractor may purchase additional copies of these plans, documents or objects, in so far as they are available.

6. The administration may not hand over these plans, documents and objects prior to the establishment of the deposit or the commitment of the directly liable guarantor provided for in Article 62.

#### Detailed plans and performance plans

##### *Article 59*

Detailed plans which the contractor must draw up and submit for the approval of the administration shall be referred to in the Special Conditions, which shall also state the time limit within such approval

must be given. The same shall apply to the timetable of performance and to the documents and objects which must be submitted to the administration for endorsement or acceptance.

Any delay by the contractor in submitting these plans, documents and objects may, without formal notice being given, result in the application of a penalty for each day of delay, the rate for which shall be determined in the Special Conditions.

Any delay by the administration in approving or accepting these plans, documents or objects shall, upon a substantiated request by the contractor, result in an extension of the period of performance equal to the length of the delay. If such extension of the period of performance does not make good the injury suffered by the contractor, the latter may claim a longer extension of the period of performance or possibly an indemnity.

The Special Conditions may provide for a period of time during which the contractor must submit all or part of these plans, documents and objects.

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

Unless otherwise specified in the Special Conditions, the detailed plans, other documents and objects prepared by the contractor may not be reproduced or used by the administration for another purpose nor communicated to third parties.

#### Quality of works and supplies

##### *Article 60*

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

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

### Supervision and inspection of preparations and manufacture

#### *Article 61*

The administration may arrange for the preparation and manufacture of everything to be delivered to it to be supervised and inspected.

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

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

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

The representative of the administration, kept informed by his supervisory and inspection activities of the methods of manufacture and operation of the undertakings, shall be under an obligation not to disclose such information except to those members of the administration who need to know of it.

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

#### *Article 62*

Save where the Special Conditions otherwise provide, the contractor shall be obliged to establish a deposit or, if he so wishes, provide a directly liable guarantor as guarantee of the sums of money which he is acknowledged as owing under the contract.

The amount of the deposit or commitment of the directly liable guarantor may not exceed 3 % of the original amount of the contract, increased where appropriate by the amount set out in the additional

clauses where the contract does not include a guarantee period and by 10 % where the contract contains a guarantee period.

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

#### *Article 63*

The deposit shall be established in the currency of the contract. It shall be deposited in accordance with national regulations.

The directly liable guarantor shall be any body under public or private law established in an associated country or in a Member State and empowered to issue such a guarantee by the authorities under whose control it operates.

#### *Article 64*

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

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

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

#### *Article 65*

If the contractor does not produce proof of the establishment of the deposit or the commitment of the directly liable guarantor within the period laid down in Article 64, the administration shall have the option of applying as of right the measures provided for in Article 121, point 2 and Article 136 (2).

Before applying these measures, the administration shall send the contractor a registered letter giving formal notice regarding the establishment of the deposit or the commitment of the directly liable guarantor. Such formal notice shall introduce a new time-limit which may not be less than 10 calendar days and which shall take effect from the date of despatch of the letter.

**Right of the administration over the deposit or directly liable guarantor**

*Article 66*

1. The administration shall as of right levy on the deposit any amounts due from the contractor under the contract.

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

Should a deposit guaranteeing performance of the contract cease to be constituted in full and should the contractor remain in default in making good the deficit, a deduction equal to the amount of the latter may be made on future payments and used to re-establish the deposit.

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

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

Should the contractor fail to provide a new guarantor, the administration may cause the provisions of Article 65 to be applied.

**Return of deposit or discharge of the directly liable guarantor**

*Article 67*

1. The deposit shall be returned or the directly liable guarantor discharged as a result of a cancellation order issued by the administration within a period of one month following the date of final acceptance of the works or supplies, in so far as the contractor has by that date fulfilled his obligations towards the administration.

Upon the expiry of this period, the liability of the guarantor shall cease to have effect, even in the absence of a cancellation order, unless the administration has stated in a registered letter addressed to the guarantor that the contractor has not fulfilled all his obligations. In this case, the guarantor may be discharged only by a cancellation order issued by the administration.

2. However, in view of the special features of the contract, the Special Conditions may provide that one

half of the deposit will be returned or one half of the commitment of the directly liable guarantor be discharged within one month of the date of the provisional acceptance.

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

**Assignment, sub-contracting and sub-ordering**

*Article 68*

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

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

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

2. The contractor may not assign or sub-contract the contract without the express authorization of the administration. Assignees or sub-contractors may be only natural or legal persons who are nationals of the Member States or Associated States.

Sub-orders may be concluded freely. Nevertheless, the Special Conditions may make provision for the prior authorization of the administration in respect of certain sub-orders.

3. In all cases of sub-contracts and sub-orders the administration shall acknowledge no legal connection with the sub-contractors and persons with whom sub-orders are placed, and the latter may not claim settlement from the administration in respect of works or supplies which they have performed.

The administration may make use of the rights laid down in Article 61 with regard to services carried out or provided by sub-contractors or persons with whom sub-orders are placed.

4. If, without being authorized to do so, the contractor has assigned his contract, concluded a sub-contract or placed a sub-order for which authorization was necessary, the administration may, without giving formal notice thereof, apply as of right the measures laid down in Article 121 point 2 and Article 136 (2).

**Simultaneous contracts***Article 69*

1. Subject to the application of such rules governing legal compensation as may be laid down by national law, and without prejudice to the provisions of Article 126, each works or supply contract and its performance by the contractor shall be independent of all other works or supply contracts of which the contractor is holder.

2. Any difficulties arising with regard to one contract may in no case authorize the contractor to amend or delay execution of the other contracts; similarly, the administration may not take advantage of such difficulties to suspend payments due under another contract.

**Order to commence performance of contract***Article 70*

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

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

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

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

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

**Orders of the Administration***Article 71*

Orders of the administration must be in writing. They shall be dated, numbered and entered in a register.

The contractor shall comply with the orders of the administration drawn up by the official responsible for directing execution of the contract or by any other authorized representative of the administration.

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

**Patents and licences***Article 72*

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

Where the administration gives a description of all or part of the works or supplies, without referring to the existence of a patent, licence, drawing, model, trade mark or trade name whose use is necessary in the execution of such works or supplies, it shall bear all costs and charges; in this case, it shall guarantee the successful tenderer against any appeal by the holder resulting from such use.

**Payment of contracts***Article 73*

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

*Article 74*

Where the prices of works or supplies or the exact conditions for determining them are not immediately evident from the provisions of the contract, the latter must, for the purpose of making its funds available

and the payment of instalments, state a provisional price which is either an overall price or a price corresponding with the basic services or the technical stages or execution.

### Advances

#### Article 75

1. Advances may be granted to the contractor for operations preparatory to the performance of the works or supplies which are the subject of the contract, in the cases listed hereinafter:

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

2. The amount of the advances may not exceed 10 % of the original amount of the contract in respect of the lump-sum allowance and 20 % for all other advances.

3. The particular conditions for granting and reimbursing advances shall be laid down in the Special Conditions.

4. No advance may be made before the contractor has furnished proof of the establishment of the deposit or the commitment of the directly liable guarantor.

5. Any advance granted must be guaranteed in its entirety by the commitment of a directly liable guarantor satisfying the conditions of Article 63.

### Reimbursement of advances

#### Article 76

Reimbursement of the lump-sum advance referred to in Article 75 (1) (a) shall begin when the amount of sums due under the contract has reached 60 % of the original amount of the latter. It must be completed when 80 % of this amount has been reached.

Reimbursement of the advances referred to in Article 75 (1) (b) shall be made by means of a deduction from the instalments and possibly from the balance owing to the contractor in accordance with the procedure laid down in the Special Conditions. Reimbursement of such advances must be completed at the latest when the amount of sums due under the

contract has reached 90 % of the original amount of the latter.

In all cases of rescission of the contract, for any reason whatsoever, the advances shall be settled immediately.

The directly liable guarantor provided for in Article 75 (5) shall be released as and when the advances are reimbursed.

### Partial payments

#### Article 77

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

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

#### Article 78

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

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

### Revision of prices

#### Article 79

1. Provision may be made for the revision of prices with regard both to works contracts and supply contracts.

2. Where prices may be revised under a contract, revision shall take place either at the request of the contractor or on the initiative of the administration,

by applying the procedures set out in the Special Conditions. Such procedures may take into account a variation in the prices of manpower, services, materials and supplies, as well as of charges laid down by law or administration action forming part of the unit prices.

Prices contained in the contractor's tender shall be deemed to have been arrived at on the basis of the economic conditions in force on the reference date. This date shall be the first working day of the month preceding that in which the final date for the receipt of tenders occurs.

3. In the event of a delay in execution of the works, which is attributable to the successful tenderer, the lowest of the following three coefficients will be applied during the period between the contractual date for the completion of the works and the actual date of completion (provisional acceptance):

- arithmetical average of the monthly coefficients for the last 12 months of the contractual period;
- variation coefficient for the last month of the contractual period;
- variation coefficient established by applying the price variation procedure during the actual period of execution of the works.

#### *Article 80*

Application of the revision procedures shall be governed by the degree of variation of the contract price, which must be equal to or more than the percentage of variation laid down in the Special Conditions. This percentage shall form the revision threshold.

Once this threshold has been reached, the variation resulting from application of the procedure shall be fully taken into account.

#### *Article 81*

Where advances have been granted and where, pursuant to the second paragraph of Article 76, they are reimbursed by deduction from sums due for partial payment or from the balance, the price revision clause shall apply only to the difference between the initial amount of the instalment or balance and the amount of the advance to be deducted.

#### *Article 82*

The periods for settling sums due in application of the price variation procedures shall be laid down in the Special Conditions.

### **Rules for payment**

#### *Article 83*

##### Payment for works

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

This progress report, compiled on the basis of the daily statements provided for in Article 108, may include:

- (a) quantities carried out in excess of the estimated quantities contained in the itemized estimate of a unit price contract;
- (b) additional works performed in accordance with an order of the administration made by the official responsible for directing performance of the contract;
- (c) works carried out at prices proposed by the contractor and not yet accepted by the administration.

2. The administration shall verify and where necessary correct the work progress report; should such report contain quantities the unit prices for which have not yet been agreed by the parties, it shall automatically determine the prices, all rights of the contractor remaining unaffected.

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

3. Payment of sums due to the contractor shall be made within 90 calendar days of the date of receipt of the statement of account by the administration.

##### Payment for supplies

#### *Article 84*

With regard to supplies, payment shall be made within 90 calendar days of the due date as laid down in the Special Conditions.

Payment in the event of attachment

*Article 85*

In the event of a judgment ordering attachment against the contractor, and without prejudice to the periods of 90 days laid down in Articles 83 and 84, the administration shall be given a period of 15 calendar days, starting from the day when it receives notification of the lifting of the obstacle to payment, to resume payments to the contractor.

Interest in respect of delay in payments

*Article 86*

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

This supplement to the rate shall be increased to 4.5 % per year as from the 91st day of delay.

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

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

Payment for the benefit of third parties

*Article 87*

All orders for payment to third parties may be carried out only after a transfer of credit or a collateral security, in accordance with the relevant provisions of the laws of the Associated State where the contract is performed.

The transfer of credit or the collateral security shall be notified to the administration by registered letter with acknowledgement of receipt.

Notification to third parties

*Article 88*

The contractor and the beneficiaries of transfers of credit and collateral securities may, during the

performance of the contract, seek from the administration either a summary progress report of the work and supplies carried out, accompanied by an estimate which shall not be binding upon the administration, or a detailed account of rights enjoyed by the contractor; they may also request a statement of the advances and instalments paid and a detailed report on information received relating to such contract.

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

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

Preliminary technical acceptance

*Article 89*

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

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

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

The request shall indicate the specification of the materials, items or samples submitted for acceptance and shall also indicate the number of the Special Conditions, the number of the lot and the location where acceptance is to take place.

Even if materials or items to be incorporated in the works to be executed or in the manufacture of objects to be supplied have been accepted in this way, they may still be rejected and must be replaced immediately by the contractor if a further examination reveals defects or faults.

2. The Special Conditions shall make provision for all the procedures relating to preliminary technical acceptance, in particular, the period of time during which the administration must take its decision to accept or reject materials, standard items and samples, and also, in the event of this period being exceeded, the administration's option to extend the period of performance at the request of the contractor.

### Claims by the contractor

#### Article 90

1. The contractor may avail himself of facts alleged against the administration and which would involve him in delay and/or detriment in order to obtain, where appropriate, an extension of the periods of performance, the revision or rescission of the contract and/or damages.

2. In principle, the contractor shall not be entitled to make any amendment to the contractual conditions as a result of circumstances which remain unknown to the administration.

However, an extension of the periods shall be justified by circumstances which the contractor could not reasonably foresee when the tender was filed or the contract concluded, which he could not avoid and the consequences of which he was unable to avert even though he had taken every necessary step to that end.

Furthermore, if the contractor has suffered very considerable detriment, he may avail himself of the same circumstances to obtain the variation or rescission of the contract.

Various natural phenomena and their consequences, where they are recognized by the administration as being abnormal for the place or the season, shall, in particular, be regarded as circumstances within the meaning of the second and third subparagraphs.

The contractor may invoke the default of a sub-contractor or a person with whom a sub-order has been placed only in so far as the latter would avail himself of the circumstances which the contractor would have been able to invoke in a similar situation.

3. The contractor shall be obliged to report to the administration, by registered letter, the facts and circumstances referred to in paragraphs (1) and (2) as soon as he would normally expect to be aware of them and not later than 30 days after their occurrence.

4. Claims by the contractor must, under penalty of being time-barred, be made by registered letter within the following periods:

- (a) before expiry of the contractual periods, in order to obtain an extension of the periods of performance or cancellation of the contract;
- (b) in order to obtain a variation of the contract or damages not later than 60 days after
  - provisional acceptance of all works or supplies, or
  - acceptance of all supplies, where the contract provides for only one acceptance.

#### Article 91

1. The contractor shall have the right to obtain remission of the penalties for delay referred to in Article 121 point 1 (c) and Article 136 (1):

- (a) in whole or in part, if he proves that the delay is due wholly or in part to acts by the administration or to the circumstances referred to in Article 90 (1) and (2);
- (b) partially, if the administration considers that the amount of the penalties is disproportionate to the minimal importance of the works or supplies thus delayed, provided however that the works and supplies carried out are capable of being used normally and that the contractor has made every effort to complete his services in the shortest possible time.

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

- the payment of the balance, in the case of works contracts, or
- the payment of the invoice to which the penalty was applied, in the case of supply contracts.

#### Period of guarantee: maintenance, repair and replacement

#### Article 92

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

Deteriorations resulting from the circumstances provided for in Article 90 or from abnormal use shall be excluded from the guarantee unless they reveal a fault or defect such as to justify the request for repair or replacement.

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

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

The period of guarantee shall commence on the date of provisional acceptance in the case of works and supply contracts. Where a supply contract accompanied by a period of guarantee includes one acceptance only, the period of guarantee shall commence as from that acceptance.

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

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

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

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

4. Should the interests of the service so require, the administration may have the repairs carried out at the expense of the contractor, the latter having been duly informed by the copy of the report.

#### Cessation or postponement of performance of contract

##### Article 93

1. Where the administration unilaterally orders the final cessation of performance of the contract, the latter shall be immediately reminded. The contractor shall be entitled to an indemnity for any injury which he may have suffered by reason of such omission for which he is not responsible.

2. Where the administration orders the postponement of the contract outside the specific cases that may be provided for in the Special Conditions, for more than six months either before or after performance, the contractor shall be entitled to the cancellation of the contract and indemnity for any injury which he may have suffered.

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

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

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

If the contractor limits his request to an indemnity, it must be submitted by registered letter not later than 60 days after:

- provisional acceptance of all works or supplies, or
- acceptance of all supplies, where the contract provides for only one acceptance.

3. Where the administration orders the postponement of performance of the contract for less than six months, the contractor shall be entitled to an indemnity for any injury which he may have suffered. He must submit his request by registered letter not later than 60 days after:

- provisional acceptance of all works or supplies, or
- acceptance of all supplies, where the contract provides for only one acceptance.

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

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

## Section II

## Specific grounds for remission

## COMPLETION OF CONTRACTS

*Article 96*

## Non-performance of contract

*Article 94*

In the event of non-performance of the contract, the contractor shall be subject to the measures laid down in the special contractual clauses relating to the works and supplies provided for in this Title and in the Special Conditions.

Recovery of outstanding sums in connection with these measures shall be made by means of levies on amounts due to the contractor, on the deposit or by contribution from the directly liable guarantor.

## Decease

*Article 95*

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

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

2. Where the contract is given to several natural persons and one or several of them die, a control report shall be agreed between the parties on the progress of the works and supplies and the administration shall decide whether to rescind or continue the contract in accordance with the undertaking of the survivors and possibly of the heirs.

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

They must accept joint and several liability in accordance with the first paragraph of Article 27.

Continuation of the contract shall be subject to the rules relating to establishment of the deposit or the commitment of the directly liable guarantor in accordance with Article 62.

1. Without prejudice to the measures provided for in Articles 121 and 136, the administration may rescind the contract in the following cases:

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

2. in the event of a works contract being rescinded:

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

Statements shall also be drawn up of emoluments still owed by the contractor to workers employed on the building site, and of sums owed by the contractor to the administration.

- (b) The administration shall have the option of acquiring, wholly or in part:
- temporary items of work which have been approved by the administration,
  - materials specially constructed in connection with the execution of work under the contract and which cannot be re-used.

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

(d) The administration shall purchase at market prices the materials and items supplied or ordered on conditions that it considers appropriate.

3. In the event of the recession of a supply contract, the account shall be settled solely on the basis of supplies delivered and accepted.

4. However, the administration may without waiting for the definitive settlement, and if it is so requested, pay the contractor up to 80 % of the credit balance shown by the provisional settlement. Likewise, if the provisional settlement shows a credit balance in favour of the administration, the latter may require the contractor to return 80 % of the amount of such balance.

## CHAPTER II

### CLAUSES RELATING SPECIFICALLY TO WORKS CONTRACTS

#### Section I

#### PRELIMINARY PROVISIONS

##### *Article 97*

In overall price contracts, the contractor shall be considered to have prepared the sum contained in his tender according to his own operations, calculations and estimates.

After the final date fixed for filing tenders he shall no longer be allowed to enter any claim concerning possible errors or omissions in the itemized estimate furnished by the administration.

Details included in this document by the administration are given solely for purposes of information and may be invoked, if necessary, only to make good any inadequacy in the Special Conditions and in the approved plans.

In the event of a discrepancy between the details of the plans and the Special Conditions or the itemized estimate, the plans shall prevail.

Should the plans contain discrepancies, the contractor may claim to have provided for the

contingency which is most advantageous to him, unless the itemized estimate gives more precise details on this matter.

##### *Article 98*

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

2. Even if they are not the subject of an item on the itemized estimate, all works, measures and expenses relating to execution of the contract shall be the responsibility of the contractor, in particular the preservation, removal and possible replacement of the cables, conduits and installations specified by the administration in the contract plans and documents.

Where the presence of cables, conduits and installations has not been specified in the contract plans and documents but is revealed by benchmarks and references, the contractor shall be bound by a general duty of care and similar obligations regarding preservation, removal and replacement. In this case, the administration shall compensate him for expenditure relating to such work, to the extent to which this is necessary for the execution of the contract.

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

Damage caused by the contractor to cables, conduits and installations which have not been notified, or marked, and of which he could not reasonably have been aware, shall be regarded as being the result of a circumstance provided for in Article 90 (2).

3. The contractor shall carry out, at his expense, any works whatsoever which, by their nature, are dependent upon or bound up with those defined in the approved plans and which are described, in addition, by the requirements of the Special Conditions and the itemized estimate.

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

#### Address for service of the contractor and representation

##### Article 99

The contractor shall give an address for service close to the works and shall notify the administration of that address. Should he fail to fulfil this obligation within a period of two months from notification of award of the contract, all notifications concerning the contract shall be valid where these are made to the address designated for this purpose in the Special Conditions.

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

The contractor shall himself carry out and supervise the works or he shall appoint a representative for this purpose; in any case, he shall be responsible for carrying out the works satisfactorily.

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

The administration shall be entitled at any time, to call for replacement of the representative.

## Section II

### PERFORMANCE OF CONTRACT

#### Checking of materials and supplies

##### Article 100

#### 1. Identification

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

#### 2. Provision and acceptance of materials and supplies

The contractor shall be required to take the necessary steps to ensure that the plant, materials and supplies are conveyed to the site in good time and that the administration has the necessary time at its disposal to proceed with the formalities of accepting the materials and supplies irrespective of the state of the means of communication and the mode of transport used. Since the contractor is deemed to have fully appreciated the difficulties which he might encounter in this respect, he shall not be permitted to put forward grounds for delay in taking these steps, without prejudice to the provisions of Article 90.

The materials and supplies may not be used unless they have first been accepted by the official responsible for directing performance of the contract or his representative.

#### 3. Tests

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

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

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

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

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

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

The contractor may be present when the tests are carried out in one of the administration's laboratories or in a laboratory approved by the administration.

In any case, the markings must be present until the time of testing.

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

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

#### 4. *Test period*

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

#### 5. *Verifications*

Weighing required to verify the articles and materials for which theoretical weights or weight tolerances are laid down shall be carried out at the contractor's factory; the contractor shall place the weighing instruments at the disposal of the administration, free of charge, in accordance with Article 61.

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

#### 6. *Check tests*

In the event of an objection by one or other party to the result of the tests, each of the parties shall be

entitled to request a check test. This shall be carried out in a laboratory selected by common consent from the laboratories approved by the administration.

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

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

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

#### 7. *Period for check tests*

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

Paragraph 4 shall apply to the period for notifying the decision of acceptance or rejection resulting from the check test or the expert opinion.

#### 8. *Extension of the period of performance*

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

#### 9. *Materials and supplies which have been accepted*

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

#### 10. *Rejects*

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

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

Materials and supplies which have been rejected shall be removed by the contractor from the sites, if the administration so requires, within a period which it shall specify, failing which the administration shall as of right effect their removal at the expense and risk of the contractor.

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

### Special situations

#### Article 101

##### 1. *Suspension of works for climatic reasons*

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

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

The periods of suspension may in no case be aggregated with the periods of postponement provided for in Article 93.

##### 2. *Discoveries while work is in progress*

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

Discoveries of any interest whatsoever made in these excavations or in this demolition work shall be brought immediately to the attention of the administration.

Objets d'art, antiques, natural history, numismatic, or other objects which are of scientific interest, and also rare objects or objects made of precious materials found in these excavations or in this demolition work shall be the property of the administration and shall be held at the disposal of the official responsible for directing performance of the contract or his representative.

In the event of dispute, the administration shall have sole authority to decide as to the characteristics set out in the second and third subparagraphs.

### 3. *Overlapping contracts*

Where other contracts must be carried out simultaneously on the same site or in the same building, the contractor shall comply with orders given to him by the official responsible for directing the performance of the contract, so as to enable the contracts to be carried out.

### General measures

#### Article 102

1. The contractor shall comply with national rules, especially those governing building, highways, hygiene, and the protection of work.

The contractor shall have the right to forbid any person not involved in the performance of the contract to have access to the site, with the exception, however, of persons authorized by the administration in accordance with Article 57.

He shall ensure that sites are policed as long as work is in progress, and shall be responsible for taking the necessary steps, both in the interests of his servants, agents of the administration and third parties, to prevent any loss or accident which may result from carrying out the works. In particular, he shall see to it that the works and installations of his undertaking cause neither difficulties nor obstacles to traffic on roads, railways, waterways, aerodromes etc., other than those permitted by the Special Conditions.

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

This obligation shall be laid upon the contractor without prejudice to the application of the national rules governing telecommunications.

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

2. The contractor shall take all essential steps, on his own responsibility, and at his expense, to ensure that existing structures and installations are protected, preserved and maintained; he shall also take all the precautions required by building practice and by the special circumstances to safeguard neighbouring properties and to avoid causing any disturbance therein.

### Outline of works

#### *Article 103*

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

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

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

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

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

### Occupation of land or premises

#### *Article 104*

##### *1. Use of land belonging to the administration*

Apart from the actual building land, the contractor shall himself procure the land he considers necessary for carrying out the works. If the administration proposes to provide him with such land, wholly or in

part, this shall be stipulated in the Special Conditions or in the contract plans.

The contractor may not make use of land procured for him by the administration, without authorization in writing.

##### *2. Use of premises belonging to the administration*

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

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

### Materials obtained from demolition

#### *Article 105*

Where the contract includes demolition work, materials and articles obtained therefrom shall be the property of the contractor subject to the provisions of Article 101 (2).

Should the Special Conditions depart from this rule and reserve to the administration the right of ownership of materials or all or part of the articles obtained from the demolition work, the contractor shall take all the necessary precautions to ensure that these are preserved. He shall be answerable for any destruction of or damage to such materials caused by him or his servants.

Irrespective of the use to which the administration intends to put the materials or articles, in respect of which it reserves the right of ownership, all costs incurred in storing them at the place indicated by the official responsible for directing the contract shall be borne by the contractor for any carriage not exceeding 100 metres.

Where the Special Conditions do not otherwise provide, the contractor shall progressively remove rubble and other demolition materials, rubbish and debris in accordance with the instructions of the administration.

### Temporary works and soil studies

#### *Article 106*

##### *1. Temporary works*

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

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

## 2. Soil studies

In accordance with the Special Conditions the contractor shall hold at the disposal of the administration the personnel and equipment necessary for carrying out any soil survey which the administration shall judge necessary. He shall be compensated for the cost of the manpower and equipment used in this work.

### Staff for the undertaking

#### Article 107

The agents and workmen employed by the contractor must be sufficient in number, and each must be suitably qualified in his own field to ensure steady progress and satisfactory execution of the works. The contractor shall immediately replace all persons indicated by the administration as capable of jeopardizing satisfactory execution of the works.

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

In the event of delay being duly ascertained in the payment of wages and salaries and the allowances and contributions laid down in national law, the administration may, as of right, after giving notice to the contractor, pay arrears of wages and salaries, allowances and contributions out of amounts due to the contractor or, failing this, by making a deduction from the deposit, or obtaining a contribution from the directly liable guarantor.

### Record of work — Daily statements of materials used and work done

#### Article 108

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

- (a) An indication of the atmospheric conditions, interruptions of work owing to inclement weather, hours of work, number and type of workmen employed on the site, materials supplied, equipment in use, equipment not in

working order, tests carried out *in situ*, samples despatched, unforeseen circumstances etc., as well as orders given to the contractor which are purely occasional and of little importance;

- (b) Detailed daily statements of all the quantitative and qualitative elements of the work done and the supplies effected, capable of inspection on the site and relevant in calculating the payments to be made to the contractor.

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

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

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

The contractor shall communicate his views to the administration by registered letter within 15 calendar days of the date on which the entry or the statements objected to are recorded.

Should he fail to countersign or to submit his views within the period allowed, the contractor shall be deemed to agree with the notes shown in the record.

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

3. At the request of the representative of the administration, the contractor shall provide him with the information needed to keep the record of work in good order.

### Insurance

#### Article 109

Within 15 days following notification of the award of the contract, the contractor shall take out insurance, to take effect from the actual commencement of the work, covering his liability with regard to accidents at work and civil liability in the event of accidents

caused to third parties as a result of the works; he shall be obliged to furnish proof of regular payment of premiums each time he is required to do so.

#### Unforeseen work and modifications to the contract

##### *Article 110*

Where the administration, without changing the subject matter of the contract, considers it necessary to carry out unforeseen work or to effect changes in the work to be done, the contractor shall comply with the orders of the administration he receives in this respect.

The price of such work shall be determined in accordance with Article 83.

#### Increase in the volume of work

##### *Article 111*

In the event of an increase in the volume of work required by the administration, the contractor may not object if such increase, calculated on the basis of the original prices, does not exceed one fifth of the amount originally provided for in the contract unless the Special Conditions otherwise provide. In that case, the contractor shall, on application, be entitled to an extension of the contractual period of performance; he must give reasons for the length of the extension he requires.

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

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

#### Reduction in the volume of work

##### *Article 112*

In the event of a reduction in the volume of work required by the administration, the contractor may

not object if such reduction, calculated on the basis of the original prices, does not exceed one fifth of the amount originally provided for in the contract unless the Special Conditions otherwise provide.

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

Where this reduction, calculated in the same manner, exceeds one third, the contractor shall, within a period of two months of the order of the administration stipulating such reduction, request compensation for the loss incurred by him as a result of the modifications to the original project. Where, within two months following the lodging of the request for compensation, no agreement has been reached with the administration as to the amount of the compensation, the contractor shall be entitled to rescind the contract and to receive compensation for any loss caused by such rescission.

#### Change in the quantities of the various items in the itemized estimate

##### *Article 113*

1. Without prejudice to the application of Articles 111 and 112, where the contract contains an itemized estimate showing, for each item, the quantities of the various works and the respective price for each of these items, and where the alterations required by the administration modify the quantities of certain of these works in such a way that the quantity shown for any item differs by more or less than one fifth, the contractor may, when the final detailed statement is drawn up, request compensation for any loss incurred by him as a result of the modifications to the original project, in this respect.

2. Where the price list shows items with prices for reference purposes only for which no quantity is indicated in the itemized estimate, the provision contained in paragraph 1 may not be invoked by the contractor.

##### *Article 114*

1. Without prejudice to the application of Articles 111, 112 and 113, where, independently of any modification made by the administration to the contract, any volume of work actually carried out, which is covered by an item in the itemized estimate

and which is provided with a separate unit price, exceeds four times the estimated volume or is less than one half of such volume, the administration or the contractor may request revision of this price and/or the original time limits.

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

In cases where the administration and the contractor are unable to agree on the fixing of the new unit price, the administration shall determine this as of right, without prejudice to any rights of the contractor.

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

#### Use of works by the administration

##### *Article 115*

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

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

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

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

#### Acceptance

##### *Article 116*

#### 1. *Verification and testing*

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

#### 2. *Rejection of works*

Works which do not satisfy the terms and conditions of the contract or which are not carried out in accordance with trade practices shall be demolished and rebuilt by the contractor; otherwise this shall be done, as of right, at his expense, by order of the administration, in one or other of the ways indicated in Article 121.

The administration may also require the demolition and reconstruction by the contractor, under the same conditions as those laid down in the preceding subparagraph, of structures in which materials have been used which have not been accepted, or of those carried out in a period of suspension, as laid down in Article 101 (1).

#### 3. *Provisional acceptance*

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

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

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

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

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

#### 4. *Final acceptance*

Upon expiry of the guarantee period, the administration shall draw up, as soon as possible, and within a maximum of 30 days, a statement of final acceptance of the works or of rejection and shall forward a copy thereof to the contractor.

In the case of a statement of rejection of the works, it shall be incumbent upon the contractor subsequently to give notice to the administration, by registered letter, that all the works of the undertaking are ready for final acceptance, and acceptance of the works shall take place within 20 calendar days from receipt of the registered letter.

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

Verification of works with a view to provisional or final acceptance shall take place in the presence of the contractor. The absence of the latter shall not be a bar to acceptance on condition that he has been summoned in due form by registered letter posted at least 20 calendar days prior to the date of acceptance.

Should one or several of the exceptional circumstances referred to in Article 90 make it impossible to ascertain the state of the works during the period of 20 days fixed for provisional or final acceptance, a statement certifying such impossibility shall be drawn up after summoning the contractor. The statement of acceptance or rejection shall be drawn up within 20 calendar days from the date on which such impossibility ceases to exist.

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

The works shall not be regarded as completed until the contractor has had removed any goods in storage, litter or redressed any change in the condition of the premises, resulting solely from the requirements for performing his contract.

**Section III**

**COMPLETION OF THE CONTRACTS**

**Responsibility of the contractor**

*Article 117*

Without prejudice to the guarantee obligation laid down in Article 92, the contractor shall no longer be responsible, after provisional acceptance, for risks which may affect the works which are the subject of the contract and which result from causes not attributable to him.

However, the contractor shall be responsible, as from the date of provisional acceptance, for the soundness of the structures, in accordance with the provisions of the national law.

**Fraud and faulty workmanship**

*Article 118*

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

**Non-performance of contract by contractor**

*Article 119*

Non-performance of the contract by the contractor occurs:

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

**Finding of non-performance attributable to the contractor**

*Article 120*

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

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

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

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

**Sanctions for non-performance attributable to the contractor**

*Article 121*

If no ground for non-performance of the contract is accepted or furnished within the period laid down in

Article 120, the contractor shall be subject to one or more of the measures defined in, and governed by the following paragraphs:

#### 1. Penalties

- (a) Special penalties for specific failures in performing the contract;
- (b) Penalty per calendar day for any form of non-performance of the contract which must be terminated immediately.

This penalty shall be applied as from the date on which non-performance of the contract has been established by an entry in the record of work in accordance with Article 120, up to and including the date on which such non-performance has been ended by the contractor or by the administration;

- (c) Penalties for delay where non-performance results from non-completion of the contract within the contractual time limits. Notwithstanding Article 120, these penalties shall be due without formal notice;
- (d) General penalty for any form of non-performance of the contract other than those laid down under (a), (b) and (c).

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

#### 2. Measures to be taken as of right

A decision of the administration relating to the application of measures taken as of right shall be notified to the contractor by registered letter.

These measures shall be the following:

- (a) execution of all or part of the works under the supervision of the administration;
- (b) conclusion of a contract with a third party, to the account of the contractor, after prior rescission of the original contract.

In applying one or other of these measures, the administration shall make any necessary arrangements to ensure the protection or satisfactory execution of the works.

After the contractor has been summoned by registered letter, the works shall be checked, an inventory of plant and materials shall be drawn up, and a statement of the wages and salaries due and the amounts owed by the contractor to the administration shall be made out.

In the event of supervision by the administration, and while that procedure

applies, the contractor shall be authorized to observe the operations without, however, being able to interfere with the execution of instructions given by the administration. Supervision by the administration may be terminated if he furnishes proof of the necessary means to resume the work and to bring it to a satisfactory conclusion.

Additional expenses resulting from supervision by the administration or from the new contract shall be borne by the contractor.

If supervision by the administration or the new contract results in a reduction in the expenses, the contractor may not claim any part of the profit thus derived, which shall be the property of the administration;

- (c) rescission of all or part of the contract, decided against the contractor;
  - (d) temporary or permanent exclusion from the award of contracts.
- #### 3. Rules governing concurrence of sanctions for non-performance of the contract

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

- (a) a single failure to perform the contract may only give rise to the application of a single penalty;
- (b) supervision by the administration may be combined with penalties for delay and with exclusion;
- (c) a contract to the account of the contractor may be combined with exclusion;
- (d) cancellation arising from the fault of the contractor may be combined with exclusion and penalties for delay relating to the period prior to the date of cancellation;
- (e) exclusion may be combined with any measures by the administration.

#### Recovery of penalties

##### Article 122

Recovery of penalties and recovery of amounts relating to damages, disbursements or expenses resulting from the application of the measures provided for in point 2 of Article 121 shall be effected by deduction from the sums due to the contractor, from the deposit, or by contribution of the directly liable guarantor.

CHAPTER III  
CLAUSES RELATING SPECIFICALLY TO  
SUPPLY CONTRACTS

Section I

PRELIMINARY PROVISIONS

**Elements included in the prices of all supply  
contracts**

*Article 123*

1. Subject to any special conditions for which provision may be made in the Special Conditions, the contractor shall be deemed to have included in his prices all costs charged on supplies, in particular:

- (a) The costs of transport and insurance;
- (b) The costs of packing, transshipment, unloading, transit, unpacking and making available at the place of delivery.

The packing materials shall be the property of the administration unless the Special Conditions otherwise provide;

- (c) The cost of documents relating to the supplies where such documents are required by the administration.

2. The contractor shall bear the expense of assembling the supplies and putting them into working order where the Special Conditions so provide.

**Verification by contractor of technical documents  
made available to him**

*Article 124*

The contractor shall be obliged to verify the technical documents submitted to him by the administration and to give notice, without delay, of errors, omissions or contradictions which these documents may contain, and which are evident to a person skilled in the art. Adjustments to prices and time limits which may result therefrom shall be negotiated in accordance with Article 128.

**Address for service of the contractor and  
representation**

*Article 125*

The administration shall send all notifications relating to the contract to the address for service given by the contractor for this purpose in his tender.

Where the person concerned has changed this address without advising the administration thereof, all notifications relating to the contract deemed made to the address designated for this purpose in the Special Conditions shall be valid.

Furthermore, the Special Conditions may provide that the contractor shall be required to give an address for service within a specific period, or to establish a representative in a place designated for this purpose.

Where the contractor does not fulfil this obligation within the time limit laid down, all notifications relating to the contract made to the address shown in the Special Conditions shall be valid.

**Overlapping contracts**

*Article 126*

Where the contractor is party to several contracts relating to like supplies, the deliveries which he makes shall be ascribed to one or other of the contracts in the order in which delivery dates fall due.

Where the contractor is the holder of a contract for several like lots but at different prices, the deliveries shall be paid for at the average price.

Section II

PERFORMANCE OF CONTRACTS

**Identifications**

*Article 127*

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

**Technical modifications during execution of  
contract**

*Article 128*

During execution of the contract, the administration may require the contractor to carry out modifications of a technical nature to the extent that these are compatible with the technical capacity of his undertaking, or accept modifications proposed by him.

The contractor must provide a detailed estimate, if so requested by the administration, within the time limit prescribed for this purpose, showing the increase or decrease in price, and the alterations to the period of performance for which provision is to be made.

Without prejudice to the provisions of Article 71, the administration shall notify its decision by order sent by registered mail.

### Tests and check tests

#### Article 129

##### 1. Tests

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

- (a) at the manufacturer's factories,
- (b) in the administration's laboratories,
- (c) in laboratories approved by the administration.

In the case of verification at the factory as provided for under (a), the test samples or parts to be tested, ready for testing, shall be made available to the representative of the administration within five calendar days of being marked. The tests shall be carried out in the presence of this representative; the contractor shall bear the costs of preparing parts, test samples, and the costs of the tests themselves.

In the case of verification in the laboratories as provided for under (b) and (c), immediately after the parts to be tested or the substances to be used in preparing the test samples have been selected and marked by the representative of the administration, they shall within five calendar days be sent by the contractor, free of charge, to the laboratory responsible for the tests, under the supervision of the representative of the administration. The administration shall bear the costs of preparing parts and test samples. It shall also bear the cost of tests carried out in its laboratories or in an approved laboratory, with the exception of tests which must be carried out by the contractor in the manufacturer's factories. The residue of test samples, broken parts and surplus samples shall remain the property of the administration. The contractor may be present when the tests are carried out in one of the administration's laboratories or in a laboratory approved by the administration.

In any case, the markings must be present the time of testing.

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

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

##### 2. Test period

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

##### 3. Verifications

Weighing required to verify the articles and materials for which theoretical weights or weight tolerances are laid down shall be carried out at the contractor's factory; the contractor shall place the weighing instruments at the disposal of the administration, free of charge, in accordance with Article 61.

The same shall apply in the case of duly verified measuring equipment and test machinery required for the test provided for in the contractor's factories or at the place of delivery.

##### 4. Check tests

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

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

The report drawn up by the laboratory or by the expert shall be submitted to the administration, which shall communicate it, without delay, to the contractor, by registered mail.

The results of the check test or the expert opinion shall be conclusive.

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

#### 5. *Period for check tests*

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

Paragraph 2 shall apply to the period for notifying the decision of acceptance or rejection resulting from the check test or the expert opinion.

#### 6. *Extension of the period of performance*

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

#### 7. *Rejects*

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

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

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

### **Delivery**

#### *Article 130*

The supplies shall be delivered to the place, within the time limits and in accordance with the conditions stipulated in the contract.

Each delivery must be accompanied by a statement drawn up by the contractor. This statement, the form of which may be prescribed by the administration, shall contain, in particular:

- the date of delivery,
- the reference number of the contract,
- the identification of the contractor,
- particulars of the goods supplied and, where appropriate, details of how they were divided for packing.

Each package must be clearly marked with its order number as shown on the relevant statement; in the

absence of indications to the contrary, it shall contain a list of its contents. The delivery of the supplies shall be confirmed by the issue of a receipt to the contractor.

Where the supplies are delivered to an establishment of the administration, the latter shall bear the responsibility of bailee during the time which elapses between their being delivered for storage and acceptance.

### Section III

#### TERMINATION OF CONTRACTS ACCEPTANCE

#### Verification operations

#### *Article 131*

1. The supplies presented by the contractor shall be subjected to qualitative and quantitative verifications intended to establish that they satisfy the contract specifications.

2. The Special Conditions shall indicate:

- the nature of and detailed procedures for verifications,
- the administrative authorities responsible therefor,
- the place where they are to be carried out,
- the period available to the administration for effecting the verifications and notifying its decision.

3. This period shall begin on the first working day following the date of delivery on condition that the administration is in possession of the statement provided for in Article 130.

Unless the Special Conditions provide otherwise, the length of this period shall be twenty days.

4. The authority responsible for verifications shall advise the contractor, in good time, of the date and time fixed for them so as to enable him to be present or to be represented. However, the absence of the contractor or his representative shall not prevent the verifications being carried out.

#### Postponements, price reduction penalties, rejections

#### *Article 132*

1. Where the authority responsible for the verifications considers that the supplies could be

accepted if certain adjustments were carried out, it shall declare a postponement and shall invite the contractor to present them again within a specific period after having carried out these adjustments. Where the contract does not specifically provide otherwise, the administration must be informed of the acceptance of the contractor within a period of 15 days from notification of the postponement decision.

In the event of refusal or silence on the part of the contractor within this period, or of failure to present the supplies again within the period allowed for their adjustment, such supplies shall be accepted subject to a price reduction penalty or shall be rejected in accordance with the conditions set out below.

The work of adjusting postponed supplies may only be carried out inside the establishments of the administration with the special authorization of the latter and at the contractor's expense.

Except in special cases which shall be decided upon by the administration, no supply may be the subject of more than two postponements.

2. At the end of the verifications, supplies which do not entirely satisfy the conditions of the contract but which nevertheless seem to be usable in their existing state may be accepted subject to price reduction penalties which shall consist of:

- a reduction in price if the defects found affect all or part of the delivery,
- a reduction in quantities in the event that the supplies exhibit localized blemishes.

The administration shall inform the contractor of the price reduction penalties which it proposes to apply.

The administration must be informed of any objection of the contractor within 15 days of notification of the proposed price reduction penalty. At the end of that period, the administration shall make a decision. If the contractor does not accept this decision, the supply shall be rejected.

However, where the contractor is not in a position to replace forthwith the supplies adjudged to be defective, he shall be obliged to submit to such price reduction penalty:

- where the supply is urgently required,
- where, because of their nature, supplies could not be stored separately in the administration's warehouses.

3. Where the supplies presented give rise to reservations such that adjustments do not seem practicable and that their use in their existing state does not seem possible, the administration shall notify the contractor of its intention to reject them.

The administration must be informed of any objection of the contractor within 15 days of notification of the proposed price reduction penalty. At the end of that period, the administration shall make a decision.

The time limit stipulated in the preceding subparagraph shall not be taken into account when making that decision, where it follows a refusal on the part of the contractor to accept a price reduction penalty or where, because of their nature, supplies could not be stored separately in the administration's warehouses.

4. If postponement is granted in respect of the supplies, the whole of the period laid down for effecting the verifications shall be available to the administration, from the date on which the supplies are again presented by the contractor. The same shall apply in the event of rejection, where the administration has authorized the contractor to present new supplies.

The period available to the contractor for submitting any objections, and the period which he requires to present the supplies again following postponement or rejection, do not in themselves constitute grounds for requesting an extension of the period of performance.

5. The decisions taken by the administration shall give the reasons for rejection, postponement or price reduction penalties. They shall be notified to the contractor, without delay, by registered letter with acknowledgement of receipt.

#### **Marking and removal of postponed or rejected supplies**

#### *Article 133*

1. The Special Conditions may stipulate that materials or articles which have been postponed or finally rejected will be marked with a special sign by the administration and that, where appropriate, rejects will be denatured or destroyed.

2. The handling and transport costs which may result from the postponement or rejection of supplies shall be borne by the contractor.

3. Should the verification operations have been carried out in the administration's warehouses, the decision to reject the supplies shall stipulate a time limit for their removal, if the Special Conditions have not already done so.

4. On expiry of that time limit, the administration is relieved of its responsibility as bailee and may:

- either send back as of right the supplies in question at the expense and risk of the contractor, or
- have them sold by public auction in accordance with the national law.

The proceeds of the sale, less expenses, shall be held at the disposal of the contractor unless they should serve to pay off debts which he may be found liable to pay to the administration under the contract.

#### Acceptance

##### *Article 134*

1. At the end of the verifications, where the supplies satisfy the contract specifications, or on the date of the decision to apply a price reduction penalty, where they are accepted solely on that condition, the administration shall draw up a statement of acceptance by which transfer of ownership is effected and shall forward a copy thereof to the contractor.

2. Where the Special Conditions on the contract have made provision for a guarantee period, the acceptance referred to in paragraph 1 shall constitute provisional acceptance. At the end of this period, the administration shall draw up a statement of final acceptance and shall forward a copy thereof to the contractor. The final acceptance may be tacit if the supplies have not given rise to any claim during this period.

3. Where one or more of the exceptional circumstances referred to in Article 90 make it impossible to carry out the verifications laid down in paragraph 1, a statement shall be drawn up establishing such impossibility, after summoning the contractor or his representative. The statement of acceptance or rejection shall be drawn up once this impossibility ceases.

#### Non-performance of contract by contractor

##### *Article 135*

Non-performance of the contract by the contractor occurs:

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

#### Sanctions for non-performance attributable to contractor

##### *Article 136*

##### *1. Penalties for delay*

The contractor shall, without formal notice, be liable for penalties for late deliveries solely by the fact of the expiry of the period of performance.

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

##### *2. Measures to be taken as of right*

Where the administration decides to apply to the contractor one or more of the measures taken as of right listed below, it shall first give him formal notice, by registered letter with acknowledgement of receipt, to put an end to the non-performance of the contract. The contractor may present any objections, by registered letter, within 15 days from the date of receipt of the formal notice. Upon expiry of a period of 25 days from receipt of such formal notice, the administration shall inform the contractor of its decision by registered letter.

The following measures may be taken as of right:

- (a) rescission of all or part of the contract, decided against the contractor;
- (b) execution of the supplies outstanding under the supervision of the administration up to the quantity not delivered, or only a part thereof;
- (c) conclusion of a contract with a third party, to the account of the contract or for all or part of the supplies still to be delivered, after prior cancellation of the original contract.

The contractor may no longer take part in the execution of that part of the contract covered by the measure taken of right, once this has been notified.

If it is not possible for the administration to obtain raw materials or articles which correspond exactly with those delivered and laid down in the Special Conditions, under conditions which are appropriate to its needs, it may substitute equivalent materials or articles.

Additional expenses resulting from supervision by the administration or from the new contract shall be borne by the contractor.

- (d) temporary or permanent exclusion from the award of contracts.

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

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

- (a) supervision by the administration may be combined with penalties for delay and with exclusion;

(b) a contract to the account of the contractor may be combined with exclusion;

(c) cancellation decided against the contractor may be combined with exclusion and penalties for delay relating to the period prior to the date of cancellation;

(d) exclusion may be combined with any measures by the administration.

**Recovery of penalties**

*Article 137*

Recovery of penalties and recovery of amounts relating to damages, disbursements or expenses resulting from the application of the measures provided for in paragraph 2 of Article 136 shall be effected by deduction from the sums due to the contractor, from the deposit, or by contribution from the directly liable guarantor.

**Declaration relating to Article 5 of the general terms and conditions of public works and supply contracts financed by the European Development Fund**

'The word "may" used in paragraphs 3 and 4 of Article 5 means that the provisions of these two paragraphs will only apply to the European Development Fund referred to in Article 17 of the Council Decision of 29 September 1970, on the association of the Overseas Countries and Territories with the European Economic Community.'

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