

Learning session: Finance: **In-kind contributions**

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In-kind contributions

- Cash vs in-kind contributions
- Juste retour instead of in-kind contributions
- Managing in-kind contributions

- Case study: IKCs at the European XFEL

Cash versus in-kind contributions

- Different models, for example:
 - CERN, ESRF: essentially all contributions in cash
 - European XFEL: ~ 50% cash, 50% in kind
 - ITER: ~ 90% in-kind
- Supply of equipment or services of national origin as in-kind contribution
 - Easier defensible (funds, jobs kept in home country)
 - Involvement of national laboratories or domestic industry: challenging tasks, share in new technology
- At the outset: agreement on IKC value and schedule
 - In-kind contributor bears risk of cost overruns and liability for delays.
 - Close follow-up and good communication nevertheless required

“Juste retour” (“fair return”) instead of in-kind contributions

- Alternative to in-kind contributions: request for “juste retour” for the award of contracts
- Methodical problem: assignment of supply to specific country not always obvious
- Not strictly enforceable: contradicts public procurement regulations
- Avoid reducing competition (and thus higher prices)
- ESRF approach: possibility of (downward) price alignment for bidders from “under-balanced” countries

Managing in-kind contributions

- System integration
 - Coordination, specification of interfaces, compatibility of IKCs from different partners
 - Effective centralised supervision and follow-up required, 100% IKC not realistic
 - Build-up of competence for operation of RI
- Cost increases, delays, under-performance
 - Clear regulations necessary from the outset
 - Cost overrun to be borne by IKC provider
 - Difficult: liability in case of delays or under-performance; impact on work packages downstream
- Acceptance and crediting the value
 - By pre-defined milestones
 - On the other hand: proof of functioning after assembly

Case study: In-kind contributions at the European XFEL

- Regulations
- IKC Agreements
- Implementation
- Conclusions

European XFEL Regulations for in-kind contributions

In accordance with the **European XFEL Convention**
the Contracting Parties ...

... designate Shareholders

... enter into commitments to contribute
towards construction costs

... shall ensure that the Shareholders contribute
to construction costs ... in cash or **in kind**

**“In-kind contributions will be defined and decided
according to Technical Document 4.”**

Technical Document 4 to the Convention

Essential items

- Definition (technical components, personnel)
- For each task: In-kind contribution agreement
- List of mandatory items of In-kind contribution agreement
- In-kind Review Committee (composition, role)
- Interface specifications to be defined by the Review Committee

Technical Document 4

attached to the European XFEL Convention

Basic rules and procedures for in-kind contributions

- (1) In-kind contribution might cover
 - a technical component as well as personnel needed for its installation and integration on site, or
 - personnel made available for specific tasks during the construction phase.
- (2) Special attention has to be paid to the allocation of responsibility, the calculation of the monetary / financial value of the contribution, the problem of under- and over-spending, and the resolution of disputes.
- (3) The in-kind-contribution agreement for each task will contain *inter alia*
 - a technical description and specifications,
 - time schedules and milestones,
 - deliverables,
 - quality control issues,
 - performance testing, acceptance and commissioning,
 - technical and financial control systems,
 - appointment of responsible technical personnel,
 - intellectual property right issues.
- (4) An In-kind Review Committee is set up, composed of one representative per Contracting Party and the Project Team, to propose to the XFEL Management the allocation of in-kind tasks to specific partner institutes for decision by Council.
- (5) The Review Committee seeks to take the best profit of available expertise at DESY and throughout Europe and identifies to this end the possible / potential work packages for in-kind contributions as a function of the available expertise and independent of the location.
- (6) The Review Committee, when evaluating possible allocations of in-kind contributions, will take into account the willingness of the partner institute to make available personnel and experts for the installation and integration of the delivered system as well as for its operation. The conclusion of long-term maintenance contracts may be envisaged.
- (7) The Review Committee will define very early in the process the necessary interface specifications and common standards, in order to extend the field of potential in-kind contributions to any task which has a clear interface with another task, element or component.
- (8) Central coordination for each of the elements is essential and will have to be located where the relevant expertise is available.

Internal Provisions on In-kind Contributions (I)

- Starting point: Steering Committee requested **Rules of Procedure of the In-kind Review Committee** to be set up before the Convention be signed.
- European XFEL Project Team felt that slightly more was needed to be regulated, given that Technical Document 4 was rather succinct.
- Result: **Internal Provisions on in-kind contributions**, with Rules of Procedure of IKRC as Annex, adopted by the Steering Committee, and later on confirmed by the European XFEL Council.

Internal Provisions on In-kind Contributions (II)

- General Principles: some items from Technical Document 4, crediting the value, responsibility for specifications
- In-kind Review Committee: Rules of Procedure as Annex
- Allocation of IKC: Expression of Interest → technical discussions
→ assessment by Project Board and IKRC → Mgmt Board
 - if value \leq 1 M€: decision on allocation by Mgmt Board
 - if value $>$ 1 M€: consultation of AFC, decision by Council
- In-kind Contribution Agreement: further items (value, responsibilities, transfer of ownership, ...)
- Production, delivery, adjustments
- Cost changes, delays, deficient delivery
- Final assessment, passage of title, disputes

Rules of Procedure of In-kind Review Committee

- RoP of IKRC = Annex to Internal Provisions on In-kind Contributions
- Quite standard as far as chair, meetings, voting are concerned
- Some specific items:
 - Conflict of interests
 - In-kind unit at the Company, supporting the chair (posts foreseen in the PRE-XFEL grant agreement)
- Close relationship with other bodies (Mgmt Board, Council, AFC, SAC, MAC)

Template for In-kind Contribution Agreements (I)

- IKRC members and institutes interested in providing IKC wished to see a kind of model agreement
- The Project Team worked out a draft, adopted by the Steering Committee in March 2008
- Content of template agreement
 - Preamble
 - Scope of the agreement
 - Basic documents (incl. Annexes such as
 - Description of IKC
 - Technical specifications
 - List of equipment to be procured
 - Manpower requirements)
 - Time schedule, milestones, deliverables

Template for In-kind Contribution Agreements (II)

Contents of template agreement (Continued):

- Quality control, performance testing, acceptance, transfer of property
- Value and resources
- Coordination and Spokespersons
- Definitions
- Exchange of knowledge
- Confidentiality
- Intellectual Property
- Publications
- Inventions
- Liability
- Continuing application of provisions
- Disputes

Special case: Accelerator Construction Agreement (ACA)

- On the one hand the ACA is part of the **long-term agreement on collaboration** between DESY and the European XFEL GmbH :
“The Company and DESY in Hamburg will collaborate on construction, commissioning and operation of the XFEL on the basis of a long-term agreement.” [Convention, Art. 1(3)].
- On the other hand it is an **IKC Framework Agreement**, combining a group of in-kind contributors in a consortium (the “**XFEL Accelerator Consortium**”) with DESY as coordinator.
- The ACA was
 - adopted by the Steering Committee in March 2008 and
 - confirmed by the European XFEL Council in February 2010.

Accelerator Construction Agreement (II)

- The ACA sets out
 - the **relations** between the European XFEL Company and the members of the XFEL Accelerator Consortium,
 - the **specific responsibilities and obligations** of all partners with respect to construction and commissioning of the accelerator complex and the related technical infrastructure, and
 - especially the **role of DESY** as leading contributor to the Accelerator Complex and as Consortium Coordinator.
- Most contributions to the accelerator are **in-kind contributions**.
Therefore, the general obligations of the parties on organisational and financial matters are again set out in the “**Internal Provisions on In-Kind Contributions**”, attached as an annex to the ACA.

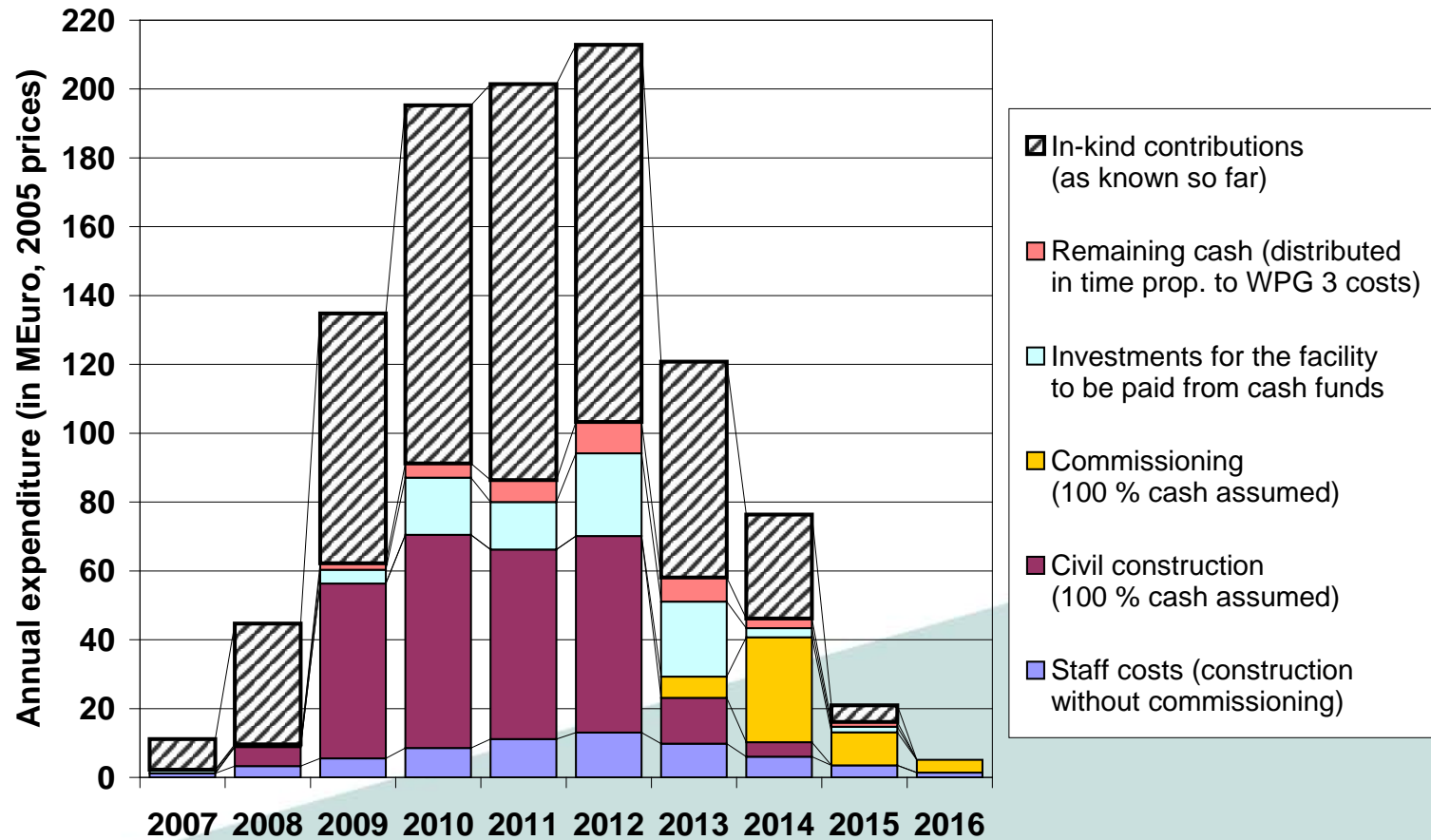
Accelerator Construction Agreement (III)

- **Technical Annexes** to the ACA specify the scope, time schedule, kind and extent of each Consortium member's particular contribution.
(to be signed by DESY and the contributing institute)
- **In-kind contribution agreements** (likewise annexed to the ACA) specify the value to be accounted as part of the contribution to the construction costs.
In principle the values are taken from the initial cost book.
(to be signed between the European XFEL GmbH and the respective shareholder)

Implementation at European XFEL

- Exceptionally (e.g. for Russian contributions): Full IKC allocation procedure but eventually supply contract against cash payment instead of In-kind contribution Agreement.
- Arbitration mechanism for the case of dispute on value (cost book values being put in doubt by contributor; excessive price increase of raw material, etc)
- Statistics: By May 2011 out of altogether
 - 72 known Expressions of Interest
 - 21 have been allocated as IKC, and from these for
 - 15 an IKC Agreement (or a supply contract) has been concluded.

Relative weight of in-kind contributions



Involvement by country

- Interest in, and capabilities for, contributing in kind is different from country to country
- Table shows: **between 0% and 100%**
- Initial guideline: up to 2/3

Country	In-kind	%	cash	total
Denmark	0	0%	11	11
France	36	100%	0	36
Germany	361	62%	219	580
Hungary	0	0%	11	11
Italy	33	100%	0	33
Poland	16	73%	6	22
Russia	0	0%	250	250
Slovakia	0	0%	11	11
Spain	9	82%	2	11
Sweden	5	31%	11	16
Switzerland	12	80%	3	15

PRE-XFEL Grant Agreement, Work Package 4 for IKC matters

- The European Commission supports the start-up phase of projects on the ESFRI Roadmap (as part of FP7).
- For the European XFEL project 5 Mio € were granted (“PRE-XFEL”), distributed over 4 years. Five work packages; WP4 deals with IKCs.
- Objectives of WP4:
 - Clarifying all organisational and legal aspects of in-kind contributions
 - Setting up a solid framework for handling IKC
 - Develop good administrative practice
- Funding for WP4:
 - 2 Techn. Managers (follow-up, interfaces, monitoring), for 3 years ;
 - 1 administrative/legal support (contract writing, monitoring), for 2 years;
 - secretarial assistance (50% part-time), for 2 years.

Follow-up of in-kind contributions

- Imagine ~ 70 IKC Agreements
- Each with ~ five milestones for checking progress and deciding on crediting earned value to shareholder
- Great variety of IKCs (magnets, vacuum, radio-frequency, power supplies, heating/cooling, assembly work, testing of equipment, ...)
- Quantitative and qualitative significant follow-up work, to be carried out by IKC coordinator, together with WP leaders.

Conclusions: Benefits

- **IKCs permit the project to benefit from know-how available at the shareholders / partner institutes** (e.g. DESY's invaluable 50-years experience in the construction and operation of accelerators)
- **Common interests of in-kind contributors, collaborative spirit** (as compared to industrial suppliers)
- **Cost risks minimised for the project (in principle)** (but also no chances of favourable results of tender exercises)
- **IKCs more generously committed than cash contributions** (benefits expected by shareholder: generation of jobs, gain of know how, ...)

Conclusions: Problems

- **Tendency to contribute most (or all) in kind**
(100% in kind is not feasible; keep overhead for project!)
- **Problematic mixture of negotiations**
 - on joining the project in general and
 - on allocation of in-kind contributions
(more or less subtle pressure possibilities)
- **Complicated arrangements**
if shareholder (or funding agency) \neq institute in charge of IKC
- **Tendency not to assume cost overruns**
against the underlying spirit of IKCs
- **Considerable coordination effort** (overhead!)