



**CLEAN SKY**

# **Guidelines for Members and Partners on Subcontracting**

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# 1 Introduction

This document provides guidelines for Members and Partners of the Clean Sky Joint Undertaking regarding subcontracting, according to the related Clean Sky Grant Agreements.

The principles to be followed on subcontracting are the same for Members and Partners. They are defined respectively in **article II.7 of the Grant Agreement for Members** and in **article II.7 of the Grant Agreement for Partners where the same provisions refer to the general term *Beneficiary***. Therefore, **Members and Partners, as Beneficiaries, follow the same rules regarding subcontracting.**

Note that there is **no upper limit indicated** regarding the amount that can be subcontracted **but the work to be subcontracted should be described in Annex I to the Grant Agreement** and obviously follow the principles laid-out in section 2.

Details on the implementation of article II.7 are provided in section 3.

## 2 Subcontracting in the Grant Agreement for Members and in the Grant Agreement for Partners

### Article II.7 on Subcontracting

1. A *subcontractor* is a third party which has entered into an agreement on business conditions with one or more *beneficiaries*, in order to carry out part of the work of the *project* without the direct supervision of the *beneficiary* and without a relationship of subordination.

Where the *beneficiary* enters into a subcontract to carry out some parts of the tasks related to the *project*, it remains bound by its obligations to the *JU* and the other *beneficiaries* under the *grant agreement* and retains sole responsibility for carrying out the *project* and for compliance with the provisions of the *grant agreement*.

Provisions of this *grant agreement* applying to *subcontractors* shall also apply to external auditors who certify financial statements or a methodology.

2. Where it is necessary for the *beneficiaries* to subcontract certain elements of the work to be carried out, the following conditions must be fulfilled:

- subcontracts may only cover the execution of a limited part of the *project*;
- recourse to the award of subcontracts must be duly justified in Annex IB (Annex I in the GA for Partners) having regard to the nature of the *project* and what is necessary for its implementation;
- recourse to the award of subcontracts by a *beneficiary* may not affect the rights and obligations of the *beneficiaries* regarding *background* and *foreground*;
- Annex IB (Annex I in the GA for Partners) must indicate the tasks to be subcontracted and an estimation of the costs;

Any subcontract, the costs of which are to be claimed as an eligible cost, must be awarded according to the principles of best value for money (best price-quality ratio), transparency and equal treatment. Subcontracts concluded on the basis of framework contracts entered into between a *beneficiary* and a subcontractor, prior to the beginning of the *project* in accordance with the *beneficiary's* usual management may also be accepted

3. *Beneficiaries* may use external support services for assistance with minor tasks that do not represent per se *project* tasks as identified in Annex IB (Annex I in the GA for Partners).

## **Article II.2 defining what the Coordinator cannot subcontract**

3. The *coordinator* shall:

- a) administer the *JU financial contribution* regarding its allocation between *beneficiaries* based on their respective activities, in accordance with this *grant agreement* taken by the *consortium*. The *coordinator* shall ensure that all the appropriate payments are made to the other *beneficiaries* without unjustified delay.
- b) keep the records and financial accounts making it possible to determine at any time what portion of the *JU financial contribution* has been paid to each *beneficiary* for the purposes of the *project*.
- c) inform the *JU* of the distribution of the *JU financial contribution* and the date of transfers to the *beneficiaries*, when required by this *grant agreement* or by the *JU*;
- d) review the reports to verify consistency with the *project* tasks before transmitting them to the *JU*;
- e) monitor the compliance by *beneficiaries* with their obligations under this *grant agreement*.

The *coordinator* may not subcontract the above-mentioned tasks.

# 3 Implementation

## Article II.7 of GA – Subcontracting

### Article II.7.1 – Definitions

The general rule is that beneficiaries shall have the necessary resources to carry out the work. However, it is accepted that, when the GA provides for it accordingly, and as an exception, certain parts of the work may be subcontracted. A subcontractor is a type of third party, i.e. a legal entity which is not a beneficiary of the GA, and is not a signatory to it. It appears in the project because one of the beneficiaries appeals to its services to carry out part of the work, usually for specialised jobs that it cannot carry out itself or because it is more efficient to use the services of a specialised organisation (e.g. setting up a website for the project).

The subcontractor is defined by certain characteristics:

- The agreement is based on "business conditions"; this means that the subcontractor charges a price, which usually includes a profit for the subcontractor. This makes it different from other third parties' contributions where the third party charges only for the costs of the activity.
- The subcontractor works without the direct supervision of the beneficiary and is not hierarchically subordinate to the beneficiary (unlike an employee). The working place of the subcontractor, its accounting rules and internal organisation are also different.
- The subcontractor carries out parts of the work itself, whereas other third parties (with some exceptions) only make available their resources to a beneficiary usually on the basis of a previous agreement and in order to support a beneficiary by providing resources.
- The subcontractor's motivation is pecuniary, not the research work itself. It is a third party whose interest in the project is only the profit that the commercial transaction will bring. A subcontractor is paid in full for its contribution made to a project by the beneficiary with whom it has a subcontract. As a consequence subcontractors do not have any IPR rights on the foreground of the project.
- The responsibility vis-à-vis the CSJU for the work subcontracted lies fully with the beneficiary. The work that a subcontractor carries out under the project belongs to the beneficiary in the GA. A subcontractor has no rights or obligations vis-à-vis the CSJU or the other beneficiaries, as it is a third party. However, the beneficiary must ensure that the subcontractor can be audited by the CSJU or the Court of Auditors.

Accordingly, subcontracting between beneficiaries in the same GA is not to be accepted. All participants by definition contribute to and are interested in the project, and where one participant needs the services of another in order to perform its part of the work, it is the second participant who should declare and charge the costs for that work. In a specific agreement (e.g. Consortium Agreement, Implementation agreement) they may define provisions to cover those costs not reimbursed by the CSJU.

### Article II.7.2 – Tasks which can be subcontracted and conditions

Subcontracting may concern only certain parts of the project, as the implementation of the project lies with the participants. Therefore, the subcontracted parts should in principle not be "core" parts of the project work. In cases where it is proposed to subcontract substantial/core parts of the work, this question should be carefully discussed with and approved by the CSJU and those tasks identified in Annex IB to GA (Annex I in the GA for Partners). Usually in such cases, the intended subcontractor could instead become a beneficiary, or the consortium should find another beneficiary able to perform that part of the work.

### What is a "core" part of the work?

Usually subcontracts do not concern the research work itself, but tasks or activities needed in order to carry out the research, auxiliary to the main object of the project. Subcontracts may involve large amounts of money, even though they have nothing to do with the core parts of the project. Their purpose might be just to facilitate/make possible the research work. In any case, it is recommended that the particular case be discussed with the CSJU.

Examples:

- Company "A" needs to dig a 300-metre deep trench in order to make some experiments. A subcontract to find an organisation with the adequate equipment is required. This may consume 50% of the total project cost - however it is justified.

Company "B" needs to collect data and interrogate databases in different countries in order to decide on the best place to install a pilot plant. A company specialised in electronic data collection is subcontracted for that task.

Coordination tasks of the coordinator such as the distribution of funds, the review of reports and others tasks mentioned under Article II.2.3 to GA cannot be subcontracted. Other project management activities could be subcontracted under the conditions established for subcontracting.

As mentioned above, the beneficiary remains responsible for all its rights and obligations under the GA, including the tasks carried out by a subcontractor. The beneficiary must ensure that the intellectual property that may be generated by a subcontractor reverts to the beneficiary so that it can meet its obligations towards the other beneficiaries in the GA. Any bilateral agreement between subcontractor and beneficiary should include this, as well as the respect of the obligations mentioned in the relevant articles of the GA which concern, among others, obligations related to information and communication of data, and financial audits and controls.

### Details to be included in Annex I and selection of subcontractors

The need for a subcontract must be detailed and justified in Annex IB to GA (Annex I in the GA for Partners), following the principles mentioned above and taking into account the specific characteristics of the project. It is the work (the tasks) to be performed by a subcontractor that has to be identified in Annex IB to the GA (Annex I in the GA for Partners). The identity of the subcontractors does not need to be indicated in Annex IB to GA (Annex I in the GA for Partners). However, if the identity of the subcontractor is indicated, the beneficiaries are nevertheless bound to demonstrate that the selection of the subcontractor complied with the principles described below.

The description of the tasks to be subcontracted should include a financial estimation of the costs. It is also important to have regard to the procedure to be used for the selection of the subcontractor, which should be proportionate to the size of the subcontract. Article II.7.2 of GA requires beneficiaries to ensure that transparent bidding procedures are used before selecting a subcontractor.

"Any subcontract, the costs of which are to be claimed as an eligible cost, must be awarded to the bid offering best value for money (best price-quality ratio), under conditions of transparency and equal treatment."

The procedure to be applied for the award of subcontracts depends on the status of the beneficiary, i.e. if the beneficiary is a public or a private entity:

- Public entities must follow the procurement principles established by their national authorities. For subcontracts exceeding certain amounts, the directive on public procurement of services applies

and the publication of a call for tenders is mandatory. However, they should in any case comply with the terms of the GA.

Example:

In a project, a beneficiary (university) subcontracts task X for an amount of EUR 50,000. If this amount is below the threshold set by its national public rules (i.e. EUR 100,000), then the subcontract should comply at least with the conditions set out in the GA, even if the national rules do not set out any specific requirement.

- Private legal entities should follow the rules that they usually apply for the selection of procurement contracts, respecting in any case the terms of the GA. The publication of a call for tenders is normally not necessary for private legal entities, but they must at least require submission of several quotes (usually a minimum of three), unless it has an established framework contract for the provision of those services. There should be a proportional relationship between the size in work and cost of the tasks to be subcontracted on the one hand and the degree of publicity and formality of the selection process on the other.

The procedure must ensure conditions of transparency and equal treatment. At the request of the CSJU and especially in the event of an audit, beneficiaries must be able to demonstrate that they have respected the conditions of transparency and equal treatment.

Beneficiaries must be able to prove that:

- the criteria and conditions of submission and selection are clear and identical for any legal entity offering a bid;
- there is no conflict of interest in the selection of the offers;
- the selection must be based on the best value for money given the quality of the service proposed (best price-quality ratio). It is not necessary to select the lowest price, though price is an essential aspect.
- the criteria defining "quality" must be clear and coherent according to the purpose of the task to subcontract, in order to provide a good analysis of the ratio price/quality.

### Framework Contracts

Many companies have framework contracts with a third party to carry out routine or repetitive tasks. They have been established before the beginning of the project, and are the usual practice of the beneficiaries for a given type of task. These framework contracts can be used to carry out tasks necessary for implementing the EC project provided they have been established on the basis of the principles of best value for money and transparency mentioned above.

### Article II.7.3 – Minor tasks

Minor tasks correspond to minor services, which are not project tasks identified as such in the Annex IB (Annex I in the GA for Partners) but are needed for implementation of the project (quite different from, for instance, analysing samples or building a pilot plant). They do not have to be specifically identified in Annex IB to GA (Annex I in the GA for Partners), as by definition their importance is minor (the amounts involved are also normally small). However, the selection procedure mentioned above also applies to these subcontracts.

The criteria to decide whether a subcontract concerns minor tasks are qualitative and not quantitative:

Examples:

- Organisation of the rooms and catering for a meeting
- Printing of material, leaflets, etc.

Subcontracting costs are direct costs. They have to be identified by beneficiaries in the financial statement form.



## 4 Subcontracting not foreseen in Annex I(B)

When a Partner or a Member wants to subcontract work and this has not been described in Annex IB (Annex I in the GA for Partners), permission should be requested to the CSJU. The request should include the same information than that requested in Annex IB in the section on subcontracting (Annex I in the GA for Partners). The CSJU will examine the validity of the request and accept or reject it. If significant amounts of subcontracting not foreseen in Annex IB are requested (Annex I in the GA for Partners), an amendment to the Grant Agreement should be performed i.e. an update of Annex IB (Annex I in the GA for Partners) indicating the work to be subcontracted with the foreseen financial amounts.

## 5 Wind Tunnel Testing

It may happen that the research work involves large and expensive tests that have to be carried on behalf of one or several beneficiaries in a specific wind tunnel. In this case, two legal frameworks can be foreseen for the wind tunnel operator, according to the features of the wind tunnel test:

(1) The wind tunnel operator shall be a Beneficiary to the GA when the wind tunnel test is not limited to the passive registration of the test data, but it involves also the analysis of those data and other additional activities before the transfer of the data to another beneficiary. It is in fact an actual participation to the project, including rights and obligations belonging to the Beneficiaries (e.g. intellectual property rights).

In this situation, the wind tunnel operator, as legal entity, shall comply with the eligibility rules of participation to the CSJU calls. It can be entitled to the reimbursement of its costs by the CSJU within the limits of 50% or 75% depending on the costs category and on the legal entity (large company, SME, etc.) and on the cost category. If it is research then the reimbursement shall be as research activity. However, if the tests that are being carried out are for demonstration purposes of a pre-commercial product or result, then the tests should be considered as demonstration.

If the consortium wishes to ensure that the wind tunnel operator's eligible costs are fully covered (save for any part of its own share that it wishes to contribute to the project), it can do so via a specific agreement made in the context of the GA with the CSJU (e.g. Consortium Agreement, Implementation Agreement). Such an agreement would establish how the distribution of the CSJU funding would be made in order to ensure that these costs will be covered.

Example: a wind tunnel owner has actual costs of € 800 000, of which four partners benefit directly because their "product" was tested. The actual CSJU contribution to those costs is € 400,000 which will be distributed to the wind tunnel owner. However, the users of the wind tunnel want to "compensate" the wind tunnel owner for these costs as the work has been carried out primarily on their behalf and there are only limited benefits to the wind tunnel operator in incurring these costs. Therefore, each one contributes up to € 100,000 of its CSJU financial contribution (i.e. x 4) to the wind tunnel operator to cover all its costs (or only € 80 000, i.e. less his own share, if the latter is to bear some costs out of its own pocket). But it could also be agreed that (all the) other partners take over individual shares.

In the above example, the € 400.000 received by the wind tunnel operator from the other participants are not a receipt for it. Receipts are defined as income either in kind or in cash from third parties (except for income generated by the project). Since the contractors are not third parties, these amounts are not receipts. It is an internal distribution (or redistribution) of the CSJU contribution.

In the report on the distribution of the CSJU funding, the Coordinator has to report which amount he has transferred to each participant. Where there is a reduction in the amounts transferred due to the internal arrangement, this should be indicated in the report.

(2) The wind tunnel operator shall be a Subcontractor in the GA when the wind tunnel test is limited to the passive registration of the test data and transfer of it to the related beneficiary. The activity is not a "core" part of the project work and Art.II.7 of the Grant Agreement shall apply. The wind tunnel operator will be paid by the beneficiary as a subcontractor and will not be Beneficiary to the GA.

In those cases where IDT Leaders or Associates issue Calls for tenders, i.e. calls for subcontracting specific tasks<sup>1</sup>, according to the subcontracting rules foreseen by Art.II.7 GA, the CSJU can publish those calls on its web site on behalf of the ITD Leaders or Associates for their advertising benefit.

## **6 Documents generally applicable**

Council Regulation (EC) No 71/2008 of 20 December 2007 setting-up the Clean Sky Joint Undertaking.

Grant Agreement for Members

Grant Agreement for Partners

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<sup>1</sup> as defined by Art.1(c) of Annex I of Council Regulation No 71/2008 of 20 December 2007 setting-up the Clean Sky Joint Undertaking