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# THE EUROPEAN DEVELOPMENT FUND: ACCESS TO CONTRACTS

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C O N T E N T S

	p a g e
<u>Introduction</u>	1
<u>I. Participation</u>	7
A. The Participants	7
B. Participation techniques and competition	10
a) The principle - open international tenders publicity - file consultation - deadline date - simplified call	
b) First exception - restricted list	
c) Second exception - accelerated procedure	
d) Private treaty - Government agencies	
<u>II. Equal terms and conditions</u>	18
A. Specifications and conditions	18
General conditions - special requirements	
B. Preparation of tenders	23
C. Award of contracts opening - comparison - taxation, transport	
D. Decision and Award	26
Supply contracts - works contracts	
<u>III. The Commission's competitions policy</u>	29
A. Project policy	29
Grouping in lots - "Turnkey" projects	
B. Policy for firms	31
Information- Cooperation incentives- financing	
<u>IV. Conclusion</u>	38
<u>Table</u> : Tenders and awards under EDF III	40

## I N T R O D U C T I O N

### THE EUROPEAN DEVELOPMENT FUND

The Treaty of Rome setting up the European Economic Community (EEC) contains in Part Four<sup>1</sup> provisions for association with it of the Overseas Countries and Territories having special relations with Belgium, France, Italy and the Netherlands. The arrangements for this association for an initial period of five years (1958-62) were laid down in an implementing convention<sup>2</sup> annexed to the Treaty. One of its provisions was, that there should be set up a jointly financed development fund. This was the origin of the European Development Fund (EDF).

By the time the implementing Convention ran out, most of these countries and territories had become independent and the association had to be reorganised in two separate groups. For the independent countries a new association Convention was signed at Yaoundé on July 20 1963, and this group was subsequently known as the Associated African States and Madagascar (AASM)<sup>3</sup>. Secondly, the association with the Community of the Overseas Countries and Territories (OCT) which had remained dependent<sup>4</sup> was provided by a decision of the EEC Council dated February 25 1964. The EDF was maintained in this two-tier association, which was again for a five-year period (1964-69), and retained by a second five-year renewal, signed, once more at Yaoundé, on July 29 1969. For the OCT, it was retained by the decision of the Council of Ministers of the European Communities, dated September 29 1970.

The accession of the United Kingdom to the EEC meant an enlargement of the Community's relationships with the countries of the Third World, on account of the special links which a number of them still maintained with this new Member State. In this connection, Protocol No.22 annexed to the Act of Accession of the new EEC Member States, provided that the Community policy of association should be continued, both for the AASM and for the countries of the Commonwealth in Africa, the Indian Ocean, the Pacific Ocean and the Caribbean. Important negotiations were commenced in July 1973, resulting in a new Convention being signed at Lomé on February 28 1975, setting up a special system of relationship between, on the one hand, the European Community and on the other, the 46 independent countries in Africa, the Caribbean and the Pacific (ACP)<sup>5</sup>. In parallel with this the enlargement has extended to the association with the OCT by including amongst the territories covered, those of the British Commonwealth.<sup>6</sup>

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1 Articles 131 - 136 of the Treaty

2 Rome, March 25 1957

3 Benin, Burundi, Cameroon, Central African Republic, Chad, People's Republic of Congo, Gabon, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Somalia, Togo, Upper Volta, Zaïre.

4 Netherlands Antilles; Surinam and the French Overseas Territories: St.-Pierre et Miquelon, Comoro Islands, French Territory of the Afars and Issas, New Caledonia and dependencies, Wallis and Futuna Islands, French Polynesia, The French Antarctic Territories and the French Overseas Departments: French Guyana, Guadeloupe, Martinique and Réunion.

5 See page 2

6 " " "

The funds provided for the EDF under the four conventions - the implementing Convention, Yaoundé I, Yaoundé II and the Lomé Convention - measured in units of account (EUA) were respectively, 581.25 million EUA, 730 million u.s.a., 900 million u.s.a. and 3,150 million EUA.<sup>7</sup>

The EDF is funded by budget contributions from the EEC Member countries and administered by the Commission of the European Community and operated as one of the latter's departments. It has no separate legal status, but is financially autonomous.<sup>8</sup>

The EDF operates mainly by outright grants, but it sometimes also provides aid in repayable form.<sup>9</sup> The projects and programmes financed by the EDF vary widely in character. They may be isolated schemes to meet particularly urgent needs; schemes forming part of a national development plan; component parts of a regional plan; economic investment in production or infrastructure; welfare or social projects; technical assistance; agricultural production and diversification aids and under a number of other headings.

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5 Besides the 18 AASM and Mauritius, which had joined them in May 1972, the ACP countries are:

- 21 Commonwealth countries: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland, Tanzania, Uganda, Zambia (Africa); Bahamas, Barbados, Guyana, Grenada, Jamaica, Trinidad & Tobago (Caribbean); Fiji, Western Samoa, Tonga (Pacific);
- 6 African countries having no special relationships with the EEC countries which had been invited to join the countries mentioned above: Ethiopia, Liberia, Sudan, Guinea, Equatorial Guinea and Guinea-Bissau.

At the first meeting of the EEC-ACP Council of Ministers in July 1976, a favourable response was given to the candidature of 6 new members. These are, on the one hand, three ex-OCT States: the Comoros, Surinam, Seychelles and Sao Tomé and Príncipe, the Cape Verde Islands and Papua New Guinea.

6 Decision of the Council of Ministers of the European Communities of 29 June 1976. The territories involved in the new association with the OCT, in addition to those set out above in Note 4, are: Anglo-French Condominium of the New Hebrides; Belize, Brunei, Associated States in the Caribbean (Antigua, Dominica, Saint Lucia, Saint Vincent, Saint Kitts, Nevis, Anguilla), Cayman Islands, Falkland Islands and dependencies, Gilbert Islands, Solomon Islands, Turks and Caicos Islands; British Virgin Islands, Montserrat, Pitcairn, Saint Helena and dependencies, Seychelles, British Antarctic Territory, British Indian Ocean Territories, Tuvalu. It should also be noted that the French Overseas Departments are no longer involved in the association with the EEC and that the Comoros (with the exception of the island of Mayotte, which has been integrated into the French Overseas Territories) and Surinam, while awaiting their definitive accession to the Lomé Convention as ACP States, enjoy associated country status as a transitional measure.

7 See page 3

8 " " "

9 " " "

When the Commission has decided to finance any project or programme, it is embodied in a financing agreement prepared by the EDF staff and signed by the Commission and the Government of the ACP country applying for the aid. The financing agreement ensures that the beneficiary country will have at its disposal the funds needed to carry out the project or programme.

CONTRACTS FINANCED BY EDF

The execution of the projects and programmes mentioned above requires three different types of work, for each of which there is a corresponding type of contract. These are :

- a) - works contracts. Most of these are for :
- erection of buildings (schools, hospitals, factories) ;
  - communications (roads, bridges, railways) and port installations ;
  - water works (dams, supply conduits) and hydraulic agricultural improvement schemes.

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(7) In the Yaoundé system the unit of account was linked with gold and initially equivalent to the US dollar. The Community was, however, anxious to safeguard the Lomé system against the impact of currency troubles (floating currencies and the inconvertibility of the dollar) which had occurred since 1971, and accordingly proposed a new mechanism which the Council, acting on the Commission's recommendation, formally adopted on April 21 1975. The unit of account is now defined as a "basket", the sum of a weighted amount of the currencies of the 9 member countries. The daily value of the unit of account in the different national currencies is calculated by the Commission on every working day, and published in the Official Journal of the European Communities.

(8) A useful French work on the EDF is the Dictionnaire du Marché Commun, Gide-Loyrette-Nouel, Collection "dictionnaires Joly" - Volume II, under the heading "Echanges extérieurs et Etats associés", (External Trade and Associated Countries), second part "Relations extérieures privilégiées" (preferential external relations), especially page 109 et seq.

(9) Under the Lomé Convention, as also under Yaoundé II, the EDF may use these funds not only to finance loans on special terms (as under Yaoundé I) but also to provide part of the risk capital

- b) - supply contracts relating to:
- material connected with specific works contracts (e.g. sanitary apparatus or factory equipment) and complex supplies needing important erection work (electrical transmission and telecommunications material);
  - supplies needed for agriculture (fertilizers, insecticides);
  - miscellaneous material : vehicles (road trucks, tractors, railway locomotives and wagons), water craft (pushers, timber barges), furniture and other materials.
- c) - service contracts drawn up in the form of technical cooperation contracts. In general these are concerned with:
- surveys, in preparation for proposed projects, including profitability studies and feasibility studies for operation under the economic conditions of the beneficiary country;
  - supervision of works by making available to the authorities in the country concerned resources enabling support to be given to the principal contractor in the task of site management;
  - technical assistance by putting at the disposal of national authorities staff competent to advise and assist them in the management of projects and thus, in more general terms, in running their administrative operations.

In principle, the works and supply contracts are put out to international tender, while service contracts require a direct agreement procedure (contracts by private treaty). These principles, however, are subject to various exceptions in specific circumstances. The detailed arrangements for the award of contracts will be examined later in these notes (see below).

The important thing to emphasise at this point is that the national authorities in the ACP countries, acting in accordance with their own national legislation in the matter, are the only people competent to award the contracts. This is a fundamental rule, but it does not exclude an element of cooperation with the Commission, which has the duty of making sure the contracts it is financing are carried out in conformity with its own principles.

Up to December 31 1975, the statistics show that 1,280 invitations to tender had been issued in respect of operations financed by the EIF since its inception. The value of the works and procurement contracts already awarded, carried out, in the course of execution or notification on the same date, was 1,222,000,000 ECU and the technical cooperation contracts were for a further 232,000,000 ECU.

The volume of these operations is bound to increase considerably in coming years, because of the trebling of the credits provided for the Fourth EIF, and the correspondingly big increase in the number of contracts.

### ACCESS TO EDF-FINANCED CONTRACTS

There is one fundamental principle at the root of all awards of public contracts which the Commission has always sought to safeguard in all matters of adjudication connected with its policy of cooperation with the authorities in countries which have the benefit of aid from the EDF. This is the principle of fair and open competition between the firms concerned.

There are two reasons for this. The first lies in the general interest attaching to the correct handling of public funds. Competition between tendering firms for the execution of a public order, makes it possible for the award to be made to the lowest or most attractive bid. The contract can thus be carried out on the best available terms.

The second justification is that public authorities must be free of all suspicion of partiality. Public contracts are a source of legitimate profit and a government must make sure that access to them is open to all firms and on equal terms.

Competition is therefore the watchword for firms seeking access to EDF-financed contracts. It is important to keep this principle firmly in mind, since it underlies all the arrangements to be described below.

The problem of making sure that EDF contracts are competitive has become something of a problem for a number of reasons. The most important lies in the fact that firms in the EEC countries do not all bid for these assignments with the same zeal.

A survey by the Commission, relating principally to works contracts financed by EDF III, showed that only a very small number of firms from some of the member countries (especially Germany and the Netherlands) had been submitting competitive bids. Their abstention, coupled with other factors mentioned below, necessarily had an effect on the contract awards. In practice, as is shown in the statistical table at the end of these notes, it is approximately true to say that a higher number of bids tends to secure a higher number of awards, though the rule is of course far from absolute. In all logic it is the firms which most often bid for these contracts which are most likely to get them.

French firms are a case apart. The dominant position of France is mainly due to the French establishment in the countries of what was formerly French Africa, and to their close knowledge of the countries concerned, including the legislation, regulations and prevailing commercial practices. It is also due to the financial and technical aid France has given, and especially to tied aid, which gives an undoubted advantage to firms from the former mother country which are thus assured in advance of a certain amount of the work. Another factor is the monetary system (French franc area) and more especially, the convertibility of the French franc and the CFA franc. The language factor, too, is of far from negligible importance.

The discrepancy in the awards has sometimes threatened to become a political problem and has even imperilled the continuation of Community aid.

The inequality in the distribution of contracts, however, cannot be blamed on the Commission. It has over the years made the most of its regular contacts with the member countries, the associated and partner countries and the various business federations, and has built up a system of competition which is probably unrivalled elsewhere in the world.

The access of firms to EDF-financed contracts must therefore be considered in the light of this system of competition, and account must be taken of various specific factors -- such as the size of the geographical area in which firms are competing and the ultimate aim of the EDF to bestow development aid primarily in the interest of the countries receiving it.

On this basis there are three aspects from which the Commission work in this field can best be studied :

- the measures taken to ensure participation by firms in the tendering ;
  - the application at the various stages of the adjudication procedure of the equal terms principle ;
  - the measures taken to lay down the basis of a policy of real competition.
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## I. PARTICIPATION

Two questions arise. Who is eligible to participate in the contracts -- works procurement or services -- financed by the EDF ? and what are the participation rules and how do they affect the competitive position ?

### A - THE PARTICIPANTS

For the first Fund, participation is governed by article 132 (4) of the Treaty of Rome which reads : "For investments financed by the Community participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a member State, or of one of the countries and territories".

Under the second Fund, the distinction between two types of association (the EEC with the AASM and the EEC with the OCT -- had an important repercussion on the participation of firms in EDF operations. Under all the subsequent conventions (Yaoundé I, art. 25; Yaoundé II art. 26 (1) and Lomé art. 56 (1)), participation is open to firms in the member States and in the partner States (i.e. in the AASM for EDF II and EDF III and in the ACP for EDF IV).

Under the system instituted by the Council decision of February 25 1964 (art.22) and renewed in the Council decision of September 29 1970 (art.23) relating to the association of the OCT, participation is open to firms in EEC member States and the associated countries and territories. An analogous provision defines participation conditions in the enlarged association for purposes of the Fourth EDF (Art. 43(1) of the Council Decision of 29 June 1976) This means that firms in the ACP countries like those in the AASM under the Second and Third EDF do not in principle take part in EDF operations in the OCT.

It is important to note, however, the wording of the rules about participation. In the conventions Yaoundé I (art. 25) and Yaoundé II (art. 26 (1)) it is specified that : "... participation in tendering procedures and other procedures for the award of contracts shall be open on equal terms to all natural and legal persons of the member States or the associated States". In article 56 (1) of the Lomé Convention, the provision is in identical terms (11).

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10 Terminologically the expression "Associated States" has been replaced in the Lomé Convention by the expression "ACP States". This is the new nomenclature for the independent States which are beneficiaries of the Fund's interventions.

11 Subject to the terminological change mentioned in footnote 10.

The provisions regarding association with the OCT are drafted in the same spirit.

It is not a mere matter of chance that restrictive wordings such as "participation is open only to ..." or "participation is restricted to ..." have been discarded in favour of wording of a more positive character.

What participation then is available for contractors or suppliers from third countries ?

On the occasions when this problem has arisen in past years, the solutions have always been empirical, but the Lomé Convention puts it in a new light. Article 56 (3) of the Convention reads : "paragraph 1 (which lays down the principle of participation by firms in member countries and ACP countries) does not mean that the funds paid over by the Community must be used exclusively for the purchase of goods, or for the remuneration of services in the member States and in the ACP States". In point of fact, both the EEC member countries and the Commission had already made a statement to the same effect at the meeting at which the Yaoundé I and Yaoundé II conventions were drafted, as a guide to the interpretation of article 25 and article 26 quoted above.

Article 56 (3) of the Lomé Convention goes further in the sense that it emphasises that any participation by third countries in contracts financed by the Community must be of an exceptional nature. It has to be authorised case by case by the Community, account being taken in particular of a desire to avoid excessive increases in the cost of projects attributable either to the distances involved, transport difficulties or delivery dates. It will be noted in this connection that the Community had already authorised exceptions on this basis on account, for example, of the urgency of supply requirements, or by specific reference to the geographical location of the beneficiary country. 12

In addition, the final clause in Article 56 (3) of the Lomé Convention lays it down that "participation by third countries may also be authorised where the Community participates in the financing of regional or inter-regional cooperation schemes involving third countries and in the joint financing of projects with other providers of funds." It is specially noteworthy that this provision in the Lomé Convention appreciably enlarges a practice which the Community had found it necessary to follow in connection with several contracts. 13

As regards the OCT, Article 43(3) of the Council Decision of 29 June 1976 is aligned on Article 56(3) of the Lomé Convention.

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12. The case arose several times in relation to Rwanda and Burundi, for supplies originating from East Africa (Kenya, Uganda and Tanzania -- which were at the time "third countries" so far as concerns the AASM). With the enlargement embodied in the Lomé Convention, exceptions of the same kind could be authorised in other areas, having regard to the wide geographical dispersion of the ACP countries and the OCT.
  13. The EDF now has quite an extensive experience of co-financing. Recent examples include :
    - the port of Mogadishu in Somalia, where the work was carried out by co-financing between EDF and the International Development Association.

Mention should also be made of two other cases in which participation was authorized by firms from third countries which, though not expressly covered by the relevant clause in the Lomé Convention, nevertheless came within the scope of derogations which the Commission had already made use of and which could apply with equal force to article 56 (3). These cases were :

- 1) In relation to supply contracts when a firm or individual in a third country can show a contract by virtue of which he is, at the date of the invitation to tender, the exclusive representative for supplies, originating in an EEC member country or in an associated country. <sup>14, 15</sup>
- 2) When the supplies for which tenders are invited are for articles for which there is no equivalent in the production of the EEC member countries or the ACP countries. <sup>16</sup>

It will be seen from the foregoing that the participation system for EDF-financed contracts is still mainly based on preferential access for the nationals of EEC member countries and, depending on the class of case, from the ACP countries or the Associated Countries and Territories -- and also supplies originating from these same States, Countries and Territories. There are, however, various modifications and exceptions which can be traced back to the constitutive texts and which give the Fund's intervention an appreciable degree of flexibility.

The geographical limits of participation being thus defined, the next task is to consider and examine the implications of the legal techniques used to stimulate competition.

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13 (continued) One of the tenders put in came from a Yugoslav firm.

- the Congo-Ocean Railway project was carried out by co-finance between the EDF, the People's Republic of Congo, the Canadian Agency for International Development, the African Development Bank, the European Investment Bank, the World Bank and the Caisse Centrale de Coopération Economique and le Fonds Français d'Aide et de Coopération. The pre-selection (see below) of firms made it possible to accept the references (among others) of two Canadian firms.

14 See article VII, sub-section 3 in the general clauses of financing conventions under EDF II and EDF III.

15 This has only happened once, in connection with the invitation to tender no. 278 "Supply of two 100 HP levelling machines". The firm winning the order, the United Africa Company Ltd. (UAC) at Lomé (Togo) was the representative of Hovers Constructie NV from Tilburg (Netherlands) Sub paragraph 3 of Article VII of the General Clauses was included to cover this possibility.

16 See page 10

B - PARTICIPATION TECHNIQUES AND THEIR IMPLICATIONS FOR COMPETITION

The usual procedure for placing contracts to be financed by the EDF is the open international invitation to tender. By way of exception the invitation may be to a restricted list, especially when there has been pre-selection; it may also be made under the expedited procedure and less frequently the contract may be placed by private treaty. In addition the Lomé Convention has introduced a new prospect for contracting with government agencies.

a) The principle : open international invitation to tender

From the competition standpoint the open tender technique ensures the widest possible participation. For this reason it is the technique the Commission has whenever possible always applied for operations financed by the EDF, in compliance with the spirit of Art. 132(4) of the Treaty of Rome and Art. 25 of the Convention Yaoundé I, confirmed by Art. 26 of Yaoundé II and Art. 56 of the Lomé Convention.

The open international tender rule is prescribed in Protocol No. 2 on the application of financial and technical cooperation annexed to the Lomé Convention. This enjoins the Commission and the competent authorities of the ACP States (inter alia) to be careful to : "ensure advance publication in reasonable time of invitations to tender" (art. 18 (2)) and to ensure for each operation "that the tender selected is economically the most advantageous" (art. 21 ) <sup>17</sup>

The encouragement of competition by wide publicity, coupled with the criterion of the "economically most attractive" bid applied to the award of the contract, are the key features of the open tender system.

In applying, within this framework, the texts determining the EDF procedures, the Commission has sought to adopt the most appropriate measures for enlarging the competition to the greatest possible extent.

For this purpose three factors are of outstanding importance. These are the publicity, consultation of the dossier covering the invitation to tender, and the time allowed for tendering. For supply contracts, too, the Commission has worked out a special system of simplifying dossier particulars for invitations to tender.

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16 Cases in which this has arisen include the supply of Land Rovers, kerosene refrigerators, ginning equipment and various items for tea production. It is to be noted that the concession holders were, nevertheless, nationals of member countries or associated countries.

1. The importance attached to publicity is shown in many texts specifying that it is obligatory<sup>18</sup>

The chief instrument of publicity is still information through the press in the form of a notice of invitation to tender. This gives the relevant particulars, including the purpose of the contract, place and time schedule for works or delivery of goods, directions for ascertaining detailed particulars, submission of tenders and their examination and eligibility for participation in the tender.

The notice of invitation to tender is published simultaneously in the Official Journal of the European Communities, and in the Official Gazette of the State, country or territory concerned. Publication in the EEC Official Journal is made in the six languages of the Community. Copies of the notice are sent by the government of the beneficiary State or country to the consular representative within its domain of the EEC Member States and the ACP countries. Any amendment to the notice is published in the same way. In addition, a number of specialist advertising newspapers in the Member States and the ACP countries and Territories habitually reproduce the notices and their amendments.

2. In addition to the notice procedure - as a further measure to enable firms to obtain information in good time about the general characteristics of the works or supplies - the Commission has organized a dossier consultation system for invitations to tender.

For this purpose the dossier for each invitation for tender can be consulted locally at the address given in the published notice of invitation. It can also be consulted in the EDF office at the Commission in Brussels, at the EEC information offices in the capital of the EEC Member States

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17 For the Second and Third EDF these injunctions figures in the Financial Regulation of Council relating to each of the Funds. In common with a number of other provisions they are now laid down directly in a text signed at the same time as the Lomé Convention itself. In a sense this change in the legal background reflects the special importance attached to compliance by all the EEC-ACP partners.

18 Article 47(2) of the Financial Regulation for the Second EDF; Art. 49(2)(a) of the Financial Regulation for the Third EDF; Article IX of the General Clauses in financing conventions under EDF II and III; Article 18 of the General Conditions applicable to contracts financed by the EDF; Article 18(2)(a) of Protocol No 2 annexed to the Lomé Convention.

and through the Union of Industries in the European Community (UNICE) at the offices of the representatives of the industrial federations of EEC countries.

3. To facilitate the submission of tenders a moderately liberal line of action is applied regarding deadline dates.

The relevant dates are calculated so as to allow interested firms to consider participation, whether they be in the EEC States, the ACP States or the Associated Countries and Territories. Allowance is accordingly made for the distance, the possible need for a translation, local investigation and the time taken in the post.

The usual time allowed is four months for works contracts and three months for supply contracts. On the other hand there may be extensions in the case of a composite bid, or when the Commission is notified of substantiated complaints about a delay in forwarding the file of the invitation to tender.

Such delays are appreciably longer than those applied under the procedures of other international finance organisations, including particularly the World Bank. It should nevertheless be emphasised that the EDF practice is generally approved by the firms concerned. In adopting it the Commission was motivated by the desire to enable interested firms to secure fuller knowledge of the special features attaching to the investment in question, and thus prepare their bids with a full knowledge of the facts.

4. For supply contracts the Commission has been working since 1966 to rationalise and standardise the procedure, and has in fact worked out and standardised a new formula.

This is a simplified call for tenders under which the publication in the Official Journal of the Communities is no longer a mere invitation to tender, but contains the greater part of the general, technical and administrative clauses which are habitually contained in the tender file itself. These clauses are so drafted as to give bidders as much indication as possible about the factors affecting the calculation of the bid. Since the Official Journal appears in all six Community languages, bidders interested in supply contracts financed by the EDF are fully informed in their own language of all the particulars necessary for drafting their tenders and calculating their prices. In all matters not conflicting with the rules of the invitation to tender, the execution of the contract is governed by the regulations applicable in the beneficiary country.

The outstanding advantage of such a system is, that it facilitates participation by a large number of small and medium firms which can easily cope with an invitation to tender on these lines, but which, for practical purposes, would otherwise have been out of reach.

While the firms are thus given more information at the outset, they are required to submit their bids within two months instead of three. This is in the interests of the ACP Countries, since it speeds up the execution of the contract.

Since 1969 the Commission has further improved its arrangements by dividing the public consultation into two parts. Part A varies from case to case, describing the supplies required and including the special conditions. Part B is standard, giving details of the general requirements common to all calls for tender for supplies. Standardisation and simplification on these lines enables the faster issue of a greater number of invitations to tender, since several public consultations can be published in the Official Journal in the form of a series of parts A and single part B common to all of them.

Moreover this speeds up the procedures by which final particulars can be compiled by the administrations of beneficiary countries, while the Commission departments are enabled to rationalise the work of translation into the official EEC languages and publication. In fact, an announcement can now proceed directly once the technical particulars have come to hand.

Only such a system as this could have made it possible to deal with the increase in the number of invitations to tender and, in individual cases, have secured delivery of the goods ordered within a reasonable time.

Since 1971, practically all the invitations to tender for procurement have been made under the simplified procedures.

The decisive success of this experiment in standardisation for simple supply contracts has encouraged the Commission to extend it to mixed contracts. These are supply contracts implying a material amount of assembly work. This arises in the case of electrical installations in general and also for oil refineries and tea production units.

b) First exception to the open invitation procedure -- restricted invitation list after pre-selection

The pre-selection procedure is not a Commission novelty. It is well known to the member countries of the EEC, to the ACP countries, to the World Bank and the leading aid agencies. It is a procedure in two phases. It begins with a pre-selection notice containing a summary description of the works or supplies required, the rules of eligibility for tendering and the references and documents relating to the firm's technical and financial capacity which it is required to submit if it wishes to apply for consideration as a candidate. The second phase is the request for tenders exclusively from the list of candidates thus chosen.

By this technique the principal data on the project is known to the firms concerned from the time of the pre-selection notice. They are thus in a

position to acquaint themselves with many details about the projected investment, and they have the benefit of an appreciable interval for study and consideration. This gives them an opportunity of making an advanced study of the technical and financial resources of their future competitors and avoids the unsuccessful candidates having to incur abortive expenditure on surveys and the drafting of a bid.

In using the resources of the first and second EDF, the Commission was allowed to make awards under the restricted list procedure only in exceptional cases, and the pre-selection machinery was in practice -- but not as an absolute rule -- kept for works so large in size or so technical in character that some element of advance choice seemed necessary. The criterion of choice was the financial and technical capacity of the firms, or groups of firms concerned.

The finance regulation for the Third EDF made the exception into a rule, and the pre-selection procedure became obligatory for works contracts estimated at over 5 million u.a. in value. The aim of the system was to encourage co-operation between firms; and the formula enables candidates, after publication of the pre-selection notice, to seek the best partnership in terms of equipment and technology to supplement their own potential and thus establish their right of access to big works contracts.

In large measure this objective has now been attained. Progressively stable multinational groups have been formed and are regular bidders for EDF contracts (see below). This being the case the authors of the Lomé Convention took the view that the time had come to revert to the flexible system which prevailed under the First and Second EDF. The new texts, therefore, do not prescribe any compulsory pre-selection for contracts above any specified estimated value.

This silence, however, does not prevent the Commission or the competent authority in the ACP Country concerned, from proposing recourse to pre-selection of firms because of the nature or the scale of the projected works.

c) Second exception -- invitations to tender by accelerated procedure

During the duration of the Second FED the Commission noted a certain lack of interest among international firms for works contracts on a small scale. It accordingly thought it advisable to use a procedure for securing bids which would be more appropriate to this type of contract, on lines which would not exclude participation by any interested firms, but which would appeal specially to firms in the beneficiary country and its neighbours. This led to the practice of calling for local or regional tenders.

The practice became official in the texts relating to the Third EDF, which provided for the possibility of organising an accelerated procedure for issuing invitations to tender, allowing a shorter interval for the submission of bids.



The difficulty was to fix the "threshold" or value below which firms outside the region were unlikely to be attracted. This probably varied according to the type of service required, with one value for buildings, one for roads, another for bridges and yet another for a well-sinking project. It will not be the same if the works are compact and concentrated, or have to be carried out on dispersed sites; and there will be differences depending on whether European tendering firms, formerly foreigners in the country concerned, have or have not established a footing through contracts with EDF finance.

The Commission regulation laying down the operational rules for the third EDF had fixed 500,000 ECU as the limit below which recourse to the accelerated procedure was to be permissible. The threshold was therefore fixed on the low side. It is worth noting that between January 1 1971 and December 31 1974, 55 invitations to tender were issued under this procedure to a total value of 18.58 million ECU.

On the other hand, the statistical table appended to this note shows that in the same period the number of tenders from firms in AASM-OCT countries was still predominant for contracts up to a million units of account, and was far from being negligible when the contract value was up to 3 million ECU.

The authors of the Lomé Convention therefore bowed to experience/<sup>19</sup> reintroducing the system of the accelerated procedure for issuing invitations to tender, but providing that it "shall be applied to invitations to tender whose value is estimated at less than 2 million units of account" (Protocol No. 2, art. 20 (a)).<sup>19</sup> The same text, however, specifies that the use of an accelerated procedure for invitations to tender valued at less than 2 million ECU "shall not exclude the possibility of the Commission's proposing an international invitation to tender to the authorities of the ACP State for agreement when the works in question, because of their specialised nature, might be of interest to international competition". This latitude is the fruit of experience. It has in fact been found that some works of comparatively small value, including certain forms of hydraulic improvements, are so specialised that firms other than those based locally are able to offer the best terms for the execution of the work concerned.

It should be noted that when invitations to tender are made by the accelerated procedure, they are covered in Europe by the publication of a summary note through the Official Journal of the European Communities and the several papers which reproduce this information. The time allowed for the submission of bids is that habitually allowed for public contracts in the beneficiary country, subject to a certain minimum.

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- 19 It is expressly laid down that the procedure can only be used for works contracts.

It is reasonable to conclude that the accelerated procedure for inviting tenders is not a real threat to competition. Outside firms can in fact participate if they wish. The Commission, by encouraging a procedure on these lines is helping to stimulate national public works firms in the ACP countries (see below); but at the same time, in view of the improbability of external competition, it is effectively working towards the acceleration of the projects in question.

d) Specific participation restrictions -- contracting by private treaty and with government agencies

For certain operations relating to exceptional aid, and for others in which the urgency of the situation is recognised, or where the nature, minor importance or particular characteristics of certain works or supplies so warrant, the authors of the Lomé Convention allow, as in the Yaoundé I and Yaoundé II systems, possible derogations from the rule of open international tenders, including contracting by private treaty ("direct agreement") or the performance of contracts through government agencies.

1. A contract is said to be placed by private treaty when the competent authority in the ACP Country concerned enters freely into such discussions as it considers useful, and awards the contract to the undertaking or the supplier it selects.

Since this procedure is intended to be exceptional, the General Conditions applicable to contracts financed by the EDF<sup>20</sup> lay down (art. 53) the limiting circumstances within which such derogations from the basic public contracting principles are to be considered permissible. Apart from urgency or the minor importance of the works or supplies, instances include cases in which the execution of works, or the manufacture of supplies, is exclusively reserved for holders of patents or licences to use, process or import the articles concerned; and cases in which no regular bids have been received or only bids at unacceptable prices.

It is to be noted, however, that even when there is recourse to this procedure, the administration is required to give consideration to the fullest possible extent and by all appropriate means to competing contractors or suppliers capable of carrying out the work required.

For works or supply contracts financed by the EDF, indeed, the application of the private treaty procedure is quantitatively marginal.

This does not apply to service contracts, for which the governing principle is that technical cooperation contracts should normally be placed directly.

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20 See below Chapter II

Before the Lomé Convention this principle was absolute. Now that EDF IV is in operation, some of the contracts may be placed by calls for tenders, especially in cases of important surveys of a specially complex or technical character; but the use of the tender procedure has to be justified by precise reasons of a technical, economic or financial character.

For every technical cooperation programme for which the contract is to be placed by private treaty -- the usual procedure -- the Commission draws up a restricted list of candidates who are nationals of member countries and/or ACP Countries. These candidates<sup>21</sup> are chosen under criteria which make sure of their qualifications, experience and independence, with a note of their availability for the work contemplated. The ACP country then makes its choice, from this list, of the candidate with whom it wishes to contract.

In the exceptional case, when there is to be a call for tenders, the restricted list is drawn up by the Commission in close cooperation with the ACP country concerned, and based on the same criteria.

In conformity with the usual rule in the tendering procedure (see below) the contract is awarded to the candidate making the bid deemed most advantageous by the Commission and the ACP country concerned.

2. The performance of contracts by government agencies means, that it is to the administration itself that the work is entrusted. It rules out any recourse to a contract with a firm and, a fortiori, any idea of competition.

For the reasons stated, the application of this procedure is used only to a limited extent in the EDF practice. It should be noted, however, that in the rules for the Fourth EDF, there is a somewhat bigger scope for this method intended to encourage greater participation in medium-scale projects by the resources of the country concerned. This form of recourse to public works departments may be authorised where the recipient ACP country has substantial suitable equipment and qualified staff and resources available in its national departments. This is, however, subject to a limit. By article 19 of Protocol No. 2 application of this rule is limited to schemes costing under 2 million units of account. Moreover the ACP country is not in a position to make use of this latitude, or any of the other derogations from the open international tender rule, except with the consent of the Commission.

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21. At Brussels the Commission has a voluminous card index recording the names and particulars of consultants and experts who have indicated their interest in operations carried out for the EDF.

## II. EQUAL TERMS AND CONDITIONS

If competition is to work normally and the contract to be matched with the offer which is economically the most attractive, it is implicit that tendering firms be given access to the market on the same terms and conditions. This is the fundamental guarantee for these firms, that they all have equal chances of securing public contracts. It is of special importance when -- as is the case for contracts financed by EDF - participation is open to firms from many countries. Care was therefore taken to state very explicitly in the basic documents, that participation is open on equal terms to all those qualifying.

Apart from various exceptions connected with the desire to protect the industries of developing countries, the Commission has always kept strictly in line with this rule. As expressly directed in the official texts, it has sought to identify and eliminate all technical or administrative obstacles -- formal or factual -- which tend to set up discrimination between firms and thus do not give them equal terms and conditions for their participation. The Council has given full encouragement to the Commission, which has been learning from each individual case and has built up a whole arsenal of rules and measures to ensure the normal play of competition.

EDF experience over more than 15 years has made it clear that discrimination can occur at every stage of the procedure. The rules and measures are accordingly framed to ensure equality of conditions, alike in specification, the drafting of bids and the award of contracts.

### A - SPECIFICATIONS AND CONDITIONS

The Commission does its best to provide potential tenderers with a file of particulars as complete and as easy to understand as possible. This reflects a desire to facilitate the work of compiling the bids, and also to give firms, little versed in the language in which the particulars are set out, a document which requires the least possible trouble in preparing a translation. This attitude was in fact dictated by the desire to ensure full conformity to the contractual character of the assignments. This explains the importance attached to the written document as the determining and unequivocal statement of the conditions applicable to contracts. The documents of which the tender file is made up, are in line with the usual practice about this. Leaving aside advertisements and information documents (see below) the contractual items governing the contract procedure are two in number :

- the General Conditions or specifications, which is the general set of rules governing the preparation award and execution of EDF contracts;
- the Special Conditions determining the individual arrangements for each particular contract.

#### a) The General Conditions

At first the contracts financed by the EDF were not subject to any standard set of general conditions. The Commission was anxious to respect the sovereignty of the partner countries, and it was therefore the regulations of each of these

countries in matters of public contracting which were applied to the EDF contracts.

As the regulations of associated countries grew more and more diverse, however, European contracting and supply firms frequently expressed their regret that the general clauses and conditions applied in the different associated States had not been brought into uniformity. They urged the fact that they were obliged to obtain these regulations from the associated countries, have them translated and study them very carefully because there were important differences between one country and another. Moreover, the general conditions were often voluminous to a degree disproportionate to the passages essential to the project covered by the invitation to tender, so that the preparation of a bid was considerably complicated and delayed. It is certain the diversity and complexity of the regulations affecting the execution of public contracts are a genuine source of difficulty. For firms in other countries the study of these texts are an unexpected preliminary and often an obstacle which it is difficult to surmount. Firms of undoubted technical and financial status are often inclined to abstain from tendering or, in the event of their lodging a tender, to find undue difficulty in the assessment of the risks and uncertainties because of their insufficient knowledge of the local procedures and practices. These are for them factors of insecurity, the importance of which they tend to exaggerate and which may induce them to put in unduly high tenders. Conversely, firms on the spot with a knowledge of local rules and practices are comparatively at an advantage. Such situations result in prejudice to the equality in the terms of access, and thus impair the normal free play of competition.

The institutions of the Community were already aware of these difficulties in the period of the Second EDF, and brought under consideration the drafting of a single set of general conditions applicable in all the associated States, countries and territories, for works or supply contracts financed by the Fund. In the Yaoundé II Convention, the partner States agreed in principle to a joint regulation on these lines.<sup>22</sup>

The Commission, with these texts to back it, set to work on the preparation of a text which was later approved by the institutions of the Yaoundé II association. As a result :

- Council of Association Decision No. 42/71, of 30 November 1971 (O.J. No. L/39 of 14.2.72) brought into force for the AASM the text of the General Conditions ;
- the EEC Council Decision No. 73/313 of 24 July 1973 (O.J. No. L/287 of 14/10.73) brought in the same measure to apply the General Conditions for the OCT.

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22 Article 16 of Protocol No.6 annexed to the Yaoundé II Convention.

In formal terms the General Conditions are a collection of 137 articles grouped under two headings of different legal scope.

The first group covers the provisions of a regulatory character, which the interested parties may not waive by agreement. This limitation of the rights of the contracting parties springs from the concept of "rules of the game" fixing a number of principles and definitions, organising the procedure for preparing and awarding the contracts and laying down the machinery for settling differences and disputes. The Commission can thus rely on the application of the rules considered fundamental for purposes of healthy competition.

The second section covers the clauses of a contractual nature, representing a pattern of requirements which can be modified or adapted to the requirements of any specific contract. These provisions are mainly concerned with the arrangements for the execution of contracts. Some of them apply both to works and procurement contracts, while others are concerned exclusively either with works contracts or with supply contracts.

A point to be emphasised is the material progress in improving the conditions of competition represented by a document of this kind.

1. The content of the General Conditions is marked by standardisation, which provides an undoubted legal security for firms which are thus better able to assess the condition governing an overseas operation. The most decisive result is, that firms in other countries no longer need to make bids containing an over-estimate of the risks arising through the existence of a multiplicity and diversity of national rules and regulations with which they are not themselves familiar. As an influence on the diminution of project costs this is far from being a negligible factor. Moreover the immutability of the clauses relating to the preparation and award of contracts is a very substantial guarantee of the equality of terms and conditions. It is reinforced by the fact that the General Conditions are available in all the official languages of the Community.

It is thus for the firms to acquire closer and closer knowledge of a document, the up-to-date nature of which is an advantage which is only just beginning to become apparent. The Commission in fact was working not only on the basis of regulations as they existed in the Member States and the partner countries, but was making improvements in the instrument by adapting it to necessities which come to the surface in the present-day conditions in which public contracts are prepared and carried out. Moreover, it made use of the most recent work on the subject carried out by Community institutions.

2. The scope of the General Conditions undoubtedly marks an advance in the way public contracts are regulated internationally.

Arrangements have in fact been made to have the General Conditions incorporated in the legislation of each associated country, and in the Community legal systems. This point is important, as showing that the General Conditions are

not a mere reference document drawn up by third parties and available for supplementary reference. The new conditions thus laid down become part of the national regulations in the same way as the texts governing internal national contracts, and take their place as elements of local law applying to contracts financed by the EDF. In this way, though the pattern is common to a number of States, the contracts are made and executed in full respect for individual national sovereignties.

Thus the General Conditions act as a codifying influence, the advantages of which must not be underestimated.

This explains why the negotiators for the Lomé Convention, in the light of this experiment, provided for an extension of the General Conditions system which would be the same for all the partner countries. By article 22 of Protocol No. 2 "the general provisions and conditions applicable to the placing and performance of public works contracts financed by the Fund shall be the subject of common rules adopted on a proposal by the Commission by a decision of the Council of Ministers at its second meeting following the date of entry into force of the Convention".

The text at present in force, however, cannot be reenacted as it stands. Various adaptations are needed to bring it into conformity with the enlarged cooperation covering the whole EEC-ACP partnerships.

To begin with, the new text will have to take into account the traditional system in force in the English-speaking countries. Pending the final adoption of this new version -- which, for completeness, would have to include provision to cover the General Conditions applicable to service contracts<sup>23</sup> -- transitional arrangements will be made. The former AASN will continue to operate for the EDF contracts, the joint text which is currently in force, while the new ACP partners will apply their own national legislation and practice, but excluding any discriminatory provision affecting the collective entity EEC-ACP.

#### b) The Special Conditions

The second item making up the provisions is the statement of special requirements and its annexes. Its content is essentially the technical part of the tender file. It also contains many administrative clauses. These two aspects -- the technical and the administrative -- require examination in the light of the equality of access rule.

1. On the technical side, the Commission several times came up against the difficult problem of neutrality in defining the subject matter of proposed contracts, especially on the supply side.

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23. The general conditions intended to govern service contracts have been applied experimentally for technical assistance contracts since March 1972, and for study contracts since April 1973. These documents, however, are quite distinct from the General Conditions which apply to works and supply contracts.

There are difficulties whichever solution is adopted. To begin with an unduly detailed specification brings in a serious risk of restraining the competition because, at least in the extreme case, it would virtually point to a specific manufacture. On the other hand, an unduly curt description would lead to uncertainty and even induce potential tenderers to abstain because of the complexity of techniques and the multiplicity of goods available in the market. The skill of compiling the tender dossier therefore consists in finding a golden mean between the unduly vague and the over-precise.

For this purpose the Commission uses a variety of procedures in different cases :

- when the goods are standardised on the international scale (dimensions, shape, weight, proportion of components etc.) the Commission services are quite willing to use this as the system of reference. A very useful factor for this purpose is the harmonisation of technical specifications which is being worked out on the Community scale under the "Euronorm" procedure -- especially since the published particulars are easily available to tendering firms. Harmonization work under the Community transport policy is a special case which has made it possible to broaden the competition in the supply of vehicles.
- in difficult cases the Commission seeks advice and technical cooperation from independent experts or specialists from trade organisations. Thus, on the question of fertilisers the method enabled a standardised and independent description to be laid down, based on the purpose and use of the supplies to be ordered.
- in all cases the Commission is careful to insert in the tender dossier a statement that any material or supplies may be proposed, provided they are functionally equivalent to the specification or reference item.

2. Though the technical description of the works or supplies is a determining factor from the standpoint of equality of terms, it must not be forgotten that the execution of the contract falls within an administrative framework which may also have in itself less obvious grounds of discrimination. The Commission, which is fully aware of this additional difficulty, has over the years worked out a number of administrative clauses intended to ensure the equality of terms and conditions.

Thus, ever since the Second EDF came into force, the Commission has inserted in the tender dossier an arbitration clause, overriding common law, for the settlement of disputes between the principal contracting party and the firm, in regard to the execution of the contract. The Commission has in fact prepared a proposal for settlement of disputes specifically for contracts financed by the EDF. The enactment of a regulation to this effect is provided for in Protocol No 2 annexed to the Lomé Convention, so that the outcome of this proposal will be part of the framework of the Fourth EDF.



At the request of trade organisations, too, the Commission has taken the necessary precautions to prevent excessive after-sales service requirements resulting in suppliers with no establishment in the beneficiary countries being eliminated from the competitive tendering. The EDF invitations to tender accordingly stipulate that after-sales service may be provided either by the supplier himself or by an intermediary for whom he has produced references.

On the question of standardising the administrative clauses applicable to EDF-financed contracts, a decisive step remains to be taken - namely, the drafting of standard forms for special requirements, notably in tenders for works. The Commission staff is working on this task, which consists in the drafting of standard clauses for each sector (e.g. for roads, waterworks, buildings etc.) which will need only minimum adaptations to the conditions of a specific project. This system, besides affording an appreciable saving of time in drawing up the invitations to tender, has the additional advantage of providing uniformity in the conditions governing Fund-financed contracts, in accordance with the General Conditions, to which the standard clauses will be articulated.

#### B - PREPARATION OF TENDERS

The Commission has done its utmost to provide tenderers with as much information as possible on various matters affecting the calculation of bids, ignorance of which might have led to serious discrimination. This applies especially to customs and fiscal matters, arrangements for the temporary admission of equipment and transport questions.

For works contracts, in order to avoid inconvenience to external firms arising from their ignorance of customs and fiscal regulations in the beneficiary countries, the conditions require a general information note to be attached to the tender dossier giving, inter alia, a precise description of the customs and fiscal systems. This note also gives an account of duties which may be collected on the temporary admission of the material needed for carrying out the contract. <sup>24</sup>

For supply contracts when delivery is required elsewhere than at the port of discharge, the calculation of transport costs -- especially when the rates have not had to be officially approved -- may raise serious difficulties for non-resident suppliers and thus affect the conditions of competition. In these cases the administration prepares an information note describing the transport facilities for which rates have been approved, and giving information on non-approved transport services, so that the firms can assess their transport costs.

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24 Regulations about temporary admission may vary from country to country. In some cases temporary admission may be general and the system provides total exemption from all duties and taxes payable on entry for the duration of the period of admission of equipment to be used in the execution of the works. In other cases the temporary admission may be granted ad hoc, the importer being charged a specified proportion of the import duties and taxes computed by reference to the ratio of the period of utilisation of equipment in the beneficiary country and the normal period for their full depreciation.

In addition, when the scale of the projected work is sufficient, the national administration organises visits to the site and supplementary information meetings for interested firms. This procedure also provides an opportunity for discussing technical, administrative and financial points essential for price calculations.

These visits to the site, when they are well organised and adequately guided, have produced very good results in a number of ways. With an appraisal on the spot of the difficulties which may arise during the work, coupled with a clear statement of labour conditions, wages, transport and the quality of local materials and equipment, the price calculations can be based on a full knowledge of the facts. This is a way of avoiding project costs being unduly raised through the charging of risk margins added by firms unversed, or insufficiently versed, in local conditions. In addition, these joint visits help to build up a confident atmosphere among the future contracting parties who have detailed discussions on the future handling of the works, in the light of which their appraisal is determined. From the administrative standpoint the visits provide an opportunity of forming opinions as to whether the interested firms are really competing with one another, or whether they are concerting their approach on specific points. In fact the uncertainties as to how a contract shall be carried out, since they preclude any exact price calculation, often lead to firms agreeing between themselves.

It should be added that in this case, also, the Commission has sought to guarantee the best possible competitive conditions, and for this purpose has secured the preparation of a descriptive minute at the end of the visit to the site. This is sent to all firms which have expressed their interest in the project and its contents become an integral part of the tender dossier and thus assume a contractual character.

#### C - AWARD OF CONTRACTS

Close cooperation has been built up over the years between the staff of the Commission and the competent authorities in the countries which benefit from EDF aid, for the purpose of seeing that the awarding of contracts conforms to the principle of equality of terms and conditions. The measures taken for this purpose are threefold.

##### a) Opening of tenders

The opening of the envelopes is the duty of a committee appointed for the task in accordance with national practice.<sup>25</sup> In accordance, however, with the texts

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25. In the preamble to the decision applying the General Conditions, the Council of Association emphasised the desirability that the public opening of tenders should progressively become the rule for all categories of invitations to tender. It is now compulsory for all supply contracts and is still at the discretion of national regulations for works contracts. In practice a high proportion of the partner States now conform to this procedure, and this should be further confirmed among the ACP countries as a whole.

determining the arrangements for cooperation between the European Commission and the administrations of the beneficiary States, the Commission Delegate, which is its permanent representative on the spot, is present as an observer at the sitting of the Committee at which the envelopes are opened, and at the subsequent meetings devoted to the examination of the tenders and proposals for the award of the contract. The Delegate thus comes into the picture at the different stages of the procedure as guarantor of the regularity of the operations. In the name of the Commission he approves the choice of the contractor, subject in complex cases to reference to the Commission itself.

b) Comparison of tenders

For works contracts the comparison raises no special problems, since the tenders are drawn in the currency of the beneficiary country.

For supply contracts account has to be taken of the complexity of the production and distribution process. Thus firms are free to express their tender either in the currency of the country in which they have their registered place of business, or in that of the beneficiary country, or even in that of the member State or ACP State in which the supplies are produced. However, in order to ensure equality in the comparison of tenders prices shown in currencies other than the national currency are converted into the latter on the basis of the exchange rates published monthly in the Official Journal of the European Communities. The reference rates are those in force on the first working day of the month preceding the final date for the submission of the tenders.

Two problems -- taxation and transport costs -- arise in comparing the tenders for supply contracts.

1. In regard to taxation, the Commission has arranged a compromise between the normal practices of international trade and the need to protect the national industries of the associated developing countries. This is why tenders are calculated net of entry duties and taxes when they are concerned with manufactured goods or supplies originating outside the beneficiary country. On the other hand, in order to neutralise the effect of indirect taxation when tenders are compared, those involving local manufactures or supplies are submitted without including the consumption or production tax (ex works price). The fixing of rules governing taxation and the transparency of the latter are of great importance in determining whether the terms are equal. The fixing of these rules enables the tenderers to calculate their tender with full knowledge of the facts; and should the tax system change the firms are still covered because of the price review mechanism.

2. In the transport field there has been a particular problem with regard to supply contracts if the place of delivery is not the same as the port of discharge. In this case calculation of the cost of transport to the interior, and in particular that of transport, for which there is no official rate, may raise serious difficulties for non-resident suppliers in that they do not have sufficiently accurate information available on the costs. There

have been occasions when various competitors have approached one or more transport firms holding a monopoly and have been quoted different rates. If the cost of transport into the interior is thus calculated differently according to the various tenderers, and if, because of the distance involved, transport represents a considerable part of the contract, equality of competition is no longer assured.

In order to eliminate this source of discrimination, which might affect the conditions of competition, the invitation to tender specifies in the dossier the geographical location for which the cost of transport and insurance is to be included in the tender. This must be situated on a network subject to official rates, and is called "the point for comparison of tenders". The cost of transport from this point to the place of delivery is not taken into account when tenders are compared.

The principle underlying this system, which consists of excluding from the comparison of tenders any element in the contract which might be calculated on an erroneous or false basis is used for solving in the same fashion problems similar to that of transport. If the supplier of an item of complex industrial equipment, for example, is required to train personnel for a given period, payment for this service may vary according to the board and lodging allowances made by the tenderer, which cannot be calculated on the same bases. In such a case the price submitted for the training contract is calculated independently from the prices asked for the equipment and its installation. This enables the basis used for the calculation to be known, any errors to be detected and the cost of training to be excluded from the comparison of the tenders or reincluded after adjustment.

#### D. Decision on the award

Under Article 21 of Protocol No. 2 annexed to the Lomé Convention, the Commission and the competent authorities in the ACP countries are required to ensure that the tender selected is economically the most advantageous, taking into account, in particular, the qualifications of and the guarantees offered by the tenderers, the nature and conditions of execution of the works or supplies and their price, utilisation costs and technical value.

Such a formula, which repeats the system already applied in the first three funds means that the tender accepted is not necessarily the lowest. It brings into account the considerations appropriate to good administration, but also others besides the mere amount of the cash bid, tempering the finance aspect by technical considerations. Moreover, the Commission sees to it that, whenever necessary, the special conditions record the factors to be taken into account for this purpose. It is to be noted, however, that the negotiators of the new Convention were at pains to add that where two tenders are acknowledged to be equivalent on the basis of the criteria stated above, preference shall be given to the one which permits the greatest possible utilisation of the physical and human resources of the ACP States.

This consideration of the resources of ACP countries is one of the aspects of work done in recent years to encourage the economic development of the countries of the Third World which have special relationships with the EEC. This has led the Community to favour various preference systems, rather than adhere to an unduly formal interpretation of the principle of equal conditions. The Yaoundé II Convention was the first to contain a clause to the effect that the principle of participation on equal terms was without prejudice to the enactment of the measures intended to assist undertakings in the AASM countries to take part in the execution of certain works or supply contracts (art.26 (2)). The authors of the Lomé Convention included a similar provision in the new agreement (art. 56 (2)). The benefit of these "appropriate measures" is mainly reflected in the price preference mechanism operating at the stage of choosing the contractor.

### 1. Supply contracts

The authors of the Yaoundé II texts had had the idea of a "degree of protection" for national industries to operate when comparing tenders of equivalent economic and technical quality.

The Financial Regulation for the Third EDF had reserved its application for the protection of newly created or developing industries with a sufficient margin of added value. The amount of the protection, decided on a case-by-case basis, could be as high as 15 % compared with the tender considered the most economically attractive.

The possibility was used on several occasions, and produced evidence of the good quality of tenders lodged by national suppliers. On the other hand, approval by the Fund committee <sup>26</sup> on each occasion was a requirement necessarily complicating its implementation and keeping its development in check.

In the light of this experience the texts for the Fourth EDF gave the arrangement general application. The 15 % preference is now to apply automatically to all tenders for supplies originating in any of the ACP countries in which the added value is sufficient (Lomé Convention, Protocol No. 2, art 20 (c))

2. Works contracts -- under the Yaoundé system there was no mechanism for price preferences in works contracts.

The innovation introduced by the Lomé Convention is thus worthy of special note: Protocol No. 2 extends the price preference system to works contracts (art. 20 (b)). "to allow for the real competitive position, as shown in EDF practice for many years, the degree of protection is fixed at 10 %. This is more than is allowed by the World Bank (7.5 %) but nevertheless

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26 An organisation made up of experts from the EEC member countries, which meets to approve financing proposals for projects and programmes to be carried out in the countries which benefit from EDF intervention.

helps to avoid an inordinate increase in the cost of investment projects. The same desire to strike a balance between encouragement for national firms on the one hand, and the desire for economic efficiency on the other, led the negotiators of the Convention to allow this preference only for the execution of works contracts of less than 2 million EUA.

It should be noted, incidentally, that under the Fourth EFP there are three separate provisions for encouraging participation by firms and administrations in ACP countries applying to operations of up to 2 million EUA. These are; the performance of contracts by government agencies in certain conditions; the issue of invitations to tender by the accelerated procedure; and price preference in works contracts.

It should be emphasised, also, that because of the advantage granted, the firm enjoying the benefit is required to have a genuine link with an ACP country. From this standpoint the "national" character of firms is determined by the legislation of the interested countries themselves. On the other hand, Protocol No. 2 of the Lomé Convention requires two sets of key conditions to be met, so as to avoid any risk of a national link being fictitious. These are :

- first, that the firms concerned should have its physical domicile and its principal business activity in the ACP country ;
- secondly, that a significant proportion of the owners and staff should be nationals of one or several ACP countries

A joint statement by the EEC and the ACP countries makes it clear that this "significant proportion" is to be determined on a case-by-case basis by the Commission and the ACP State or States concerned.

### III. THE COMMISSION'S COMPETITION POLICY

The Commission has always sought to improve competitive conditions of competition, to which end it devotes special care to the actual nature of the goods and services covered by the contracts. It has also introduced a number of measures to arouse or increase the interest taken by the firms.

The two components of the Commission's competition policy are thus directed partly to the projects and partly to the firms.

#### A - PROJECT POLICY

In handling the projects and programmes put forward by the beneficiary countries, the Commission has always endeavoured to issue the invitations to tender and distribute the relevant contracts in such a way as to keep international competition active. The policy followed in this field is of comparatively long standing. Already, under the Second EDF, the Commission had made it its aim to group the invitations to tender into lots as large as is economically and technically desirable. For the Third EDF, this practice was brought into the financial regulation itself, which is an indication of the importance attached to this question by the EEC member countries.

For the Fourth EDF there is no text expressly dealing with the balanced nature of services. The fact remains, however, that the General Conditions invite the administration, when it is decided to divide up an invitation to tender into lots, to bear in mind the advantage of grouping the services into homogeneous lots which are as large as possible.

In the light of the foregoing, the following courses of action have been adopted :

- a) In general the decision to split an invitation to tender into lots is governed by economic considerations (such as the geographical situation) and technical factors (in particular to take account of the specialisation involved). It is standard practice to allow tenders to be lodged for a single lot, several lots or all the lots offered, so that any firm shall be able to participate consistently with its own scale of operations. In addition, cost benefits can be obtained if the tenderers grant an overall rebate when some of the lots are grouped together.
- b) As regards works contracts the practice of splitting into lots and grouping invitations to tender into homogeneous lots has made EDF contracts accessible to small and medium firms and thus been an important factor in making competition the keener.

In order to take account of geographical situations and to meet the efficiency requirements, the Commission is trying to group into a single invitation to tender, sub-divided into several lots, works of the same kind scheduled to be undertaken in regions which are very close together. Another

possibility would be to have invitations to tender issued in close succession for works of the same type in one or several neighbouring countries.

Such grouping or coordination also encourages cooperation between firms, thus contributing to securing one of the Commission's aims for which purpose it has employed a number of specific instruments (see below).

c) As regards supplies, the Commission's approach is to invite tenders, so far as possible, for everything required for the execution of a specific project, or at least for everything sufficiently similar to be covered by a single invitation to tender. In other words, as was the case regarding neutrality of specifications (see above) the rule in presenting the tender dossier is to seek a fair compromise between excessive division and undue concentration of the lots. The Commission's staff, therefore, take special care in these grouping operations. In some cases they are governed by geographical considerations; and they prevent the pepper-pot sprinkling of the same kind of contract for the same kind of supply in contiguous areas on the pretext that they happen to be on different sides of a frontier.

In addition, the Commission, in making its choice, is guided by the structure of the industries concerned, especially the European ones. It has acquired a reasonably thorough knowledge of these structures, as a result of the many representations made to it in the early years of the EDF, and the approach adopted -- splitting or grouping -- is decided accordingly.

To complete the package of measures for rationalising the grouping of supply lots, the Commission has lately been studying the possibility of placing orders for delivery over a period of several years, by virtue of a single invitation to tender. Such a procedure would have equivalent advantages for the beneficiary country and for the contractor, the one having the benefit of a price and utility guarantee and the other the economic advantage of an order on a large scale. This system would apply essentially to agricultural projects which usually take several years to complete.

d) It should also be stressed, that the practice of grouping into lots has enabled the disadvantages inherent in the "turnkey" project system to be avoided.

Though this system leads in some cases to fully coordinated projects completed by the scheduled date, it has various disadvantages viewed in the light of general development principles. The educative effect, which is one of the expected effects of cooperation, is altogether lacking; it is difficult to reconcile the procedure with the underlying principle of invitations to tender, because this kind of all-embracing job does not exactly correspond with the structures of industry in the EEC countries or those of the ACP. Lastly, this system does not provide access on equal terms to all the nationals of all the countries, for it would exclude industry in ACP countries which do not have the capacity and personnel needed for all-embracing work.



On the other hand, the system of grouping into homogeneous lots, which are as large as economically and technically warranted, enables firms to submit tenders directly in accordance with their capacity. This is a procedure which caters extremely well for firms in the beneficiary countries.

## B - POLICY FOR FIRMS

In regard to the firms, the Commission's action has been concentrated for the most part in three fields -- information, cooperation and finance.

### a) Information

It has always been the Commission's policy to give firms as wide a range of information as possible. The intention in the first instance is to provide a fuller knowledge of EDF procedures and information on Fund operations, adding to this as many pointers as possible on conditions in the country where the contract will fall to be carried out and the site where the firm will be working.

#### 1) The Commission has prepared an information booklet on the EDF procedures?<sup>27</sup>

It is available in the official languages of the Community, and explains the whole working of the Fund machinery from the introduction of a project to the end of its execution. It includes a summary of the regulations on invitations to tender, the system of payment and the part played by the executive agents (the Authorising Officers, the Commission Delegate and the Paying Agent) who play their part during the different stages. The booklet has had a wide circulation among European firms through trade organisations and Community information offices. It is supplied directly in response to requests for information received daily from firms desiring to participate in tenders.

#### 2) EDF operations are given a good deal of publicity, so as to ensure that plenty of information is available in quarters potentially interested. This covers the main stages in the course of the operation -- assent to the finance; the finance conventions; publication of the invitation to tender; and the result of the tendering procedure.

- The financing decisions of the Commission are made after assent by the EDF Committee, and are recorded in a note in the Official Journal of the European Communities, indicating the outline of the project and the amount of the credits provided. The information is repeated in a press communiqué issued by the Community spokesman and reproduced by press agencies and specialised newspapers in the EEC countries and the beneficiary countries.

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27. The European Development Fund. "From the introduction of the project to its execution" European Communities Publications Office. Revised edition 1973. A further edition, adapted to the Lomé Convention procedures, is in course of preparation.

- The signing of financing agreements is announced in the Official Journal of the European Communities and a press communiqué issued by the Community information departments.

- The notices of invitations to tender are published as described above.<sup>28</sup>

- Publicity is also given to the results of the tenders. As soon as the contract is awarded the name of the contractor, the amount of the tender and a note of the number of participants are published in the Official Journal of the European Communities under the heading "Results of Tenders".<sup>29</sup>

This practice originated as a Commission initiative in the early years of the EDF, and has been made official by the Financial Regulations of the Second EDF and the Third EDF, and brought in at Treaty level by a clause in Protocol No.2 of the Lomé Convention.

It is primarily intended to round off the information measures described above, by publicity for the final phase in the contract award procedure.

It has also been found useful for informing the firms involved in a subsidiary capacity, such as sub-contractors, carriers, forwarding agents and other intermediaries. The publication puts these firms on notice of the identity of the contractors whom they can then contact and offer their services.

The practice has already been mentioned<sup>30</sup> of attaching to tender dossiers a general information sheet. This has recently been done in a new form, consisting of a booklet compiled for each of the countries which benefit from EDF intervention.

These booklets contain as much as possible of the information needed by a contracting firm on conditions in the country in which he will be working, and the site where his operations will be centered. It includes information of two types :

- a number of practical information items on the country and the site -- geography, climate, administrative organisation, currency system and banking organisation, access routes and modes of transport, the principal transport firms and forwarding agents, the name of the Commission delegate and list of useful addresses.

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28. See above, Chapter I, point B, a.1.

29. An issue of the Official Journal of the European Communities specifically published each year, with the statistics of awards sub-divided by contractor's nationality, also includes a summary of all invitations to tender issued during the year.

30. See above Chapter II, point B

- note of factors of direct importance in calculating prices — the customs system, the fiscal system, manpower and wages, social security charges, transport costs, prices of construction materials, energy, water and the cost of living.

This is information which firms without a local establishment usually do not possess, and on most occasions it is indispensable for any serious price computation.

It should be added that the Commission seeks to maintain the value of the information by bringing it up-to-date every time there is an invitation to tender of any size.

It should also be emphasised that the general information sheet, even though it is issued as part of the tender dossier, does not rank as a contractual document.

#### b) Incentives to cooperation between firms

The grouping of projects into lots has been put forward as a factor making for a better balanced participation by firms in the EDF contracts. A second factor working in the same direction is the formation of multinational groups of firms, on which the Commission has done much patient work.

It was the fruit of considerable discussion with the Union of Industries in the European Community (UNICE). The latter was concerned at the fact that in the early days almost all the contracts for oversea works were awarded to traditional firms — i.e. mainly local subsidiaries of firms in the former metropolitan countries. It had suggested the Commission should take action to ensure that contracts of a certain size be reserved solely for groups of firms composed of partners of at least two different nationalities.

The Commission, however, refused to adopt a measure which might jeopardise free competition. It tried instead to act by persuasion by representing, in the industrial circles concerned, that advantages could not fail to accrue from cooperation on these lines, including the pooling of technology and the reduction of administrative costs.

This desire to promote cooperation was also an inducement to the adoption of the pre-selection formula (see above). This has produced encouraging results, in that stable groups have gradually been formed, often consisting of a local subsidiary of a European firm, another firm which is a national of the beneficiary country and a partner from outside, which is a newcomer to the market. The procedure has been found to improve the technology and organisation of the local partner and provide initiation into local conditions for the new arrival.

The statistical table appended to this booklet, incidentally, brings out an interesting fact. Under the Third EDF the contracts awarded to multinational groups represent 45 % -- not far short of half -- of the total value of contracts exceeding a million units of account.

For contracts above 3 million EUA, the predominance of the international groups is specially marked. The number of contracts is indeed smaller than was secured by France (29 % against 47 %), but again they represent almost half (47%) of the total value of contracts in this category (the French share was 35 %). A detailed analysis of the awards made to such groups shows that it is indeed the bigger contracts with which they are concerned -- all of them for road-building projects, including three for more than 10 million EUA and one of 20 million EUA for a French-German-AASM group.

The above considerations show that the policy of encouraging groups of firms <sup>31</sup> is a practical method for firms which have experienced difficulties in securing an individual footing in these markets to gain access to contracts enjoying EDF finance. Moreover, when it comes to big works contracts the grouping makes for a better balancing of the task commitments, each of the firms concerned finding its outlet in accordance with its capabilities.

c) The firms' financing

The policy followed about the finances of the firms, though it partly determines the way contracts shall be carried out, is also a factor affecting the firms' access to these contracts. This happens in two ways :

- at the tendering stage, the facilities made available to contracting firms have the effect of enlarging the competition for the contracts, especially by bringing in comparatively small firms and others with no local establishment.
- at the later stage, when the work comes to be paid for, the procedures have been speeded up and the steps taken for this purpose make the EDF contracts attractive enough to induce firms to participate.

1. In the execution of a contract, especially one for public works, the contractor often has to incur considerable expenditure, and there is the possibility that his cash resources may not suffice. This is felt, particularly, by the comparatively small firms, which do not have a high financial standing, and have only limited access to bank credit. In order to get round obstacles of this kind, which might restrict firms from tendering for EDF contracts, the Commission has formulated measures to

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31 Protocol No. 2 of the Lomé Agreement expressly invites the Commission and the competent authorities in ACP countries to encourage the formation of groups for cooperation between firms in member countries and firms in ACP countries.

ease the cash strain on the firms, either by making direct advances to them or by making it easier for them to obtain bank finance.

Advances may be granted to the contractor for operations preparatory to the performance of the contract. Subject to a guarantee being found (a deposit or a "joint and several" guarantee) there are two kinds of advance the contractor may obtain :

- a lump sum for commencement, payable as soon as the approval of the tender is notified ;
- an advance for equipment, machines, tooling and material required for carrying out the contract, covering also other large preliminary items such as surveys and the acquisition of patents.

Repayment of the advances is made by a deduction from the instalments payable and possibly from the balance due to the contractor as determined by the Special Conditions.

It should also be mentioned that the lump sum commencement loan, because of its pre-financing nature, is not usually paid off till the contract is already far advanced. . .

Such a mechanism is justified by the desire that the advance really serves its purpose by letting the contractor have the use of the money for an adequate time.

The second source from which some of the cash strain can be relieved is by the use of bank credit.

The opening of these loans or overdrafts for contractors, however, usually involves giving the bank collateral or a guarantee. For this reason the Commission has adopted several mechanisms for making it less difficult for contractors, but without prejudice to any legally enforceable security, necessary alike for lenders and for the administration in the beneficiary countries.

In the early stages the only available machinery was the pledging of the contract itself under the French system known as nantissement, which was well known in French-speaking associated countries. The Commission, however, was anxious to maintain equal terms for firms accustomed to other legal systems, and unfamiliar with this one; and accordingly made it possible to use the more current practice of the assignment of debts.

Moreover, the Commission had noted, especially in the case of supply contracts, that the contractors found it easier to secure advances from their bankers if it could be clearly shown that the contracts were being

financed by the EDF. A procedure of contract authentication was accordingly instituted, under which the Chief Authorising Officer of the Fund issues an authentication certificate if asked to do so by the contractor or his bank.

2) The Commission's action has not been limited to measures for making it easier for firms to obtain funds. It has also done its best to see that the EDF built up a reputation as a prompt payer, and it took a number of steps to ensure the payments due to firms for their services should be made with all due promptitude.

This question must be considered separately for works contracts and supply contracts.

Works contracts are expressed in the currency of the country which is having the benefit of the aid. The currency of the actual settlement is chosen by reference to the nature of the contract and to the country of the contractor's headquarters. Moreover, this proportion of the initial amount of the contract is covered by an exchange guarantee, resulting from the contractual fixing for the whole duration of the works of the exchange rate between the currency of the contracting firm's headquarters and the currency of the country aided by the EDF intervention.

The exchange rate used for this purpose is that ruling on the first day of the month preceding that in which the tenders were lodged.

The exchange rate guarantee protects the contractor against the devaluation of the currency of the country where the works are carried out. Since this involves that part of the contract for which the contractor requested in his tender that payment be made in the currency of his own country, the rate of exchange applied until the services have been rendered in full, remains that in force at the time the tender was drafted.

The contractor is thus safe in the knowledge that the amount of any foreign currency required for paying expatriate staff or importing equipment and material will retain its value against the local currency however much the latter may fluctuate.

For supply contracts the tenders may have been expressed in the national currency of the beneficiary, the currency of the tenderer or that of his place of business, or in the currency of the country where the supplies were produced. The tendering firm chooses between the three, in the light of the country in which its chief business is conducted. The currency of settlement is the same as the currency named in the tender, so that the contractor is not exposed to any exchange risks. <sup>32</sup>

<sup>32</sup> The Financial Regulation for the Fourth EIF has introduced a new procedure - that of quoting supply tenders on the transferable portion in works contracts, in European units of account. In such cases, payments relating to the debt will be made, where relevant, in the currency of one of the Member States or ACP States named in the contract, on the basis of the equivalent value of the European unit of account the day preceding payment.

In order to lighten the interim finance burden borne by the supplier, and to align the EDF procedure on normal business practice, a system of interim instalment payments has been made compulsory. The recommended standard practice is 30 % of the total by way of advance at the time of the order, 30 % against shipping documents attesting effective dispatch, 30 % provisionally on receipt of the supplies at the place scheduled for delivery and the final 10 % balance on the expiration of the guarantee period on the official recording of the final acceptance of the supplies.

In the past delays have often arisen in the payment of the first two instalments under the above schedule.

On due reflexion, the Commission came to the conclusion that insofar as the payments concerned had to be made outside the beneficiary country, and without there even being any need for the payment to be officially recorded there, it was itself entitled to act on its own account as manager of the EDF Fund. The Commission, therefore, now habitually takes direct action by sanctioning and paying these first two instalments on account of the contract.

## C O N C L U S I O N

In ending this report, stress must be laid on the importance of the Commission's work in developing, with the greatest possible detail and clarity, the system of competition and in facilitating access to EDF financed contracts on equal terms.

To this end it has worked pragmatically with two main objectives in view:

- to identify discriminatory factors de jure or de facto which are liable to impair the competition between firms in their participation;
- to draw up common rules for getting rid of these distortions.

In the first years of the Commission's activity, it took note of the reactions of the industries concerned, and proceeded to improve the instrument it was preparing to promote contact with them. It was encouraged by seeing that its methods met with the approval of those concerned, that their purpose was not called in question or their enforcement criticised.

Concerning the results of these measures the first point to note is that the aim of securing lower costs has been in large measure attained. The response to invitations to tender, alike in the number of participants and in the content and amount of their tenders, shows that firms are taking a serious interest in EDF contracts.

It can also be stated that, generally speaking, competition is keen. There have been very few occasions on which beneficiary States and the Commission, through lack of tenders or excessive prices, have had to re-start the procedure by issuing a second invitation to tender or falling back on contracts by private treaty.

It is nevertheless a fact that a well balanced division of contracts between firms of the different tendering nations still depends on a number of complicated factors. Some of them stem from factual privileges, subsisting in the relations between beneficiary countries and the former European metropolitan countries. Others arose through recent changes in international business conditions, especially the higher value of some of the tenders attributable to currency fluctuations.

Here again, action by the Commission is clearly necessary in the early future, so as to mitigate the effects of these distortions of competition. On the other hand, the Commission's action, quite apart from any effort made to counter the vagaries of the economic situation, comes up against a limiting factor which is in some sort psychological, in that it can have no control over the willingness of the industrial world, in all its



diversity to respond to the EDF calls for tenders. It is one thing for the Commission to build up the framework and make the instruments which will ensure equality of terms, but it is another thing to overcome the reluctance in some European industrial quarters, to seek work in countries where the economic, social and climatic conditions are so different from those to which they are accustomed in Europe.

This is also part of the reason why the guidelines laid down for implementing the Fourth EDF reflect increased determination to make use of the national resources of the ACP countries. The broader acceptance of the accelerated procedure for works contracts and the preferences granted to works contractors and suppliers from these countries, will be bound to produce new trends in the allocation of EDF contracts, and establishing a better balance of assignments between foreign firms and those domiciled in the countries concerned. There is no doubt that in the past the search for such a balance, necessary though it be, was not ranked among the top priorities.

The Lomé Convention, too, marks another stage in the history of the EDF, to the work of which three new member countries will now be contributing. This will undoubtedly broaden the competition among those firms which have access to the EDF contracts, partly because of the greater number of participants and partly owing to the greater diversity of European tenders, especially on the technological side.

The Fourth EDF, too, is considerably bigger than its predecessor, which cannot fail to awaken the interest of industrial firms glad to take part in operations on a much bigger scale than heretofore.

Another aspect of the new growth now to be expected is in the Commission's task of joining hands with the ACP authorities, to seek a better balanced participation between the EEC countries and those of the ACP.

Tenders for and awards of works contracts under EDF III (1)

CONTRACTS	up to 1 million u.s.			1 - 3 million u.s.			over 3 million u.s.		
	Tenders (number)	Awards		Tenders (number)	Awards		Tenders (number)	Awards	
		Number	Total amount ( '000 u.s.)		Number	Total amount ( '000 u.s.)		Number	Total amount ( '000 u.s.)
GERMANY	6	1	301	5	-	-	11	1	3,586
BELGIUM	3	-	-	3	-	-	4	-	-
FRANCE	65	12	6,602	70	14	20,306	41	8	39,648
ITALY	8	4	1,783	6	-	-	14	2	15,464
LUXEMBOURG	-	-	-	1	-	-	-	-	-
NETHERLANDS	3	-	-	2	-	-	1	-	-
AASW/OCT	149	49	11,470	32	9	10,444	6	1	4,024
MULTI-NATIONAL GROUPS	12	4	1,956	15	12	20,310	25	5	52,923

NB. The countries refer to single firms or firms forming part of one-country consortia.

- (1) This table covers only contracts financed from the EDF. In cases of co-financing (involving certain major contracts) only the EDF share has been taken into account.