

Affiliated institutions

➔ Background Information

The partner states of the Alpine Space Programme have defined common eligibility rules which shall be obeyed by all project participants coming from EU-member states. In chapter 2 "external experts and services" the eligibility rules set out the provisions to be observed when a project participant intends to commission project-external actors with the delivery of services for the project. One of these provisions reads as follows:

"Contracts between affiliated institutions (i.e. contracts between organisations that are formally divided, but personally, financially or functionally connected) are eligible if only verified actual and eligible costs without any additional fees are charged."

Since this rule may leave room for interpretation it shall be further explained in the following.

➔ Guidance

1 Definition of "affiliated institutions"

The above-mentioned eligibility rule related to "affiliated institutions" has been established in the light of the public procurement rules (see also factsheet 6.3. public procurement). In the field of public procurement law the European Court of Justice (ECJ) has set up an exemption from the obligation to apply procurement rules, namely the concept of "in-house"-procurement.

In general, this concept provides that the procurement rules do not apply in the following cases:

- (1) *direct internal awards* (e.g. a department within the contracting authority is commissioned to deliver a service) and
- (2) when the body that shall be contracted is in a close relationship with the latter (even though if legally distinct from the contracting authority) so that still an "in-house-arrangement" can be assumed. There are strict limits around this *wider concept of "in-house"* and it is only applicable where:
 - + the contracting authority (or authorities) exercise(s) control over the body that shall be contracted which is similar to that which it (they) exercise(s) over its/their own departments, and
 - + that body carries out the essential part of its activities for the controlling contracting authority/authorities that control(s) it.

A "control" which is similar to that which an authority exercises over own departments can be assumed if the contracting authority has the possibility to influence strategic and important decisions of the body. If the contracting authority holds, alone or together with other public authorities, all of the capital of a company this indicates generally that the contracting authority exercises over that company a control similar to that which it exercises over its own departments. It can be supposed that the "essential part of the activities" of a body that shall be contracted is carried out for the contracting authority (or authorities) that control(s) the body if the latter mainly acts for the contracting authority (>90% of the activities according to the ECJ).

For the programme this means that the following question has to be answered by the project participants:

"Has the body that shall be commissioned with the delivery of goods, services or public works such a close relationship with the contracting project participant that "in-house"-procurement is possible?"

If the answer is yes: the body is to be regarded as an "affiliated institution" in the sense of the eligibility rules (i.e. formally distinct from the project participant as contracting authority, but personally, financially or functionally connected with it) and the respective provisions as set out there are to be obeyed (see below).

If the answer is no: the body is not to be regarded as "affiliated" and the procurement of the respective services, etc. has to be carried out in compliance with the respective procurement rules (see factsheet 6.3. procurement law).

For the sake of completeness also the following shall be set out here: The EC-procurement directives only apply to "contracts" for pecuniary interest between contracting authorities and undertakings. In a younger decision the ECJ has clarified the term "contract": if the body that shall be commissioned with a task has no choice, either as to the acceptance of the demand made or as to the tariff for its services and if the relations between this body and the authority making the demand are in every respect internal, dependent and subordinate there is no "contract" in the sense of the EC-directives and procurement rules do not apply. Thus, if the influence of the project participant on the body to be commissioned is so strong that not even a contract in the sense of procurement law is given then the relationship between these two is to be considered as to be so close that the body is to be regarded as "affiliated institution".

The question if the above-mentioned possibility of "in-house"-contracting may be used or if a contract in the sense of the procurement rules exists or not shall be carefully judged by the respective project participant *before* starting the awarding procedure. The observance of public procurement rules and thus the question if the "in-house"-rule was properly applied will undergo an in-depth check by the responsible first level control body. Thus, the consultation of an expert in procurement law is highly recommended (respective costs for such external experts are generally eligible for co-funding).

2 Eligibility rule related to "affiliated institutions"

The possibility of "in-house"-arrangements shall not result in realisation of profits and inefficient use of project funds. Therefore, the eligibility rule related to "affiliated institutions" only allows charging and reporting of actual eligible costs without any additional fees.

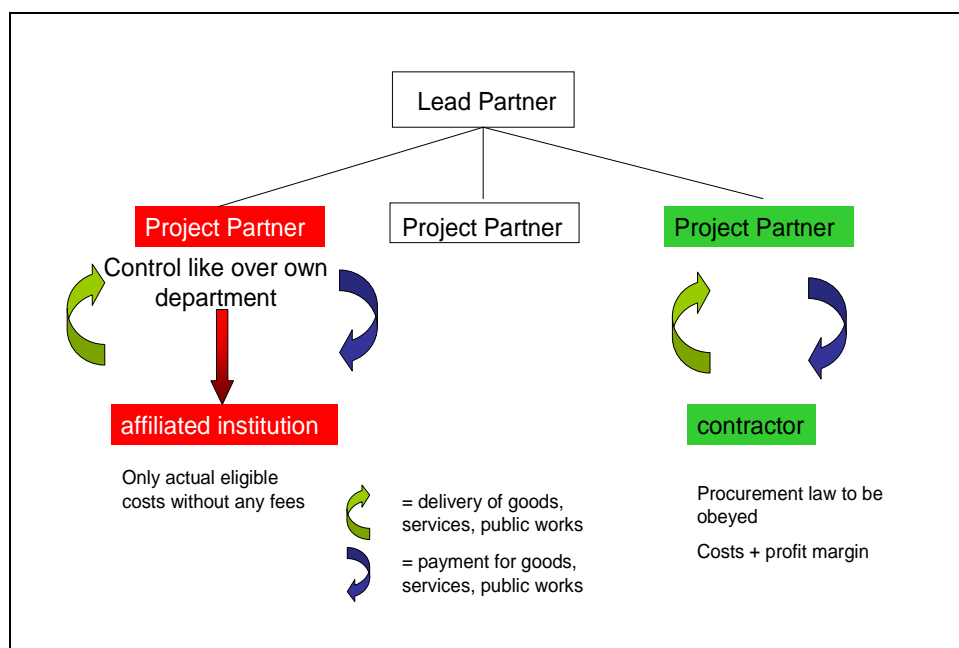
The term "additional fee" is to be understood as any compensation that goes beyond the actual costs that have arisen for the "affiliated institution" when performing the task for the project participant that commissioned it. Thus, any profit margin of the affiliated institution shall not be eligible for co-funding.

Moreover, the term "fee" does not mean "taxes". Therefore, if an affiliated institution is to be regarded as taxable person in the sense of VAT-regulations and therefore has to charge VAT on services or goods delivered it has certainly also to charge VAT for services or goods provided to a project participant as contracting authority. If VAT is not recoverable for the latter, also the respective amount of VAT is eligible for co-funding.

3 Allocation of Costs

If an "affiliated institution" shall be contracted by a project participant the related expenses shall be allocated to the cost category that they would belong to if the activity that shall be performed by the "affiliated institution" would have been performed by the respective project participant. E.g. in case of delivery of services these costs should be regarded as staff costs.

4 Overview



➡ Reference Documents

- Eligibility rules, chapter 2.1.
- Partnership Agreement, articles 2 (3), 4 (2) lit g, 5 (4) lit g
- Subsidy Contract, articles 2 (2), 6 (1) lit i
- Decisions of the European Court of Justice (C-107/98, C-26/03, C-458/03, C-295/05, C-220/06)