

ANNEX IV IMPLEMENTATION AND MANAGEMENT PROCEDURES

CHAPTER 4 Competition and preferences

ARTICLE 20

Eligibility

Save where a derogation is granted in accordance with the General Regulations for contracts or Article 22:

- (a) participation in invitations to tender and the award of the contracts financed by the Fund shall be open on equal terms to:
 - (i) natural persons, companies or firms or public or semi-public agencies of the ACP States and the Member States;
 - (ii) cooperative societies and other legal persons governed by public or private law, of the Member States and/or the ACP States; and
 - (iii) joint ventures or groupings of companies or firms of ACP States and/or of a Member State.
- (b) supplies must originate in the Community and/or the ACP States. In this context, the definition of the concept of 'originating products' shall be assessed by reference to the relevant international agreements and supplies originating in the Community shall include supplies originating in the Community shall include supplies originating in the Overseas Countries and Territories.

ARTICLE 21

Participation on equal terms

The ACP States and the Commission shall take the necessary measures to ensure the widest possible participation on equal terms in invita-

tions to tender for works, supplies and services contracts, including, as appropriate, measures to:

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

ARTICLE 22

Derogation

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

- (a) the geographical location of the ACP State concerned;

- (b) the competitiveness of contractors, suppliers and consultants from the Member States and the ACP States;
 - (c) the need to avoid excessive increases in the cost of performance of the contract;
 - (d) transport difficulties or delays due to delivery times or other similar problems; and
 - (e) technology that is the most appropriate and best suited to local conditions.
2. Participation by third countries in contracts financed by the Community may also be authorised:
- (a) where the Community participates in the financing of regional or inter-regional schemes involving such countries;
 - (b) in the case of co-financing projects and programmes; and
 - (c) in the case of emergency assistance
3. In exceptional cases and in agreement with the Commission, consultancy firms with experts who are nationals of third countries may participate in service contracts.

ARTICLE 23

Competition

1. To simplify and streamline the general rules and regulations for competition and preferences for EDF financed operations, contracts shall be awarded through open and restricted procedures as well as framework contract, direct agreement contracts and direct labour as follows:
- (a) open international invitation to tender through or after the publication of a procurement notice in accordance with the provisions of this Agreement;
 - (b) open local invitation to tender where the procurement notice is published exclusively in the beneficiary ACP State;
 - (c) restricted international invitation to tender where the Contracting Authority invites a limited number of candidates to take part in the call for tender after the publication of a pre-information notice;
- (d) direct agreement contracts which involve simplified procedure where the publication of the procurement notice is dispensed with and the Contracting Authority invites a limited number of service providers to present their offers; and
- (e) direct labour agreement where contracts are performed through public or semi-public agencies and departments of the beneficiary States concerned.
2. Contracts financed from the Fund shall be concluded in accordance with the following provisions:
- (a) works contracts of a value:
 - (i) higher than EUR 5 000 000 shall be awarded in an open international invitation to tender;
 - (ii) between EUR 300 000 and EUR 5 000 000 shall be awarded through an open local invitation to tender; and
 - (iii) lower than EUR 300 000 shall be awarded by direct agreement contract which involves a simplified procedure without publication of a procurement notice.
 - (b) supply contracts of a value :
 - (i) higher than EUR 150 000 shall be awarded through an open international invitation to tender;
 - (ii) between EUR 30 000 and EUR 150 000 shall be awarded through an open local invitation to tender; and
 - (iii) below EUR 30 000 shall be awarded by direct agreement contract which involves a simplified procedure without publication of a procurement notice.
 - (c) service contracts of a value :
 - (i) higher than EUR 200 000 shall be awarded through a restricted international tender after publication of a procurement notice; and

- (ii) below EUR 200 000 shall be awarded by direct agreement contract which involves a simplified procedure or a framework contract.
3. For works, supply and service contracts with a value of EUR 5 000 or less, these can be awarded directly without competition.
 4. In case of restricted invitation to tender, a short-list of prospective tenderers shall be drawn up by the ACP State or States concerned in agreement with the Head of Delegation following, where applicable, a call for pre-qualification of tenders based on the publication of a procurement notice.
 5. In case of direct-agreement contracts, the ACP State shall enter freely into such discussions as it may consider appropriate with the prospective tenderers whom it has short-listed in accordance with the Articles 20 to 22 and award the contract to the tenderers whom it has selected.
 6. The ACP States may request the Commission to negotiate, draw up, conclude and implement service contracts directly on their behalf or through its relevant agency.

ARTICLE 24

Direct Labour

1. In case of direct labour operations, projects and programmes shall be implemented through public or semi-public agencies or departments of the State or States concerned or by the person responsible for executing the operation.
2. The Community shall contribute to the costs of the department involved by providing the equipment and/or materials that it lacks and/or resources to allow it to acquire additional staff required in the form of experts from within the ACP States concerned or other ACP States. The participation of the Community shall cover only costs incurred by supplementary measures and temporary expenditure relating to execution strictly confined to the requirements of the project in question.

ARTICLE 25

Emergency assistance contracts

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

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

ARTICLE 26

Preferences

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

- (a) for works contracts of value of less than EUR 5 000 000, tenderers of the ACP States, provided that at least one quarter of the capital stock and management staff originates from one or more ACP States, shall be accorded a 10% price preference where tenders of an equivalent economic, technical and administrative quality are compared;
- (b) for supply contracts, irrespective of the value of the supplies, tenderers of the ACP States who offer supplies of at least 50% in contract value of ACP origin, shall be accorded a 15% price preference where tenderers of equivalent economic, technical and administrative quality are compared;

- (c) in respect of service contracts, given the required competence, preference shall be given to;
 - (i) experts, institutions or consultancy companies or firms from ACP States where tenders of equivalent economic and technical quality are compared,
 - (ii) offers submitted by an ACP firm in a consortium with European partners, and
 - (iii) offers presented by European tenderers with ACP sub-contractors or experts.
 - (d) where subcontracting is envisaged, preference shall be given by the successful tenderer to natural persons, companies and firms of ACP States capable of performing the contract required on similar terms; and
 - (e) the ACP State may, in the invitation to tender, propose to the prospective tenderers the assistance of other ACP States' companies or firms or national experts or consultants selected by mutual agreement. This cooperation may take the form either of a joint venture, or of a subcontract or of on-the-job training of trainees.
- (iii) the nature of, the conditions and the time limit for executing the contracts, and the adaptation to local conditions.
- (c) for a service contract who offers the most advantageous tender taking into account, inter alia, the price, the technical value of the tender, the organisation and the methodology proposed for the provision of the services as well as the competence, independence and availability of the personnel proposed.
2. Where two tenders are acknowledged to be equivalent on the basis of the criteria stated above, preference shall be given:
 - (a) to the tenderer of an ACP State; or
 - (b) if no such tender is forthcoming, to the tenderer who:
 - (i) permits the best possible use of the physical and human resources of the ACP States;
 - (ii) offers the greatest subcontracting possibilities to ACP companies, firms or natural persons; or
 - (iii) is a consortium of natural persons, companies and firms from ACP States and the Community.

ARTICLE 27

Award of contracts

1. Without prejudice to Article 24, the ACP State shall award the contract to the tenderer:
 - (a) whose tender is found to be responsive to the tender dossier:
 - (b) for a works or supply contract, who has offered the most advantageous tender as assessed, inter alia, on the basis of :
 - (i) the price, the operating and maintenance costs;
 - (ii) the qualifications of, and the guarantees offered by the tenderers, as well as the technical qualities of the tender, including the offer of an after-sales service in the ACP State; and

ARTICLE 28

General regulations for contracts

1. The award of contracts financed from the resources of the Fund shall be governed by this Annex and the procedures which shall be adopted by decision of the Council of Ministers at the first meeting following the signing of this Agreement, upon the recommendation of the ACP-EC Development Finance Cooperation Committee. These procedures shall respect the provisions of this Annex and the Community's procurement rules for cooperation with third countries.
2. Pending the adoption of these procedures, the current EDF rules as contained in the

current general regulations and general conditions of contracts shall apply.

ARTICLE 29

General conditions for contracts

Performance of works, supply and service contracts financed from the resources of the Fund shall be governed by:

- (a) the general conditions applicable to contracts financed by the Fund which shall be adopted by decision of the Council of Ministers at the first meeting following the signing of this Agreement, upon the recommendation of the ACP-EC Development Finance Cooperation Committee; or
- (b) in the case of co-financed projects and programmes, or where a derogation to third parties has been granted or in accelerated procedures or in other appropriate cases, such other general conditions as may be agreed by the ACP State concerned and the Community, i.e. :
 - (i) the general conditions for contracts prescribed by the national legislation of the ACP State concerned or its established practices regarding international contracts; or
 - (ii) any other international general conditions for contracts.

ARTICLE 30

Settlement of disputes

Any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services during the performance of a contract financed by the Fund shall:

- (a) in the case of a national contract, be settled in accordance with the national legislation of the ACP State concerned; and
- (b) in the case of a transnational contract be settled either:

- (i) if the Parties to the contract so agree, in accordance with the national legislation of the ACP State concerned or its established international practices; or
- (ii) by arbitration in accordance with the procedural rules which will be adopted by decision of the Council of Ministers at the first meeting following the signing of this Agreement, upon the recommendation of the ACP-EC Development Finance Cooperation Committee.

ARTICLE 31

Tax and customs arrangements

1. The ACP States shall be apply to contracts financed by the Community tax and customs arrangements no less favourable than those applied by them to the most favoured States or international development organisations with which they have relations. For the purpose of determining the most-favoured-nation (MFN) treatment, account shall not be taken of arrangements applied by the ACP State concerned to other ACP States, or to other developing countries.
2. Subject to the above provisions the following shall apply to contracts financed by the Community:
 - (a) the contract shall not be subject in the beneficiary ACP State to stamp or registration duties or to fiscal charges having equivalent effect, whether such charges already exist or are to be instituted in the future; however, such contracts shall be registered in accordance with the laws in force in the ACP State and a fee corresponding to the service rendered may be charged for it;
 - (b) profits and/or income arising from the performance of contracts shall be taxable according to the internal fiscal arrangements of the ACP State concerned, provided that the natural or legal persons who realise such profit and/or income have a permanent place of business in that State, or that the performance of the contract takes longer than six months;

- (c) enterprises which must import professional equipment in order to carry out works contracts shall, if they so request, benefit from the system of temporary admission as laid down by the national legislation of the beneficiary ACP State in respect of the said equipment;
 - (d) professional equipment necessary for carrying out tasks defined in a service contract shall be temporarily admitted into the beneficiary ACP State or States in accordance with its national legislation free of fiscal, import and customs duties and of other charges having equivalent effect where these duties and charges do not constitute remuneration for services rendered;
 - (e) imports under supply contracts shall be admitted into the beneficiary ACP States without customs duties, import duties, taxes or fiscal charges having equivalent effect. The contract for supplies originating in the ACP State concerned shall be concluded on the basis of the ex-works price of the supplies to which may be added such internal fiscal charges as may be applicable to those supplies in the ACP State;
 - (f) fuels, lubricants and hydrocarbon binders and, in general, all materials used in the performance of works contracts shall be deemed to have been purchased on the local market and shall be subject to fiscal rules applicable under the national legislation in force in the beneficiary ACP State; and
 - (g) personal and household effects imported for use by natural persons, other than those recruited locally, engaged in carrying out tasks defined in a service contract and members of their families, shall be exempt from customs or import duties, taxes and other fiscal charges having equivalent effect, within the limit of the national legislation in force in the beneficiary ACP State.
3. Any matter not covered by the above provisions on tax and customs arrangements shall remain subject to the national legislation of the ACP State concerned.