

## Assemblies of the Member States of WIPO

### Fiftieth Series of Meetings Geneva, October 1 to 9, 2012

#### UPDATED PROGRESS REPORT ON THE NEW CONSTRUCTION PROJECT AND THE NEW CONFERENCE HALL PROJECT

*prepared by the Secretariat*

1. The present document contains the Updated Progress Report on the New Construction Project and the New Conference Hall Project (document WO/PBC/19/24), which is being submitted to the WIPO Program and Budget Committee (PBC) at its nineteenth session (September 10 to 14, 2012).
2. The recommendation of the PBC in respect of this document will be included in the "Summary of Recommendations Made by the Program and Budget Committee at its Nineteenth Session held from September 10 to 14, 2012" (document A/50/14).
3. *The Assemblies of the Member States of WIPO and of the Unions administered by it, each as far as it is concerned, are invited to take note of the contents of this document, taking into consideration any recommendation of the Program and Budget Committee made in respect of document WO/PBC/19/24, as recorded in document A/50/14.*

[Document WO/PBC/19/24 follows]



## Program and Budget Committee

### Nineteenth Session Geneva, September 10 to 14, 2012

#### UPDATED PROGRESS REPORT ON THE NEW CONSTRUCTION PROJECT AND THE NEW CONFERENCE HALL PROJECT

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#### INTRODUCTION

1. The purpose of this document is to present to the Program and Budget Committee (“the PBC”) an updated progress report on the New Construction Project and the New Conference Hall Project (“the Projects”) covering the period since May 2012, date of issuance of the progress report for each of these two projects (documents WO/PBC/19/12 and WO/PBC/19/13).
2. The contractual relationship in respect of the Projects was terminated by WIPO and the General Contractor, “*Implemia Entreprise Générale SA*”, through an amicable and jointly agreed separation at the end of July 2012.
3. Since then, the Secretariat has decided, in order to protect the best interests of WIPO, to take over the direct responsibility for executing the Projects while relying on extended professional mandates assigned to the Pilot, Architect and specialized engineers, in order to complete both Projects with the level of quality that had been required at the outset and within the overall budgets approved by Member States.
4. The Secretariat under the leadership of the WIPO Construction Committee—whose responsibility is to oversee the Projects, to take decisions and make recommendations on policies with regard to project execution—has come to that decision after a thorough review of the situation in terms of:
  - responsibility, risks and liability
  - cost and time
  - contractual, legal and financial framework
  - professional and operational framework.

In its review of the situation, the Construction Committee sought the advice of the internal teams and various internal units involved, as well as the Pilot, the Architect, the engineers and other external advisors and experts, including a law firm.

5. The present Progress Report contains the following main sections:

- I. Events that led to the termination of the contracts with the General Contractor
  - A. The New Construction Project
  - B. The New Conference Hall Project
  - C. WIPO decision to engage into high-level discussions to resolve matters
  - D. WIPO decision to engage into top-level discussions to resolve matters
- II. Resulting situation after the amicable and jointly agreed termination of the contracts with the General Contractor
  - A. For the New Building
  - B. For the New Conference Hall Project
    - B.1. With another general contractor
    - B.2. Without another general contractor
- III. Implementation of the classical mandate for the New Conference Hall Project
  - A. From the contractual and liability viewpoints
  - B. From the budget and financial viewpoints
  - C. Intellectual property aspects relating to the wood structure
- IV. Conclusion

## I. EVENTS THAT LED TO THE TERMINATION OF THE CONTRACTS WITH THE GENERAL CONTRACTOR

### A. The New Construction Project

6. The project implementation and relationship with the General Contractor went on satisfactorily from April 2008 to the Summer 2010, as for any major construction project of such a scope with its inherent and “normal” difficulties.<sup>1</sup>

7. In the Autumn of 2010, the original delivery date of the construction was postponed from early October to end November 2010, with a penalty for delay of 0.5 million Swiss francs due to WIPO by the General Contractor. The General Contractor did not however meet the agreed postponed delivery date. As a consequence, as from the end of 2010, the Pilot suspended the validation of remaining invoices and WIPO suspended the corresponding payments to the General Contractor pending resolution of outstanding works.<sup>2</sup>

8. It must be recalled that the New Building was expected to be ready by the end of 2010 so as to allow WIPO to vacate the former “P&G Building” in view of the fact that the termination

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<sup>1</sup> Progress reports were submitted to the Independent Advisory Oversight Committee for its sessions in March, May, August/September and November 2011, March and May/June 2012; refer to the reports of the corresponding sessions: IAOC/20/1 (paragraphs 18 to 20), IAOC/21/2 (paragraph 36, Annex), IAOC/22/2 (paragraphs 24 to 27, Annex), IAOC/23/2 (Annex), IAOC/24/2 (Annex) and IAOC/25/2 (Annex). Refer to progress reports submitted to the PBC and the Assemblies of the Member States of WIPO for their respective sessions in September/October 2011, and reports of those sessions (documents WO/PBC/18/9, WO/PBC/18/22 (paragraphs 601 to 609), A/49/11 and A/49/18 (paragraphs 229 to 232)). Refer to the External Auditor's Reports issued in August 2009 and December 2011 and presented to the September 2010 and September/October 2012 sessions of the PBC and the Assemblies, respectively under documents WO/PBC/15/13 and WO/GA/39/3, and WO/PBC/19/18 and WO/GA/41/6. Refer to the Internal Audit Reports issued in September 2009, September 2010 and May 2011.

<sup>2</sup> See footnote 1.

date of the lease contract was August 2011, with no possibilities for extension.<sup>3</sup> The Secretariat could therefore no longer maintain its original plan to wait for full completion of the Project before starting moves of staff to the New Building. Instead, the Secretariat had no choice but to organize with the General Contractor a series of partial deliveries of the New Building, floor by floor, so as to accommodate the phased move plans of about 400 WIPO employees located in the P&G Building.<sup>4</sup> The moves started mid-March 2011 (immediately after issuance of the “occupancy permit” delivered by the Geneva local authorities) and lasted until June 2011, at which time the New Building had become fully operational including the cafeteria, the library, the parking for delegates and employees and the storage areas.<sup>5</sup>

9. From the budget and financial viewpoint, it must be emphasized that, proceeding as described in the previous paragraph, the Secretariat not only complied with the commitment contained in the Program & Budget for the 2010-11 biennium, i.e., vacating the P&G Building in August 2011, but also avoided the potential additional cost of renting office spaces elsewhere for the 400 employees who had to leave that building but could not have been moved to the New Building, had the Secretariat maintained the original goal of full completion of the New Building before moves could start. It is recalled that the rental cost of the former P&G Building was 7 millions Swiss francs plus utilities, per annum.

10. In view of the delays not being properly managed by the General Contractor and the effect this had on the move plans, the Secretariat initiated in the Spring of 2011 further negotiations on penalties for delay. These negotiations were concluded in May 2011 by an agreement for a total amount of 2,225,000 Swiss francs to cover the period from October 2010 to June 2011 due to WIPO by the General Contractor.<sup>6</sup>

11. Having said that, it must be pointed out that, if on the one hand, about 96 per cent of the New Building was completed before the Summer 2011, on the other hand, no serious progress was made by the General Contractor in coping with delays in finishing and repair works (mainly facades, atria glass roof tops and parquet floor) which were then estimated to take several months to be completed.<sup>7</sup>

12. Another significant factor proved, in retrospect, to have a significant impact on the progress of works: three key members of the General Contractor management team were changed between end 2010 and Summer 2011, bringing a change in management culture and a change in customer relations.

13. At that point, since the General Contractor had not fulfilled its contractual responsibility in respect of the New Building, and since WIPO did not want to settle for sub-standard quality of works (the completed works had to be as contracted out and as paid for), the Secretariat had no choice but to hold the General Contractor accountable for its failure to comply with its obligations.

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<sup>3</sup> The owner of the former P&G Building has engaged a major renovation project of that building, as can be seen from the worksite on the *Chemin Pré-de-la-bichette*, across from the PCT Building.

<sup>4</sup> The total number of moves into the New Building was 500, including 100 employees moved from buildings other than the former P&G Building, in order to regroup units which had been split across buildings for the last years, pending the availability of the New Building. Furthermore, the grand total of all moves undertaken between March and the end of June 2011 amounted to about 750 moves across the WIPO campus.

<sup>5</sup> See footnote 1.

<sup>6</sup> See footnote 1.

<sup>7</sup> Progress reports were submitted to the Independent Advisory Oversight Committee for its sessions in August/September and November 2011, and March and May/June 2012; refer to the reports of the corresponding sessions: IAOC/22/2 (paragraphs 24 to 27, Annex), IAOC/23/2 (Annex), IAOC/24/2 (Annex) and IAOC/25/2 (Annex). Refer to progress reports submitted to the PBC and the Assemblies of the Member States of WIPO for their respective sessions in September/October 2011, and reports of those sessions (documents WO/PBC/18/9, WO/PBC/18/22 (paragraphs 601 to 609), A/49/11 and A/49/18 (paragraphs 229 to 232)).

## **B. The New Conference Hall Project**

14. In Spring 2011, at the same time as more delays and difficulties started to occur for the completion of the New Building (see above paragraphs), the negotiations for the mandate of General Contractor for the New Conference Hall Project were ongoing with the same company which had been selected by the Selection Board in February 2011. The Selection Board had been briefed by the WIPO Evaluation Team and the Pilot on the delays and difficulties as they stood in December 2010 and early February 2011. The contract with the same General Contractor was signed in May 2011.<sup>8</sup>

15. In this context, a number of distinct points need to be emphasized or recalled.

16. Firstly, it is important to emphasize that this second major construction project was, from the side of WIPO as the Client, as well as all of the Client's professional and technical service providers (Pilot, Architect, and specialists engineers) managed by the same entities and personnel as the first project (the New Construction Project) had been managed since 2008.

17. Secondly, it is important to re-emphasize the unique nature of the conference hall design (as opposed to a more standard office building) and the necessity for any potential service provider or contractor to take stock of that very nature in submitting their proposals or bids, and subsequently in accepting the award of contracts. Potential service providers had to be in a position to meet the required high quality of the execution of the design and the commensurate demand on worksite management, as extensively detailed in the contractual technical specifications.

18. Lastly, it is important to recall<sup>9</sup> that, in the context of the tender process for the mandate of general contractor for the New Conference Hall Project, only two tenders had been submitted, one detailing one mode of execution and the other detailing two variants for execution, the price gap between the cheapest and most expensive of the three options was 20 millions Swiss francs. The selected bidder, "*Implenia Entreprise Générale SA*", offered the cheapest option while complying with the required quality of works.

## **C. WIPO decision to engage into high-level discussions to resolve matters**

19. In December 2011, the decision was taken by the Secretariat to engage into discussions on resolving the issues related to the New Building at higher level (WIPO Assistant Director General for Administration and Management and the Head of the general contractor branch at the General Contractor). Thereafter, four such meetings took place between December 2011 and April 2012. Despite the high-level engagements and commitments made by the General Contractor representative at these meetings, the General Contractor continued to fail to meet all newly agreed deadlines and execute corresponding actions.<sup>10</sup>

20. In Spring 2012, when all efforts made by the Secretariat since the end of 2010 to resolve the issues in a professional and conciliatory manner had failed, the Secretariat had no option

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<sup>8</sup> Progress reports were submitted to the Independent Advisory Oversight Committee for its sessions in March, May and August/September 2011; refer to the reports of the corresponding sessions: IAOC/20/2 (paragraphs 18 to 20), IAOC/21/2 (paragraph 36, Annex) and IAOC/22/2 (paragraphs 24 to 27, Annex). Refer to progress reports submitted to the PBC and the Assemblies of the Member States of WIPO for their respective sessions in September 2010 and September/October 2011, and reports of those sessions (documents WO/PBC/15/20, WO/PBC/15/24 (paragraphs 487 to 490), WO/PBC/18/10, WO/PBC/18/22 (paragraphs 610 to 615), A/48/26 (paragraphs 285 to 293), A/49/12 and A/49/18 (paragraphs 233 to 238)).

<sup>9</sup> This point was detailed in the Secretariat presentation to the PBC at its session in September 2011 (in addition to the Progress Report contained in document WO/PBC/18/10), in particular in the report of that session (document WO/PBC/18/22, paragraph 611).

<sup>10</sup> Progress reports were submitted to the Independent Advisory Oversight Committee for its sessions in March and May/June 2012; refer to the reports of the corresponding sessions: IAOC/24/2 (Annex) and IAOC/25/2 (Annex).

but to seek advice from an external law firm specialized in construction-related legal matters, on resolving outstanding issues related to the repair works for the New Building.

21. In parallel, since late Spring 2012, the problems relating to completing the New Building started to affect the New Conference Hall worksite. The General Contractor had placed for the New Conference Hall worksite the same team of three key management personnel as for the New Construction Project. In early June, the worksite management announced a delay of about two months in the project delivery without justification. The worksite management refused to comply with contractual provisions related to architectural specifications. The worksite relationship between the General Contractor worksite management on the one hand, and the WIPO representatives (WIPO staff concerned, Pilot, Architect and engineers) on the other, started to deteriorate and become conflictual.

22. WIPO sent to the General Contractor a series of legal notifications (“*mises en demeure*”) with legally binding deadlines (from mid-May onwards) on several matters concerning the New Building. The General Contractor, however, did not take any of the required actions. The legal consequence was that, after the respective expiration dates of the legal notifications had passed, WIPO substituted itself for the General Contractor on all corresponding works relating to the New Building.<sup>11</sup>

23. In addition, the Secretariat sought legal advice from the law firm on trying to better understand the extent of delays on the New Conference Hall Project (through a study carried out by international construction planning experts). The result of this study was that, as at mid-July 2012, the actual delay was in the order of four months, not two as had been announced by the General Contractor in early June 2012.

#### **D. WIPO decision to engage into top-level discussions to resolve matters**

24. As the situation deteriorated quite rapidly between May and mid-June 2012, the conclusion was reached in June 2012 by the Secretariat that a top-level meeting between the two Chief Executives would be necessary to unblock the situation. At the end of June 2012, agreement was reached between the two Chief Executives to hold a “mini-trial” type of hearing, allowing both sides to separately present their case to both Chief Executives, for them to come to a joint conclusion. The meeting took place on July 18, 2012, in Geneva; the participants in the WIPO delegation included also the Pilot and the Architect.

25. In this context, the Secretariat had considered four options which were elaborated with advice from the law firm. Two extreme options were excluded at the outset from further consideration: (i) the *status quo*, considered to be not acceptable as it would not have resolved the issues and would only have made matters worse; and (ii) the immediate conflictual termination of both contracts, considered to be not desirable as it would have meant years of litigation, interruption of the worksite leading to higher costs and compensation payments to the professional and technical service providers (Pilot, Architect and engineers) and the sub-contractors, and significant delays in future project implementation.

26. Two options were favored as being reasonable and realistic: (i) amicable and jointly agreed immediate termination of the contract on the New Construction Project—since the New Building was almost completed—while the General Contractor would have kept the contract for the New Conference Hall Project subject to certain conditions, including a change to the General Contractor worksite management structure; and (ii) amicable and jointly agreed

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<sup>11</sup> This matter was included in the progress report submitted to the Independent Advisory Oversight Committee for its session in May 2012 and already reflected in the progress reports submitted to the PBC and the Assemblies of the Member States of WIPO for their respective upcoming sessions in September/October 2012 (documents WO/PBC/19/12 and A/50/11).

termination of both contracts immediately. The Secretariat's most preferred option was option (i) described in this paragraph.

27. At the conclusion of the mini-trial, agreement was reached by both Chief Executives, in the best interests of both parties, to seek an amicable and jointly agreed termination of both contracts. In practice, one "agreement" would be drafted and concluded for each Project, by end July 2012, under the leadership of the Head of the general contractor branch at the General Contractor and the WIPO Assistant Director General for Administration and Management.

28. Aspects of each agreement are reflected in Sections II and III, below.

## II. RESULTING SITUATION AFTER THE AMICABLE AND JOINTLY AGREED TERMINATION OF THE CONTRACTS WITH THE GENERAL CONTRACTOR

### A. For the New Building

29. As mentioned in paragraph 22, WIPO has substituted itself for the General Contractor for all remaining finishing and repair works<sup>12</sup> in respect of which the General Contractor had not taken the required actions. WIPO's interests are fully preserved since WIPO is retaining sufficient funds to cover the cost of works from the balance owed to the General Contractor until all works are completed and since those works remain legally under the responsibility of the General Contractor.

30. WIPO will obtain the standard 5% bank guarantees corresponding to works completed by the General Contractor, including all the repair works.

### B. For the New Conference Hall Project

31. Two options were considered in respect of the resumption and completion of the Project: (1) either with another general contractor, or (2) without another general contractor.

#### B.1. With another general contractor

32. Engaging another general contractor would have first required a substantial status review and documentation by the Architect and engineers of the completed works as compared with the original architectural and technical Terms of Reference. It was estimated that this review would have taken at least three months to be completed. It would then have required the launching of a new tender process, which, from issuance of call for tender to award of contract, would have taken an estimated eight to nine months to be completed. At least two additional months would have had to be added before the worksite could re-open. The entire process, before work could resume, would therefore have required about 13 to 14 months.

33. Separately from the theoretical approach described above, the risk of not having a company prepared to bid under such a new tender was considered extremely high for the following reasons: a new contractor might have had difficulties to take over the responsibility and liability on a partially executed project—or it would offer a price with a comfortable margin corresponding to its appreciation of what that risk would represent; a new contractor would have had to accept the effect of pre-existing delays in addition to the delay caused by the mere fact of relaunching the tender altogether; in any case, a new contractor would have had to accept the mandatory operational requirements relating to the working language (French) and knowledge of applicable Swiss local laws and regulations for direct dealings with the local

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<sup>12</sup> With the exception of the atria glass tops and the parquet floors, which the General Contractor will complete under the terms of the agreed separation.



cantonal and city authorities. It is also to be pointed out that the local market of general contractors remains quite limited from a competitiveness viewpoint<sup>13</sup>.

34. An additional risk considered by the Secretariat to be extremely high would have been the additional cost caused by the closing of the worksite for at least one year, in particular when there would be no certainty whether a new general contractor could eventually be engaged. Furthermore, should there be a potential general contractor, WIPO's starting position in entering into contract negotiations would be much weaker than it was when the fixed price mandate was negotiated in 2011 on the basis of 2010 prices. Future prices could only be 2013 prices (while existing conditions, at 2010 prices, apply for 70 per cent of the construction cost that are covered by existing contract awards (see paragraph 41, below)).

35. Significant additional risks would be incurred (estimated at several millions Swiss francs as a result of closing the worksite for at least one year) and would not be able to be absorbed by the budget approved by Member States. These include:

- (i) suspending or terminating professional mandates for the execution works (Pilot, Architect and engineers);
- (ii) losing professionals (having the historical knowledge of the project design and execution so far);
- (iii) losing sub-contractors who would move their equipment and workers to other worksites;
- (iv) additional consequential financial compensations which would inevitably be claimed in the interim by service providers and sub-contractors covered by existing contract awards; and
- (v) future sub-contractors refusing to take over responsibility for partially completed works or offering to do so, but at much higher cost.

36. The WIPO Secretariat's conclusion was that seeking another general contractor might not be successful or viable due to the lack of available and competent bidders, and, in the remote likelihood that it would be successful, it would cause substantial additional costs and would unduly delay by at least one more year the completion of the project, while it is estimated at present that the remaining duration before completion of the project would be about one and a half years.

## **B.2. Without another general contractor**

37. In Switzerland and in other European countries, large construction projects are not always managed by a general contractor. Another well-practiced approach has been used for several decades for managing major construction projects under the so-called "classical mandate" ("mandat classique"). Both the Pilot and the Architect have over 20 years experience with such a model in Switzerland and Germany, respectively.

38. Under the classical mandate, the distribution of elements of the general contractor mandate between the Pilot, the Architect and WIPO is as follows:

- (i) the existing contracts with the Pilot, the Architect and the engineers will be extended according to the following:
  - the overall project execution planning will be shifted to the Pilot, in coordination with the Architect

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<sup>13</sup> This point was detailed in the Secretariat presentation to the PBC at its session in September 2011 (in addition to the Progress Report contained in document WO/PBC/18/10), in particular in the report of that session (document WO/PBC/18/22, paragraph 611).

- the overall project execution timetable and general worksite direction will be shifted to the Architect
  - the technical worksite direction will be shifted to the specialized engineers reporting to the Architect in accordance with their respective area of speciality
- (ii) the administration of contractual relationships with each of about 50 sub-contractors (which were previously under the direct responsibility of the General Contractor) will fall under WIPO's direct responsibility.

39. From the standpoint of standard maintenance and repair works in existing buildings, WIPO has been successfully managing directly, and for several decades, an average of 30 to 50 contracts on an annual basis, covering all technical areas in all existing buildings, for individual amounts which are of course much less than the amounts concerned in respect of the Project, but the administration of contracts will be basically the same.

### III. IMPLEMENTATION OF THE CLASSICAL MANDATE FOR THE NEW CONFERENCE HALL PROJECT

#### A. From the contractual and liability viewpoints

40. The General Contractor contract provided the obligation for it to sub-contract only to companies which would be obligated to accept a take over of their contract by WIPO, without any modifications (in particular the agreed price), should the contract between WIPO and the General Contractor be terminated. This is the currently applicable contractual situation. Furthermore, from a practical viewpoint, virtually all existing sub-contractors have confirmed to the Secretariat and the Pilot their willingness and full engagement for completing the project, under the price conditions agreed with the General Contractor.

41. About 20 contracts and awards, representing about 70 per cent of the construction cost, can be taken over by WIPO with virtually no change in conditions or cost. About 30 contracts, representing about 30 per cent of the construction cost, will need to be tendered by WIPO since the General Contractor had not yet tendered them.

42. WIPO has already obtained from its insurance company, as from September 2012, special insurance coverage for the worksite ("*travaux de construction*"), in addition to the civil responsibility insurance that WIPO has already as "*Maître de l'ouvrage*" and the special coverage for potential damage to existing buildings caused by the worksite.

43. WIPO has already secured, as from September 2012, the worksite to prevent unauthorized access.

44. WIPO will cover health and safety on the worksite by taking over the existing contract between the General Contractor and the sub-contractor concerned, to ensure that adequate coverage will be operational as soon as the worksite re-opens.

45. It is important to recall that, based on its long standing practice (and as most recently done for the New Construction Project and for the security perimeter around the WIPO Campus), the Secretariat deposited the applications for building permit at the Swiss cantonal authorities for the New Conference Hall Project in order to fully comply with Swiss laws and regulations on the matter. The main permit for the new hall and modifications to the AB Building was delivered by the Swiss cantonal authorities on June 1, 2010<sup>14</sup>; an additional permit was

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<sup>14</sup> This matter was included in the Progress Report submitted to the WIPO Audit Committee for its sessions in July 2010 and May 2011 (see report IAOC/21/2, paragraph 36, Annex) and in the updated presentations made before the PBC and the Assemblies at their respective sessions in September 2010 (documents WO/PBC/15/24, paragraph 487, and A/48/26, paragraphs 285 to 293).

delivered in December 2011 for the future access center. Similarly, any required application for occupancy permit for the new hall, modifications to the AB Building and future access center will be deposited at the Swiss cantonal authorities (as was done for the New Building, in respect of which the occupancy authorization was issued in March 2011<sup>15</sup>). In conclusion, all already issued permits and authorizations remain valid and any future authorization will be handled according to the applicable Swiss laws, regulations and practice, irrespective of whether or not there is a general contractor.

## **B. From the budget and financial viewpoints**

46. The fixed price contract with the General Contractor, negotiated in the Spring 2011 on the basis of the tender submitted in the Autumn of 2010, includes about 50 millions Swiss francs for construction works and about 6 millions Swiss francs for honoraria, risks and benefits and other related costs.

47. Out of the 50 millions Swiss francs for construction works, about 35 millions Swiss francs cover works which have been awarded or were about to be awarded by the General Contractor to sub-contractors under conditions based on the 2010 contract and price framework, all of which can be taken over by WIPO at those conditions with no modifications. In other words, even after termination of the contract with the General Contractor, WIPO fully benefits from the fixed price approach it had chosen in 2010 when launching the original tender, in respect of all the awarded works (i.e., about 70 per cent of the total contractual fixed price). It is to be noted that WIPO would not have been able to benefit from the fixed price approach for such a large share of the works, if it had chosen to seek another general contractor.

48. The amount of 35 millions Swiss francs includes:

- (a) about 13 millions Swiss francs for works which have been completed and paid; these are mainly the excavation and preparation of the worksite (100 per cent completed), masonry works (90 per cent completed), wood cutting and production and assembling of beams in factories in central Switzerland and Poland (50 per cent completed); and
- (b) about 22 millions Swiss francs for works awarded but not completed.

49. The balance amount of 15 millions Swiss francs includes works which had not been tendered by the General Contractor and for which the Secretariat estimates, at this point, a possible maximum additional cost of about 2 millions Swiss francs due to the fact that new tenders will have to be launched at 2012 or 2013 prices.

50. Out of the 6 millions Swiss francs for honoraria and risks and benefits, the Secretariat estimates that WIPO will have at its disposal a total of about 4.3 millions Swiss francs, including:

- (a) 100 per cent of the contractual amount for risks and benefits (2.7 millions Swiss francs), as the General Contractor is no longer entitled to retain it, since it will not be taking any risk, now that the contract is terminated;
- (b) the pro rata of the contractual General Contractor honoraria corresponding to works not completed (estimated to be between 1 and 1.3 millions Swiss francs), as this honoraria would no longer be due to the General Contractor; and
- (c) an amount of 300,000 Swiss francs as compensation against possible future claims, as agreed in the context of the separation agreement.

51. Reverting now to the budget for the Project as approved by Member States, it must be recalled that, if the basic budget is currently fully committed on the basis of the original fixed

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<sup>15</sup> This matter was included in the Progress Report submitted to the PBC for its session in September 2011 (document WO/PBC/18/9).

price contract, a total of about 4 millions Swiss francs are uncommitted at present from other approved provisions, and are therefore available as follows:

- (a) 1 million Swiss francs remain available from the additional budget of 4.5 millions Swiss francs approved by Member States in 2011<sup>16</sup>; and
- (b) 3 millions Swiss francs remain available from the 4 millions Swiss francs “Contingency Provision for Miscellaneous and Unforeseen” approved by Member States in 2009<sup>17</sup> (this Contingency Provision is to cover unforeseen works that may arise during the execution phase, as per the definition given by the External Auditor in the context of the New Construction Project and reflected in documents presented to the PBC and Member States in 2007, and applied by the Secretariat since 2008 for that Project and for the New Conference Hall Project<sup>18</sup>).

52. As a consequence, the available funds, estimated at this point at a total of about 8.3 millions Swiss francs (4.3 millions Swiss francs plus 4 millions Swiss francs, as mentioned in paragraphs 50 and 51, respectively) should be sufficient to cover comfortably the currently estimated cost of the “classical mandate”, i.e., about 8 millions Swiss francs, detailed as follows. The additional honoraria for the Pilot, the Architect and all the engineers is estimated at about 4 millions Swiss francs,<sup>19</sup> while the internal capacity strengthening via internal redeployment, secondment within UN Agencies, and/or external specialized temporary resources is estimated at about 1.7 millions Swiss francs, and the estimated additional cost due to new tenders having to be launched is estimated at about 2 millions Swiss francs (or 15 per cent on the estimated total of about 15 millions Swiss francs mentioned in paragraph 49). The result of these estimates shows at present a remaining available balance of about 600,000 Swiss francs for the Project as a whole.

53. In conclusion, the Secretariat is of the view that there should be no additional cost to the Project, caused by the take over by WIPO under the “classical mandate”, since the existing approved budget and provisions, as well as funds that will become available by virtue of the termination of the contract, will be sufficient. The Secretariat is also of the view that this is now the only viable approach permitting the completion of the Project within the approved budget.

54. Finally, WIPO will obtain the standard 2-year 5 per cent bank guarantee from the General Contractor covering the completed works, and separate bank guarantees from each of the sub-contractors relating to works under their responsibility.

### **C. Intellectual property aspects relating to the wood structure**

55. The Secretariat wishes to raise another concern it had to address which is unique to the New Conference Hall Project, i.e., the wood structure as covered by the fixed price contract between WIPO and the General Contractor cannot be built by any company other than the current wood sub-contractor for reasons of both the mere feasibility of the execution of the wood

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<sup>16</sup> See document A/49/12 presented to the Assemblies at their session in September 2011, and the report of that session (document A/49/18, paragraph 238).

<sup>17</sup> See document A/47/12 presented to the Assemblies at their session in September 2009, and the report of that session (document A/47/16, paragraph 347).

<sup>18</sup> The complete text of the recommendation concerned reads as follows: “Recommendation No. 4: To include a reserve for miscellaneous and unforeseen in the financial envelope for the project in order not to compromise decision making which is essential to the progress of the project. This reserve is to be used only to meet possible unforeseen construction or market expenses, technical modifications or additions necessary during the execution phase, which were unforeseeable during the project stage and inaccuracies or omissions in the terms of reference leading to additional work.” (See document A/43/INF/6, Annex, paragraph 46).

<sup>19</sup> Estimates based on the various rates applicable under the Swiss Engineers and Architects Standard (“Norme SIA”) for the mandates of overall planning and coordination, general worksite direction and technical worksite direction).

structure design and linkage to the masonry works, and for intellectual property reasons, as further detailed below.

56. As indicated in paragraph 18, the selection of the General Contractor was based on the cheapest option complying with the required quality of works, i.e., an alternative specially designed by the wood sub-contractor and included as an essential part of the bid submitted by the General Contractor. The draft contract already contained the mandatory condition, as set in the call for tender, that both the wood sub-contractor and the wood structure execution would have to be fixed from the time of the submission and could not be changed after signature of the contract between WIPO and the General Contractor, unless WIPO specifically and expressly agreed to the change(s).

57. The wood structure, as any other architectural work, is in principle a protected creation under copyright law. It can only be built by—or with the authorization of—the wood sub-contractor, which means that further delaying the take over of the worksite and re-launching the tender for general contractor could have extremely costly consequences for WIPO, as opposed to WIPO taking over the contract of that sub-contractor under the existing conditions.

58. Furthermore, on the basis of the signed contract, a large part of the concrete works were conceived exclusively for the particular option of the wood structure, the latter can only be assembled on the existing supporting masonry works. Any change to the masonry works by a new general contractor would mean that the beams already prepared would have to be destroyed as these have been cut to precision (representing over 50 per cent of the wood already cut).

#### IV. CONCLUSION

59. The Secretariat is fully confident that the finishing and repair works for the New Building will be carried out, under the management of the WIPO professional service providers (Pilot, Architect and engineers) in the upcoming 12 months period, at no additional cost to WIPO in view of the funds still being withheld until the balance of the final accounts is settled after all works are completed.

60. The Secretariat is also fully confident that the New Conference Hall Project can be completed in compliance with the architectural and technical quality required under the original terms of reference, without exposing the Organization to liability, within the approved budgets and provisions. The timetable would have to be extended by about six months, according to current analysis, and therefore it is expected that the Project will be completed by the end of 2013 (instead of end of April 2013).

61. The Secretariat, under the leadership of the Construction Committee, is prepared to give Member States a briefing on the progress of works, on a monthly basis. In addition, the Secretariat will continue to reflect the new situation in a variety of monitoring documents and progress reports to the oversight and governing bodies.

*62. The Program and Budget Committee is invited to recommend to the Assemblies of the Member States of WIPO and of the Unions administered by it, each as far as it is concerned, to take note of the contents of this document.*

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