



EUROPEAN COMMISSION

RESEARCH DIRECTORATE-GENERAL

Directorate A - Coordination of Community actions  
Regulatory and cross-cutting matters

Brussels, 3 November, 2003

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

**Subject: Public bodies in FP6 contracts**

This note addresses the issue of the meaning of “public bodies” and the implications for financial viability checks, financial collective responsibility, cost models, and the use of competent public officers for audit certificates.

### **1. What is a public body?**

The Rules for Participation define<sup>1</sup> a public body as “a public sector body or a legal entity governed by private law with a public service mission providing adequate financial guarantees”.

This definition is similar to that established by the Financial Regulation<sup>2</sup> which refers to public bodies as “national public-sector bodies or bodies governed by private law with a public-service mission providing adequate financial guarantees”.

Therefore, there are two clear cases of entities that are considered public bodies:

- public sector bodies
- legal entities established under private law with a public service mission and providing adequate financial guarantees

---

<sup>1</sup> Regulation (EC) 2321/2002 of the European Parliament and of the Council of 16 December 2002 concerning the rules for the participation of undertakings, research centres and universities in, and for the dissemination of research results for, the implementation of the European Community Sixth Framework Programme (2002-2006), Article 2.31. (The provisions of Euratom Regulation are the same.) The Rules for Participation absolve from financial collective responsibility any public body that meets this definition. In addition, international organisations and legal entities “whose participation in the indirect action is guaranteed by a Member State or an Associated State” are not obliged to bear the debt of any defaulting contractor. Article 13.2 last paragraph

<sup>2</sup> Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, Article 54.2.c. The implementing rules, Commission Regulation (EC, Euratom) 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, Article 176.4 and 173.4. Such bodies, and international organisations, are exempted from verification of financial capacity and authorising officers may exempt them from the obligations to provide any financial guarantees required by the Financial Regulation’s implementing rules.

There are two other types of entity that enjoy some or all of the benefits of public bodies, depending on the circumstances. These are:

- international organisations
- a legal entity whose participation in the indirect action is guaranteed by a Member State or an Associated State

### **What is a public sector body?**

Any public authority or entity set up under public law by a state or one of its authorities (e.g. government). Even if such an entity has a legal personality (e.g. French universities), it acts on behalf of the State with regard to and within the limits of its specific areas or competencies. Activities carried out by such authorities or entities may be of a commercial nature.

### **What is an entity established under private law with a public service mission providing adequate financial guarantees?**

With respect to the “public service mission”:

a) where an entity established under private law is owned by a public sector body or the state (e.g. France Telecom where the government owns the majority of the stock), it can be deemed to have a public service mission.

b) for an entity established under private law that is not owned by a public sector body, the entity must be explicitly granted such a mission through a decision by a public sector body. Secondary and higher education establishments<sup>3</sup> that deliver diplomas recognised by a public authority according to criteria established by the state or perform research with public funding and in accordance with objectives agreed by the state would meet this criterion.

In cases of doubt proof of the public service mission can be required from the potential contractor showing that it falls into one of the two categories above.

With respect to the “adequate financial guarantees”:

a) if the entity is owned by the state then it can be presumed to provide adequate financial guarantees as the state will honour its obligations

b) if the entity is not owned by the state or a public sector body then it must prove that it will provide adequate financial guarantees (except for the secondary and higher education establishments that are presumed to provide such guarantees).

In cases of doubt proof of the existence and adequacy of a financial guarantee can be required from the potential contractor showing that it falls into one of the two categories above.

### **What is an international organisation?**

Article 2 of the Rules for Participation, states that an international organisation is one that “arises from an association of States, is established on the basis of a treaty or similar act, and has an international legal personality distinct from that of its Member States”.

---

<sup>3</sup> The implementing rules of the Financial regulations assimilate such organisations to public bodies as they may be exempted from providing audited financial accounts (Article 173.4, 5<sup>th</sup> indent)

The Financial Regulation's implementing rules<sup>4</sup> defines international organisations as “international public-sector organisations set up by intergovernmental agreements, and specialised agencies set up by such organisations” and extends the definition to include the International Committee of the Red Cross (ICRC), and the International Federation of National Red Cross and Red Crescent Societies.

Clearly multinational private companies (e.g. Coca-Cola) or international private non-profit organisations (including NGO's associated to activities carried out by the United Nations such as Amnesty International or Greenpeace) are **not** international organisations by these definitions.

**What is a legal entity whose participation in the indirect actions is guaranteed by a Member State or an Associated State”?**

This notion has implications only with regard to the financial collective responsibility in those instruments to which it applies (not SME specific actions, Marie Curie actions and duly justified specific support actions).

This is an entity which does not meet the criteria established by the definition of public body or international organisation. It must be able to prove that it has the guarantee of the state. The proof must be an explicit statement from a public authority of a Member State or Associated State confirming that it will guarantee any financial claim made by the Commission vis à vis the entity.

**2. What are the implications and when?**

**a) Financial Verification and Financial Guarantees:**

Financial verification is not required for national public-sector bodies or bodies governed by private law with a public-service mission providing adequate financial guarantees or international organisations.

The authorising officer of the Commission can decide, depending on the analysis of the management risks involved, to waive the obligation to provide external audit reports for grants that exceed € 300,000 for “public bodies, secondary and higher education establishments, the international organisations [identified in point 1 above], and beneficiaries who have accepted joint and several liability in the case of agreements with a number of beneficiaries”.<sup>5</sup> Article 176.4 of the implementing rules goes further to indicate that “verification of financial capacity shall not apply to natural persons in receipt of scholarships, nor to public bodies, nor to the international organisations” as defined by the rules.

If this information is waived, it means that no financial security will be requested from such organisations as it is presumed that they will honour their obligations both to carry out the work required by the grant and to repay any amount that may be due to the Commission in the event of a recovery.

---

<sup>4</sup> op cit ; Article 43.2

<sup>5</sup> op cit; Article 173.4

**b) Financial Collective Responsibility:**

The last paragraph of Article 13.2 of the Rules for Participation indicates that where a participant to an indirect action under FP6 is “an international organisation, a public body or a legal entity whose participation in the indirect action is guaranteed by a Member State or an Associated State” the participant is not obliged to bear the debt of any defaulting contractor. This is important both for the assessment of the overall financial risk to the Commission associated with providing the grant and for determining the nature of the coverage of the financial collective responsibility amongst the other participants, for those instruments that apply this provision. The procedures for determining whether the financial collective responsibility is sufficient are described in the contract preparation forms (CPF) and in the Guide to Financial issues relating to FP6 projects.

**c) Cost Models:**

The Framework Programme decision clearly indicates in footnote 4 in Annex III that additional cost is a possibility and can be offered “subject to specific conditions [to] specific legal entities, particularly public bodies, [who] will receive funding of up to 100% of their marginal/additional costs.” The notion of non-commercial, non-profit organisations established either under public law or private law is by its nature assimilated to a public body. If such an entity did not meet the definition of a public body it would still have to meet the requirements established by the contract with respect to accounting capacity in order to use the AC model.

That is, there may be public bodies such as France Telecom, that would be exempt from the obligation to provide financial guarantees or to undergo financial verification and that are exempt from financial collective responsibility but because of their nature cannot be considered to meet the criteria required to work on the additional cost model (namely, commercial nature and accounting capacity).

**d) Use of a competent public officer for audit certificates**

Article II 26.3 of the model contract for FP6 projects allows public bodies (defined by the contract as “a public sector body, or a legal entity governed by private law with a public-service mission providing adequate financial guarantees” and including international organisations), but not all those eligible for exemption from financial collective responsibility (i.e. not those guaranteed by a Member State or Associated State), to use a competent public officer to provide the audit certificates required by the contract.

Where a public body opts for a competent public officer to certify its audit certificates, it must meet the following criteria:

- the public competent public officer selected has not 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 (e.g. an internal auditor who is an official of the contractor concerned), its independence may be established by the relevant national authorities.
- the relevant national authorities have established the legal capacity of that competent public officer to carry out audits of the public body