

Preliminary Guidance on the Preparation of Agreements with Donors and Implementing Partners

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I. Introduction

1. This contains the guidance by OPPBA to Secretariat Departments, Offices and Peacekeeping and Special Political Missions for preparation of contribution agreements with donors. The aim is to provide clarity on the roles and responsibilities with regard to application of the financial policies, thus enabling authorized officials to manage the related risks effectively. In general, the modality of a contribution agreement should be kept as simple and straightforward as possible, i.e., donor contributions should normally be provided directly to the Secretariat and not through intermediate agencies or entities, regardless of the wishes of the donor.
2. The standard language provided under each section in these guidelines should be used especially in cases where a new agreement is being drawn up between a donor and a United Nations Secretariat entity.
3. The advice and approval of the Office of the Controller regarding any deviation from these guidelines should be sought and obtained in advance (controlleroppba@un.org). The relevant administrative instructions and policies by memorandum are enclosed. These will be revised on an ongoing basis, as necessary.

II) Preparation of Contribution Agreements with Donors

A. General Terms and Conditions

- a) The terms and conditions in the agreements with donors should be in accordance with the terms of reference of the trust fund to which the contribution is made. Whereas additional complementary provisions may be included, if necessary, they cannot contradict those provided in the terms of reference of the trust fund.
- b) The agreement must be thoroughly reviewed to ensure that it does not contain any text which may cause a financial liability to the UN.
- c) Special requirements of donors and unique terms and conditions must be kept to a minimum.
- d) Advice from the Office of Legal Affairs (OLA) and Office of Central Support Services (OCSS) must be sought as and when necessary, for example for requests by the donor for changes to clauses, before the request for approval comes to the Controller for approval. For this purpose, please refer to the check list which indicates the steps before submission to the Controller.

B. Umbrella Agreement

4. When the Organization has established an overarching umbrella agreement with a specific donor or group of donors, such as the Financial and Administrative Framework Agreement (FAFA) of 29 April 2003 with the European Union, as amended in 2014 and the umbrella agreement with individual donors such as Germany, the Netherlands, USAid, and the World Bank the specific contribution agreement must be in accordance with the provisions set forth in the umbrella agreement.

C. Regulatory Compliance

5. In addition to ensuring full compliance with the relevant regulatory framework of the Organization, including financial regulations and rules and policies, UN procurement and recruitment policies, the following non-negotiable clause should always be included:

“The contribution/donation/funds provided in accordance with this Agreement and the activities financed therefrom shall be administered in accordance with the/ applicable United Nations regulations, rules and policies, including United Nations Financial and Staff Regulations and Rules.”

D. Programme Support Costs

6. The Programme Support Costs charged should be in accordance with the memorandum issued by the Controller on 8 June 2012 on this subject. (See enclosed copy).

E. Reports

7. The financial and substantive reporting arrangements set forth in financial agreements with donors must be complied with in a timely manner; timely substantive and financial reports must also be obtained from implementing partners.

8. Substantive Reports: Substantive offices and departments with the responsibility for the implementation of projects funded from voluntary contributions should ensure that they can meet donors’ requirements for interim and final substantive reports.

9. Financial Reports: Substantive offices and departments should be mindful of the difference in terminology between “certified” and “audited” in relation to financial statements. Whereas the Organization can provide donors with financial statements that are certified by the Controller annually, it cannot provide audited statements. Final financial reports, certified by the Director of Accounts Division, or as authorized, at the fund level may normally be made available to the donors six (6) months after end of the financial year in which the project was completed. Final financial reports at the project level are prepared by the substantive offices and departments and certified by the Director of the Accounts Division, or as authorised. Provision of interim financial reports or statements of accounts at the project level more frequently than on an annual basis, during the implementation period, should be avoided.

F. Remaining Surplus

10. Upon completion of a project and after all commitments for expenditures are actually incurred, any unspent balances or surplus contribution remaining shall be used to support other objective(s) of the contribution, in accordance with its terms of reference, or returned to the donor at its request. The issue concerning unused funds should be addressed in the contribution agreement with the donor. Any accrued interest can only be refunded at the time of closure of a project or when the purposes for which the trust fund or project was established have been realized, and the trust fund or project is closed. (See paragraph 46, ST/SGB/188, or its revision).

G. Reduction or Termination of Funding by Donor

11. The Organization cannot repay funds that were already disbursed or committed via binding contractual document, unless exceptionally agreed by the Controller. However the donor can request the unencumbered balance, if any, of contribution payments already received, should the donor so desire. If funding is reduced, suspended or terminated for any reason, including for misuse or fraud, costs already incurred or committed with legally binding arrangements by the Organization up to the effective date of the decision to reduce, suspend or terminate the funding should be reimbursed by the donor. The standard language is per the below:

“The Government of xxx may at any time, in good faith, reduce the contribution by: (i) withholding payments that have not yet been made, or (ii) requesting the unencumbered balance, if any, of payments already made, should the Government decide to discontinue this support programme. In case of termination or reduction of funding, the Government of xxx should give reasonable notice prior to such termination or reduction. Upon receipt of such notice, the United Nations shall not incur any new financial commitments unless agreed upon by the Government of xxx.”

H. United Nations Audit Policy

12. The UN audit policies must be complied with. The Organization cannot accept any procurement and recruitment restrictions and must comply with the single audit principle, i. e., all contributions will be subject exclusively to internal and external audit set forth in the United Nations Financial Regulations and Rules (i.e., only the UN Board of Auditors may conduct external audits of the contributions). No other audit arrangement is acceptable. Thus a donor shall not be permitted to conduct an audit, as it violates Financial Regulation 7.6. Only the General Assembly and the Advisory Committee on Administrative and Budgetary Questions (ACABQ) can direct or request the United Nations Board of Auditors to conduct audits. However, should a management letter of the United Nations Board of Auditors contain observations related to a contribution, such information can be shared, upon request by the donor.

I. Anti-Terrorism

13. In light of the United Nations status, privileges and immunities, the Organization is not subject to national or local laws and cannot therefore agree to comply with anti-terrorism laws of the Member

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State. Therefore, if a donor requests to include a provision with regard to anti-terrorism in the contribution agreement, the following language should be used:

“Consistent with numerous United Nations Security Council resolutions, including S/RES/1269 (1999/S/RES/1368 (2001), and S/RES/1373 (2001), the parties are firmly committed to the international fight against terrorism, and in particular, against the financing of terrorism. It is the policy of [donor] to seek to ensure that none of its funds are used, directly or indirectly, to provide support to individuals or entities associated with terrorism. In accordance with this policy, the recipient undertakes to use reasonable efforts to ensure that none of the [donor’s] funds provided under the award are used to provide support to individuals or entities associated with terrorism.”

OLA should be consulted with regard to any deviation from the above clause. OLA should also be consulted with regard to other provisions proposed by donors, e.g., anti-corruption and fraud prevention (See Anti-fraud policy to be issued by the Department of Management).

J. Privileges and Immunities

14. The following clause shall be included in each contribution agreement:

“Nothing in this Agreement shall be deemed a waiver, expressly or implied, of any of the privileges and immunities of the United Nations, including its subsidiary organs.”

K. Settlement of Disputes

15. In cases where the donor is a government, the following clause should be included with respect to any dispute that arises in connection with the contribution agreement:

“Disputes between the United Nations and the Government concerning the interpretation or application of this Memorandum of Understanding which are not settled by negotiation or other agreed mode of settlement shall be submitted to arbitration at the request of either party. Each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the Chairman. If within thirty days of the request for arbitration either party has not appointed an arbitrator or if within fifteen days of the appointment of two arbitrators the third arbitrator has not been appointed, either party may request the President of the International Court of Justice to appoint an arbitrator. The procedure of the arbitration shall be fixed by the arbitrators, and the expenses of the arbitration shall be borne by the parties as assessed by the arbitrators. The arbitral award shall contain a statement of the reasons on which it is based and shall be accepted by the parties as the final adjudication of the dispute.”

16. In cases where the donor is not a government, the following clauses should be used :

*“A. **AMICABLE SETTLEMENT:** The Parties shall use their best efforts to amicably settle any dispute, controversy, or claim arising out of this Agreement or the breach, termination, or invalidity thereof. Where the Parties wish to seek such an amicable settlement through conciliation, the conciliation shall take place in accordance with the Conciliation Rules then obtaining of the United Nations Commission on International Trade Law (“UNCITRAL”), or according to such other procedure as may be agreed between the Parties in writing.*

B. Arbitration: Any dispute, controversy, or claim between the Parties arising out of this Agreement or the breach, termination, or invalidity thereof, unless settled amicably under the above paragraph on “Amicable Settlement”, within sixty (60) days after receipt by one Party of the other Party’s written request for such amicable settlement, shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. The decisions of the arbitral tribunal shall be based on general principles of international commercial law. The arbitral tribunal shall be empowered to order the return or destruction of goods or any property, whether tangible or intangible, or of any confidential information provided under this Agreement, order the termination of the Agreement, or order that any other protective measures be taken with respect to the goods, services or any other property, whether tangible or intangible, or of any confidential information provided under the Agreement, as appropriate, all in accordance with the authority of the arbitral tribunal pursuant to Article 26 (“Interim measures”) and Article 34 (“Form and effect of the award”) of the UNCITRAL Arbitration Rules. The arbitral tribunal shall have no authority to award punitive damages. In addition, unless otherwise expressly provided in this Agreement, the arbitral tribunal shall have no authority to award interest in excess of the London Inter-Bank Offered Rate (“LIBOR”) then prevailing, and any such interest shall be simple interest only. The Parties shall be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such dispute, controversy, or claim.

II) Preparation of Agreement with Implementing Partners

A. General Terms and Conditions

18. Secretariat Departments, Offices and Peacekeeping and Special Political Missions are required to follow the guidelines outlined below when preparing and approving financial agreements (also referred to as grant agreement or agreement of cooperation) with implementing partners.

19. The advice and approval of the Office of the Controller regarding any deviation from these guidelines should be sought and obtained in advance. The following conditions shall apply:

- a) Implementing partners shall be selected by the United Nations with upmost care with a strict vetting process that includes careful assessment of capacity and qualifications.
- b) All implementing partners must be registered with the office in question using a local database, pending development of a global registration platform at the appropriate time.
- c) Periodic on-site reviews of the partners should be undertaken, if necessary, to review its financial records to oversee the use of United Nations funds
- d) Programme monitoring of the implementation of the activities contracted and audits in relation to the use of UN funds
- e) Implementing partners and their personnel are required to cooperate with UN investigations and exhorting their personnel to report any wrongdoing and possible misuse of UN funds to the dedicated hotline of the Office of Internal Oversight Services (OIOS) at <http://oios.un.org/>
- f) Conditions regarding use of assets after project completion, transfer and write-off of assets; disclosure of funding from other sources for the same project (prohibition); notification of unused funds; subcontracting and procurement by the implementing partner; notification by

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implementing partner of fraud investigation; termination due to force majeure and confidentiality restrictions should be clear.

20. In the event the Organization has established an umbrella agreement with an implementing partner, such as with UNOPS, the specific financial agreement must be in accordance with the provisions set forth in the umbrella agreement. In addition, the following provisions shall apply:

- a) A financial agreement with implementing partners shall be concluded only in cases where sufficient funds are held by the UN in support of the proposed contracted activities. In exigency cases only, pending transfer of earmarked funds from a donor pursuant to a duly executed contribution agreement, a financial agreement with an implementing partner may be concluded based on the availability of resources from the unearmarked portion of the trust fund.
- b) No implementing partner shall commence any works pertaining to projects, without a duly executed funding agreement with the Organization.
- c) In order to avoid potential claims by donors for breach of contractual obligations by the Organization, it is imperative to ensure that contributions are administered and utilized in accordance with the donors' wishes and intent, as are stipulated in the agreement with the Organization.
- d) The terms and conditions of the financial agreement with the implementing partner must correspond with the provisions of the agreement with the donor.
- e) Advice from the Office of Legal Affairs (OLA) and Office of Central Support Services (OCSS) on any legal and procurement issues must be sought as and when necessary, before the submission of the agreement for the approval of the Controller or as authorised.

B. Personnel

21. The personnel of the implementing partner shall not be considered in any respect as being the employees or agents of the Organization. The Organization should not accept any liability for claims arising out of the activities performed under the financial agreement or any claims for death, bodily injury, disability, damage to property or other hazards that may be suffered by implementing partners' personnel as a result of their work pertaining to the project. The following clauses should be included on partner employees avoiding conflict of interest, in particular:

- a) Partner employee conduct may not foster any suspicion of conflict between professional duty and personal interest;
- b) Nobody will solicit or accept, directly or indirectly, any gift, favour, entertainment, loan or anything of monetary value from vendors or potential vendors;
- c) Bids may not be solicited from, and contracts may not be awarded to, any company that is owned, controlled or actively influenced by any partner employee or by a close relative of a partner employee
- d) Vendors will not participate in developing or drafting specifications for goods or services for which they subsequently admit and offer/proposal.

C. Reports

22. Interim substantive and financial reports shall be submitted by implementing partners in accordance with progress in the works of the project. The reports must correspond to the project's schedule as provided in the project description and should be provided immediately upon completion of the works to be reported.
23. Interim financial report as at 31 December should be submitted in accordance with the schedule established for the annual closing of the Organization's accounts, in order that expenditures reported by implementing partners, are included in the previous year's accounts. The final certified financial report for the project as at 31 December should be submitted no later than 30 June of the subsequent year.
24. Implementing partners must submit final substantive and financial reports within three (3) and six (6) months respectively from the completion of the project.
25. Final financial reports must be certified by the Controller or equivalent senior official of the implementing partner. Interim financial reports may be signed by a duly authorized official of the implementing partner or auditor contracted for the purpose.

D. Budget and Payments

26. A project's budget must be reviewed carefully by programme and budget officers in the substantive offices and departments who are responsible for the project to ensure that all the items are related directly to the objectives and expected outputs of the project, that all the costs are accounted for and that there are no duplications of costs or hidden costs. It is also imperative to ensure the reasonableness and fairness of the costs. The daily subsistence allowance rates of the Organization, when applicable, should not be exceeded (travel, UN standards of accommodation, etc.).
27. The Organization shall not be liable for any expenditure incurred by the implementing partner in excess of the contributed amount authorized in the financial agreement, unless approval has been given for amendments to the budget.
28. Scheduled payments shall accurately reflect the progress in the implementation of the project and shall correspond with the submission of the substantive and financial reports.
29. The first installment shall be made upon signature of the financial agreement. Subsequent installments shall be made within 30 days from the submission of satisfactory substantive and financial reports, and following verification and confirmation by the responsible substantive offices or departments of the successful completion of the phase for which the reports relate to. The installments shall not exceed the annual/year to date cumulative budget of the project. Risk assessment shall be undertaken, in cases where cash installments are received on a different schedule to ensure that it does not override the cash replenishment system of the main donor agreement.
30. The amount of each installment shall not exceed authorized actual expenditures incurred, budgeted projected expenditure for the identified future period, and unutilized funds from previous installment shall be deducted from the subsequent installment.

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E. Return of Unspent Funds and Interest

31. Unspent balances including interest accrued shall be returned to the Organization within thirty (30) days of the completion of the project, and no later than at the time of submission of the final financial report.

F. Insurance

32. The below is required by all implementing partners, including UN system implementing partners and governments which have insurance policies in place. They must maintain:

- a) Insurance against all risks in respect of its property and any equipment used for the implementation of the project under the agreement.
- b) All appropriate worker compensation and employer liability insurance, or its equivalent, with respect to its personnel to cover claims for injury, illness, death or disability in connection with the agreement.
- c) Liability insurance in an adequate amount to cover claims including but not limited to claims for death or bodily injury, loss of or damage to property arising from or in connection with the provision of services under the agreement, or the operation of any vehicles, boats, airplanes or other equipment owned or leased by the implementing partner or its personnel performing work or services in connection with the agreement.

33. The insurance policies specified in the paragraph above shall:

- a. Name the Organization as additional insured;
- b. Include a waiver of subrogation of the implementing partner's insurers rights against the Organization;
- c. Provide that the Organization shall receive thirty (30) days written notice from the insurers prior to any cancellation or change of coverage.
- d. The implementing partner shall provide the Organization with certificates of insurance evidencing the above coverage prior to the commencement of the project. The Organization reserves the right, upon written request to the implementing partner, to obtain copies of any insurance policies required to be maintained by the implementing partner under the MOU.
- e. All insurance shall be obtained through insurers reasonably satisfactory to the Organization.
- f. All policies shall be primary without right of contribution from any other insurance which may be carried by the Organization.

G. Indemnification

34. The implementing partner must indemnify, hold and save harmless, and defend, at its own expense, the Organization, its officials, agents, servants and employees from and against all suits, claims, demands, and liability of any nature or kind, including their costs and expenses, arising out of acts or omissions of the implementing partner, or its personnel, in the performance of the financial agreement. This requirement for indemnification shall extend, *inter alia*, to claims and liability in the nature of worker compensation, products liability and liability arising out of the use of patented inventions or devices, copyrighted material or other intellectual property by the implementing partner or its personnel.

35. The implementing partner shall be responsible for and deal with all claims brought against it by its own personnel.

H. Privileges and Immunities

36. The proposed provision in paragraph 14 above shall be included in the financial agreement with the implementing partner.

I. Settlement of Disputes

37. The relevant provision in Section I above shall be used and applied in the financial agreement with the implementing partner. To be updated pending development of fraud policy, including recovery of funds from implementing partners.

J. Tax Exemption

38. The Organization, including its subsidiary organs, is exempt from all direct taxes, except charges for public utility services, and is exempt from customs duties and charges of a similar nature in respect of articles imported or exported for its official use. Thus, the following clause should be included in the financial agreement with the implementing partner:

“In the event any governmental authority refuses to recognize the UN exemption from such taxes, duties or charges, the implementing partner shall immediately consult with the UN to determine a mutually acceptable procedure. The implementing partner shall be responsible for any amount representing such taxes, duties or charges, unless it has consulted with the Organization before the payment thereof and the Organization has, in each instance, specifically authorized the implementing partner to pay such taxes, duties or charges under protest. In that event, the implementing partner shall provide the Organization with written evidence that payment of such taxes, duties or charges has been made and appropriately authorized.”

K. Other provisions

39. This section contains provisions that are subject to the development of a framework for the management of implementing partners, as recommended by OIOS. It will be updated in due time pending the development of the framework.

40. In the meantime, the following minimum standards should be used, as far as possible, for due diligence assessment of implementing partners (IP):

- IP is registered with an approving body in its country, has a physical address and is not included on the UN Security Council sanctions list and the World Bank listing of ineligible firms and individuals
- IP is voluntary and not-for-profit, independent of government and is not affiliated to any political party
- IP has a stated purpose of existence and information about its objectives, available to its members, its community or its constituency, and has a bank account

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- IP has a history of implementing and completing projects or programmes with development and/or relief-related focus
- IP technical capacity is commensurate with the scope of its projects/programmes
- IP can describe its plans for monitoring of projects and under undertakes regular project monitoring
- IP has some practices in place that mitigate fraud risk such as multiple signatories on bank account, supporting documentation collected and retained, and commits to reporting any incidents of corruption

ANNEX

I. Check list

Submission of financial contribution agreements for approval by the Controller

| MUST BE CHECKED BEFORE SUBMISSION TO THE CONTROLLER* | Check |
|---|--------------|
| A. Contribution agreement with donor (Governments, private/public institutions, agencies) | |
| Umbrella agreement (Check, if yes) | |
| <i>When the United Nations Secretariat has established an umbrella/framework agreement with a specific donor or group of donors, such as the EU (FAFA) and the Netherlands, USAID, Canada or GIZ (Germany), the agreement must be in accordance with the provisions of the umbrella/framework agreement.</i> | |
| 1. The terms and conditions of the agreement are in accordance with (don't contradict) the terms of reference of the trust fund to which the contribution is made. The approval of the Controller for exceptions has been obtained. | |
| 2. All required standard provisions in compliance with UN rules, including UN Financial Regulations and Rules (see guidelines) have been included. | |
| 3. Advice from the Office of Legal Affairs and Office has been sought in advance and clearance has been obtained for <u>all legal terms and conditions</u> . Advice from the Office of Central Support Services has been sought in advance and clearance has been obtained for matters relating to <u>in-kind contributions</u> . | |
| 4. Standard mandatory Programme Support Costs are applied. If not, strong justification must be included in the submission, i.e., no additional liability on regular budget resources. | |

*The Controller will not process a request for approval until the agreement has been created in the Grants Management Module in Umoja with a unique ID number.

| MUST BE CHECKED BEFORE SUBMISSION TO THE CONTROLLER* | Check |
|---|--------------|
| B. Contractual instrument with implementing partner | |
| The Implementing partner has been vetted in compliance with the minimum standards of due diligence established in the Guidelines (para 40) (check if yes) | |
| Umbrella agreement (check if yes) <i>When the Organization has established an umbrella agreement with a specific implementing partner (i.e., UNOPS), the contractual instrument must be in accordance with the provisions of the umbrella agreement.</i> | |
| 1. The contractual instrument must correspond to the purpose, terms and reference of the trust fund. The approval of the Controller for exceptions has been obtained. | |
| 2. The services provided by the Implementing partner are NOT procurement-related, as confirmed by OCSS. | |
| 3. All non-negotiable clauses for implementing partners and standard language (see guidelines) have been included. | |
| 4. Advice from the Office of Legal Affairs (OLA) and Office of Central Support Services (OCSS), as and when necessary, has been sought in advance and clearance has been obtained for <u>all unique terms and conditions</u> . | |
| 5. The cumulative Programme Support Costs, if charged by the implementing partner including that of the UN, do not exceed the rate stipulated in the contribution agreement with the donor. | |

*The Controller will not process a request for approval until the agreement has been created in the Grants Management Module in Umoja with a unique ID number.

II. Policy memoranda

Roll-out of Umoja Grants Management module and changes in roles and processes in the management of voluntary contributions (grants), 24 April 2015

Updated procedures for the administration of allotments, for entities forming part of Umoja clusters 1 to 3, 1 June 2015

Cost plans for grants and indirect costs (programme support costs) for 2016, 9 November 2015

[End of guidelines]