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REPORT OF THE WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER ON THE WORK OF ITS SEVENTH SESSION (NEW YORK, 8-19 April 1985)

CONTENTS

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INTRODUCTION

1. At its eleventh session the United Nations Commission on International Trade Law decided to include in its work programme a topic entitled "The legal implications of the new international economic order" and established a Working Group to deal with this subject. 1/ At its twelfth session the Commission designated member States of the Working Group. 2/ At its thirteenth session the Commission decided that the Working Group should be composed of all States members of the Commission. 3/ The Working Group consists, therefore, of the following States: Algeria, Australia, Austria, Brazil, Central African Republic, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Germany, Federal Republic of, Guatemala, Hungary, India, Iraq, Italy, Japan, Kenya, Mexico, Nigeria, Peru, Philippines, Senegal, Sierra Leone, Singapore, Spain, Sweden, Trinidad and Tobago, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Yugoslavia.

2. At its first session the Working Group recommended to the Commission for possible inclusion in its programme, inter alia, the harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development. 4/ The Commission, at its thirteenth session, agreed to accord priority to work related to these contracts and requested the Secretary-General to undertake a study concerning contracts on the supply and construction of large industrial works. 5/

1/ Report of the United Nations Commission on International Trade Law on the work of its eleventh session, Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), para. 71.

2/ Report of the United Nations Commission on International Trade Law on the work of its twelfth session, Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17), para. 100.

3/ Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 143.

4/ A/CN.9/176, para. 31.

5/ See footnote 3, above.

3. The study 6/ prepared by the Secretariat was examined by the Working Group at its second and third sessions. 7/ At its third session the Working Group requested the Secretariat, pursuant to a decision of the Commission at its fourteenth session, 8/ to commence the drafting of a legal guide on contractual provisions relating to contracts for the supply and construction of large industrial works. 9/ The legal guide is to identify the legal issues involved in such contracts and to suggest possible solutions to assist parties, in particular from developing countries, in their negotiations. 10/

4. At its fourth session the Working Group examined a draft outline of the structure of the legal guide and some sample draft chapters prepared by the Secretariat 11/ and requested the Secretariat to proceed expeditiously with the preparation of the legal guide. 12/ At its fifth session 13/ the Working Group discussed some additional draft chapters and a note on the format of the legal guide. 14/ At its sixth session 15/ the Working Group discussed further draft chapters. 16/

5. The Working Group held its seventh session in New York from 8 to 19 April 1985. All members of the Working Group were represented with the exception of Algeria, the Central African Republic, Nigeria, Sierra Leone, Singapore, Trinidad and Tobago, Uganda and the United Republic of Tanzania.

6. The session was attended by observers from the following States: Argentina, Bulgaria, Canada, Chile, Democratic People's Republic of Korea, Dominican Republic, Ecuador, Finland, Gabon, Greece, Holy See, Honduras, Indonesia, Iran (Islamic Republic of), Mozambique, Netherlands, Oman, Poland, Qatar, Republic of Korea, Switzerland, Thailand and Turkey.

6/ A/CN.9/WG.V/WP.4 and Add.1-8, and A/CN.9/WG.V/WP.7 and Add.1-6.

7/ A/CN.9/198, paras. 11-80, and A/CN.9/217, paras. 13-129.

8/ Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 84.

9/ A/CN.9/217, para. 130.

10/ See footnote 8, above.

11/ A/CN.9/WG.V/WP.9 and Add.1-4.

12/ A/CN.9/234, paras. 51 and 52.

13/ A/CN.9/247.

14/ A/CN.9/WG.V/WP.9/Add.5, and A/CN.9/WG.V/WP.11 and Add.1-4 and 6-9.

15/ A/CN.9/259.

16/ A/CN.9/WG.V/WP.11/Add.4 and 5 and A/CN.9/WG.V/WP.13 and Add.1-6.

7. The session was also attended by observers from the following international organizations:

(a) United Nations organs

United Nations Industrial Development Organization
United Nations Institute for Training and Research

(b) Specialized agencies

World Bank

(c) Intergovernmental organizations

Asian-African Legal Consultative Committee
European Economic Community
Inter-American Development Bank

(d) International non-governmental organizations

International Bar Association
International Chamber of Commerce
International Federation of Consulting Engineers

8. The Working Group elected the following officers:

Chairman: Mr. Leif SEVON (Finland)*

Rapporteur: Mrs. Jelena VILUS (Yugoslavia)

9. The Working Group had before it for examination draft chapters of the legal guide on drawing up international contracts for construction of industrial works on "Price" (A/CN.9/WG.V/WP.15/Add.1), "Consulting engineer" (A/CN.9/WG.V/WP.15/Add.2), "Transfer of technology" (A/CN.9/WG.V/WP.15/Add.3), "Transfer of ownership of property" (A/CN.9/WG.V/WP.15/Add.4), "Applicable law" (A/CN.9/WG.V/WP.15/Add.5), "Construction on site" (A/CN.9/WG.V/WP.15/Add.6), revised "Draft outline of the structure" of the legal guide (A/CN.9/WG.V/WP.15/Add.7), revised draft chapter on "Choice of contracting approach" (A/CN.9/WG.V/WP.15/Add.8), revised draft chapter on "Completion, take-over and acceptance" (A/CN.9/WG.V/WP.15/Add.9) and draft chapter on "Procedure for concluding contract" (A/CN.9/WG.V/WP.15/Add.10).

10. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Consideration of draft chapters of the legal guide on drawing up international contracts for construction of industrial works.

4. Other business.

5. Adoption of the report.

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* The Chairman was elected in his personal capacity.

11. The Working Group proceeded to discuss the documents before it in the order presented below.

CONSULTING ENGINEER 17/

12. It was generally agreed that the guide should stress the importance of consistency between the provisions of the works contract dealing with the consulting engineer and the contract between the purchaser and the consulting engineer. It was suggested, however, that the guide should specify that the works contract could not deal with the relationship between the purchaser and the consulting engineer. A suggestion was made that the guide should point out that some international lending institutions and the rules of some legal systems might prohibit the professional who performed the feasibility study from serving as the consulting engineer under a works contract, since his conclusions with respect to the feasibility of the project could be influenced by the prospect of his providing services in connection with the construction of the works.

13. With respect to the functions to be performed by the consulting engineer, a suggestion was made that the "General remarks" section should indicate that such functions would vary depending on the nature of the works contract. It was further suggested that paragraph 1 should avoid an implication that a consulting engineer might engage in contract management.

14. Various views were expressed with respect to the exercise of independent functions by the consulting engineer. According to one view, it was not realistic to expect that a contractor would agree to the exercise of certain independent functions (e.g. dispute settlement, or determination of the existence of hardship or of rights to suspend or terminate the contract) by a consulting engineer who had been selected by the purchaser and was providing services to or acting on behalf of the purchaser. A suggestion was made that a consulting engineer should be given the authority to exercise independent functions only in exceptional cases. Another suggestion was that the nature of independent functions to be exercised by the consulting engineer should be limited, e.g. to those of a technical nature.

15. A view was expressed that the discussion of the exercise of independent functions by the consulting engineer should be retained, as the authority to exercise such functions was sometimes given to consulting engineers in practice. It was suggested that the parties might in some cases consider it desirable to authorize the consulting engineer to exercise such functions since he would be knowledgeable about the construction and would be available to deal expeditiously with questions, problems or disputes concerning the construction. The view was expressed, however, that the giving of such authority to the consulting engineer should be presented only as an option which the parties might wish to consider in drafting a works contract, and not as a recommendation for inclusion in the contract.

16. In connection with the question of authorizing the consulting engineer to exercise independent functions, a view was expressed that a distinction should be made between the case where the consulting engineer was selected by the purchaser alone, and the case where the consulting engineer was selected by both parties. Where the consulting engineer was selected by the purchaser

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17/ A/CN.9/WG.V/WP.15/Add.2.

alone, views were expressed that the consulting engineer should not be authorized to exercise any independent functions, and that if he were authorized to do so, such functions should be limited. Another view was expressed that a consulting engineer who was selected by the purchaser alone should not have the authority to take decisions which were binding on the contractor. According to an additional view, however, there was no reason why the consulting engineer should not be able to take binding decisions if the parties had confidence in the consulting engineer and agreed to his taking such decisions even if the consulting engineer was engaged by the purchaser. Where the consulting engineer was selected by both parties he might be authorized to exercise broader independent functions, including taking decisions binding on the parties. Suggestions were made that the consulting engineer should not be able to exercise independent functions concerning matters in respect of which he had provided services or acted on behalf of the purchaser, and that in exercising independent functions the consulting engineer should be obligated to act impartially with respect to the purchaser and the contractor.

17. A suggestion was made that each party should appoint a consulting engineer at the time of entering into the contract, and that these consulting engineers should have authority to take decisions binding on the parties concerning matters of a technical nature. Another suggestion was that there might be one consulting engineer to render advice and technical expertise to the purchaser and to act on behalf of the purchaser, and another consulting engineer to exercise independent functions. A view was expressed, however, that it was unwise for more than one consulting engineer to be serving at the same time.

18. A further suggestion was made that the consulting engineer might be authorized to take decisions binding on the parties where the value involved in such decisions was less than a certain stipulated amount, and that decisions involving a value over that amount should be referred to mediation before an independent mediator, named in the contract, who was readily available to take such decisions. If mediation was unsuccessful, the matter would be referred to arbitration or judicial settlement. A suggestion was also made that a consulting engineer who was authorized to perform an act or take a decision independently should be obligated to perform such act or take such decision within a specified period of time.

19. With respect to the functions listed in paragraph 8, it was generally agreed that the Secretariat should reconsider which functions were independent functions and which were performed on behalf of the purchaser. In addition, it was suggested that the Secretariat should consider which of those functions should be transferred to the discussion in the chapter on "Settlement of disputes". It was generally agreed that the consulting engineer should not be authorized to adapt the contract in a hardship situation if the parties were unable to agree on an adaptation.

20. With respect to the selection of the consulting engineer, it was noted by the Secretariat that in many cases the identity of the consulting engineer designated by the purchaser would have been communicated to the contractor prior to the conclusion of the contract, and that the consulting engineer would be named in the contract; in such cases the consulting engineer might be viewed as having been selected by both parties.

21. With respect to the replacement of the consulting engineer, it was generally agreed that the purchaser should be able to select the replacement without the participation of the contractor when the consulting engineer only rendered services to or acted on behalf of the purchaser. In respect of the case where the consulting engineer was to exercise independent functions, the view was expressed that if the purchaser selected the original consulting engineer without the participation of the contractor, he should also be able to select the replacement consulting engineer without the participation of the contractor. In such a case, however, the purchaser should be obligated to notify the contractor of the replacement selected by the purchaser. On the other hand, if the original consulting engineer was selected by both the purchaser and the contractor, the replacement consulting engineer should be selected in a similar manner. A suggestion was made that, if the purchaser were permitted to select a replacement consulting engineer without the participation of the contractor, he should not be permitted to select a consulting engineer who was on his own staff. It was noted that international lending institutions might object to the participation of the contractor in the selection of a replacement consulting engineer when the replacement only provided services to or acted on behalf of the purchaser, but not when he exercised independent functions.

22. A view was expressed that if the contractor were permitted to object on "reasonable grounds" to a replacement consulting engineer proposed by the purchaser, the contractor's lack of knowledge of the proposed replacement consulting engineer should be regarded as reasonable grounds. A suggestion was made that the contract should provide that if the parties could not agree on a replacement consulting engineer, they might agree on a third party who would make the selection. It was generally agreed that the guide should advise the parties to deal with the question of the extent to which a replacement consulting engineer should be bound by acts and decisions taken by the original consulting engineer.

23. With respect to the delegation of authority by the consulting engineer, a suggestion was made that the reference in paragraph 17 of the draft chapter to the ability of the consulting engineer to delegate his authority among his employees should be deleted. It was also suggested that the chapter should indicate that the delegation of authority by a consulting engineer was regulated by the rules of some national legal systems.

24. With respect to the information and access to be provided to the consulting engineer, it was generally agreed that the consulting engineer should have no greater rights than did the purchaser. A view was expressed that the works contract should give to the consulting engineer, in his own right, the authority to require a construction schedule from the contractor and to require the contractor to vary the schedule, to co-ordinate the work of all contractors involved in the construction, to inspect the plant during construction and, in a cost-reimbursable contract, to inspect the contractor's accounts. A further view was expressed that the consulting engineer should have such authority only in respect of his independent functions. The prevailing view, however, was that any such authority of the consulting engineer should be derived from authority possessed by the purchaser himself, and should not be accorded to the consulting engineer in his own right. It was suggested that the role of the consulting engineer with respect to the scheduling of construction work should be referred to in the section on "Rendering advice and technical expertise to the purchaser".

TRANSFER OF OWNERSHIP OF PROPERTY 18/

25. The view was expressed that the distinction between the terms "plant" and "works" might not be clear and should be clarified. The question was raised whether the guide should deal with transfer of ownership of tools and construction machinery to be used for effecting construction. There was wide support for the view that this issue should not be dealt with in this chapter, but rather in another chapter, e.g. the chapter on "Security for performance", with appropriate cross-references.

26. It was suggested that the section on "General remarks" might need some clarification. A view was expressed that the relationship between the transfer of ownership and the passing of risk might require some additional explanation, since under some legal systems the time of the transfer of ownership might be relevant for the passing of the risk of loss or damage if the parties did not agree upon a different approach in the contract.

27. It was agreed to amalgamate paragraphs 4 and 5, and to deal with the time of the transfer of ownership of equipment and materials in general terms without reference to the examples indicated in the present text. However, the need to avoid multiple transfers and re-transfers of property should be stressed. The heading of section C should be adapted to conform to the terminology to be used in the final version of the guide.

APPLICABLE LAW 19/

28. It was noted that the chapter assumed that the parties would choose the rules of a legal system of a single State to govern their contract. Other approaches, however, were possible, e.g. the contract could be governed by legal principles common to the legal systems of the two countries to which the parties belonged, or by general principles of law commonly accepted in international trade. The parties could also provide that different contractual obligations were to be governed by different legal systems. It was observed that, in presenting the latter approaches, the chapter should also indicate possible difficulties inherent in these approaches. For instance, it might be difficult to identify the legal principles referred to. In addition, certain legal systems might not recognize the validity of such a choice, and consequently courts would determine the law governing the contract on the basis of the rules of private international law. There was a proposal to change the title of the chapter to "Choice of law". There was also a proposal that the French title be changed to "Loi applicable".

29. There was wide agreement that most legal systems did not specifically deal with works contracts of a complex character. The parties should therefore be advised to deal with problems which might arise under works contracts, to the extent possible, by including appropriate terms in their contract.

18/ A/CN.9/WG.V/WP.15/Add.4.

19/ A/CN.9/WG.V/WP.15/Add.5.

30. The view was expressed that the guide should bring to the attention of the parties the question of the time factor in relation to the choice of the applicable law, i.e. whether the applicable law was the law as it prevailed at the time of the conclusion of the contract, excluding subsequent modifications to this law, or was the law which prevailed at the time of the conclusion of the contract subject to future modifications. The guide might also bring to the attention of the parties the possibility of making rules of law applicable by incorporating them in the contract in the form of contract terms. In addition, the parties might be advised that making the same law applicable to the works contract as well as to contracts between the contractor and sub-contractors might facilitate the co-ordination of such contracts.

31. It was observed that the description in the chapter of mandatory laws which might limit the autonomy of the parties in choosing the applicable law was not sufficiently comprehensive. For example, mandatory laws regulating unfair contract conditions might limit party autonomy. Moreover, parties could not derogate from certain rules of private international law determining which law was applicable to resolve certain issues relating to immovable property. It was also noted that a court might derogate from the application of some provisions of the law chosen by the parties by applying legal rules having the character of ordre public.

32. Differing views were expressed on the suggestion contained in the chapter that, in making a choice of law, the parties should specifically refer to the "substantive" rules of a legal system. It was noted that the term "substantive" was capable of different meanings: it could be used to emphasize a contrast with rules of private international law rules, or to emphasize a contrast with procedural rules. Under one view, the use of this term when making a choice of law was unnecessary, as it was self-evident that the choice of a legal system did not include a choice of rules of private international law or procedural rules. Under another view, the use of this term was desirable to indicate that the parties at least excluded the application of rules of private international law. It was noted in this connection that, while the choice of a procedural law to govern the procedure for the settlement of disputes would be ineffective when the disputes were adjudicated in a court (since a court would always apply its own procedural law), such a choice may be effective when disputes were settled by arbitration.

33. The Working Group considered the reference in the chapter to the possible application to works contracts of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). It was observed that the provisions of the Convention defining when the Convention was applicable to contracts for the supply of goods to be manufactured or produced should be described in greater detail. Under one view, these provisions had the result that the Convention applied very infrequently to works contracts.. Under another view, however, certain legal systems classified works contracts as sales contracts. Accordingly, a choice by the parties of such a legal system to govern a works contract might have the result that the Convention became applicable. It was also noted that parties might sometimes wish expressly to choose the Convention to regulate their contract. There was support for the view that any discussion of the possible application of the Convention to works contracts should be in the body of the chapter, and not in a footnote.

34. The view was expressed that, instead of making a direct choice of the law which was to govern the contract, the parties might choose the court which was to adjudicate on disputes arising out of the contract, or choose an arbitral institution according to the arbitration rules of which such disputes were to be arbitrated. The applicable law could then be chosen by such court, or by the arbitrators. A further suggestion was that issues directly relating to the choice of jurisdiction, e.g. when such a choice might be invalid, would appropriately be discussed in the chapter on the settlement of disputes, and not in this chapter.

35. The Working Group discussed the manner in which a choice-of-law clause might be formulated. There was considerable support for the view that it was necessary for a choice-of-law clause only to identify the legal system which was to govern the contract. There was some support for the view that, in addition to such an identification, the choice-of-law clause should indicate that the chosen law was to govern formation and validity of the contract, and possibly also the consequences of invalidity. In opposition to this view, it was observed that it was logically impossible to choose a law to govern the issues of formation and validity, since the choice would only be effective if the contract had been formed and was valid. There was less support for the view that the choice-of-law clause should enumerate in detail the issues to be regulated by the chosen law. It was agreed that the illustrative choice-of-law provision in the chapter should have three variants illustrating these different approaches. It was also agreed that the phrase "mandatory legal rules of a public nature" needed clarification.

36. The Working Group considered the discussion in the draft chapter relating to the party who was to bear the risk of a change in the mandatory rules concerning technical aspects of the works or its construction, or of the creation of new rules, after the conclusion of the contract (paragraph 17). It was observed that the significance of this discussion would be more apparent if the recommendation which immediately preceded this discussion regarding the obligation to be imposed on the contractor (i.e. the obligation to construct the works in accordance with applicable technical legal rules: paragraph 16) was modified. The guide should recommend that the contractor be obligated to construct the works in accordance with applicable technical legal rules prevailing at the time of the conclusion of the contract.

37. It was suggested that the discussion as to which party should be obligated to obtain approvals, authorizations or licences necessary for the performance of the contract should be placed in a different chapter where such discussion would be more appropriate. It was further suggested that the section entitled "General remarks" needed clarification. This section should elucidate more clearly the problems which were addressed in the succeeding sections of the chapter. The view was also expressed that the chapter should include more illustrative provisions. Several suggestions were made for improving the drafting of the chapter.

PRICE 20/

38. It was suggested that the title of the chapter should also refer to "payment conditions". It was suggested to change the title of the chapter to "Costs" instead of "Price". This proposal was, however, not adopted. The view was expressed that the section on "General remarks" should indicate that international lending institutions might require that the issues discussed in this chapter be settled in particular ways. A suggestion was made that the issue of adjustment of the price should be discussed in the substantive chapters devoted to the various circumstances which might give rise to such adjustment, e.g. the chapters on "Variation clauses" and "Hardship clauses". The Secretariat was asked to consider whether additional illustrative provisions might be included in this chapter.

39. A view was expressed that the guide should not refer to the case where no pricing method was provided in the contract, as this case did not occur in practice. It was stressed that the unit-price method was not interchangeable with the other two pricing methods mentioned in paragraph 2. It was suggested that paragraph 5 should be redrafted so as to make it clear what consequences would arise from a violation of the legal rules mentioned in this paragraph.

40. Different views were expressed regarding the terminology to be used in the section on adjustment and revision of the price. There was general agreement that the distinction between adjustment and revision should be made clearer. A view was expressed that a lump-sum price should be subject to revision only in accordance with the applicable law or a revision clause included in the contract. It was suggested that the guide should indicate that some legal systems provided for an adjustment of the price even if there was no contractual provision on this issue. According to an additional view, the price should be stable and adjustment or revision of the price should be exceptional. In this connection it was suggested that the phrase "subject to a price adjustment or price revision clause included in the contract" should be deleted from the second sentence of paragraph 8.

41. It was suggested that the influence of the method of pricing on the need for adjustment and revision of price should be stressed. It was noted that where the cost-reimbursable method of pricing was used, the ceiling or target costs specified in the contract might need to be adjusted or revised in certain circumstances (e.g. if the scope of construction was varied). A view was expressed that some of the situations discussed in the section on adjustment of price were not questions of adjustment of price, but rather of the liability of a party. With respect to changes in local regulations, a suggestion was made that the guide should only describe the problems involved, and should leave the choice of a settlement of the problems to the parties.

42. It was suggested that it should be mentioned in paragraph 9 that the contractor might protect himself against the risk mentioned in that paragraph by including an adjustment or revision clause in the contract. The view was expressed that paragraph 9 should be redrafted so as

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20/ A/CN.9/WG.V/WP.15/Add.1.

simply to refer to the risks associated with various pricing methods. A suggestion was made that the word "quality" might be deleted from the last sentence of this paragraph. It was observed that it might be useful to clarify the distinction between a lump-sum price, which might be subject to a revision in certain situations, and a fixed price. It was observed that in some cases the cost-reimbursable method of pricing was used even in turnkey contracts, and it was suggested that the first sentence of paragraph 15 should be redrafted accordingly.

43. With respect to the cost-reimbursable method of pricing it was suggested that the distinction between reimbursable costs and the fee should be clarified, and that the guide should indicate which costs incurred by the contractor might be covered by the fee and therefore should not be considered to be reimbursable costs. An observation was made that even in cases where a fixed fee was agreed, the contractor usually had an interest to complete the construction as soon as possible.

44. It was suggested that the guide should describe the various types of cost-reimbursable contracts used in practice (e.g. cost-plus-percentage and cost-plus-fixed fee). The view was expressed that the guide should not imply that the pricing method was the only factor relevant to the incentive of the contractor to complete the construction in time. It was suggested that the guide should recommend that the cost-reimbursable method of pricing should not be used if the estimated costs of construction were not known to the purchaser at the time of the conclusion of the contract; however, it was noted that such estimates would usually be known to the purchaser. It was pointed out that the purchaser's participation in the selection of sub-contractors of the contractor was relevant as a method of controlling reimbursable costs (i.e. the costs of the sub-contractor's services) only in the case of sub-contractors who were not specified in the contract.

45. It was observed that international lending institutions did not in all cases oppose the cost-reimbursable method of pricing. A suggestion was made to delete paragraph 13. There was considerable support for the view that, when the cost-reimbursable method was used, the purchaser should have a right to audit the contractor's records in order to verify the costs incurred by the contractor. A view was expressed that termination of the contract in cases when actual costs exceeded the target cost was not desirable, and that the reference to that possibility should either be deleted or should be limited to cases where an agreed ceiling was exceeded. A suggestion was made that this issue should be dealt with in the chapter on "Termination".

46. It was suggested that the guide should contain more typical examples of unit pricing. A view was expressed that the guide should refer to the possibility of adjusting the price for a construction unit when the quantity of units actually used in the construction varied by more than a specified percentage from the quantity estimated at the time of the conclusion of the contract.

47. A view was expressed that a bonus payment for early completion of construction should not be used in connection with the cost-reimbursable method of pricing, since this might induce the contractor to incur higher costs (e.g. by hiring additional labour) in order to obtain the bonus. It was suggested that the last sentence in paragraph 29 should be deleted. According to an additional view, a bonus payment should not depend upon the continuous

operation of the works; rather, payment of a bonus should depend upon whether the purchaser received an anticipated profit from an earlier operation of the works. One view suggested that continuous operation of the works should not be required, and that the bonus might be payable upon the commencement of the operation of the the works. Another view was expressed that a bonus payment should not be provided for in the contract, but should be agreed upon only after conclusion of the contract if the earlier completion of construction was of benefit to the purchaser.

48. It was suggested that the section on the currency of the price should stress the distinction between the currency in which the price was determined (currency of account) and the currency in which the price was to be paid. A further suggestion was made that the section should refer to problems associated with fluctuations in the purchasing power of the price currency, in addition to fluctuations in exchange rates.

49. A suggestion was made that paragraph 31 should specifically refer to foreign exchange regulations in force in the countries of both parties. A view was expressed that the currency of the purchaser's country should be used in the contract in most cases, and that if another currency were used a relevant foreign exchange rate should be included in the contract. It was suggested that paragraph 33 should clarify the advantages and disadvantages for the purchaser of the approaches mentioned therein with respect to the currency in which costs should be reimbursed. It was pointed out that paragraphs 32 and 36 might need to be harmonized.

50. It was suggested that the guide should refer to the need to change an index clause in the event of substantial variations in the scope of construction or of a substantial change in economic factors relevant to the contract. The desirability of simplicity of the index clause was stressed. A view was expressed that paragraph 50 should be deleted or that it should only indicate that the index clause normally applied to each payment when it was made. It was noted that under the laws of some countries the use of index clauses was restricted or was not allowed at all.

51. It was suggested that the approach described in the last sentence of paragraph 53 should be limited to cases where the contractor was responsible for the delay. Another view was that this sentence should be deleted. It was suggested that the index clause should apply only in cases where its application would result in change exceeding a certain percentage of the price.

52. With respect to footnote 1, a view was expressed that it might be advisable to draw the attention of the parties to limitations which might exist in national law concerning the power of a court to adjust the weightings used in an index clause. It was suggested that it would be helpful to add some explanatory notes to the index clause formula contained in the appendix.

53. A view was expressed that in the case of a delay by the purchaser in making a payment to the contractor, a currency clause might give the contractor a choice between the exchange rate prevailing at the time of maturity of the obligation to pay or that prevailing at the time of actual payment. It was suggested that the section dealing with the unit of account clause should also refer to the European Currency Unit (ECU) as a unit of account.

54. A suggestion was made to delete the percentages in paragraph 63, as well as the part of the last sentence of that paragraph dealing with applicable foreign exchange restrictions. Views were expressed that the first sentence of paragraph 63 might be superfluous, and that the second sentence of paragraph 64 should be deleted.

55. It was suggested that the section dealing with payment during construction should mention payment conditions which might be used in connection with the cost-reimbursable method of pricing, since these might differ from those used in connection with the lump-sum pricing method. With respect to payment by the purchaser for equipment or materials supplied by the contractor, it was suggested that payment might fall due prior to delivery of such items to the purchaser upon presentation by the contractor of documents proving that insurance of the equipment or materials had been taken out, in addition to the presentation of other documents, such as documents proving that the equipment or materials had been handed over to the first carrier for delivery to the purchaser.

56. With respect to credit granted by the contractor, one view was that such credits are used in practice only exceptionally. According to another view, however, it was not uncommon for the government of the contractor's country to guarantee or otherwise back credit granted by the contractor to the purchaser. Various suggestions were made for improving the drafting of the chapter.

TRANSFER OF TECHNOLOGY 21/

57. There was general agreement that the issues dealt with in this chapter were of great importance to the purchaser. It was also agreed that the chapter dealt with these issues in a balanced manner. It was noted that some of the terms used in the chapter may need further explanation. Thus the term "mandatory" often used to qualify the term "legislation regulating technology transfer" might need clarification, as such mandatory regulation might take place in different ways. It should also be clarified that know-how might either be confidential and known only to the contractor, or might not be confidential and might be known to others as well. Moreover, in some countries the term "licensing" was used not only in relation to patents, but also to describe the communication of know-how.

58. The view was expressed that a more detailed account might be given of national legislation which regulated technology transfer. The terms of the contract might be effected by such legislation prevailing not only in the country of each party, but also in other countries. In this connection it was observed that some legislation provided for compulsory licensing of technology in certain circumstances. In some countries, legislation restricted the rights of contractors who were parties to transfer of technology contracts.

59. It was suggested that the different kinds of technology, and the ways in which such technology might be transferred either individually or in combination, might be described at the commencement of the chapter. It was suggested that in this chapter reference should be made to follow-up

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improvements to the transferred technology. Furthermore, the possible reasons (e.g. cost considerations) for choosing different contractual arrangements for the transfer of technology might be indicated. It was noted that the acquisition of a knowledge of the functioning of the works was not the most significant way in which technology was transferred. There was support for the view that the description of industrial property, and in particular the system of patents, needed further explanation. Reference should be made to the international conventions which regulated industrial property. It should also be indicated that patents had legal effect within defined territories.

60. With regard to the description of the technology, it was observed that under certain contracting approaches no separate description of the technology to be utilized would be needed, as the description of the scope and quality of the works would include a description of the technology to be utilized. With regard to conditions which might be inserted in the contract restricting the purchaser in the use of the technology transferred, it was suggested that the reference to the ongoing discussion of such conditions at sessions of the United Nations Conference on an International Code of Conduct on the Transfer of Technology should be referred to in the section entitled "General remarks". It was observed that it was difficult to predict the impact of a possible Code of Conduct on the drafting of works contracts, since the extent to which the Code would bind parties, and the formulation of the Code provisions dealing with the restrictions in question, had not been finally settled. The view was expressed that the guide should not incorporate the provisions of the Code of Conduct, although reference to the Code might be made. The Working Group decided to defer its decision on the reference to the Code of Conduct to a later date. It was agreed that the drafting of provisions illustrating such restrictive provisions should not be undertaken. However, the restrictive provisions which were relevant to, and might be inserted in, works contracts might be briefly identified and discussed. It was noted that it was inappropriate for a guide to seek to lay down normative standards for such restrictive provisions, and that in any event party autonomy in inserting such restrictive provisions was often limited by national legislation.

61. It was noted that the appropriate form of a guarantee in regard to technology would depend on the contracting approach adopted. If, for example, the turnkey approach was adopted, no separate guarantee concerning the technology would be necessary, as the general guarantee concerning the quality and performance of the works would also cover the technology.

62. It was observed that the guide should suggest that the contractor be required to guarantee that he was the owner of the technology which he was transferring, or that he be required to undertake that he would obtain the right to transfer the technology. There was support for the view that the last sentence of paragraph 12 should be deleted, or at least considerably modified, both because its contents did not assist the parties in drafting their contract, and because the rule stated therein that the contractor be permitted to avoid liability was debatable. The view was expressed that the situation dealt with in the penultimate sentence of paragraph 19 (i.e. where the purchaser terminated the contract because of a failure of performance by the contractor) should also be examined from the standpoint of its impact on guarantees given by the contractor. It was suggested that, even when in such situations the contract was completed by another contractor, the original contractor should remain bound by the guarantees given by him in regard to the

technology supplied by him. It was also observed that the guide should indicate that guarantees given by the contractor would be ineffective if the works were operated by the purchaser's personnel in an improper manner.

63. In regard to price, it was suggested that the description of the various methods of pricing technology might be further elaborated. In this connection it was noted that mention might be made of the method whereby the price was paid in the form of the delivery of the products of the works. Under another view, however, such payment methods properly belonged to the domain of countertrade, and did not need special mention in the present context; such methods might perhaps be mentioned in the chapter on "Price".

64. The view was also expressed that the appropriate payment methods to be adopted might depend on the length of the period of time for which the payments were to be made (e.g. if royalties were to be paid over a long period, the amount of each instalment might be less than if royalties were to be paid over a short period). It was also observed that the transfer of confidential know-how was usually paid for by a down payment. There was wide support for the view that the pricing of technology should be dealt with in the chapter on "Price". It was agreed that the discussion of the price payable for training might be retained in this chapter, but that a cross-reference should be made in the chapter on "Price" to the discussion in this chapter.

65. With regard to the infringement of the rights of a third party through the use of the technology transferred, it was noted that in practice transferors of technology only undertook that the use of the technology would not infringe the rights of third parties in specified territories. Transferors would usually state that they were unaware if the rights of third parties would be infringed in other territories. It was also observed that the guide should refer to the possibility that the rights of third parties might be infringed, not merely through the use of the industrial processes transferred, but through the distribution of the products produced in the completed works.

66. It was noted that no extensive discussion of the remedies for the infringement of the rights of a third party was necessary, as such remedies were laid down by the applicable law, and might vary among different legal systems. The chapter might usefully deal with the allocation of the rights which parties might have in the event of infringement. In this connection it was noted that, under many legal systems, guarantees against such infringement were implied by the law and need not be regulated by contract provisions.

67. The question was considered whether all the cases where the rights of a third party might be infringed in the course of the implementation of a works contract should be discussed in the guide at a single location. It was observed that such a treatment would be logical and could be comprehensive. The view was expressed, however, that a treatment of the issue in the various sections of the guide where the factual situations giving rise to particular infringements were described might be of greater assistance to the reader of the guide.

68. The suggestion in the guide that when legal proceedings were brought against a party for infringement, the other party should be obligated to assist the former party in defending these proceedings, was discussed. It was observed that the nature of the obligation to assist needed further clarification, e.g. the extent of the assistance to be given should be specified. It was also noted that under certain legal systems procedures existed under which the party sued could compel the other party to participate in the suit.

69. With regard to confidentiality, there was agreement with the view expressed in the chapter (paragraph 18) that the contractor might wish to obligate the purchaser to maintain confidentiality as to know-how disclosed by the contractor at two stages: at the stage of negotiations and, if the negotiations led to the conclusion of a works contract, at the stage when a works contract was concluded. It was noted that under some legal systems this might require the conclusion of an independent contract as to confidentiality before negotiations commenced, and subsequently the inclusion in the works contract of terms requiring confidentiality. Under other legal systems, however, no contract might be required prior to negotiations, as concepts such as good faith contained in such legal systems imposed a duty of confidentiality. It was also observed that, where a contract as to confidentiality was concluded prior to negotiations, such a contract should provide that the obligations as to confidentiality were to continue after the conclusion of the negotiations even if no works contract was later concluded as a result of the negotiations.

70. There was support for the view that a contract which contained obligations of confidentiality as to know-how might also provide that such obligations should cease, and that royalties for the know-how might cease to be payable, if the know-how reached the public domain. The Working Group considered the case where a contract was terminated by the purchaser because of a failure of performance by the contractor, and the purchaser then found it necessary to disclose to another contractor such of the know-how as was necessary for completion of construction by the other contractor. It was observed that the works contract should in such cases obligate the purchaser to require from the other contractor an undertaking that the latter will not disclose the know-how he acquires to others. It was also suggested that such disclosure by the purchaser (both in the circumstances discussed, and when the contractor was prevented by an exempting impediment from completing the construction) should only be permitted in so far as the contractor was in a position to give the purchaser permission to disclose the know-how to the other contractor.

71. With regard to the supply of documentation, it was noted that the list of the types of documents which might be supplied could be amplified (e.g. to include operating personnel and desirable spare parts). It was also noted that it was not always necessary for the supply of all documentation to be completed by the time fixed in the contract for the completion of construction. For example, under a produit en main contract, the documentation might be provided after completion.

72. With regard to the training of personnel, it was observed that the contractor might not have the capability to effect the training. It might be preferable for such training to be arranged by the consulting engineer, or to be effected by an institution specialized in training. It was also observed that domestic legislation which often existed regulating working conditions

might also relate to the training of personnel and that account should be taken of that legislation. Such legislation was often designed to protect the rights of workers, and might restrict the rights of employers to determine the conditions of training.

73. It was observed that where the feasibility of training a particular trainee was in doubt, the contractor or other trainer should be entitled to require the purchaser to provide a replacement trainee. In such cases, the contractor or other trainer should be obligated to inform the purchaser of the need for a replacement as soon as he became aware of such a need. It was noted, however, that the legislation referred to in the preceding paragraph might restrict the freedom of the contractor and purchaser with regard to the replacement of a trainee.

74. It was noted that the chapter did not address the question of possible damages which might be caused by trainees to the works at which they were being trained. It was suggested that the guide should advise the parties to settle in the contract the question as to which party was to bear the loss resulting from such damage. The view was also expressed that the contract should also settle the question as to which party was to bear the responsibility if harm was suffered by trainees in the course of the training.

75. The view was expressed that, where the purchaser required training of his personnel, the contractor would always require to be remunerated for the cost of such training. Such cost might be included in the overall price charged for the construction, or might be specified separately.

76. It was noted that the subject of training embraced certain practical matters which the purchaser would have to address. Thus it was possible that personnel after receiving their training might leave the service of the purchaser. The purchaser may also find it advisable to make an independent assessment of his personnel requirements, rather than to rely exclusively on the contractor's judgement, since the purchaser was better acquainted with the capabilities of local personnel. Furthermore, the purchaser would need to obtain visas or travel authorizations for trainees who were to be sent abroad for training, and accordingly the contract might obligate the contractor to assist the purchaser in obtaining such visas or travel authorizations. The view was also expressed that, due to various reasons, the construction might sometimes be interrupted or delayed. It was noted that the contract should provide for the training programme to be adapted if interruptions or delay occurred.

77. There was wide agreement that the guide should seek to avoid formulating recommendations in mandatory terms, but rather should present recommendations in the form of options which the parties might consider in drafting their contract. Several suggestions were made for improving the drafting of the chapter.

CONSTRUCTION ON SITE 22/

78. It was generally agreed that the Secretariat should reconsider the use of the terms "construction" and "erection", and should ensure that these terms were used consistently throughout the chapter. It was also generally agreed that the Secretariat should reconsider the usage of the word "should", with a view towards achieving a neutral presentation of the approaches to the issues discussed in the chapter. A view was expressed that the issue of timing (e.g. time for completion, time schedule) should receive greater emphasis, perhaps by referring to this issue in the title of the chapter. An additional view was expressed that the section on "General remarks" should be expanded so as to provide a fuller introduction to the issues dealt with in the chapter. Reference was made to the possibility that a contractor might be engaged to erect equipment supplied by other contractors.

79. Views were expressed that the guide should recommend that the parties deal with the question of which party was to pay the costs of facilities needed for the purposes of construction by the contractor's personnel, and that the contract stipulate the standard of the facilities to be provided. A view was expressed that the guide should also advise the parties to consider whether the contractor should be obligated to provide certain facilities for the purchaser's personnel. With reference to paragraph 6, a suggestion was made that the guide should advise the parties to consider whether and under what terms the purchaser would have the right to acquire the workshop after the completion of construction and that, accordingly, the last sentence of this paragraph should be deleted. It was noted that under rules of national law the contractor would usually be responsible for the working conditions of his own personnel on site, and it was suggested that the guide advise the parties to take such rules into consideration in dealing with the question of accommodation, utilities and other facilities on site.

80. A suggestion was made that, in connection with the discussion of machinery and tools for effecting construction, reference should also be made to the possibility of leasing of such machinery and tools. It was noted that licences and authorizations may be needed for the import of machinery and tools to the country of the site, whether or not they were to be re-exported. It was suggested that the types of transport intended to be covered by paragraph 9 should be clarified.

81. A view was expressed that the contract should always set forth a time for completion of construction and that the second sentence of paragraph 11 should accordingly be deleted. A suggestion was made that if the contract set forth a fixed date for completion, it should also establish when construction should commence.

82. A view was expressed that the list in paragraph 12 of dates to be used for determining the time when construction was to commence should not be exhaustive. A suggestion was made to add to this list the date when the site was handed over to the contractor; it was noted, however, that this might not be the relevant date in all cases, as in the case where the contractor was to commence the manufacture of equipment on his own premises prior to the handing over of the site. A further suggestion was made that in

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addition to the date of receipt by the contractor of an advance payment, reference should also be made to the date of delivery by the purchaser to the contractor of a guarantee that such an advance payment would be made. A suggestion was made that item "(b)" of paragraph 12 should be clarified so that the last element (i.e. "that construction should begin") would be set forth as an additional date for commencement and not as an alternative.

83. A suggestion was made that paragraph 14 should be redrafted so as to reduce the emphasis on the purchaser's possible interest in early completion of construction. An additional suggestion was that references should be made in this section to the chapters on "Failure to perform" and "Liquidated damages and penalty clauses".

84. With respect to the time-schedule for construction, a view was expressed that the contract should contain a basic time-schedule for the performance of major tasks and should provide for a detailed time-schedule to be prepared by the contractor after the contract had been concluded. It was also suggested that the guide should refer to the possibility of using computerized time-schedules.

85. A view was expressed that it was not appropriate in a turnkey contract to provide for sanctions if a milestone date in the time-schedule was not met by the contractor, since what was important was whether the entire construction was completed on time. It was generally agreed, however, that the guide should merely state that milestones might be given different degrees of importance in different types of contracts, and recommend that the parties should agree upon the consequences of a failure by the contractor to meet such milestones. Another view was that the right of the purchaser to order the contractor to speed up construction, referred to in paragraph 16, was of no value unless the contract also provided for the consequences of a failure by the contractor to do so.

86. Different views were expressed concerning the possibility of the contractor's terminating the contract if the purchaser did not require the commencement of construction within a specified period of time. According to one view, this possibility was too harsh and should be deleted from paragraph 16. According to another view, this possibility should be retained, as there had to be some limit to the period during which the contractor's obligation to begin construction would subsist.

87. It was observed that the section on extension of time for completion of construction should be redrafted and compressed. It was generally agreed that the guide should recommend that the parties consider whether the question of extension of time was adequately dealt with by the applicable law, or whether the contract should provide for extension in certain circumstances. It was also generally agreed that the chapter should merely refer to other chapters dealing in substance with circumstances which might justify an extension, and that such circumstances should not be dealt with in this chapter. It was suggested that the guide should clarify by whom the duration of an extension would be determined if the parties could not agree upon a "reasonable" extension. It was also suggested that the contractor should not be entitled to stop construction either during negotiations or during dispute settlement proceedings concerning such an extension.

88. With respect to construction to be performed under the contractor's supervision, it was suggested that a distinction should be made between an obligation of the contractor to supervise and inspect the construction and an obligation merely to give advice to the personnel effecting such construction. It was suggested that the contractor should be obligated to keep a record of the performance of his obligations as to inspection. It was generally agreed that the last portion of paragraph 24 should be redrafted so as to make it clear that the contractor might not be liable for defects caused by a failure of persons engaged by the purchaser to follow the contractor's instructions, but that the contractor might be obligated to inspect work performed by such persons and inform the purchaser of any such defects and might be made liable for a failure to fulfil those obligations.

89. A view was expressed that the contract should refer to the risks involved in performing supervisory functions and that the damages payable by the contractor for a failure to supervise should be limited. A view was also expressed that the purchaser should be liable to compensate the contractor for losses arising from a delay in the completion of construction resulting from a failure to perform by persons engaged by the purchaser.

90. The view was expressed that the section on "Access to site and plant" should be compressed and should indicate in general terms that provision should be made in the contract for access by various persons to the site.

91. It was noted that working conditions were often governed by rules of law in the country of the site. It was generally agreed that the guide should merely recommend that the contract provide for the allocation of responsibilities for working conditions and for the content of such responsibilities, taking into account relevant rules of national law.

92. It was generally agreed that the opening chapter of the guide should stress that the full co-operation of the parties was essential for the smooth progress and successful completion of construction and that this co-operation should extend through every phase of the contract. It was suggested that the Secretariat should reconsider the appropriate location in the guide for the discussion of liaison agents.

93. It was suggested that provision should be made in the contract for payment by the purchaser for items procured by the contractor on behalf of the purchaser separately from provisions dealing with other elements of the price to be paid by the purchaser.

94. Suggestions were made that the contractor should be obligated to leave the site in a clean and workmanlike condition and that the words "after completion" should be deleted from the heading of section "J" of the chapter. Various other suggestions were made for improving the drafting of the chapter.

REVISED DRAFT OUTLINE OF THE STRUCTURE 23/

95. A view was expressed that definitions of terms used in the guide should be set forth in a separate chapter containing a glossary of terms in accordance with an earlier decision tentatively adopted by the Working Group. Under another view, however, such an approach might not be adequate because of difficulties inherent in defining various terms in a concise manner, and it would be preferable that terms be defined or explained in the chapters in which the terms were used. It was agreed that the preparation of an analytical index in alphabetical order would enable the reader to find without difficulty a definition or explanation of terms used in the guide in the context of a particular inquiry.

96. A view was expressed that the quality guarantee should not be dealt with in chapter V, "Description of works". This suggestion was not adopted by the Working Group.

97. It was suggested that the section on the semi-turnkey contract approach in chapter II, "Choice of contracting approach", should be deleted. It was decided that the decision on such deletion should depend upon the decision of the Working Group relating to this section during its discussion of chapter II.

98. It was suggested to change the locations in the structure of chapter VIII, "Consulting Engineer" and chapter IX, "Sub-contracting"; however, this suggestion was not adopted by the Working Group. It was agreed to place chapter XIV, "Transfer of technology" after chapter V, "Description of works" and to place chapter XV, "Price", after chapter XIV, "Transfer of technology". It was noted that chapter XVIII, "Delay, defects and other failures to perform", should include some general remarks explaining the relationship among various remedies and forms of compensation for failure to perform. It was observed that chapter XX, "Liquidated damages and penalty clauses" might be placed before chapter XIX, "Damages".

99. Views were exchanged on the question of the appropriate place to deal with the issues in respect of the applicable law. It was agreed that some problems connected with drafting works contracts in the light of the applicable law might be discussed in the introduction to the guide and in various other chapters where such discussion might be instructive. It was noted that some revision of terminology might be needed in the Arabic version of the outline of the structure of the guide.

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CHOICE OF CONTRACTING APPROACH 24/

100. There was wide agreement that the chapter in its present form was in general acceptable, but that certain modifications to its structure, and in certain matters of detail, would result in greater clarity. There was also wide agreement that the chapter should seek to avoid giving any impression that the contractual arrangements which might be entered into for the construction of industrial works could be divided into well-settled categories which were clearly distinct. While the main characteristics of certain contractual approaches (e.g. the turnkey contract approach, the product-in-hand contract approach and the separate contracts approach) were generally recognized, and should be described, it should be stressed that a range of gradations was possible in regard to contractual arrangements. Such gradations could not be easily categorized. It was observed, however, that this range of arrangements should also be reflected in the chapter, since it would be useful in particular for developing countries to be aware of such possible arrangements.

101. From the standpoint of the structure of the chapter, it was noted that a basic distinction might be drawn in the chapter between contractual arrangements, under which only one party was engaged to effect the construction, and contractual arrangements involving the engagement of more than one party. The chapter could then refer to the possible advantages and disadvantages of the two forms of arrangement and might thereby avoid some repetition which existed under the present treatment of different contract approaches. In dealing with the first type of arrangement, the chapter could cover the turnkey and product-in-hand contract approaches, while in dealing with the second type of arrangement the chapter could cover the approach under which the construction was divided among a large number of contractors (separate contracts approach).

102. In regard to the separate contracts approach, it was observed that it would be useful to indicate the nature of some of the separate contracts which were frequently entered into (e.g. for civil, mechanical or electrical engineering) and give some indication of which kinds of contracts would be required for different kinds of works. It was also observed that the technique sometimes referred to as "fast-track construction" should be explained. An additional view was expressed that the existence of contractual arrangements involving supervision by a consulting engineer or project manager should be emphasized.

103. It was noted that the chapter might deal with the frequent case where the purchaser entered into a contract with a consortium of contractors, and also with the case where the construction took the form of a joint venture between the purchaser and the contractor. It was agreed that it would be sufficient if such arrangements, and the special issues arising in such arrangements, were dealt with in chapter I, "Identifying project and selection of parties", with appropriate cross-references in the two chapters.

104. With regard to the section on "General remarks," it was agreed that the account given in that section should be amended to conform to the approach to

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be adopted for the chapter as a whole. It was observed that the discussion in paragraph 1 needed simplification and clarification. For instance, the reference to contracts of limited scope might be supplemented by a more specific discussion of such kinds of contracts (e.g. contracts for mechanical or electrical engineering). Cross-references might also be included to later chapters of the guide where the issues dealt with in such contracts of limited scope were dealt with (e.g. the chapters on supply of equipment and materials and the transfer of technology), and the elaborate account of the various possible combinations of contracts of limited scope and works contracts might be unnecessary. It was noted that the statement in paragraph 2 as to the extent to which the purchaser participated in the construction might not always be true, as some of the obligations described as being undertaken by the purchaser at a minimum might, in some cases, be undertaken by the contractor. Accordingly, the guide might only advise the parties to determine the obligations which they might wish the purchaser to undertake.

105. It was observed that the view expressed in paragraph 3 that institutions financing construction might require certain approaches to contracting might be deleted. With regard to the impact of tax legislation on contracting approaches, it was noted that a statement that such legislation might influence the contracting approach was sufficient, as tax legislation differed considerably in various countries and it would be impossible to give a full account of the different ways in which such legislation might influence the contracting approach. It was also suggested that the description of each contracting approach should include an account of the factors which might influence the parties in adopting the approach (e.g. the purchaser possessing or not possessing technological or managerial capabilities, or the need to adopt a particular pricing method).

106. With regard to the turnkey contract approach, it was noted that the paragraphs dealing with this approach would be subsumed under a section dealing with cases where only one party was engaged to effect the construction. The section would then give a clear description of the main characteristics of the turnkey contract approach, while avoiding a definition. It was observed that some elements indicated as characteristic of the turnkey contract approach (e.g. that the contractor would be obligated to complete construction by a specified date) would also apply to other types of contracts, and it was suggested that such elements should not be used in the description. It was observed, however, that such elements might have to be included for the sake of completeness of the description.

107. In regard to the factors which might influence the adoption of the turnkey contract approach by purchasers in developing countries, it was noted that the relevant factor might not be the level of industrialization in the country in general, but the degree of technological capacity in the specific field relating to the works to be constructed. The view was also expressed that the guide should reflect that the turnkey contract approach was not the only method of dealing with the problem of the lack of technological capacity faced by developing countries (e.g. a comprehensive contract approach might also be used).

108. There was agreement that the chapter should deal with the possible advantages and disadvantages of the turnkey contract approach. However, the description of such advantages and disadvantages should not be categorical,

and the guide might preferably focus on how possible disadvantages might be mitigated. It was observed that paragraph 8 did not clarify that the benefit of competition in respect of the design for the works resulted from the use of tendering procedures and not from the turnkey contract approach itself. The difficulties of comparing different turnkey offers (paragraph 9) also arose when tendering procedures were used. A suggestion was made that paragraphs 8 and 9 should therefore be deleted, as the issues dealt with in these paragraphs would be covered in the chapter dealing with the procedure for concluding the contract. The view was expressed that the last sentence of paragraph 10 should be deleted, as the idea expressed therein did not accord with practice. However, there was also support for retaining the idea, but to give it lesser emphasis.

109. With regard to the comprehensive contract approach, it was observed that the term "comprehensive contract" was not often used in practice or was used in a different sense; it might suffice for the chapter to describe the approach without using this term. It was also observed that the term "co-ordinate" (paragraph 13) was used in other chapters of the guide where the activities of several persons were involved and that this usage should be consistently adopted. Furthermore, the use of the term "professional" to refer only to the individual producing the design might be misleading, as many of the persons involved in the construction process were also professionals.

110. It was noted that paragraph 12 should indicate that an essential prerequisite for adopting this approach was that the design had to be completed before the contract was concluded. It was also noted that the statement that the contractor would not be liable if the works were not in accordance with the contract was misleading, since in all cases the contractor, in constructing the works, would have to conform to the contractual obligations undertaken by him. It might be preferable to state that the contractor was not responsible for defects resulting from the design supplied by the purchaser. In this connection, the view was expressed that even when the design was supplied by the purchaser, under some legal systems the contractor would be obligated to bring to the attention of the purchaser defects in the design. It was observed, however, that under other legal systems the contractor was not under such an obligation.

111. It was noted that the description of the advantages and disadvantages of this approach (paragraph 13) might need some modification to achieve a proper balance. Thus the possible advantage that the professional preparing the design might not have an incentive to sacrifice certain aspects of the works (e.g. durability, reliability) might be counterbalanced by the possible disadvantage that he might not have an incentive to prepare an economical design. Furthermore, the fact that there might be some disadvantages in this approach might be indicated in the treatment of this approach. However, it was noted that this approach was a species of the approach under which more than one party was engaged to effect the construction, and that the restructured chapter might show that this approach might attract at least some of the disadvantages of the approach under which more than one party was engaged to effect the construction. A view was expressed that an additional advantage of this approach was that it allowed the purchaser to use a multitude of financing sources for the contract. It was also observed that, in paragraph 13, the possibility and advantages of using tendering procedures in relation to the comprehensive contract approach should be distinguished from a description of the approach itself.

112. There was wide agreement that the product-in-hand contract approach was an extension of the turnkey contract approach and should be dealt with as such. However, the differences between the two approaches should also be clarified, and elements which might be common to both approaches (e.g. the operation of the works for a test period and training of the purchaser's personnel) were not useful for identifying the special characteristics of the product-in-hand contract approach. It was also agreed that there was some variety in contractual arrangements which might be described as product-in-hand arrangements. Thus, the obligation of the contractor was sometimes to effect such training as would enable the purchaser's personnel to operate the completed works, but to do so under the guidance of the contractor's managerial personnel. In other cases, his obligation was to make the purchaser's personnel capable of independently operating and managing the works. The parties should be advised to clarify the obligation which the contractor was to undertake.

113. It was observed that the description in paragraph 15 of the advantages and disadvantages of this approach might be more balanced. Thus the fact that the total cost under this approach might be higher than under the turnkey contract approach could not necessarily be viewed as a disadvantage, because the purchaser obtained more services from the contractor in return for the higher price. Nor was a possible restriction of the purchaser's freedom to select personnel to be trained necessarily a disadvantage, as the purchaser may in fact prefer the contractor to make the choice as the latter might be more qualified to do so. In this connection, it was observed that it might be preferable, instead of listing advantages and disadvantages, to focus on identifying circumstances in which one approach rather than another might be more advantageous to the purchaser.

114. With regard to the separate contracts approach, it was observed that the description of the risk of defects or delays in construction when adopting this approach (paragraph 16) might be balanced by combining it with the description of available methods for reducing this risk (paragraph 21). It was suggested that the advisability of engaging a third person for purposes of co-ordinating the separate contracts needed greater emphasis. The guide should further clarify the different ways in which the responsibility of such a third person might arise (i.e. under the contract or under the applicable law) and the extent of the responsibility which might be imposed on him under the contract. Consideration should also be given to an appropriate term to describe such a third person.

115. The view was expressed that the advantages of this approach referred to in paragraph 18 were open to question and should be reconsidered. It was doubtful if the purchaser retained greater control over the persons involved in the construction, or if he had greater flexibility in making changes in the scope and manner of the construction. The purchaser had a certain degree of freedom to order variations to the scope and manner of construction under any type of contracting approach and such variations might be easier to execute if only one contractor was engaged.

116. It was observed that, under some legal systems, the contractor was obligated (e.g. because of a duty to act in good faith) to notify the purchaser of defects which he discovered in the design, even if the contract did not impose such an obligation on him. However, it was observed that no such obligation was imposed under other legal systems.

117. With regard to the semi-turnkey contract approach, there was wide agreement that this was a species of the approach under which more than one party was engaged to effect the construction, and should be dealt with as such; it was therefore unnecessary to use the term "semi-turnkey contract approach" as a separate subtitle. It was observed that the circumstances in which the use of more than one party to effect the construction might be regarded as a use of the semi-turnkey contract approach might sometimes be unclear, since there was no general agreement on the characteristic obligations to be assumed by a semi-turnkey contractor. The Working Group thought it inappropriate to use the term "semi-turnkey" in the guide other than by reference.

118. It was noted that the obligation of the semi-turnkey contractor to define the scope and quality of the construction as set forth in paragraphs 22 and 23 should be made consistent. It was suggested that what was significant about the portion of the construction undertaken by a semi-turnkey contractor was not the quantity of the construction undertaken, but its importance; accordingly, the word "vital" might be substituted for the word "major" in the first sentence of paragraph 22. It was also observed that clarification was needed (paragraph 24) that the responsibility of the semi-turnkey contractor was only to comply with the contract concluded with him and to deliver works concluded in accordance with that contract.

119. It was observed that the cost comparison between the separate contracts approach in general and the semi-turnkey contract approach (paragraph 25) might be open to question, as the point at issue under the different approaches might only be the different manner in which the purchaser bore the same overall costs. It was also observed that cost comparisons alone might be misleading and that such comparisons should be made together with possible differences in the quality of the works which might be achieved under different contracting approaches.

120. The view was expressed that the guide should, at an appropriate location, give a description of a contract for the supply of a complete industrial works. Under such a contract, the contractor was usually obligated to provide the design, supply the equipment needed, supervise the erection and be responsible for the quality of the works. However, the erection and the civil engineering might be effected by others.

121. Several suggestions were made for improving the drafting of the chapter.

COMPLETION, TAKE-OVER AND ACCEPTANCE 25/

122. It was generally agreed that the various approaches discussed in the chapter should be set forth in a less normative manner and that the

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25/ A/CN.9/WG.V/WP.15/Add.9.

Secretariat should reconsider its use of the word "should" throughout the chapter. This word should not be used so as to indicate that a certain approach was legally required or that certain consequences flowed automatically from a particular course of action chosen by the parties; rather, it should be used only to indicate matters that the parties should take into consideration in drafting the contract.

123. Various views were expressed concerning the terminology used in the chapter. The Secretariat noted that the word "construction", as used in the chapter on "Construction on site", encompassed erection, building and civil engineering, while in this chapter the word was used in a broader sense, covering all of the obligations of the contractor. Views were expressed that while the word could be used in a narrow sense, e.g. referring only to civil engineering, it could also be used to cover a broad range of functions. A further view was expressed that it was not necessary that the word be used in the same sense in every chapter of the guide, so long as its meaning and usage were clear to the reader in each instance. A suggestion was made that the term "the work of the contract" might be used to refer to everything which was to be done by the contractor. A view was expressed that the phrase "take-over of the work" was preferable to "take-over of construction". It was generally agreed that the Secretariat should take note of the problems associated with the word "construction" and should use the term in such a way as to avoid misunderstanding.

124. With respect to the word "erection", a view was expressed that this was a term of art used in connection with works contracts. Other views were expressed, however, that this word was too narrow and was not always used in practice. The word "installation" was suggested as being preferable to "erection". It was generally agreed that the word <u>installation</u> should be used in the French version of the chapter. Views were expressed that the word "protocol" should not be used in connection with works contracts; suggestions were made that the words "certificate", "minutes" or "statement" might be used instead. It was noted that what was important in this regard was that the document was to be signed by both parties. It was generally agreed that the term <u>procès verbal</u> should be used in the French version of the chapter instead of the word "protocol".

125. Views were expressed that certain portions of the chapter were repetitious and that the section on "General remarks" should be more generalized. In connection with the last sentence of paragraph 1, a view was expressed that the guide should clarify the circumstances in which approval would be deemed to be given, and whether such a consequence would arise from the applicable law or whether it should be provided for in the contract. According to an additional view, "erection" should be added to the listing in the first sentence of paragraph 1 of equipment, materials and services, the supply of which would result in the completion of construction, since erection was not usually regarded as the provision of a service.

126. A view was expressed that the guide should discuss the relationship between the type of contracting approach and completion, take-over and acceptance, since the sequence and application of the latter events would depend upon the type of contracting approach. Such a discussion might require two separate paragraphs, instead of the present paragraph 2. The first sentence of paragraph 2 was viewed as containing an erroneous implication that completion, take-over and acceptance did not all occur in all cases. In this

connection, the view was expressed that each of these events would occur in all cases, and the only questions were when and in which sequence they occurred. According to other views, however, there might be cases in which some of these events would not occur. It was noted with regard to the last sentence of paragraph 3 that take-over would occur even in the case where the purchaser was in physical possession of the plant, since he would have had to take over the plant at some point. According to a further view, take-over would occur in two stages: preliminary take-over, when the guarantee period would commence, and final take-over, at the end of the guarantee period.

127. A view was expressed that the heading of section B of the chapter should be changed so as to reflect more accurately the subject-matter of that section; the heading "Mechanical completion of construction" was suggested. With respect to paragraphs 6 and 7, the view was expressed that the purchaser should be able to require the contractor to perform additional or modified tests and to bear the costs of such tests only if the contract so provided. In this connection, suggestions were made to delete the first sentence of paragraph 6 and the last two sentences of paragraph 7. A further suggestion was made to delete paragraph 6 in its entirety. An additional view was that paragraph 7 should indicate that the contractor might be obligated to bear the costs of additional or modified tests even if they were not standard practice in the industry.

128. In connection with paragraph 6, the observation was made that additional or modified tests presented not only the problem that such tests might damage the works, but also the question of how to deal with the situation where the additional or modified tests revealed defects that were not revealed by the tests provided for in the contract. It was generally agreed that the parties should provide in the contract how such a situation should be resolved.

129. It was noted that much of the discussion in the draft chapter was not applicable to civil works. In this connection, a view was expressed that the guide should refer only to "completion tests" and not to "mechanical completion tests", since mechanical completion tests would not be conducted in the case of civil works. It was also suggested that the guide should clarify in which cases it was possible for performance tests to be conducted only after the entire construction had been completed.

130. With respect to a failure of the purchaser to attend mechanical completion tests, a view was expressed that the contractor should be able to conduct the tests in the absence of the purchaser only if the purchaser was not entitled to request a postponement of the tests or did not request such postponement. Moreover, if the purchaser was prevented from attending by a cause for which neither party was responsible, and he so notified the contractor and requested an extension, postponement or repetition of the tests, the costs of extending, postponing or repeating the tests should be borne as set forth in the contract, and each party should bear any additional costs incurred by him. A further view was expressed that the contract should obligate the parties to co-operate so as to achieve a successful completion of the tests. It was pointed out that the wording of paragraphs 9 and 10 was almost identical to that of paragraphs 24 and 25, and the Secretariat was requested to explore means to avoid such repetition, perhaps through the use of appropriate cross-references.

131. It was noted that if an inspecting organization participated in mechanical completion tests it might recommend changes in the work to which the contractor might not agree, and it was suggested that the contract should provide for a dispute settlement mechanism to deal with this situation. It was generally agreed, however, that since this usually either would involve regulations with which the works must comply, or would form the subject of variations which would be ordered by the purchaser, this chapter should merely refer to the chapters in which those subjects were discussed.

132. A view was expressed that paragraph 11 should deal with the nature and role of an inspecting organization participating in mechanical completion tests. According to another view, however, the role of an inspecting organization was only to arrange tests either on behalf of the contractor or of the purchaser, and paragraph 11 should remain as it was drafted at present. It was generally agreed that the expert to whom differences between the parties concerning the readings or evaluation of the tests might be referred, as mentioned in paragraph 12, should be an independent expert agreed to by the parties and named in the contract.

133. A view was expressed that the execution of a mechanical completion test protocol as referred to in the chapter should not discharge the contractor from his responsibility for defects in equipment, materials or the works discovered during the trial operation period, performance tests or the guarantee period. It was generally agreed that the guide should clarify the relationship between the protocol and the responsibility of the contractor for such defects, and that the chapter should contain a cross-reference to the chapter dealing with the consequences of such defects.

134. A view was expressed that, in addition to specifying items found during mechanical completion tests to be missing, the protocol should specify items found to be defective and the period of time within which such items must be corrected. A view was expressed that the purchaser's signature to the protocol should be dispensed with only when he was not entitled to request a postponement of the tests or did not request such a postponement.

135. It was generally agreed that the contract should clearly indicate when the construction was considered to have been completed. In this connection, a view was expressed that this should be the date of successful completion of mechanical completion tests, rather than the date proposed by the contractor for the commencement of the tests. According to another view, however, since the tests might take a long time, the date of the commencement of the tests might also be considered by the parties.

136. A view was expressed that the main consequence of a failure of the tests to be successfully completed should be that the contractor would be in delay. In this regard, a view was expressed that the last sentence of paragraph 13 should be deleted, as it should not be attempted to regulate in the contract every conceivable situation which might arise. Moreover, the situation referred to in that sentence was usually adequately dealt with by the applicable law. According to another view, however, this sentence should be retained. In this connection a suggestion was made that the issue dealt with in the sentence should be discussed more fully and that such discussion should deal with the consequences of a failure to commence mechanical completion tests as well as of a failure to complete such tests successfully.

It was noted that such discussion might be included in a proposed new subsection on the legal consequences of completion.

137. A view was expressed that the difference between take-over and acceptance, and the relationship between them, should be clarified. Take-over was viewed as constituting a physical act by the purchaser (i.e. taking possession of the works), while acceptance was viewed as a legal act (i.e. an indication by the purchaser of his approval of the construction effected by the contractor as being in conformity with the contract). It was noted that take-over and acceptance might occur simultaneously.

138. Various views were expressed regarding the legal effects of take-over and acceptance. With regard to take-over, a view was expressed that the passing of risk of loss of or damage to the works was not the main legal effect, and it was noted that passing of risk might occur even prior to take-over. On the other hand, a view was expressed that the passing of risk was one of the most important legal effects of take-over. A further view was expressed that another important legal effect of take-over might be the commencement of the guarantee period. With regard to acceptance, views were expressed that risk might also pass at the time of acceptance, that the transfer of ownership might occur at that time, and that the guarantee period might also commence at the time of take-over.

139. It was generally agreed that the guide should adopt a flexible approach to these questions by indicating that the parties might provide for risk to pass at the time of take-over, but that this was only one option which they might consider; they might also consider other solutions, such as providing for risk to pass at the time of transfer of ownership, or at the time of acceptance. Furthermore, the contract might provide for the guarantee period to commence at the time of take-over, or at some other time, such as at the time of acceptance, and for ownership of the works to pass at the time of acceptance. It was noted that the passing of risk of loss of or damage to the works might be influenced by what was provided in the contract with respect to the passing of risk of loss of or damage to equipment to be incorporated in the works.

140. A view was expressed that take-over might occur before as well as after the trial operation period, and in this connection it was suggested that paragraph 14 should not indicate which of these cases was "usual" or "exceptional". A view was expressed that in the discussion in paragraph 15 of the case where the works remained in the possession of the contractor during the trial operation period, it should be indicated that take-over would occur after the trial operation period. A suggestion was made that the trial operation period should be discussed under a separate heading and that this discussion should deal with which party was to provide labour, materials and feedstock and which party should bear the costs of these items.

141. It was noted that the situation discussed in paragraphs 17 and 18, i.e. take-over in the case of termination of the contract, did not concern the usual cases of take-over, and it was suggested that this discussion should be moved to the chapter on "Failure to perform" or another appropriate chapter, with a reference to that chapter contained in the present chapter.

142. With regard to the take-over protocol, a view was expressed that the guide should distinguish among the various situations in which such a protocol would be required. A further view was expressed that, in addition to the case mentioned in paragraph 19, a take-over protocol would also not be needed if take-over occurred immediately after mechanical completion tests. In this regard it was suggested that reference be made in paragraph 19 to paragraph 12.

143. Views were expressed that the heading of section D should be changed from "Acceptance of construction" to "Acceptance of works" and that paragraph 21 should contain a reference to paragraph 34, dealing with the legal effects of acceptance. A view was also expressed that the last two sentences of paragraph 22, indicating that it might not be possible to test equipment or to put it into operation before the entire construction was completed, should be deleted. A further view was expressed that provisional acceptance was widely used in practice, and its use should not be discouraged by the guide. A suggestion was made that the meaning of the second sentence of paragraph 23 should be clarified by indicating that the same objectives sought to be achieved by provisional acceptance could also be achieved by providing for take-over after mechanical completion tests subject to an obligation of the contractor to supply missing items or to remedy defects noted in the take-over protocol.

144. A view was expressed that the discussion of performance tests should clarify whether such tests should seek to ascertain if the works functioned properly, or also if it was capable of producing an output of the required quantity and quality. It was suggested that the possibility mentioned in paragraph 33, that if works could not be tested they might be put into operation, should be clarified so as to indicate that this referred to the case where the tests could not be performed due to the absence of an inspecting organization.

145. A view was expressed that the contract should provide that if one party did not sign the performance test protocol, the protocol might instead be signed by an expert. It was noted, however, that signature by an expert would not be permitted in all legal systems. It was generally agreed that the guide should advise the parties to consider whether signature of the protocol by an expert was an approach which should or could be included in their contract. A view was expressed that the contract should set forth a period of time within which the acceptance protocol must be executed by the purchaser, since the time of execution of the protocol might be relevant to certain rights and obligations of the parties, such as the obligation of the purchaser to pay the price.

146. It was generally agreed that it would be helpful to the reader of the guide if the approaches and documents referred to in the chapter were illustrated. The Secretariat was requested to prepare such illustrative provisions and forms, and to consider whether this might permit certain portions of the chapter to be shortened. Various other suggestions were made for improving the drafting of the chapter.

PROCEDURE FOR CONCLUDING CONTRACT 26/

147. It was generally agreed that the issues relating to the procedures for selecting a contractor and for concluding a contract were of great importance to the purchaser, and should be discussed in the guide. However, various views were expressed with respect to the scope of such a discussion. It was noted that the complexity of these issues was such that they could not be exhaustively treated in a chapter of the guide, since to do so would result in a chapter of disproportionate length. It was also noted that the Commission would consider at its eighteenth session the question of work to be undertaken after the completion of the guide designed to enhance further the effectiveness of the guide, and that the Commission might consider in this connection the preparation of annexes to the guide, including one on procurement and tendering procedures. A decision to prepare such an annex would be relevant to the scope of the present chapter; however, it was generally agreed that the Working Group should base its consideration of the present chapter on the assumption that the preparation of such an annex would take some time. Taking into account the foregoing considerations, it was generally agreed that the chapter should draw the attention of the purchaser to the matters which he should take into consideration, but that it should not attempt to set forth solutions in detail.

148. A view was expressed that the chapter should deal only with the procedure for selecting a contractor, and not with the formation and entry into force of the contract. According to another view, however, the chapter should also deal with the latter subjects. According to this view, the discussion in particular of the entry into force of the contract should be expanded. On the other hand, it was pointed out that it might be difficult to discuss the formation of the contract in detail, since this matter was often governed by mandatory legislation containing different approaches. It was not necessary to engage in an analysis of the various national legal rules on these issues; rather, the attention of the parties should be drawn to such rules.

149. Different opinions were expressed with respect to the title of the chapter. There was considerable support for the view that the title should correspond more closely to the main issue (i.e. at present, tendering) dealt with in the chapter. However, no decision was taken as to the title which should ultimately be adopted.

150. A view was expressed that the categorization of the open and limited systems of tendering was too sharply defined. There existed a gradation of possible solutions and procedures that might be adopted, ranging from a strictly open tendering system to a limited system as described in the chapter. There also existed a gradation of possible degrees of formality associated with whatever procedure was adopted by the purchaser. Even the negotiation approach involved certain procedural formalities, including the preparation of documents to serve as a basis for negotiations. The view was expressed that the guide should deal with procedures which the purchaser might adopt for the conduct of such negotiations. It was noted that certain aspects

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26/ A/CN.9/WG.V/WP.15/Add.10. This document was presented during the session, and it was agreed that this fact should be taken into consideration when the revised version of the chapter was discussed.

of tendering procedures which might apply when a tenderer was a private enterprise (e.g. a requirement to provide certain documentation) might not apply when the tenderer was a State enterprise.

151. There was considerable support for the view that the discussion of the negotiation approach should be treated on an equal level with that of the tendering approach, taking into account, however, their different natures. The chapter should not convey the impression that tendering was the more important approach to the conclusion of works contracts, since in practice negotiation was also very often used in the conclusion of such contracts. In addition, the chapter should avoid giving the impression that the benefits of competition could not be achieved under the negotiation approach. It was stressed that negotiation often took place with more than one potential contractor.

152. According to one view, negotiation could be engaged in even under the tendering approach. Another view, however, was that such a practice should be discouraged. Furthermore, with the exception of the price, no contractual terms should be left open to discussion between the tenderer and the purchaser. It was pointed out that it might not be practicable to adopt tendering procedures when using the cost-reimbursable method of pricing. Under another view, tendering procedures could be used even in this case. A view was expressed that the guide should point out that when the separate contracts approach was used, different procedures might be used in respect of different contracts. A further view was expressed that the guide should note that under rules of national law or international treaties tendering might be restricted to contractors from certain countries or regions. It was observed that there might be certain price advantages associated with the open tendering system. It was also observed that under this system the opportunity to tender need not necessarily be accorded to tenderers worldwide.

153. A view was expressed that the chapter should deal in greater detail with criteria which might be used for the evaluation of tenders. It was pointed out that the price might not be the most important criterion, and that in addition to it the tenderer's capability to perform his obligations, and the responsiveness of his tender to the requirements of the invitation to tender, might also be of great significance. It was suggested that there should be a clearer distinction drawn between the opening of tenders and their evaluation, and that these tasks might be undertaken by different bodies. A view was expressed that the discussion of the "two envelope" system of evaluating tenders should be clarified. It was suggested that the guide might mention the possibility of the purchaser's rejecting all tenders, but that this should not imply that he could reject one tender otherwise than in accordance with the tender procedures.

154. It was suggested that the chapter should deal with certain issues concerning the legal position of the purchaser and tenderers during the tendering procedures. It was pointed out that the legal positions of the parties would be determined by the applicable law. Views were expressed that it would be advisable to discuss and clarify the legal consequences of making an invitation to tender, and submitting a tender. It was observed that under some legal systems a tender might be considered as an offer, and it might be difficult to ensure that the tenderer was not entitled during any particular period to withdraw or change the tender. A view was expressed that the guide should also discuss the ability of the purchaser to change tender procedures

after they had been laid down. It was suggested to expand the discussion of the problems connected with the conclusion of the contract on the basis of tendering procedures. It was noted that financial institutions did not have uniform requirements in respect of tender procedures. A view was expressed, however, that the chapter should not refer to such requirements.

155. Various views were expressed on the depth in which pre-qualification was to be discussed in the chapter. According to one view, the chapter should be confined to a general discussion of the role and merits of pre-qualification (paragraph 9). Under another view the details to be included in the invitation to apply for pre-qualification (paragraph 11) and the questionnaire to be sent to enterprises which wished to be pre-qualified (paragraph 12) were very useful for the purchaser and should be retained in the guide. It was agreed to have an expanded discussion in general terms of pre-qualification, including the reasons why this approach might be used, and a description of the steps which might be followed, and to reflect the detailed information contained in paragraphs 10 and 11 in illustrative samples of an invitation to apply for pre-qualification and a pre-qualification questionnaire. It was agreed that the same approach should be followed with respect to the invitation to tender. The Secretariat was asked to prepare the illustrative provisions and forms and to include them in the revised draft of the chapter to be discussed at the future session of the Working Group when the revised chapters were discussed as a whole.

156. With respect to the documents to be provided to prospective tenderers, a view was expressed that greater emphasis should be given to contract specifications. In this connection it was also suggested that the chapter should point out that the works must be completely or nearly completely designed by the time tenders were solicited. It was noted that some of the draft forms referred to in paragraph 17 might not be given to prospective tenderers in all cases. A suggestion was made that the chapter should avoid an implication that a performance guarantee was to be submitted by a tenderer with his tender. It was generally agreed that the discussion of the invitation to tender and the instructions to tenderers should not set forth periods of time of a specified duration, but should merely advise the parties to consider what period of time was appropriate.

157. It was noted that tender guarantees were not required in practice in all cases and it was suggested that this should be reflected in paragraph 17. It was also noted that tender guarantees should remain in effect for a certain period after the date until which the tender was to remain in effect. It was suggested that the guide should not recommend that the tender guarantee should be "high enough", but that it should indicate merely that the purchaser should take into consideration various factors in determining its amount. It was pointed out that the form and contents of certificates of authority might be regulated by the law of the country of a potential tenderer in a mandatory manner, and that it was accordingly not advisable to include such certificates in the list of draft documents mentioned in paragraph 17.

158. Opinions differed concerning whether to delete or retain the subsection on "Discussion with most acceptable tenderer". The prevailing view was that the subsection should be retained, and the expression "to the satisfaction of the purchaser" in paragraph 32 should be replaced by the term "to the satisfaction of both parties". It was suggested to add to the term "performance guarantees" in paragraph 34 the expression "if provided for in the tender".

159. It was generally agreed that the guide should draw the attention of parties to problems connected with the validity of the contract, and that this issue should be elaborated either in this or in another chapter. It was also agreed that the written form for a works contract should be strongly recommended to the parties even in cases where it was not required by the applicable law.

160. It was pointed out that some linguistic revisions were needed in the Arabic version of the chapter, in particular in paragraphs 1 and 5. Some revisions were also needed in the Spanish version of the chapter. Various suggestions were made for improving the drafting of the chapter.

OTHER BUSINESS AND FUTURE WORK

161. The Secretary of the Commission informed the Working Group that, subject to approval by the Commission, the eighth session of the Working Group was scheduled to be held at Vienna from 17 to 27 March 1986. The Working Group agreed that the Secretariat should submit to that session the draft Introduction to the guide and draft chapters on "Identifying project and selection of parties", "General drafting considerations", "Supply of equipment and materials", "Supplies of spare parts and services after construction" and "Settlement of disputes". In addition, if possible, the Secretariat might submit a few revised draft chapters which it considered desirable to submit for further careful examination by the Working Group because of the extent of revision required.