

International Development Co-operation



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Department
National Treasury
REPUBLIC OF SOUTH AFRICA

Budget Support in South Africa

Financing Agreement Contractual Clauses



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Supplement 4 to “The Policy Framework and Procedural Guidelines for the Management of Official Development Assistance (2003)”

This document has been prepared as a supplement to the National Treasury “Policy Framework and Procedural Guidelines for the Management of Official Development Assistance (2003)” with information specific to programmes funded by the European Union using the Budget Support modality. These Supplements reflect the commitment of the Government to ensure proper application of Budget support funds in the South African developmental context. There are nine such Supplements with more in depth information on EU funding modalities and Budget Support management. The nine Supplements are:

- Context for EU Funded Budget Support in South Africa
- Introduction to EU funding modalities
- Guidelines for formulation of the Financing Agreement
- Financing Agreement Contractual Clauses
- Management of Budget Support Programmes
- Requesting the Release of Funds
- Evaluation of Budget Support Programmes
- Managing Budget Support Funds within the SA Public Accountability System
- Management of Grants Provided under the General Budget Support Programme.

The first three supplements listed above provide an overview of Budget Support modality and the conditions required to qualify for Budget Support. This document provides an insight into the General and Special Conditions of **Contract** of the Budget Support Financing Agreement, which set out the legal operation of the Financing Agreement. The document covers

- The Special Conditions of Contract (SCC) and their interpretation
- The General Conditions of Contract (GCC) and their interpretation

It should be noted that this document does not purport to provide legal opinion or interpretation, but seeks provide a layman’s understanding of the content of the Financing Agreement Contractual Clauses. Where strict legal interpretation is required, then the services of a legal adviser must be sought.

The reader is also referred to the other supplements listed above for further information on Budget Support programmes in South Africa, specifically to the supplement “Guidelines for Formulation of the Financing Agreement”, which covers the general and specific conditions applicable to tranche releases.

October 2013

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Glossary and Abbreviations

| | | | |
|-------|--|---------|--|
| AENE | Adjusted Estimates of National Expenditure | MoA | Memorandum of Agreement |
| AFS | Annual financial statements | MoU | Memorandum of Understanding |
| AG | Auditor General | MTEF | Medium-Term expenditure Framework |
| BAS | Basic Accounting System | NAO | National Authorising Officer |
| BS | Budget Support | NGO | Non-Governmental Organisation |
| CABRI | Collaborative African Budget Reform Initiative | NIP | National Indicative Plan |
| CEF | Comprehensive Evaluation Framework | NT: IDC | National Treasury: International Development Cooperation unit |
| CFO | Chief Financial Officer | ODA | Official Development Assistance |
| CSP | Country Strategy Paper | OECD | Organisation for Economic Cooperation and Development |
| DAC | Development Assistance Committee | OVI | Objectively verifiable indicator |
| DCI | Development Cooperation Instrument | PAF | Performance Assessment Framework |
| DCMIS | Development Cooperation Management Information System | PAS | Public Accountability System |
| DDG | Deputy Director General | PFM | Public finance management |
| DG | Director General | PFMA | Public finance Management Act (as amended) |
| DIRCO | Department of International Cooperation and Development | PMG | Paymaster-General |
| DPME | Department of Monitoring and Evaluation | PSP | Policy Support Programme |
| DTI | Department of Trade and Industry | RCF | Risk Capital Facility |
| EC | European Commission | RDP | Reconstruction and Development Programme |
| ENE | Estimates of National Expenditure | ROM | Results Orientated Monitoring |
| EPRD | European Programme for Reconstruction and Development | SA | South Africa |
| ESP | European Special Programme | SAI | Supreme Audit Institution |
| EU | European Union | SBS | Sector Budget Support |
| EUD | European Union Delegation | SCC | Special Conditions of Contract |
| FA | Financing Agreement | SCOA | Standard Chart of Accounts |
| FMPA | Financial Management of Parliament Act | SLA | Service level agreement |
| GBS | General Budget Support | SME | Small and Medium Enterprise |
| GCC | General Conditions of Contract | SP | Sector Programme |
| GP | Government programme, as specified in the Financing Agreement, supported by the Budget Support programme | SPSP | Sector Policy Support Programme |
| IYM | In-year monitoring | SWAp | Sector Wide Approach |
| JAP | Joint Action Plan | SWEEEP | Sector Wide Enterprise, Equity and Employment Programme |
| JCC | Joint Cooperation Committee | TA | Technical Assistance |
| LFA | Logical framework analysis | TAPs | Technical and Administrative Provisions |
| M&E | Monitoring and Evaluation | TDCA | Trade and Development Cooperation Agreement |
| MFMA | Municipal Financial Management Act | ToR | Terms of Reference |
| MIP | Multi-annual Indicative Plan | UNESCO | United Nations Educational, Scientific and Cultural Organisation |

1 The Financing Agreement Structure

Financing Agreements have a standard structure. In reading this section it will be of value to refer to an example of the conditions of contract. The standard structure includes:

- A Cover page with support programme name and EU Agreement Number. The cover page is not used on contract interpretation. However, it provides information on the contracting parties, the legal programme name in the EU system and the funding period, the EU programme identification number and the EU Agreement Number
- Special Conditions of Contract. This section usually has eight articles (clauses). This is the section which is signed by both parties. These Special Conditions relate to the contractual processes and differ from the Specific Conditions in the Technical and Administrative Provisions section, which relate to technical performance (See the supplement “Guidelines for Formulation of the Financing Agreement” section 2.6)
- General Conditions. This section usually has five “Titles” (sections) and twenty articles (clauses). These conditions are standard and are included in all EU Financing Agreements in South Africa, including “Project” modality programmes. As a result a number of them are not applicable to Budget Support Programmes, and are removed in terms of an article in the Special Conditions. The General Conditions of Contract relate to the contractual processes and are not the same as the General Conditions for tranche release set out in the Technical and Administrative Provisions section, which relate to technical performance (See the supplement “Guidelines for the Formulation of the Financing Agreement”)
- Technical and Administrative Provisions (TAPs). This section describes the technical nature of the programme and the support provided through setting out the objectives, result areas, activities, budget and funding, implementation arrangements, performance measurement, etc. The TAPs has Annexes dealing with Performance Indicators, Disbursement Arrangements and Variable Tranche calculation. The Technical and Administrative Provisions section is dealt with in the supplement “Guidelines for Formulation of the Financing Agreement”.

This document provides an insight into the General and Special Conditions of **Contract** of the Budget Support Financing Agreement. These conditions are contractual clauses which set out the legal operation of the Financing Agreement. They differ from the technical General and Specific Conditions in the **Technical and Administrative Provisions** section of the Financing Agreement, which are technical provisions that determine whether tranche releases are made¹.

2 Special Conditions of Contract

The Special Conditions of Contract (SCC) have a standard structure and clauses, but have content (amounts, programme names, addresses, etc.) specific to each programme. The Special Conditions of Contract (SCC) contain contract specific information in eight articles (clauses) with standard headings. Although the information in this section is specific to the contract, the structure and wording is as standardised as possible. In a legal dispute the Special

¹ Refer to the supplement “Guidelines for Formulation of the Financing Agreement”

Conditions take precedence to all other sections of the Financing Agreement. The content and general implications of the articles of the SCC are given in the “Special Conditions of Contract” table overleaf. The most significant article of the SCC relates to Article 7, which removes and modifies articles of the General Conditions of Contract to align with the Budget Support approach.

3 General Conditions

The General Conditions of Contract (GCC) are largely standard for all Financing Agreements. They are a set of standard conditions which are issued with all EU funded programmes. They do not mention programme names, specific amounts, or specific dates. The General Conditions have five “Titles” (sections) and eighteen articles (clauses). More insight into these conditions is given in the “General Conditions of Contract” table overleaf.

The General Conditions are the same for all European Union funded programmes, regardless of whether they are “project” programmes using EU procurement procedures or Budget Support modality. They are modified in the Special Conditions of Contract to make them appropriate for Budget Support modality. Certain articles are removed or reworded, and certain articles added. Article 7 of the Special Conditions of Contract modifies the GCC.

End date for contracting (the “D+3” clause)

The term D+3 refers to the period in which contracts may be signed under an EU Financing Agreement. The “D” refers to the date of signature of the Financing Agreement, and the “3” refers to the maximum number of years after date of signature that contracts may be signed. Thus, if the Financing Agreement is signed on 2 February 2010, the last date for signing any contracts to be funded from the Financing Agreement will be midnight on 1 February 2013.

Special Conditions of Contract

| Article | Content | Implications |
|--|--|--|
| Article 1: Nature and purpose of the operation | <p>Agreement by the EU to contribute to the programme</p> <p>Programme Name and EU programme identification number</p> | <p>South African Government is the contracting party. The government is represented in the transaction by the National Treasury. Because of the state-to-state nature of the agreement, it should ideally be signed by the President, but usually the function is delegated to the Minister of Finance.</p> <p>The Minister delegates the implementation responsibility to a state entity or department, which is responsible to the Minister (and through him to Parliament), for implementing the programme, within the framework of South African public accountability legislation.</p> |
| Article 2: The Community's Financial Contribution | <p>Programme costs and the total EU contribution to the cost of the programme</p> <p>The funding modalities and associated sub-total amounts of the EU contribution</p> <p>Tranche amounts and type (fixed, variable) and date of tranche release</p> <p>EU budget line number</p> <p>May contain information on appropriation year in EU budget</p> | <p>The tranche amounts and types are contractually binding and not merely implementation issues. "Riders" (contract addendums) are typically not issued by the European Union on Special and General Conditions, so that these provisions are typically not amenable to adjustment.</p> <p>Where the budget year of the EU is specified for a particular tranche payment: should the application for tranche release not be made in time to allow for processing and payment in this financial year, then the EU may decline to roll the tranche over and the tranche may be lost entirely. The same would apply if the tranche conditions are not met in the timeframes specified in the Financing Agreement.</p> |
| Article 3: The Beneficiary's Contribution | <p>Defines the amount and non-financial contribution of South Africa to the overall programme. Usually refers to the TAPs for detail</p> | <p>The South African Government department which is the beneficiary / lead department of the programme must ensure that financial and non-financial contributions are met and can be substantiated.</p> |
| Article 4: Period of Execution | <p>Sets out start and end date of the programme. Refers to Article 4 of the General Conditions</p> <p>Sets out start and end dates of</p> | <p>This clause refers to the "end date for contracting" clause (colloquially termed the D+3 clause) in the General Conditions of Contract. D is the date of signing of the Financing Agreement, (usually by the last party to sign), and 3 refers to the number of years for implementation from the date of signing. Refer to clause 4 of the GCC in Table 2 for more information</p> <p>Article 4 of the GCC is modified under article 7 of the Special Conditions of Contract such that the D+3 condition applies</p> |

| Article | Content | Implications |
|---|---|--|
| | operational / implementation phase and closure phase | <p>only to certain funds in the Financing Agreement. The contracts referred are any contracts to be signed by the implementing authority, where such contracts will be financed from funds provided by the European Union under the programme.</p> <p>However, for the Budget Support portion of a Financing Agreement, this refers only to the signing of the Financing Agreement itself and not to contracts entered into by the South African government using the Budget Support funds. The latter can be undertaken at any time after signing of the Financing Agreement.</p> <p>The last valid year for signing of these contracts will therefore be three years after the year in which the contract was signed, and the last valid day for signing will be midnight on the day before the date on which the Financing Agreement was signed.</p> <p>Contracts signed by the appropriate date may still be implemented after this date, as long as they are complete by the end of the closure period.</p> <p>This condition is unchangeable in respect of the three years.</p> |
| Article 5: Address Content | Addresses of EU Delegation and South African Department of Finance | <p>All legal and official documentation is to be sent to these addresses.</p> <p>It should be noted that the official address of the beneficiary or lead department is not the legal address for purposes of the agreement. Rather, it is the address of the National Authorising Officer, the Minister of Finance</p> |
| Article 6: Annexes | <p>Lists out all the documents comprising the agreement and setting out the terms and conditions of the financing</p> <p>Sets out "precedence" of various documents</p> | <p>Although the programme is implemented in terms of the TAPs, the Special and General Conditions of Contract is an important part of the agreement</p> <p>The precedence refers to which documents will be taken to be correct in the event that there is discrepancy or lack of clarity between the documents comprising the agreement.</p> |

| Article | Content | Implications |
|---|---|--|
| <p>Article 7: Conditions applying to a Budget Support operations</p> | <p>Removes and replaces clauses from the General Conditions and supplements it with certain other clauses</p> <p>Identifies the European Union as the programme implementer and defines what this means</p> | <p>Refer to General Conditions of Contract section of this document for information on clause removal and replacement</p> <p>Implementation by the European Union is defined as verifying conditions for payment and making payment to the South African Government. It refers to implementation of the Financing Agreement and not to implementation of the government programme which is supported by the Financing Agreement.</p> |
| <p>Article 8: Entry into force of the Financing Agreement</p> | <p>Specifies the date on which the agreement comes in force</p> | <p>The date specified is usually the date on which the last party to the agreement signed the agreement.</p> |

General Conditions of Contract

| Title | Articles / Content | Interpretation |
|---|--|---|
| Title 1: Programme Financing | <p>General Principle</p> <p>Cost overruns and covering them: DELETED</p> <p>Limits the contribution of the European Union to the programme</p> <p>Makes funding conditional on fulfillment of obligations by the beneficiary</p> | <p>The European Union sets its contribution at a specific amount, and may refuse to pay over the funding if the programme does not perform, or does not comply with agreed conditions.</p> |
| Title 2: Implementation | <p>General Principle (REPLACED)</p> <p>Period of execution (4.2 DELETED, 4.1 SUPPLEMENTED)</p> <p>EU implements the programme.</p> <p>Sets out operational and closure phases and eligibility of costs incurred in relation to these phases (D+3 clause)</p> | <p>Implementation by the EU is defined as verification of compliance and paying of tranches. It does imply that the EU manages the underlying government programme Programme of government, which is supported by the EU finance.</p> <p>The D+3 does not apply to the portion of the finance agreement which is to be implemented using Budget Support. Budget Support tranche releases can be requested as long as the operational implementation phase is current. However, complementary support, such as under technical assistance or grants budget lines in the Financing Agreement, are subject to D+3.</p> |
| Title 3: Award of Contracts and Grants | <p>General Principle DELETED</p> <p>Deadline for signature of the contracts implementing the Financing Agreement DELETED</p> | <p>These articles relate to programmes where EU procurement procedures must be used, and are therefore removed for Budget Support funding budget lines. They are, however, still applicable to complementary support budget lines (such as technical assistance or grants)</p> |

| Title | Articles / Content | Interpretation |
|---|--|--|
| <p>Title 4: Rules applicable to the performance of contracts</p> | <p>Establishment and rights of residence DELETED</p> <p>Tax and customs provisions DELETED</p> <p>Foreign exchange arrangements (DEFINITION ADDED IN SC ARTICLE 7)</p> <p>Use of data from studies DELETED</p> <p>Allocation of amounts recovered under contracts (12.2 DELETED)</p> <p>Foreign exchange may be imported for the programme</p> <p>Rate of exchange will be non-discriminatory</p> <p>Payments made from the programme that are later recovered must be returned to the programme</p> | <p>Articles 8 is removed because contractors under the government programme are not EU appointed</p> <p>Removal of Article 9 acknowledges implementation by the government, and the fungibility² of funding once in the SA government fiscal system</p> <p>Removal of clause 10 acknowledges ownership by the government of the programme</p> <p>Banks may not manipulate exchange rate applied to EU funding.</p> <p>Recovered funding from the programme returns to the programme and not the national fiscus or departmental voted funds.</p> <p>The exclusion of clause 12.2 means that penalties imposed on contracts are paid to the government and not to the EU.</p> <p>These articles are removed only for Budget Support budget lines, and are therefore still applicable to complementary support budget lines (such as technical assistance or grants).</p> |
| <p>Title 5: General and final provisions</p> | <p>Visibility (13.2 DELETED)</p> <p>Prevention of irregularities and fraud (14.3 APPLICABILITY EXTENDED)</p> | <p>Places the responsibility for prevention and management of corruption on South Africa</p> <p>Extension of the applicability means that the anti-corruption measures and rights of the European Union extend beyond the tranche payments to the contracts entered into under the whole of the</p> |

2 Fungibility is the property of mutual substitution. In this case it implies that the funds provided by the EU, being in support of a government programme, are not distinguishable from the government funds spent on the programme since, where the programme resources are defined as including SA and EU resources.

| Title | Articles / Content | Interpretation |
|-------|--|---|
| | <p>Verification and checks by:</p> <ul style="list-style-type: none"> • the European Commission • the European Anti-fraud Office (OLAF) and • the European Court of Auditors. <p>Consultation between the European Union and South Africa</p> <p>Amendment of the Financing agreement</p> <p>Suspension of the Financing Agreement</p> <p>Termination of the Financing Agreement</p> <p>Dispute-settlement arrangements</p> <p>EU visibility guidelines not applicable</p> <p>Sets out procedures to be followed when there is disagreement or breach</p> <p>Defines irregularity in spending and sets out measures against corruption</p> <p>Provides rights of audit and investigation to the European Union and its institutions</p> | <p>government programme, including contracts paid using SA funding</p> <p>Grants OLAF the right to audit the government programme, contractors and sub-contractor of the programme</p> <p>Changes to the Financing Agreement require a Rider (addendum)</p> <p>The European Union can suspend the funding in case of war or unrest, corruption, breach of human rights and can terminate if these issues are not resolved</p> <p>Dispute settlement is through arbitration in the Permanent Court of Arbitration in the Hague</p> |

4 Summary of Changes to the General Conditions for Budget Support Programmes

The changes to the General Conditions **in respect of amounts to be expended using Budget Support modality** are summarised below:

Remove Articles

- Cost overruns and covering them
- First sentence: this species that costs incurred are eligible only if incurred in operational phase
- General Principle specifying the use of EU procurement procedures
- Deadline for signature of the contracts implementing the Financing Agreement
- This removes the D+3 clause for contracts implementing the programme
- Eligibility
- Establishment and rights of residence
- Tax and customs provisions
- Use of data from studies
- Allocation of amounts recovered under contracts: repayment of financial penalties on tenders to European Union
- Visibility: following EU visibility guidelines.

Replace Articles

EU management of the programme is replaced by EU management of the support programme. Refer to explanation under SC Article 7 in the “Special Conditions of Contract” table in section 3 of this document.

Supplement Articles

- Modifies clause to be specific to tranche release and not to contracts for implementation of the government programme
- Extend applicability
- Clause on corruption is applicable to all of the operation, including implementation contracts.

5 Amendments

EU Financing Agreement may be amended, by agreement. Such an amendment is termed a “Rider” in EU terminology. Amendments can be made:

- To the duration of the programme, except that funds subject to the “D+3 rule must always be contracted within the three year period
- To the budget (which may be reduced or re-allocated between budget headings
- To the indicators
- To the conditions for compliance.

All amendments must be agreed in writing by the EU and South Africa. No amendments, whether to performance indicators or legal and contractual conditions, are retro-active. Which means amendments cannot be made to regularise prior non-compliance or non-performance.



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