

This note provides some initial interpretative guidance for contractors but does not represent the official position of the Commission and is not a legal document adopted by the Commission.

How and when to use the Special Clauses for the Model Contract for FP6 projects

BACKGROUND

This document provides information to contractors regarding how and when the approved special conditions are used in Article 9 of the model contract. It should be noted that the special conditions take precedence over any other provisions of the contract (including Annexes I, II and III). They should be discussed during the negotiation of the contract with the Commission services. If and when necessary, they can be inserted after the signature of the contract by means of amendment.

To date the Commission has adopted, for use in the model contracts for the Sixth Framework Programmes, 38 special conditions. However, new special conditions may be adopted if needed in the future.

1. Participation by the JRC *(included when the Joint Research Centre (JRC) of the European Commission participates with other contractors in an indirect action.)*

If the JRC participates in an FP6 project, it shall be in the same footing as a legal entity established in a Member State, and shall have the same obligations and rights as the contractors. However it does not sign the contract with the Commission like the other contractors, but a standard administrative arrangement that governs the relations within the Commission between the relevant DG and the JRC. For these reasons this special condition is necessary to draw to the attention of the other contractors the particularities of the JRC's participation:

- The JRC does not follow the same contract signature process as the other participants because it does not sign the contract. It has all the other rights and obligations of a contractor, but it signs an administrative arrangement with the DG responsible for financing the project. However, it is a member of the consortium that will carry out the project and signs the consortium agreement.
- Also, the payment procedure is different, as the payments to the JRC are not made through the coordinator but directly by budget transfer within the Commission. The coordinator must inform the Commission of the decisions taken within the consortium with respect to the financial contribution to the JRC.

The administrative arrangement has as an annex the EC contract (except for cases where the JRC is the sole participant in a project. In the latter case the provisions relating to the core contract are directly inserted in the administrative arrangement and the special clause is not applicable) and it takes precedence over the contract signed between the Commission and the contractors (Article 1.2).

2. International Organisations (United Nations family)

This special clause applies to international organisations that are part of the United Nations or one of the specialised agencies of the United Nations, having acceded to the UN-EC Financial and Administrative Framework Agreement of the 29.04.2003 (FAFA). This special condition includes a possible derogation

of the applicable law (that of the headquarters of the international organisation rather than the law of Belgium or Luxembourg that applies in all other contracts), and of the jurisdiction of the European Court of Justice as well as some provisions regarding audit certificates, checks and audits.

The special clause “2bis” for participation of international organisations in Marie Curie contracts is the same as above except that the references to the Annex II are different. This clause is used only for Marie Curie contracts.

2.A and 2.A bis) International organisations (general rule)

If an international organisation (including European Interest International Organisations) that is not party to the FAFA agreement participates in an indirect action under a FP6 project this special clause is used. The version 2Abis is only used for the Marie Curie actions because the references to the related articles of Annex II to those contracts are different.

3. Complementary contracts

This special condition allows access to the technical work, and in particular to the results generated under the contract, to legal entities that do not participate in the project but participate or have participated in another EC-funded project. This (these) contract(s) will be considered as complementary to the *contract* where this special clause is inserted.

The coordinator of the *contract* undertakes the obligation to provide copies of the reports referred to in Article II.7.2a) and II.7.4d) to the complementary contractors. Moreover, this special clause enables the complementary contractors to enjoy access to the intellectual property rights (Part B of Annex II) and obliges them to respect the obligation of confidentiality (Article II.9).

This clause is usually inserted at the request of contractors participating in two or more different projects when they wish to facilitate the exchange of IPR and its access between the projects. It may be suggested by the Commission services. . It may also be used for clustering.

3bis. Clustering and Concertation

This special clause allows the organisation of periodic cross-dissemination meetings between the contractors and representatives of other related projects with the view to promote the exchange of information and the creation of interest groups clusters that can be of interest to the Community.

4. Sole contractor clause for SSA (or other similar cases)

The model contract is by nature multi-contractor. This clause is used when there is only one legal entity participating in a “Specific Support Action” (it is not usually used in other FP6 instruments, however there are certain other cases where it is appropriate. The Marie Curie instruments have their own contract structure for these cases). Two cases are to be distinguished: the first where more partners can join an on-going FP6 specific support action but the project initially has only one contractor; the second where no more partners can join. In the first case the first part of the clause should be used. In the other case, the second part of the clause should be used. In the latter case, the contract will remain “mono-contractor” for its whole life.

Although this clause is intended primarily for SSAs it can also be used in those special cases where a single contractor may be the sole participant in any other FP6 instrument. An EEIG or other similar legal entity that meets the criteria established by Article 5.4 of the Rules for Participation rules can participate as a single contractor in any instrument. For such cases this clause can also be used.

5. Mid-term review clauses

In some cases, the Commission may consider it necessary to carry out a mid-term review of the project. This special clause establishes the terms and conditions of that review.

The review is carried out before the end of the mid-term point of the project and under the modalities determined by the Commission. For example, the mid-term review can include the organisation of a meeting or the request of further information concerning the work carried out under the project. Costs associated with these aspects of the mid-term review are considered as eligible costs of the project. If each contractor is to attend the mid-term review meeting then the sentence in brackets in paragraph 2 of this clause will apply.

If paragraph 3 of the clause is inserted, an update of the work plan in Annex I, for the remaining duration of the project, should be submitted. Moreover, a “mid-term report” covering all the work carried out since the start of the *project*, can be required as the basis for the mid-term review.

If fourth paragraph is inserted, the Commission will make the mid-term review on the basis of certain deliverables identified in the special clause, which could be different from the milestones identified in Annex I.

6. Payment of the pre-financing is subject to provision of financial guarantee(s)

During the negotiations, where there are concerns relating to the financial viability of the coordinator/contractor, the Commission may require a financial guarantee. Other solutions could be envisaged such as appointing another contractor as coordinator or the elimination of the pre-financing.

6A) This special clause requires the coordinator to withhold the pre-financing to one or more specified contractor(s) until a financial guarantee is provided from that/those contractor(s) to the Commission. The name of the contractor and the amount of the guarantee is included in the special clause.

6B) The second option allows the Commission to retain either a share of the % of pre-financing or a fixed amount of the pre-financing foreseen in Article 8 of the contract, until a contractor(s) identified in the clause has (have) provided a financial guarantee equivalent to that share or amount. This can include the coordinator but in this case all the pre-financing will be withheld until the bank guarantee is provided.

6C) As an alternative, the contractor(s) can forego the provision of pre-financing instead of providing a financial guarantee. The name of the contractor must be identified in the clause and it cannot be the coordinator.

In this case, payments will be settled by the coordinator once the Commission had approved the reports referred to Article II.7.2 (Article II. 7.4: for the last period) accompanied by the audit certificates (Article II.7.3).

6C bis) This option is the same as 6C but is specific to Marie Curie mono-contractor projects and used only for them as and where appropriate.

6D) The last option relates to the obligation to provide a financial guarantee from the co-ordinator prior to receipt of the pre-financing. It allows the Commission to withhold the pre-financing to all contractor(s) until a financial guarantee is provided from the coordinator. The bank guarantee may be lifted once all the contractors have acceded to the contract.

The duration and other terms and conditions of the guarantee will be established in the guarantee itself. If the Commission deems it necessary to maintain the guarantee after the other contractors have

acceded, this will be clearly defined in the guarantee, along with the other terms and conditions related to its duration.

6D bis) This option is the same as 6D but is specific to Marie Curie mono-contractor projects and used only for them as and where appropriate.

7. “Late” payment of the pre-financing.

This clause may be used when the start of the project is more than 45 days after the entry into force of the contract. Its use means that the Commission will pay the pre-financing **not earlier than 45 days before the start of the project (Article 4.2)** a derogation from the provisions of Article 8 of the contract which require the payment to be made within 45 days of [the date of entry into force of the contract] or [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*, and as detailed in the call for proposals to which the *project* is related] or [the date the *Commission* is informed of accession to the *contract* of all the *contractors* identified in Article 1.2].

8. Exoneration of Financial Collective Responsibility

This clause can be inserted by the Commission to remove the financial collective responsibility, in duly justified cases, for certain specific support actions, where according to the work programme/call for proposals financial collective responsibility does not apply.

9. Reimbursement of less than 100% for SSA or other instruments with “other specific activities” except for NoE

This special clause is primarily used for specific support actions and only for contractors using FC and FCF. It only applies to “other specific activities” and not to management activities.

The second and third options are for the specific cases of some SSAs where the EC contribution is in the range of 40-50% of the total costs. The Commission services will identify whether this clause is necessary for your project.

If paragraph 2 is inserted, a reimbursement rate of < 100% for certain contractors and/or for different periods will apply.

If paragraph 3 of this clause is inserted, the contractors using the FC cost model shall indicate their real overhead rates in carrying out the project.

10. Signature of a consortium agreement as prerequisite to beginning of project

This special clause can be used where the Commission or the contractors do not want the project to start without ensuring that the consortium agreement is in place.

In this case the coordinator must inform the Commission of the date of the signature of the consortium agreement. The start of the project will be the first day of the month following the last date of signature of the consortium agreement by the contractors.

11. Ineligibility of costs incurred in relation to an activity

This special clause is foreseen to be used for coordination actions relating to infrastructures where the training activity is not eligible (as defined by the work programme/call for proposals). However, it can be

used for other specific cases where the costs incurred for the performance of certain activities are not considered eligible costs by the work programme/call for proposals.

12. Increase of the EC financial contribution - only for multi-annual SSA under article 9.2.a Rules for Participation

This special clause is used only for certain specific support actions referred to in Article 9.2.a of the Rules for Participation (only for SSA with multi-annual basis i.e. financed by consecutive budgets). The use of the clause will be to ensure that the project continues normally even though the budget will only be accorded on a multi-annual basis. Use of this special clause also involves an amendment of the contract each time the EC contribution is changed, in particular Article 5, which fixes the maximum EC financial contribution.

The submission by the contractor to the Commission of an update of Annex I, including a detailed work plan and **a revised budget**, which covers the following reporting period and the first six months of the next one at the end of a reporting period (except for the last one period) may result in an increase of the EC financial contribution. This is only allowed in relation to the activities and within the limits of the amount established in the specific work programme, and after the Commission's approval.

13. Contractors with flat rate overheads of less than 20 %

This special clause is included when it has been requested by the contractor concerned or it is required by the work programme/call for proposals.

It allows identified contractors to use a flat rate for reimbursement of indirect costs that is less than the 20% established by Articles II.22 and II.25. It is only for contractor(s) using either the AC or FCF cost model. The actual amount of the flat rate must be introduced for each contractor and it must be less than 20%, in no case more than 20%.

14. Contractors with eligible costs but no EC contribution (e.g. usually established in third countries not benefiting from an EC financial contribution)

This special clause can be inserted for legal entities (usually established in third countries not benefiting from a financial contribution for international cooperation) participating without EC funding (Article 6 Rules for Participation). Their costs will be taken into account for determining the total cost of the project but not the Community financial contribution. This clause indicates that such a contractor(s) is (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 the financial collective responsibility provisions (if they exist in the project in question).

However, these entities are subject to scientific and technological reviews.

14bis) Contractors with eligible costs but no EC contribution (e.g. usually established in third countries not benefiting from an EC contribution)*This special clause is limited to use in the Marie Curie actions as the contract references are different.*

15. Ethical rules

The Commission may only finance research activities carried out in compliance with fundamental ethical principles.

This excludes the financing of projects that include, in particular, human cloning, modification of genetic heritage and the use of human embryos.

16. Clinical research

Paragraph 1 of this special clause is used when biomedical research involving human beings is foreseen. Paragraph 2 is used when it also includes clinical or other trials.

Contractors must provide to the Commission proof that they have obtained the agreement of the specific competent committees and authorities as foreseen in national and European legislation before beginning any such research.

It provides that the Commission is never considered to be a sponsor for clinical trials and therefore cannot be held responsible as such. Also it is required that Annex I indicate the name of any sponsors.

17. Specific support actions involving Transnational Access

This special clause only applies to specific support actions (SSA) that provide transnational access to infrastructures.

18. Cases where other *enterprises* and/or *end-users* participate

This clause can only be used in Cooperative Research projects for SMEs. This derogates from the provisions of Annex III to this instrument that states that SMEs participating in a research cooperative project are obliged to pay the eligible costs of the RTD Performers that are not covered by the EC financial contribution. This special clause obliges other enterprises and end-users to use the Community financial contribution to their costs to contribute to the costs of the RTD Performers (who are reimbursed for 100 % of their eligible costs incurred for research and technological development or innovation activities during the project).

It is not used in those cases where the other enterprises and end-users can prove that the Community financial contribution to their costs is essential to their participation in the project.

If the EC contribution is not sufficient to cover the eligible costs of the RTD Performers, the Community financial contribution to the costs of the SME contractors should be used in second priority.

The project can not start until the Commission has received a duly signed copy of the consortium agreement that respects this provision. The Commission shall inform the contractors of the start date of the project.

19. Delayed accession of *contractors* established in a new Member State to *contracts* entering into force between the 01.01.2004 and the 30.04.2004 due to Article 32 of the Accession Treaties)

This special clause is limited to those projects covered by 2004 budget appropriations for which the contracts will enter into force between 1 January 2004 and 30 April 2004, where one or more of the contractors is a legal entity from a candidate country that will become a Member State on 1 May 2004. It is not applicable to those projects financed by 2003 budget credits. There is a special provision (the second option) for the case where the coordinator is a legal entity from one of those countries. The third option is for the case where the sole contractor is a legal entity from one of those countries.

The countries concerned are: Malta, Cyprus, Poland, Latvia, Estonia, Lithuania, Slovenia, Slovakia, Czech Republic and Hungary.

20. Sublicensing of software

This special clause is used when contractors want sublicensing of software to be a condition of the grant of access rights.

20bis) Sublicensing of software Marie Curie contracts –*limited to use in the Marie Curie actions as the contract references are different.*

21. Identified Bank Account

This clause requires the coordinator to establish a specific bank account exclusively for the use of the project.

21bis) Identified Bank Account –*limited to use in the Marie Curie actions as the contract references are different.*

22. Different cost reporting model within the same legal entity

This special clause is limited to the case where the legal entity uses AC and one of its departments uses FC.

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

Option A of this clause should be used when the members of the UMR do not participate in the contract as contractors, in order to clarify the particularities of the costs incurred by the other members of the UMR. When all the members of the UMR participate in the contract as contractors it is NOT used. Each member of the UMR that is not a contractor but will contribute to the project must be identified in the clause.

Option B of this clause should be used for EEIGs and associations. The list of the members of the EEIG should be listed in Annex I. The effect of the clause is the same for the members of the EEIG or association as the members of an UMR.

In both cases, the resources that will be attributed to the project by the third parties (the members of the UMR, EEIG, or association) must be identified in Annex I to the contract and their eligible costs will not be considered to be receipts of the project.

23bis) Only for Marie Curie contracts - *limited to use in the Marie Curie actions as the contract references are different.*

24. Management of the consortium activity costs paid at 100% limited to a lower percentage than <7% of the Community financial contribution

This special clause is used when the Commission finds it appropriate to reduce the ceiling of the reimbursement of management costs at 100% to less than 7% of the EC contribution.

24bis) Only for Marie Curie multicontractor contracts - *limited to use in the Marie Curie actions as the contract references are different.*

25. IRC

This clause is specifically used for innovation relay centres.

26 and 26bis) Only for Marie Curie actions *(suspension of a Marie Curie action and change of status in a Marie Curie action that have an impact on carrying out the actions)*

27. No distribution of pre-financing until start of the project (Specific Actions for SMEs)

This special clause can be used for Specific SME Actions. This is because the consortium agreement must be approved by the Commission prior to the beginning of project and it is only after this approval that the Commission will inform the consortium of the start date of the project. If and when necessary, it could potentially be used in other instruments.

28. Payments subject to the establishment of a “blocked” account or equivalent by the co-ordinator (Specific Actions for SMEs)

This special clause is used primarily for Specific SME Actions. It is used to ensure that the transfer of the pre-financing to the other partners in the project is carried out correctly. Generally, use of a blocked account permits the elimination of a bank guarantee. If and when necessary, it could potentially be used in other instruments.

29. Trust account

This clause is similar to special clause 21 except for the mention of “trust account”. This is important as the establishment of a trust account gives greater protection of the financial interests of the Community with respect to the funds held in such an account. The holder of the account is the “trustee” usually the coordinator (or a sole contractor), the “beneficiary” is the consortium (the contractor if a sole contractor) and the “trustor” is the Community.

30. Performance guarantee

This clause may be used in order to protect the financial interests of the Community.

31. Negotiation costs incurred during the duration of the project *(only for projects that have a start date before or during the period in which the contract was being negotiated)*

This special clause is only used for projects that have a start date before or during the period in which the contract was being negotiated. It only confirms the basic principle that such costs are not necessary for the project and therefore not eligible.

31bis) Only for Marie Curie contracts - *limited to use in the Marie Curie actions as the contract references are different.*

32. Audit certificates (Only for IP and NoE) *(Article 7.2 of the contract requires **annual** audit certificates for IPs and NoEs)*

This clause negates the provisions of Article 7.2 of the core contract that requires audit certificates to be provided annually from each contractor for Integrated Projects and Networks of Excellence. These instruments generally involve large projects with big budgets, justifying and necessitating annual audit certification. However, in some exceptional cases, some of these projects have many partners, with sometimes relatively limited budgets. For these particular cases, this special clause can be used to change the periods during which audit certificates are submitted in order to coincide with the expected

rate of expenditure rather than on an annual basis. For example, audit certificates might be requested every two years or at the end of the first important period of expenditure, mid-way through the project and at the end.

It should be noted that this special clause should be used only for such exceptional cases, in order to avoid payments of pre-financing over several periods without any settled payments during that time. Pre-financing is only accepted as a settled payment when accompanied by an audit certificate. Where pre-financing is split like this into more than one period each subsequent pre-financing can only be made if it can be shown that 70% of the previous pre-financing has been consumed and the total amount of the pre-financing can never exceed 85% of the total EC financial contribution.

33. Special clause for Design Studies

This special clause is specific to Specific Support Actions for Design Studies carried out in the infrastructures area. It derogates from the general rule of Article II.25, which indicates that the reimbursement rate of eligible costs for SSAs is 100% (for management consortium agreement activities and for other specific activities). Its provisions only apply to “other specific activities” and not to management activities. The clause should be used when the desired reimbursement rate of eligible costs for those contractors applying the FC and FCF cost reporting models is to be limited to 50%. This limitation does not affect contractors applying the AC cost reporting model.

The second paragraph is optional. It is used when the Community financial contribution cannot exceed the costs of contractors established in Member States and Associated States and any specifically identified third country, although costs of other contractors shall be considered as eligible and be reimbursed. In other words, EU and Associated States’ contractors may receive up to 100% of their costs within the limit of 50% of the total costs.

34. Special clause for Construction of New Infrastructures

This special clause is specific to Specific Support Actions for Construction of New Infrastructures in the infrastructures area. It derogates from the general rule of Article II.25, which indicates that the reimbursement rate of eligible costs for SSAs is 100% (for management consortium agreement activities and for other specific activities). Its provisions only apply to “other specific activities” and not to management activities. The clause should be used when the desired reimbursement rate of eligible costs is to be limited to 10% for all contractors whatever their cost model.

The second paragraph is optional. It is used when the Community financial contribution cannot exceed the costs of contractors established in Member States and Associated States and any specifically identified third country, although costs of other contractors shall be considered as eligible and be reimbursed. In other words, EU and Associated States’ contractors may receive up to 100% of their costs within the limit of 50% of the total costs.

35. IST Prize contract (specific to DG INFSO)

This special clause is specific to DG INFSO and can only be used for the particular contract concerning the award of the IST Prize and the associated organisation of an awards ceremony. This particular special condition will only be necessary for those contracts awarded in 2004. Thereafter, the normal terms of the contract concerning payment will be applicable.

The contract involves the payment of actual costs incurred by the contractor in organising and promoting the EISTP scheme and the further payment of an amount to be held in trust by the contractor on a separate bank account for the benefit of the prize winners. In consequence, it is necessary to provide for the contractor to use two separate bank accounts. Paragraphs 1 to 4 of the special clause reflect this

differentiated payment system. Articles 8.2 and 11.3 of the core contract apply only to the Community's financial contribution to costs involved in the organisation and promotion of the EISTP scheme.

The contractor is bound to acknowledge the support given by the Commission in all documents disseminated or published concerning the EISTP scheme.

36. Personnel cost of OIF and IIF (specific to Marie Curie)

This clause is only applicable to Marie Curie Incoming International Fellowships and the Marie Curie Outgoing International Fellowships submitted under calls with closure dates after the 19 January 2004 modification of the Work Programme.

Pursuant to this special clause, personnel costs related to researchers carrying out a return phase at their home institution are also eligible when these researchers have been recruited by the contractor (i.e. home institution) for more than one year from the date of the relevant deadline of the proposal.

37. Durable equipment IRG/ERG (specific to Marie Curie)

This clause is only applicable to European and International Reintegration Grants submitted under calls with closure dates after the 19 January 2004 modification of the Work Programme.

Pursuant to this special clause, the costs of durable equipment incurred in carrying out the project may be reimbursed up to 100% subject to the following conditions: that it is necessary for the project, duly justified on the basis of real costs, with the prior agreement of the Commission, and if it is indispensable and justified by the use of the equipment and its final destination.

38. Identification of contractors that are public bodies or international organisations

Under the terms of the FP6 contract:

- financial collective responsibility does not apply where a defaulting contractor is, inter alia, a public body or an international organisation (Article II.18.3)
- further, Article II.26.3 provides that a contractor which is a public body may, instead of using the services of an external auditor, opt for the services of a competent public officer to provide an audit certificate for that public body.

Although the use of this clause is not necessary for the correct application of the contract, in some cases it will be used to identify the contractors to whom these provisions apply in projects where some of the contractors are public bodies or international organisations.