

# SIXTH FRAMEWORK PROGRAMME: FREQUENTLY ASKED QUESTIONS

## I. PARTICIPATION / ELIGIBILITY

### 1) Participation without funding

In FP5 it was possible for **participants** from EU member countries to participate in funded projects, but not to receive funding. Is this also possible in FP6? If yes, which responsibilities and obligations would a participant have if they receive no funding? (For example, in FP5, no cost statements are needed from the partner).

In FP6 it is possible for legal entities from EU countries to participate without receiving funding. Their costs will be taken into account for calculating the total cost of the project but not the Community financial contribution. For these cases, the contract can include the special clause for such contractors, indicating that they are not subject to financial audits and audits on accounting and management principles referred to in Article II.29.1. As a consequence, Section 1 of Part B of Annex II (eligible costs of the project, direct costs, indirect costs, cost reporting models, receipts of the project Community financial contribution, reimbursement rates, audit certificates, interest yielded by pre-financing provided by the Commission, payment modalities) do not apply to those contractor(s). Also, such contractors would not be subject to any financial collective responsibility provisions applicable to the project.

### **NEW**

### 2) Eligibility Criteria

Which legal documents determine the eligibility criteria for proposals submitted under FP6?

The documents which regulate the eligibility criteria for proposal submissions are:

- a) The text of the relevant call published in the Official Journal of the European Union
- b) The work programme of the FP6 specific programme
- c) The rules for participation (Official Journal EC L 355/23) chapter II articles 4 to 11 and
- d) " Guidelines on Proposal Evaluation and Selection Procedures" adopted by the Commission on 27.03.2003 (COM C/2003/883) as amended by Decision COM/2003/4350 dated 25 November 2003.

These documents can be found by using the web site address:

<http://fp6.cordis.lu/fp6/home.cfm> under the heading "find a call". Some of them may be found at the web site address:

[http://europa.eu.int/comm/research/fp6/working-groups/model-contract/index\\_en.html](http://europa.eu.int/comm/research/fp6/working-groups/model-contract/index_en.html)

## **NEW**

### 3) Ownership of a participant

If a legal entity is established in a Member State or Associated State is it eligible to participate even though a majority of its shares is owned by an entity established in a third country?

The rules for participation in the Sixth Framework Programme (2002-2006) [OJ L355 - 30-12-2002]" indicate that a legal entity established in a Member State is a Member State legal entity; and a legal entity established in an Associated State is an Associated State legal entity.

In other words, the nationality of a legal entity is determined according to the country where it is registered and not the nationality of its owners.

The direct or indirect holding of the nominal value of the issued share capital of a legal entity is relevant only when two or more legal entities participate in an FP6 indirect action and one of them is controlling the other. (See article 3 of the rules for participation in the Sixth Framework Programme (2002-2006) [OJ L355 - 30-12-2002]" available at:

[\[http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_355/l\\_35520021230en00230034.pdf\]](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_355/l_35520021230en00230034.pdf)

Article 5.2 of the rules for participation requires that the **minimum number of participants** (unless increased or adapted by the work programmes) shall not be fewer than three **independent** legal entities established in three different Member States or associated States, of which at least two shall be established in Member States or associated candidate countries.

*(Example: 1 Italian independent legal entity, 1 Danish independent legal entity and 1 Hungarian independent legal entity.)*

### 4) Evolution of consortium

When and under what conditions are competitive calls necessary?

Competitive calls are necessary when it is foreseen in the technical annex to the contract (Annex I) that a budget is allocated to as yet unidentified contractors (and only for Integrated Projects (IP) and Networks of Excellence (NoE)). In these cases, a competitive call must be launched by the consortium to notify the research community. Proposals are evaluated and the new contractors are proposed to the Commission. The terms and conditions for carrying out the call are enumerated in Article 3 of Annex III to the contract for these instruments.

#### **New participants:**

Consortia have greater autonomy under FP6 including the possibility to expand to include additional contractors, with different capacities necessary for the project or to modify their membership by replacing contractors during the project life.

The consortium, at its own initiative, can start the "expansion" procedure, which can range from a simple direct replacement of one contractor by another, to a "competitive call", launched by the consortium to select the new contractor(s) from applicants. Launching competitive calls applies only to Integrated Projects (IP) and Networks of Excellence (NoE) in

which a specific budget has been set aside for new participants not already identified at the beginning of the project.

This option does not lead to any increase in EC financial contribution to the project.

#### **Additional financial contribution:**

The Commission may decide, under certain circumstances to launch call(s) for proposals to provide additional funding for on-going indirect actions, in order to cover new activities, expand the consortium and/or the budget, or to involve particular types of participants. In these cases only, the selected proposal(s) may benefit from additional financial contribution from the Community. In these cases, the additional Community funding is governed by the specific call for proposals launched by the Commission and addressed to on-going projects. The consortium cannot claim additional funds in any other case.

#### **5) Physical persons**

Must all participants be part of a legal entity? If yes, can physical persons be subcontractors?

A physical person can be a contractor. In that case, as a physical person, you must use the AC cost model. However, this is limited to persons working as individuals in a research contract. Some SMEs are legally speaking physical persons but have accounting systems and employees. These entities should use one of the cost models available to SMEs (FCF or FC).

Physical persons may also act as subcontractors. In that case the contractor with whom they are associated will have chosen them following the provisions of the EC contract, awarding the sub-contract on the basis of the best quality/price ratio.

#### **6) Roles of participants**

Is there a partner status in FP 6 similar to assistant contractor in FP5?

No. There is only one type of contractor, all with equal rights and obligations. This does not mean that all partners have to have an equal share of the work in the project but that their rights and obligations as contractors are the same.

Nothing prevents the contractors internally, through their consortium agreement, to grant each another particular roles or responsibilities such as those relating to management activities, organisation of meetings, or leadership of work packages. However, these would have no effect on collective and individual obligations of each contractor towards the Commission.

The co-ordinator has some additional obligations under the contract. These relate to ensuring the accession of all the contractors to the contract, communication between the consortium and the Commission, receiving and distributing the Community financial contribution and keeping accounts to that end.

**NEW** Co-ordinator tasks

Can some coordinator tasks actually be performed by one of the other contractors? If so, can they claim for the cost of doing these? If so, how should they be reported to the Commission?

The specific obligations of the coordinator must be distinguished from the management of the consortium activities. The coordinator's specific obligations to ensure accession to the contract by the other contractors, to ensure the communication between consortium and Commission, and to receive and distribute the EC contribution and to keep accounts must be carried out by the coordinator; only the coordinator may have these particular tasks and their associated costs. However, there are many other tasks that are considered part of the management of the consortium and these can be carried out by any contractor, in accordance with the terms of the consortium agreement. The costs are determined according to the task allocation.

**NEW** Sub-contractor

In case of use of **freelancers/self employed experts** by a contractor, will effort/cost initially planned (in the CPFs) under 'personnel' be reallocated to 'subcontracting'?

A subcontractor is not a "participant" or a contractor and is always associated with a contractor. The rules concerning subcontracting costs must be followed for subcontractors. Personnel employed by the contractor are not usually considered subcontractors whereas freelancers working for the contractor usually are (unless they become contractors in their own right) or are considered to be in-house consultants, working exclusively for the contractor on a full-time basis (*intra muros*).

## II. CONSORTIUM AGREEMENT (CA)

Since consortium agreements are mandatory for certain instruments, particularly IPs and NoEs, can the co-ordinator pay pre-financing to participants **without the CA having been signed**?

The payment of the pre-financing is made by the Commission to the co-ordinator based on one of the three options established by Article 8.2 of the contract:

The Community financial contribution is paid within 45 days of one of the following:

- a) the date of entry into force of the contract;
- b) the date the Commission is informed of the accession of the last contractor required to constitute the minimum number of participants established by the Rules for Participation, as detailed in the call for proposals to which the project is related; or
- c) the last date the Commission is informed of accession to the contract of all the contractors.

The contract will establish which of these options is applicable. The second issue is the distribution of the pre-financing by the co-ordinator among the contractors. Where the pre-financing is paid on the basis of the first option above, Article 8.1.c states: *However, the initial pre-financing shall not be distributed to the contractors until the minimum number of contractors required by the Rules for Participation have acceded to the contract.* In this case, the co-ordinator may distribute the EC contribution to the other partners **only** after the minimum number of participants has been reached.

In all cases, Article 8.1.c will state that: the *coordinator* shall distribute the *Community* financial contribution without unjustified delay.

"Unjustified delay" usually means in accordance with any provision established by the consortium agreement or any special clause of the contract (for example relating to prior provision of a bank guarantee or other financial security). The coordinator will allocate each tranche of the Community financial contribution between the contractors in accordance with the provisions of the contract and any relevant decisions of the consortium (the latter cannot contradict the provisions of the contract).

Can the co-ordinator pay the advance payment to partners only when their activities start within the project (for example when their tasks start)?

Yes, if it has been agreed by the consortium. The coordinator will notify the Commission of interest accrued on this pre-financing.

### III. NEGOTIATION AND CONTRACT PREPARATION FORMS (CPF)

In the CPF for Integrated Projects (IP), A.2.c Form, the first clause (a) states that the organisation "Has **stable and sufficient sources of funding** ... to provide any counterpart funding necessary." What is the implication of this clause for a **non-EU participant** and for **participants using the AC cost model**?

- For participants not receiving EU funding there is no obligation to identify the counterpart funds. It is presumed that they make their own arrangements to ensure that they can cover the estimated costs. The capacity of that contractor to carry out the work should be confirmed.

- For participants using the AC cost model, the Community grant covers all those **additional** eligible costs which may be reimbursed according to the contract but **not all** costs incurred in the project. Such participants must identify the other resources that they will contribute to the project and estimate the cost of those other resources (e.g. permanent personnel, infrastructures; etc.) and report on this during the life of the project.

What is meant by: Contractors using **additional cost (AC)** reporting model must indicate clearly **the other own resources that they intend to contribute to the project** (i.e. in addition to the eligible costs that will be funded by the Community contribution) and give an approximation of the value of these resources?

Contractors using the AC model must indicate all the resources and their estimated costs related to the project and not only the "additional direct costs" (i.e. the eligible costs additional to the normal recurring costs of the contractor that are associated directly to the project and are not covered by any other sources of funding) even if only the additional costs are eligible.

For example, the costs of permanent staff carrying out work on the project do not constitute additional costs and are not reimbursed by the EC contribution. However, one has to indicate the use of this resource on the project and indicate the estimated value to the project.

#### IV. TYPES OF ACTIVITIES

What are the different types of activities foreseen for different projects?

#### **NEW** Type of activities per type of instrument

Types of instruments and/or actions / Types of activities		Research and technological development or innovation activities	Demonstration activities	Training activities	Management of the consortium activities	Other specific activities
Network of excellence					•	•
Integrated project		•	•	•	•	
Specific targeted research or innovation project		•	•		•	
Specific research project for SMEs	Cooperative research	•			•	
	Collective research	•		•	•	
Integrated infrastructures initiative		•	•		•	•
Coordination action	Classical			•	•	•
	For Infrastructures				•	•
Specific support action					•	•

What are the reimbursement rates for the different types of activities?

**NEW** The table below indicates the maximum reimbursement rates per instrument, per activity and per cost model for all indirect actions.

Maximum reimbursement rates of eligible costs	Research and technological development or innovation activities	Demonstration activities	Training activities	Management of the consortium activities	Other specific activities (*)
Network of excellence				100% (up to 7% of the contribution) (AC: eligible direct costs)	100%
Integrated project	FC/FCF: 50% AC: 100%	FC/FCF: 35% AC: 100%	100%	100% (up to 7% of the contribution) (AC: eligible direct costs)	
Specific targeted research or innovation project	FC/FCF: 50% AC: 100%	FC/FCF: 35% AC: 100%		100% (up to 7% of the contribution) (AC: eligible direct costs)	
Specific research project for SMEs	FC/FCF: 50% AC: 100%		100% (for collective research only)	100% (up to 7% of the contribution) (AC: eligible direct costs)	
Integrated infrastructures initiative	FC/FCF: 50% AC: 100%	FC/FCF: 35% AC: 100%		100% (up to 7% of the contribution) (AC: eligible direct costs)	100%
Coordination action			100% (FC indirect costs: flat rate(**))	100% (up to 7% of the contribution) (AC: eligible direct costs) (FC indirect costs: flat rate(**))	100% (FC indirect costs: flat rate(**))
Specific support action				100% (up to 7% of the contribution) (AC: eligible direct costs) (FC indirect costs: flat rate(**))	100% (FC indirect costs: flat rate(**))

(\*): Other specific activities means:

- for Network of Excellence: Joint Programme of Activities, except management of the consortium activities.
- for Integrated infrastructures initiative: any "specific activity" covered by Annex I, including transnational access to infrastructures
- for Coordination Action: Coordination activities, except management of the consortium activities
- for Specific support action: any "specific activity" covered by Annex I, including transnational access to infrastructures

(\*\*): Flat rate for FC indirect costs: 20% of all their eligible direct costs minus the eligible direct costs of sub-contracts.

Even though the Commission reimburses certain activities at certain rates are we obliged to reimburse each partner that amount for activities carried out?

The members of the consortium can decide how to distribute the financial contribution received from the Commission. This may be in strict accordance with the reimbursement rates made by the Commission or may be in accordance with the consortium's preferences. Whatever the choice, it is important that it is clearly indicated in the consortium agreement in order to avoid problems.

## V. COSTS AND EC CONTRIBUTION

1) What is the funding policy in EU projects in the FP6 for **non-profit organisations** (non-governmental)?

There are no constraints on participation of such entities. However, the nature and extent of funding they receive depends on the cost model used, which in turn is determined by the nature of the legal entity and its accounting practices.

Public bodies that are non-commercial or non-profit organisations, which do not have an accounting system that allows the share of their direct and indirect costs relating to the project to be distinguished, may opt for the additional cost model.

In this model, the contractor charges 100% of eligible direct **additional** costs\* (AC) and a flat rate for indirect costs. The flat rate is a fixed contribution equal to 20% of all eligible direct **additional** costs minus costs of sub-contracts. As an exception to this rule, AC contractors can charge, but only to the management of the consortium activity, costs of permanent personnel to the extent that they can identify their actual costs. However, the flat rate for indirect costs does not apply to these costs as they are not additional.

(\*Direct additional costs are eligible costs **additional** to the normal recurring costs of the contractor that are associated directly with the project and are not covered by any other sources of funding).

Direct additional costs of personnel can include:

- Personnel with a temporary contract to work under the Community contract concerned;
- Personnel with a temporary contract to complete a doctorate;
- Personnel whose employment contract depends wholly or in part on additional external financing. In this case, costs charged to the project must exclude all costs covered by normal recurring financing.

### a) COST MODELS

- Choice of cost model

1) How to choose a cost model?

Access to a cost model depends on the type of legal entity concerned and its accounting system:

-All legal entities can use the full cost model (FC) model with the exception of physical persons;

-Physical persons use the additional cost model (that is individuals participating in the project as individuals – not SMEs that are not incorporated)

- Non-commercial or non-profit organisations established either under public law or private law and international organisations may choose one of the additional cost (AC), full cost flat rate (FCF) or FC models. However, only those non-commercial or non-profit organisations established either under public law or private law and international organisations which do

not have an accounting system that allows the share of their direct and indirect costs relating to the project to be distinguished may opt for the AC model.

- Legal entities defined as SMEs have the choice between the FC and FCF model.

2) What are the **differences** between the three models?

- The FC model allows all direct and indirect costs to be charged to the project. Costs are reimbursed at different rates according to the activity and instrument.

- The FCF model allows all direct costs to be charged to the project with a flat rate to cover indirect costs. Direct costs are reimbursed at different rates according to the activity and instrument.

- The AC model allows only eligible **additional** direct costs to be charged to the project with a flat rate to cover indirect costs. These costs are reimbursed at 100% in all instruments. (The **exception** is for **Networks of Excellence** where costs must exceed the grant for integration and may result in costs being reimbursed at less than 100% depending on the composition of the consortium, the costs incurred, and the amount of the grant for integration.)

*(For the reimbursement rates per activity and per cost model see the table in part 4 of the Executive Summary and part 3.1.3.2 of the Guide to Financial issues relating to instruments of FP6.)*

3) Where a legal entity has a **MIXED accounting system** (composed of one which allows to distinguish indirect costs and another which doesn't allow it) can we choose the AC model?

In this case, so long as the direct costs of the project can be identified, the FCF model can be used. Where it is not possible to distinguish the share of the direct and indirect costs to this project it is possible to use the AC model, so long as the legal entity meets the criteria for its use.

**NEW** 4) Indirect costs:

Must the indirect costs used be based upon the actual costs for the life of the project, or can they be based upon the last set of financial accounts?

This is only relevant for contractors using the FC model, which in turn presupposes an accounting system that correctly identified these costs and distinguishes between direct and indirect costs. Only indirect costs relevant to the project are eligible and they have to be actual costs for each period concerned. While an estimate can be used to identify the expected costs over the life of the project, only actual costs may be claimed at each reporting period. Any necessary adjustments to reflect corrections to amounts claimed in a previous period must be identified in the subsequent period.

## **NEW**

Must the basis for allocating the indirect costs (e.g. project direct staff hours / total direct staff hours) be calculated for the life of the project, or may the figure used (e.g. total direct staff hours) be for the period of the last financial accounts?

Only indirect costs relevant to the project are eligible and they have to be actual and adjusted where they deviate from the estimates.

## **NEW b) PRE-FINANCING**

Interest on pre-financing - the guidelines are clear that bank interest earned by the coordinator on pre-financing monies is a receipt of the project. Is bank interest earned by contractors also a receipt of the project?

The Financial Regulation requires that interest earned from the pre-financing by the coordinator is a receipt. The FP6 contract (Annex II, Article II.27) says that "the *coordinator* shall inform the *Commission* of the amount of any interest or equivalent benefits yielded by the *pre-financing* *it* has received from the *Commission*." The *Community* financial contribution shall be offset by any interest or equivalent benefits yielded by the *pre-financing* of the *project*, as referred to in Article II.27 (see also Article II. 24.5). However, interest earned by contractors once the pre-financing has been transferred to them is not declared as a receipt.

## **NEW**

The pre-financing provided to the contractors remains the property of the Commission until reimbursed to the contractors.

The pre-financing will be spent continuously from the moment it is transferred until the financial statement is accepted. On the other hand, the principle of co-financing also means that the contractors should draw equally from the pre-financing and from their own resources during each period.

## **c) PERSONNEL**

### **NEW** Staff costs

The guidelines refer to using actual costs. Under FP5 contractors were allowed to use average employment costs. Are average employment rates no longer permitted under FP6?

Average employment costs are no longer permitted by the FP6 contract - only actual costs can be used. Contractors can use average rates to estimate the budget of the project over its duration but must report only actual costs for each reporting period.

## 1) How does one calculate the **productive hours** per year?

All eligible costs must be determined in accordance with the contractor's usual accounting principles.

As far as productive hours are concerned, contracting parties must calculate their specific productive hours according to their normal procedures (taking into account national holidays, illness, training, etc.).

### **NEW**

Contractors using direct staff hours would normally apply an utilisation **rate** (i.e. hours actually used after holidays, sickness, etc). Must this utilisation rate be calculated for the life of the project, can it be based on the last set of financial accounts?

The utilisation rate must reflect the real productive hours.

## 2) Can the **Commission fund permanent personnel** when the **AC** model is applied?

Article II.20 of Annex II (General conditions) to the FP6 model contract stipulates that:

"Contractors using the additional cost model may charge to the project only those direct costs that are additional to their recurring costs. Any such direct additional costs specifically covered by contributions from third parties are excluded. Direct costs of personnel shall be limited to the actual costs of the personnel assigned to the project where the contractor has concluded with the personnel:

- A temporary contract for working on Community RTD projects,
- A temporary contract for completing a doctorate,
- A contract which depends, in full or in part, upon external funding additional to the normal recurring funding of the contractor. In that case, the costs charged to this contract must exclude any costs borne by the normal recurring funding."

Therefore, a contractor using the AC model may charge the cost of **permanent staff** involved in the project providing they have a contract which depends in full or in part upon external funding **additional** to the normal recurring funding of the contractor.

For example, a researcher has a permanent employment contract but the work carried out covers only part of the time that researcher can work during the week. The researcher's salary is € 5000 for carrying out this part-time employment. The full-time equivalent for the same post however is € 6000. If mentioned in the employment contract, the researcher can have an additional salary of up to € 1000 to carry out additional tasks up to the maximum permitted. In such cases, part or all of the difference (€1.000), depending on the amount of time actually spent on the FP6 project, may be considered as an additional direct eligible cost.

In such cases, it is important that:

- The employment contract (or any related document) clearly states that the amount that the person receives for working on a contract funded by external sources, when added to the person's part-time salary, does not exceed the full-time equivalent. There is a distinction

between working time and salary for the time related to the recurrent costs of the employee and the part subject to external funding.

AND

- The additional salary is effectively paid.

The terms and conditions of the contract with your personnel must be in accordance with national legislation.

Also, permanent personnel for AC contractors may be classified to management activities of the direct costs of such personnel can be identified. The rate does not apply to these costs as they are not direct additional costs.

### 3) How should **partners** input personnel costs from third countries?

If a legal entity established in a third country may participate **without** receiving any EC funding, it has to calculate the person months and costs according to its usual accounting and management principles. This input should be identified in the technical annex to the contract (Annex I) and the budget estimated for that contractor's costs will be included as part of the total costs of the project (but not part of the estimated maximum EC contribution).

If a legal entity established in a third country **may receive EC funding**, it is treated like any other contractor: it must meet all the provisions of the contract including those concerning the eligible costs (Articles II.19, II.20, II.21, II.22 and II.25 of the FP6 model contract).

### 4) Where **personnel of a sister company** performs management tasks of the coordinator, are these eligible costs under the contract?

Even though two companies are affiliated they are separate legal entities and only one of them is a contractor. Therefore, work carried out by a sister company is considered to be subcontracting.

Generally speaking management costs cannot be subcontracted. However, certain minor costs can be subcontracted by their nature; or even if they relate to the management activity. (For example, the audit certificates of an external auditor are by definition subcontracts; the subcontracting of the organisation of a workshop or seminar might also be acceptable, etc.)

These costs could be treated as subcontracting (if they meet the criteria for subcontracting – i.e. not core tasks, included in Annex I, etc.) or these could potentially be considered as resources made available to the contractor from third party if they meet the criteria established by the model contract (i.e. prior agreement, identified in Annex I, etc.).

### 5) How detailed should the '**working time** to be charged' (part 6.1.1 Guide to Financial Issues) be recorded? Is it sufficient if the researcher records the **hours**? Or is it sufficient to indicate she/he worked so many months on an EU-project?

Working time to be charged must be recorded throughout the duration of the project through any effective tool (including time sheets), in accordance with the contractor's normal accounting rules. The person in charge of the work designated by the contractor should certify the records. An estimation is insufficient.

Employees normally record time sheets on a daily basis while the certification of the person in charge could be done monthly. Certified time sheets must include the person's identity and her/his time spent on the project. If the person is working in different "activities" under the

contract it is necessary to be able to distinguish among the tasks as they relate to each activity. In addition, a full overview of the working time should be possible in the event of an audit (i.e. for persons working part-time on the project it should be possible to determine where their time was spent when not on the project).

Costs claimed for personnel time must be actual, not averages, and recorded on the contractor's account (income statement, balance sheet) not just on internal (management) accounts.

#### 6) Can we claim overtime costs for research personnel?

If overtime is actually paid and if it is the policy of the organisation to pay overtime then it is possible **if** the overtime is necessary to the project. Generally speaking though, except for certain technical staff, overtime is not paid and is not usually necessary to carry out the project.

#### 7) Should **in-house consultants** be treated as subcontractors as the costs of these will normally be recorded in the accounts as 'services/supplies'?

If so, would this also imply the necessity for competitive tender and best value for money?

This depends on the accounting principles of the contractor: if they are treated as subcontractors on the accounts then they are subcontractors, if they are treated as personnel then they are not subcontractors.

If they are subcontractors then the provisions of the model contract apply which require subcontracting to be amended to the best bid. If this amendment is approved by the Commission then a corrected version of the contract will be placed on the web site.

### **d) SUBCONTRACTING**

#### 1) In what cases can a contractor subcontract?

As a general rule contractors must have the capacity to carry out the work themselves (Article II.6 of the FP6 model contract). Subcontracting is a derogation to this general rule and is limited to specific cases.

##### A. Conditions related to activities subcontracted:

- Subcontracts may relate only to a limited part of the project (Article II.6, 2, a of the FP6 model contract): "They may only cover the execution of a limited part of the project. Therefore, generally core elements of the project can not be subcontracted".

- Article II.6, 2, b of Annex II of the FP6 model contract states that: "recourse to the award of subcontracts must be justified having regard to the nature of the action and what is necessary for its implementation".

- Even though certain services may be performed by a subcontractor, the contractor maintains fully responsibility for carrying out the project, retains the intellectual property generated, if any, and must ensure that certain of provisions of the model contract are reflected in the agreement with the subcontractor. (Article II.6, 2, a of Annex II (General conditions) to the FP6 model contract).

## B. Conditions placed upon the subcontractor:

-The subcontractor must be a legal entity.

- Subcontracts are carried out only by third parties (Article II.1, 27 of Annex II of the FP6 model contract). Subcontracting between contractors is not possible, except in very particular cases (It might be the case where a different independent department of one contractor, not involved in the project, has provided a service to another contractor. However, this should be avoided to the extent possible.)

- Any subcontractor, whose costs will be claimed under the project, must be made to the [best bid based on price/quality] and in compliance with the national legislation of the contractor concerned (see: Article II.6.2 of Annex II of the FP6 model contract).

### 2) Is a subcontractor considered as a **participant**?

No, a subcontractor is a third party carrying out tasks identified in Annex I or other minor tasks not relating to the core work of the project, by means of a subcontract with one or more of the contractors. (Article II.1.27 of Annex II of the FP6 model contract).

### 3) Who pays the subcontractor?

As a third party, the subcontractor is not reimbursed by the Commission directly but by the contractor on the basis of the agreement concluded between the contractor and the subcontractor. Once the subcontractor is paid by the contractor, this contractor will be able to claim the reimbursement of that subcontracting expense to the Commission as a form of direct eligible cost.

### 4) What is the **reimbursement rate** for subcontracts? Is it right that a partner - using the Full cost Model - is getting max. 50% of its sub-contractor's costs reimbursed?

As direct eligible costs, the reimbursement rate of subcontracting cost will depend on the type of activities under which the cost of the subcontract has been incurred and the instrument in which the contractor is participating. (See *the table in part 4 of the Executive Summary and part 3.1.3.2 of the Guide to Financial issues relating to instruments of FP6*)

### 5) Is the cost of **VAT** levied on a subcontract in an FP6 project an eligible cost?

It is clear from Article II.19.2.a of the FP6 model contract that VAT is a non-eligible cost. Therefore eligible costs of subcontracting exclude VAT.

For example, where the total price paid for a subcontract is €1,200 (the cost of the services were €1,000 and the V A T €200), the direct eligible cost is € 1,000.

### 6) Does a **subcontractor** submit a **signed Financial Statement (Form C)**?

Subcontractors do not submit Financial Statements. However, the costs incurred by the contractor for subcontracting must be identified in the contractor's Financial Statement. The contractor must ensure that its audit certificate also covers the eligible costs of the amount paid to the subcontractor.

## **d) RECEIPTS**

1) What are receipts and income to a project? What interest is counted as income? Does it relate only to interest earned by the coordinator on payments from the Commission, or does it also include any interest accrued by any of the partners throughout the duration of the project?

### **Receipts**

There are three main kinds of receipts:

- Financial transfers or their equivalent to the contractor from third parties;
- Contributions in kind from third parties;
- Income generated by the project.

The first two cases (financial transfers or contributions in kind), are considered as receipts of the project if the third party has provided them specifically to be used in the project. However, if the use is at the discretion of the contractor they may be considered not to be receipts.

Where contributions from third parties are used by the contractor for the project, the latter is required to inform the third party of this use, in accordance with the national legislation or practice in force.

### **Income**

In the case of income generated by the project itself, any income generated by the project itself, including the sale of assets bought for the project (limited to the initial cost of purchase) is considered income to the project (e.g. admission fee to a conference carried out by the consortium; sale of the proceedings of such a conference; sale of equipment bought for the project, etc.)

### **Interest**

Pre-financing remains the property of the Community. As a consequence, in the relevant periodic report, the **coordinator** must declare to the Commission any interest or equivalent benefits yielded by the pre-financing that it has received by the Commission on behalf of the Commission.

The proposed correction to Article II.27 of Annex II (General conditions) to the FP6 model contract would reflect this.

“Article II.27

1. In accordance with the provisions of the *Financial Regulation* 15, pre-financing granted to the *coordinator* on behalf of the *consortium* remains the property of the *Community*.”

## **NEW e) THIRD PARTY CONTRIBUTIONS**

What is a third party contribution?

This is a contribution in kind or by financial transfer provided to a contractor by a third party on the basis of a **prior agreement**. A third party is any legal entity that is not a contractor and not a subcontractor. A subcontractor is also a third party to the contract but not the type usually addressed by these provisions.

The "third party" contribution in a project funded under FP6, is regulated by Article 8 of the Rules for Participation and by Article II.22.1 a) and b) of Annex II to the contract.

### **NEW**

What is the difference between a contribution in kind and a financial transfer?

An example of a contribution in kind is where a contractor uses the personnel of a third party to carry out tasks related to a project in which it participates. An example of a financial transfer is where there is a financial contribution of additional public or private funding made available for research activities and with an impact on an FP6 action. These two kinds of contributions from third parties may be considered receipts under certain conditions (see above).

### **NEW**

Must the contractor and the third party sign a prior agreement and submit it to the Commission?

A prior agreement must exist between the third party and the contractor stipulating that resources are or will be made available by third parties to the contractor. Proof of this prior agreement must be submitted to and accepted by the Commission during the negotiation. Third parties and their resources to be made available to the contractor (on the basis of the agreement) will be identified in the contract's technical annex (Annex I).

### **NEW**

In what cases can third party personnel costs be eligible costs of the contractor?

The criteria are set out in Article II.19. 1e) of Annex II to the contract: "in the case of contributions made by third parties established on the basis of an agreement between the contractor and the third party existing prior to its contribution to the project, and for which the tasks and their execution by such a third party are clearly identified in Annex I, the costs must : i) be incurred in accordance with the usual accounting principles of such third parties and the principles set out in paragraph d) above; ii) meet the other provisions of this Article and this Annex; and iii) be recorded in the accounts of the third party no later than the date of the establishment of the audit certificate referred to in Article II.26."

### **NEW**

When is additional funding from a third party a receipt that is not deducted from the eligible costs?

These endowments are receipts of the project if the third party has provided them specifically for use in the project.

If, on the other hand, the use of these endowments is at the discretion of the contractor they are not receipts. Where contributions from third parties are used for the project by the contractor, the latter is required to inform the third party of this use in accordance with the relevant national legislation or practice.

The receipts are not deducted from the eligible costs except in the case of contractors working on the additional cost (AC) model. The total amount of receipts plus the financial contribution of the Community must not exceed the amount of the total eligible costs of the action. Where the receipts added to the financial contribution of the Community exceeds the total eligible costs, the Community financial contribution will be reduced. The profit concept in an FP6 grant (see Article 165.1.a) of the Implementing Rules to the Financial Regulation) is defined as "the surplus of receipts over the costs of the action in question...". (For example, costs are 100, EC contribution expected is 50 but receipts are 60 - the EC contribution will be reduced to 40 where the EC contribution is a maximum of 50% of costs)

## **NEW f) JOINT RESEARCH UNITS (UMR / JRU)**

### **NEW** What is a JRU?

JRU means a partnership between legal entities and without legal entity of its own, with the following characteristics:

- scientific and economic unity
- "permanent" character (i.e. not one-off or project specific)
- recognised by a public authority

The partnership is based on an agreement (e.g. French contract quadrennial/multi year arrangement for CNRS/ or ad hoc agreement) and has **no legal status**.

JRU are usually formed between entities of the same nationality but can exist between entities with different nationality (e.g. French/Chilean UMR between CNRS and a Chilean university).

JRU are usually formed between public bodies, but may also be established between public bodies and private companies.

### **NEW** Consequences on EU granting on FP6?

In FP6, one of the basic principles is that all the participants of the consortium are contractors, with equal rights and obligations. There is no longer a distinction between different types of participants such as principal contractors, associated contractors or members as there were in previous Framework Programmes.

But unlike the previous Framework Programmes, FP6 foresees that resources made available by third parties may be eligible as costs of the project and may potentially be reimbursed by the Community. However these costs may also be considered as receipts of the action and not be reimbursed.

Based on these rules, two options would be possible:

1 – Each member (legal entity) of a JRU involved in a project becomes a contractor (JRU having no legal status couldn't be contractor).

2 – Only one member of the JRU signs the contract and the costs of the other members (third parties) could be considered eligible. However, in this case the costs could also be considered as receipts.

In that context, option 1 offers all possible guarantees to the parties to a JRU.

However, since existing JRUs have informed the Commission that option 1 is not always practical for them, and since there are other similar cases such as EEIGs or other forms of associations foreseen in the Rules for Participation that need to be addressed with regard to the issue of receipts, a special clause (n° 23<sup>1</sup>) to the contract has been adopted by the Commission. Option A of that clause is foreseen for JRUs.

According to the terms of the special clause:

1 - only one of the members of the JRU shall be a contractor;

2 - the members of the JRU whose costs will be eligible and will contribute to the project are identified in the clause;

3 - the eligible costs incurred by these members are not considered as receipts of the contractor. (NB: the costs of the member may include receipts that have to be taken into consideration);

4 - each member of the JRU applies its own cost reporting model, unlike the case of any other third party whose costs are reported in accordance with the cost model of the contractor to whom they have contributed the resources.

**Special clause 23 :**

**Entities composed of one or more legal entities [EEIGs / Joint research units (Unités mixtes de recherche etc.) / Enterprise groupings]**

1. [**Option A : For Joint research units** ] The *contractor* [*name of the contractor*] represents also the following members of [*name of the JRU*] (referred to in this special clause as “*member(s)*”)

--[*name of the legal entity*].

--[*name of the legal entity*].]

[**Option B: For legal entity composed of legal entities, i.e. EEIG, Enterprise groupings...**] The *contractor* [*name of the contractor*] represents also its *members* (referred to in this special clause as “*members*”)

2. The *contractor* may charge costs incurred by the *members* in carrying out the project, in accordance with the provisions of the *contract*. These costs shall not be considered as receipts of the *project*. The *members* shall identify the costs to the *project* in accordance with the provisions of part B of the *contract*. Each *member* shall apply a cost reporting model in accordance with the principles established in articles II.19, II.20 and II.21. The *contractor* shall provide to the *Commission*:

an individual financial statement from each *member* in the format specified in Form C.

These costs shall not be included in the *contractor's* Form C

an audit certificate from each *member* in accordance with the relevant provisions of this *contract*

a summary financial report consolidating the sum of the eligible costs borne by

<sup>1</sup> *Decision DL/2003/3188 dated 27.11.03*

each *member* and the *contractor*, as stated in their individual financial statements, shall be appended to the *contractor's* Form C.

When submitting reports referred to in Article II.7, the *consortium* shall identify work performed and resources deployed by each *member*.

3. The eligibility of the *member's* costs charged by the *contractor* is subject to controls and audits of the *members*, in accordance with Article II.29.

4. The *contractor* shall retain sole responsibility toward the *Community* and the other *contractors* for its *members*. The *contractor* shall ensure that the *members* abide by the provisions of the *contract*.

The special clause prevails over all other provisions of the contract and its annexes.

**To sum up, concerning the possibilities for members of JRU willing to participate in an indirect action, there are two solutions: each member is contractor or special clause 23 is included in the contract.**

How will the work of the members be identified in the contract?

If this special clause is used, the tasks of members involved in the project, that are not contractors, are described in Annex I of the contract and their costs are considered eligible (if they meet the other conditions of eligibility foreseen in the contract).

Which are the rights and obligations of the members of the JRU towards the Commission?

None. Only the contractor has rights and obligations vis-à-vis the Commission. The consortium agreement may organise the relations between the contractors and the members of a JRU (i.e. Management, IPR rules...), but the Commission is not involved in this agreement and is not a party to it. For the Commission, members of a JRU are third parties.

Which cost model shall apply for members of JRU foreseen in the special clause?

Members of JRU shall apply their own cost reporting model and not the cost reporting model of the contractor.

Which forms should the contractor fill in for the members of the JRU?

The contractor must identify the costs of the members in the CPF Form A3; however no separate CPF is necessary for each member.

The contractor must provide for each member a Form C, a summary financial report consolidating the sum of the eligible costs borne by each member and itself and an audit certificate. The contractor declares its own costs of audit certificate and the members of JRU specified in the special clause declare their costs of audit certificate.

Do the members of the JRC have to submit reports?

The consortium shall identify the work performed and the resources deployed by each member and their contribution to the project must be identified and reported on in the periodic reports.

What happens when members of more than one JRU are involved in a project?

Each member of each JRU involved in a project shall be identified in the special clause, which can be used for each JRU participating.

What is the best solution when JRUs are composed of legal entities of different nationality?

The most secure legal solution (for applicable law, jurisdiction, responsibility of public bodies etc.) is that each member becomes a contractor.

How is the question of JRU treated in the Marie Curie actions?

The same special clause, adapted for the Marie Curie actions (n°23bis) is available for this purpose.

## **NEW** g) AUDIT CERTIFICATES/AUDITORS

### **NEW** 1) Audit Certificate

Must the contractor whose involvement is for only part of the term of an IP for which annual certificates are required, produce blank certificates for the years during which they are not involved in the IP?

A contractor involved in only part of a project term can choose to leave the consortium mid-term (after its tasks are completed) or stay without any tasks or expenses. If no costs are incurred or claimed, no audit certificates are required.

Is an audit based upon a **sample** of the total costs sufficient, or is a complete check of all transactions required?

It is clear that the audit cannot cover every detail in a big project. The auditors determine the level of control, depending on their experience with the type of project and complexity given the legal framework. The auditors must be sure that the results are reliable and acceptable within their responsibility.

### **NEW** 2) Auditors for the public bodies

The independence of a competent public officer performing the audit of a public body may be established by the 'relevant national authorities'. How does one determine who is a competent public officer in a Member State?

Article II.26.3 of the FP6 Model contract states: "A contractor that is a public body may opt for a competent public officer to provide an audit certificate, provided that the relevant national authorities have established the legal capacity of that competent public officer to audit that public body."

- The competent public officer selected must not have been involved in any way in the processing of the Financial Statement per Activity (Form C).

- If "in fact and/or in appearance", the auditor is not independent from the contractor concerned (example of an internal auditor who is an official of the contractor concerned), its independence may nevertheless be established by the relevant national authorities.

## **NEW VI. SPECIAL CLAUSES**

Is the list of special clauses of the Model Contract comprehensive?

The list of special clauses adopted to date is virtually complete. However, it is possible that the list will be added to, as necessary, during the Sixth Framework Programme period.

## **NEW VII. COLLECTIVE RESPONSABILITY**

If the coordinator of an integrated project has proposed to withhold part of the payments from the EU to create a common fund for the consortium, in order to secure indemnification in any case where the Commission claims reimbursement in accordance with Articles II.18 and II.33 of the EU Contract, is the participation of a public body in this common fund compatible with the terms of Article II.18 of the EU contract?

Article II.18, paragraph 2 of the FP6 model contract indicates that in the event of termination of the contract for breach, the amount to be recovered by the Commission shall be allocated among the remaining contractors **other than public bodies** in accordance with their pro rata share in the overall project. Public bodies are not bound by the provisions of financial collective responsibility, only by the obligation to try to ensure the successful completion of the project (technical collective responsibility). Public bodies can however choose to participate in the common fund.

## **VIII. INTELLECTUAL PROPERTY RIGHTS (IPR)**

### **a. Pre-existing know-how**

#### **NEW**

1) Pre-existing know-how set out in Article II.35 (d) of the model contract.

If a University has multiple departments that in practice - although not registered as such - work like affiliated companies and each carries out its research and normally has no knowledge of the research of other departments, is it correct that the EU views the university as a whole? If this is true, how does one formulate exclusions regarding Pre-Existing Know-How so that departments not involved in the EU-project will not be affected by IPR issues?

First, access to pre-existing know-how may be granted only where the contractor from whom access is requested is free to grant it. Therefore, there is a certain limitation already established with respect to full and free access to all pre-existing know-how of the contractor. For example, pre-existing know-how that is already the subject of an exclusive licence to a third party or that is restricted in any other way would not be available to another contractor in the project.

Second, access is granted only upon request from another contractor in the same project and must be based on the requesting contractor's need to use the know-how either for carrying out its part of the work under the project, or for using its own results of the project.

Third, access rights can be made conditional upon their correct and limited use (for example, only during the life of the project, only for use on the project, access terminating after the end of the project, etc.) as provided for in Article II.35.1.a of the model contract that states: "... The granting of access rights may be made conditional on the conclusion of specific agreements aimed at ensuring that they are used only for the intended purpose, and of appropriate undertakings as to confidentiality..."

Therefore, for access rights to be granted:

- (1) The contractor requesting them has to show that access is necessary for it to carry out the project or for that contractor's use of its own project results;
- (2) The request has to be made in writing;
- (3) The contractor to whom the request is made has to be free to grant them; and.
- (4) Reasonable conditions can be added to any such grant of access.

These conditions differ from those established by the contract for FP5 research projects. In those contractors knowledge was available for use by all contractors. Also, the model contract required that access rights to **any necessary** pre-existing know-how be provided to any contractors requiring it to carry out their work on the project and for the use of their own knowledge, without the option to exclude specific pre-existing know-how.

Although under FP6 it is now possible to exclude access to specific pre-existing know-how, the basic premise of these collaborative projects is that information necessary to carry out the project should be exchanged within the limits established by the rules for participation and the contract.

## 2) Exclusion of pre-existing Know-how

How should pre-existing know-how be excluded from access in a specific project? Should there be a list excluding all pre-existing know-how except for some specific elements available for the project or should there be a "negative"-list containing explicitly the pre-existing know-how that will be excluded?

Generally speaking everything that is necessary for carrying out the project or necessary for the use of the knowledge generated by the project should be made available under the terms and conditions established by the contract or on more generous terms as agreed by the contractors.

The contract clearly indicates that **specific** pre-existing know-how can be excluded by means of a separate agreement to which all contractors agree prior to the EC contract coming into force. This means that any exclusion should be specific. The intention is to ensure that the pre-existing know-how necessary for the project will be available if and when it is needed for the project. There is no automatic right to have access to all pre-existing know-how owned by the other contractors. Each contractor has to request access and to show why it is necessary either for them to carry out the project or to use their own project results. Such access can also be limited by conditions set by the contractors concerned e.g.

in time, in nature (only for the research carried out under the project), in application (no sublicensing), etc.

It is perhaps useful to recall that the access rights under FP5 contracts were even broader than they are under FP6 and there was no right of exclusion.

Can the exclusion list be revised during the project?

Removing items from the list:

It is possible to remove items from the list of explicit exclusions of pre-existing know-how during the life of the project.

Adding items to the list:

In theory, "side-ground" or pre-existing know-how acquired in parallel with the project cannot be added to a list already existing because it was not excluded prior to the EC contract coming into force.

If a contractor excludes specific pre-existing know-how before a new contractor joins the project, does this exclusion apply for all contractors from this day on or only for the new contractor?

The list of specific exclusions can be revised when a new contractor joins the project. The new contractor may also wish to add items to the list. The revised list will apply to the new contractor as well as the existing contractors.

#### **b. Knowledge generated in a NoE**

Are the results of the research carried out in a network but not covered by the activities of the joint programme of activity considered to be knowledge and therefore subject to the IPR provisions of the EC contract?

Since the Community financial contribution is to fund the joint programme of activity, if any knowledge is generated by the JPA then it is by definition covered by the provisions of the contract. However, the broader aspects of the network that might be related to joint research activities NOT covered by the JPA, would not be covered by the provisions of the contract, unless they are specifically related to tasks identified in Annex I to the contract and covered by the JPA.