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In accordance with Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community (OJ L 43, 15.2.1983, p. 1), as amended by Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 (OJ L 243, 27.9.2003, p. 1), this file is open to the public. Where necessary, classified documents in this file have been declassified in conformity with Article 5 of the aforementioned regulation.

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COMMISSION
OF THE
EUROPEAN COMMUNITIES

General Secretariat

COM(81) 728 final.

Brussels, 2 December 1981

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COMMISSION COMMUNICATION TO THE COUNCIL

CONCERNING THE RULES GOVERNING THE PLACING AND AWARD OF
SERVICE CONTRACTS FINANCED FROM THE RESOURCES OF THE 5th
E.D.F.

COM(81) 728 final.

EXPLANATORY MEMORANDUM

In the negotiations leading up to the conclusion of the second A.C.P./E.E.C. Convention of Lomé, agreement was not reached on the texts concerning the rules governing the placing and award of service contracts financed from E.D.F. resources, despite successive efforts by the Community to achieve a compromise in the talks. In order not to hold up the overall agreement, therefore, it was decided to extend provisionally the system in force under the first Lomé Convention and to stipulate that new rules were to be determined by a decision of the A.C.P./E.E.C. Council of Ministers at its first meeting after the entry into force of the second Lomé Convention (see Article 142 of the second Lomé Convention).

The Convention entered into force on 1 January 1981 but at its first meeting on 9 and 10 April 1981 the A.C.P./E.E.C. Council of Ministers was unable to deal with the matter. The fact that the timetable specified in Article 142 of the second Lomé Convention could not be kept to, however, does not mean that it is now too late to take action.

The purpose of the attached draft decision is therefore to get A.C.P./C.E.E. discussions going again on this matter in order to determine the rules which are to govern the placing and award of service contracts under the second Convention.

The draft decision is based on the latest Community proposal, which was put forward in May 1979.

For the information of the Member States, a summary table attached to the draft decision gives the texts at present in force on a temporary basis alongside those proposed in May 1979, together with comments on the latter regarding changes that could be made to the texts in the negotiations with the A.C.P. States.

.../...

The Commission proposes that as soon as the Community has agreed on a text it should be transmitted to the A.C.P. States in good time for the matter to be discussed at the next meeting of the A.C.P./C.E.E. Council of Ministers, which is to be held in Libreville in 1982.

DECISION N° OF THE A.C.P./E.E.C. COUNCIL OF MINISTERS OF

establishing the rules governing the placing and award of service contracts financed from the resources of the European Development Fund under the A.C.P./E.E.C. Convention signed in Lomé on 31 October 1979.

THE A.C.P./E.E.C. COUNCIL OF MINISTERS,

- Having regard to the second A.C.P./E.E.C. Convention signed in Lomé on 31 October 1979, hereinafter referred to as the CONVENTION, and in particular the Article 142 thereof,
- Whereas it is necessary to determine the specific rules governing the placing and award of service contracts under the Convention;
- Whereas these rules are to replace, with effect from 1982, those provisionally laid down in Annex XIV to the Convention pursuant to Article 142, § 2,

HAS DECIDED AS FOLLOWS :

Article 1

With effect from 1982, the rules governing the placing and award of service contracts under the Convention shall be those set out in the Annex.

Article 2

The A.C.P. States, the Member States and the Community shall be bound, each to the extent to which it is concerned, to take the measures required to implement this decision.

Done at,

For the A.C.P./E.E.C. Council of Ministers
the President

Rules governing the placing and award of service contracts under the second A.C.P./E.E.C. Convention of Lomé

Article 1

1. Service contracts shall be awarded following a restricted invitation to tender. Certain contracts may be arranged by mutual agreement, notably in the case of the following :
 - a) schemes of minor importance or short duration;
 - b) technically difficult schemes;
 - c) schemes entrusted to individual experts;
 - d) schemes further to schemes already in hand;
 - e) following an unsuccessful invitation to tender.
2. The method of awarding each contract shall be decided by mutual agreement between the Commission and the A.C.P. State concerned.

Article 2

1. For each technical cooperation scheme involving an invitation to tender the Commission and the A.C.P. State concerned shall compile by mutual agreement, following a preselection procedure where appropriate, a short list of candidates selected in the light of their legal and financial situation, their qualifications, experience, independence and availability.
2. According to the individual case the invitation to tender may cover :
 - a) the design of the cooperation scheme and the services and/or personnel to be provided, to the exclusion of any financial aspect, the prices payable being negotiated subsequently, or
 - b) both the design of the cooperation scheme and the prices.

.../...

3. The invitation to tender dossier, to be drawn up by the A.C.P. State in agreement with the Commission, shall give details of the manner in which tenders are to be submitted and the criteria to be used in selecting the contractor.
4. The Commission and the appropriate Authorities of the A.C.P. States shall ensure that the most advantageous tender is chosen for each scheme, account being taken of inter alia the technical quality of the tender, the organization and the methods proposed for the services to be provided, the qualifications, experience and special skills of the personnel assigned to the scheme and, in the case referred to in paragraph 2 b) of this article, the price of the services.

Article 3

Where the mutual agreement procedure is applied the contractor shall be designated by the A.C.P. State on a proposal from the Commission.

Article 4

1. Service contracts shall be negotiated, drawn up and concluded by the appropriate Authorities of the A.C.P. States, in agreement with the Commission and within the framework of general conditions governing the award and performance of contracts adopted, on a proposal from the Commission, by a decision of the Council of Ministers at its first meeting following the adoption of this decision.
2. However, until the entry into force of the general conditions, the performance of service contracts financed by the Fund shall be governed :

.../...

.../...

- in respect of the A.C.P. States parties to the Convention signed in Yaoundé on 29 July 1969, by the general conditions currently used in the contracts financed by the Fund;
- in respect of the other A.C.P. States, by their respective national laws or their established practices regarding international contracts, unless they apply on an interim basis the general conditions currently used in contracts financed by the Fund.

Article 5

1. In the award of service contracts the A.C.P. States and the Community shall ensure the elimination of any discriminatory practice that may prevent equality of treatment for all candidates or tenderers who are nationals of the Member States or the A.C.P. States.
2. The Community shall encourage cooperation between consultancy firms and consulting engineers or experts of Member States and A.C.P. States, temporary partnerships, subcontracting and the use of experts from the country itself in the teams belonging to consultancy firms or consulting engineers from the Member States.

Text of Articles 24 to 27 of Protocol N° 2 to the A.C.P./E.E.C. Convention of Lomé*	Final E.E.C. proposal in the 1979 negotiations** (Council document 7304/1/79 Rev. 1 of 11 June 1979) and proposed numbering in the draft Annex to the Decision	Remarks
(1)	(2)	(3)
<u>Article 24</u> Technical co-operation contracts shall be arranged by mutual agreement. Certain contracts may be awarded following competitive tendering, notably for important, complicated and technically difficult studies where technical, economic or financial reasons justify recourse to this procedure.	<u>FTC 53 (article 1 of Annex to the Decision)</u> 1. Service contracts shall be awarded following a restricted invitation to tender. Certain contracts may be arranged by mutual agreement, notably in the case of the following : a) schemes of minor importance or short duration; b) technically difficult schemes; c) schemes entrusted to individual experts; d) schemes further to schemes already in hand; e) following an unsuccessful invitation to tender. 2. The method of awarding each contract shall be decided by mutual agreement between the Commission and the A.C.P. State concerned.	Because of the differing constraints involved in each system (as regards duration, cost, etc...) it would probably be advisable to leave open the choice between invitation to tender and mutual agreement, while establishing certain guidelines for making the choice. The following text would be a possibility : "1. Service contracts shall be awarded following an invitation to tender or by mutual agreement. 2. For all schemes other than those specified in paragraph 3, recourse to a tendering procedure shall be decided by mutual agreement between the Commission and the A.C.P. State or States concerned. 3. Service contracts shall be awarded by mutual agreement in the case of the following in particular :

* Contained in Annex XIV to the second Lomé Convention and applicable temporarily (see Article 142 of Lomé II).

** Leaving aside the compromise proposals made at the ministerial meeting held on 25 June 1979 in an attempt to reach agreement.

(1)

(2)

(3)

Article 25

1. For each operation of technical co-operation which will involve a mutual agreement procedure, the Commission shall compile a list of selected candidates from Member States or A.C.P. States, selected according to criteria guaranteeing their qualifications, experience and independence and taking into account their availability for the proposed undertaking.

The A.C.P. State concerned shall choose freely the listed candidate it wishes to deal with.

FTC 55 (article 3)

Where the mutual agreement procedure is applied the contractor shall be designated by the A.C.P. State on a proposal from the Commission.

- a) schemes provided for in Article 140 § 2 of the CONVENTION,
- b) schemes involving a small financial commitment,
- c) technically difficult schemes,
- d) schemes entrusted to individual experts,
- e) schemes further to schemes already in hand,
- f) following an unsuccessful invitation to tender."

- a) On 11 May 1979 an amendment to FTC 55 was requested by the A.C.P., as follows :
on a proposal from the Commission, after consultation with the Commission Delegate.

The Community reserved its position on this request;

- b) the short-list system under the mutual agreement procedure was abandoned by the Community right from its earliest textual proposals (see document NEG/ACP-EEC/16/79 FTC of 1 February 1979) and by the A.C.P. in the following comment taken from a document drawn up by the A.C.P. States Group (ACP/368/79 (Secr. Fin. Reneg.) Rev. 1 of 6 May 1979, page 8, point 6 b) : "the list system has led to lengthy delays while the formality of a search is pursued, even when appropriately qualified personnel can be readily identified at the outset";

(1)	(2)	(3)
2. When competitive tendering is resorted to, the list of selected candidates shall be drawn up in close collaboration with the Commission and the A.C.P. State concerned on the basis of the criteria set out in paragraph 1. The contract shall be awarded to the listed candidate that submits the tender judged by the Commission and the A.C.P. State concerned to be economically the most advantageous. 3. The A.C.P. firms which may be taken into consideration for technical co-operation actions shall be selected by mutual agreement between the Commission and the A.C.P. State or A.C.P. States concerned.	<u>FTC 54 (article 2)</u> 1. For each technical co-operation scheme involving an invitation to tender the Commission and the A.C.P. State concerned shall compile by mutual agreement, following a preselection procedure where appropriate, a short-list of candidates selected in the light of their legal and financial situation, their qualifications, experience, independence and availability. 2. According to the individual cases the invitation to tender may cover : a) the design of the co-operation scheme and the services and/or personnel to be provided, to the exclusion of any financial aspect, the prices payable being negotiated subsequently; or b) both the design of the co-operation scheme and the prices. 3. The invitation to tender dossier, to be drawn up by the A.C.P. States in agreement with the Commission, shall give details of the manner in which tenders are to be submitted and the criteria to be used in selecting the contractor.	c) this article (and article 2) could be accompanied by a Joint Declaration on Articles 2 and 3 stating that in exceptional cases and by agreement with the Commission, recourse could be had to consultants or experts from third countries. a) On 11 May 1979 an amendment to paragraph 3 of FTC 54 was requested by the A.C.P., as follows : drawn up by the A.C.P. State in agreement with the Commission Delegate... in selecting the contractor, <u>which must take place within thirty days of the date of examination of the tenders.</u> b) The reference to preselection, which entails delays of varying length, could be dropped.

(1)	(2)	(3)
<u>Article 26</u> In the context of the common rules provided for in Article 22 and the general conditions of payment established by agreement between the Commission and the A.C.P. States, the technical co-operation contracts shall be prepared, negotiated and concluded by the appropriate authorities of the A.C.P. States, in participation and agreement with the Delegate of the European Commission referred to in Article 31 (hereinafter called the "Delegate").	4. The Commission and the appropriate authorities of the A.C.P. States shall ensure that the most advantageous tender is chosen for each scheme, account being taken of inter alia the technical quality of the tender, the organization and methods proposed for the services to be provided, the qualifications, experience and special skills of the personnel assigned to the scheme and, in the case referred to in paragraph 2 b) of this article, the price of the services. <u>FTC 52, paragraph 1 (article 4)</u> Service contracts shall be negotiated, drawn up and concluded by the appropriate authorities of the A.C.P. States, in agreement with the Commission and within the framework of general conditions governing the award and performance of contracts adopted, on a proposal from the Commission, by a decision of the Council of Ministers at its first meeting following the date of entry into force of the Convention. <u>NOTA : Joint declaration on Article FTC 52</u> Until the Decision provided for in Article FTC 52 is put into effect, the performance of service contracts financed by the Fund shall be governed : - in respect of the A.C.P. States parties to the Convention signed in Yaoundé on 29 July 1969, by the general	The general conditions for service contracts were not adopted by the Council of Ministers in April 1981.

(1)	(2)	(3)
<u>Article 27</u> The Commission shall, as far as possible, encourage co-operation between consultants and experts of Member States and A.C.P. States, temporary partnerships, sub-contracting and the use of national experts in the teams belonging to consultants from Member States.	* conditions currently used in the contracts financed by the Fund; - in respect of the other A.C.P. States, by their respective national laws or their established practices regarding international contracts, unless they apply on an interim basis the general conditions currently used in contracts financed by the Fund. <u>FTC 51, paragraphs 2 and 3* (article 5)</u> 2. In the award of service contracts the A.C.P. States and the Community shall ensure the elimination of any discriminatory practice that may prevent equality of treatment for all candidates or tenderers who are nationals of the Member States or the A.C.P. States. 3. The Community shall encourage co-operation between consultancy firms and consulting engineers or experts of Member States and A.C.P. States, temporary partnerships, subcontracting and the use of experts from the country itself in the teams belonging to consultancy firms or consulting engineers from the Member States.	

* Paragraph 1 of FTC 51 was incorporated in Article 140 1) and paragraph 2 was partly incorporated in Article 125 1) of the second Lomé Convention.