



Project Commercial and Legal Requirements

There are aspects of the Project Contract and Project Commissioning Process that are of particular importance to the ETI. The ETI requests that the Respondents provide a detailed view on these aspects in their proposal as part of the Statement of Compliance to set out any areas where the ETI's position is considered to be problematical for the Respondents. Any such matters will form the basis for further discussion and negotiation. The important issues that ETI would like to highlight for initial consideration are as follows:

1. Value Return

The funding structure and purpose of the ETI means that it is a strategic investor in technology development. The ETI expects its projects to deliver value in return for its investment. The ETI anticipates sharing the value created by the Project between the ETI, its Members, the Participants, the wider industry and the UK economy.

The specific value to each Participant will depend upon factors such as the extent and nature of its participation in the Project and its business strategy.

The expected Value Return to the ETI, its Members, the wider industry and the UK economy will be determined by factors such as the nature of the Project, the level of ETI Investment, the proportion of the Total Project Cost represented by the ETI Investment, direct benefits to the ETI and its Members and the wider business value of the Project outcomes.

The expected Value Return is set out in the RfP and is bespoke to each Project.

There are some typical models:

Knowledge Gathering Projects

Typically, this is similar to contract research and the ETI will obtain value through owning the Arising IP in the outputs in order to utilise the outputs in later projects and/or disseminate the outputs widely. Additional access to Background IP in order to enable such usage is complementary and may often form a core requirement.

Technology Development Projects

Typically, this is where the ETI funds or co-funds further development in new technologies developed already to concept or lab-scale and where the ETI Investment enables the technology to be developed, proved and demonstrated sufficiently to prototype or beyond to de-risk future investment at a larger or commercial scale.

System Demonstration Projects

Typically this is where ETI funds or co-funds further development in new technologies developed already to no less than laboratory-scale and/or prototype and where the ETI Investment enables the technology to be developed, proved and demonstrated sufficiently in a whole-system, often as a first-of-a-kind, de-risk future investment at a larger or commercial scale.

In Technology Development or System Demonstration Projects, the ETI anticipates that the Value Return will be provided in a combination of ways. The following list sets out the ETI's minimum requirements for making an investment, examples of other the types of Value Return that have been agreed by the ETI for other ETI projects, and guidance on the wider benefits which Respondents will need to demonstrate will arise from the Project.

Typical Value Return requirements for a Technology Development or System Demonstration Project

Minimum requirements

- For both the ETI and its Members, access to Project information to gain experience and knowledge of the technology and its operation during the execution of the Project.
- Rights for the ETI and ETI Members to read, circulate and understand the deliverables produced by the Project within their respective businesses (see also Section 2, Intellectual Property).
- Preferential rights to and access to the Project results and the technology for ETI Members for use in their own businesses across the corporate groups of each ETI Member.
- Direct financial return on its investment in the event of successful deployment of the technology or other appropriate upside scenarios relevant to the technology and Project.

Additional components (guidance only)

- Additional rights for either the ETI or ETI Members to technology and Intellectual Property results:
 - either broader rights to use the Project results in their businesses; and/or
 - exploitation rights to the Arising IP and accompanying rights to the Background IP on fair and reasonable terms (in an agreed field or more broadly).
- Additional preferential access to the technology for ETI Members (e.g. through preferential access to technologies, equipment and services, preferential access to manufacturing slots, guaranteed delivery times, preferential unit prices or licence fees and/or preferential operational support packages, preferential terms for Background IP);
- Equity or equity options either in a pre-existing entity or in an SPV set up for operation of the Project and/or subsequent exploitation of the Technology (note: in the case of an SPV, equity may be a requirement); and/or
- Minimum revenue/return arrangements.

Wider benefits

- Benefits to the wider industry/UK economy (e.g. the development, manufacture and application of similar projects and relevant technologies in the UK, development of the UK skills base for the design, manufacture and operation of such technologies, enhanced application of such technologies to assist the UK in meeting its carbon reduction targets); and/or
- Public dissemination of selected/identified Project outputs.

2. Intellectual Property

Arising IP

The ETI will tailor its approach depending on whether the Project is a knowledge gathering project, a technology development project, a system demonstration project or another type.

Knowledge Gathering Projects

Typically, the ETI will expect to own the Arising IP for knowledge gathering projects. In these cases, the ETI will expect to own all Arising IP so that it can use and exploit the Arising IP and results/outputs of the Project in its discretion (including, without limitation, by utilising in later ETI projects, licensing ETI Members and other third parties, and by publication).

Depending on the project, the ETI may or may not anticipate granting rights to the Participant(s) (whether by licence or sub-licence) to use or exploit Project results/outputs or Arising IP, or otherwise.

Technology Development Projects and System Demonstration Projects

Ownership

In principle, the Participant that is best placed to manage any Arising IP will own it, although the ETI reserves the right to own Arising IP in certain circumstances. Where Arising IP is owned by a Participant, **the Participant will be required to license the Arising IP it owns to the ETI exclusively, so that the ETI can in turn sub-licence it to anyone who has exploitation rights (including, where appropriate, the Participant(s); see below).** This mechanism is to ensure effective exploitation of the technologies developed.

Licensing for Use and Exploitation

In these types of project, different categories of Arising IP may be created, for example relating to fundamental science, improvements to existing component technology and, often particularly, system IP.

The approach to Arising IP licensing between the Participants, the ETI and its Members will depend on the agreed (i) Value Return, and (ii) value to be derived by the Participant(s) from the Project.

Typically in ETI projects, for a limited period after completion of a Project, Arising IP will be (sub)licensed by the ETI exclusively to (a) one or more Participants; and (b) the ETI Members and ETI Programme Associates (if any), in each case so that the results of the Project may be used and exploited. In such an arrangement the rights of each group relating to use and exploitation, including the rights to sublicense further, are negotiated and tailored to ensure that the technology will be exploited and accelerated effectively and that those investing in the technology gain an appropriate return.

In some projects, where a primary Value Return will be by way of royalty payments to the ETI by the Participant(s), the ETI and its Members may have more limited rights to Project results.

In the event that a Respondent proposes to request a licence of the (or any) Arising IP, this should be discussed with the ETI prior to submission of a Proposal. Any licence for commercial use would not be expected to be royalty free. Respondents should also note that profit will not be paid to a Participant in addition to the grant of a licence of Arising IP.

The ETI does not generally grant Arising IP rights to Subcontractors.

Academic Organisations

Generally, if requested, the ETI will expect rights to be granted to Participants / Subcontractors who are academic institutions for the purposes of academic research and teaching. Such licences are often related to the scope of the academic contribution to the Project. Publication of appropriate parts of the Project results will generally be permitted subject to an approval process.

Arising IP and Profit

Participants should note that profit will not generally be paid to a Participant in addition to the grant of a licence of Arising IP to use and exploit Project results.

Background IP

Ownership of Background IP remains with the owner. Where a licence of Background IP is required to carry out the Project and/or for the subsequent exploitation of any Arising IP/Project results/outputs, the Prime Contractor, Participants and Subcontractors (as appropriate) are expected to make such Background IP available on a non-exclusive, royalty-free basis. For some Technology Development or System Demonstration projects, access to Background IP may be on different arrangements.

If Participants (or their proposed Subcontractor(s)) fail to meet this expectation, the attractiveness to the ETI of the relevant Proposal may be adversely affected.

Due diligence on Background IP will be required both in the Proposal and during the Project Shaping and Contract Negotiation Stage.

Third Party IP

Where Third Party IP is required to carry out the Project and/or to produce Project outputs, the ETI expects the relevant Prime Contractor or Participant to obtain the relevant licences for usage of the Third Party IP in the Project and by the ETI in line with its rights to use the relevant Project results/outputs. This includes any third party images which may be included in reports.

As with Background IP, due diligence will be required both in the Proposal and during the Project Shaping and Contract Negotiation Stage to ensure that any required Third Party IP will be identified and, if appropriate, the necessary rights secured.

Patent Studies

As part of the due diligence on Background IP and Third Party IP, any Respondent(s) selected to proceed to the Project Shaping and Contract Negotiation Stage may be required to undertake a Patent Study at their own expense.

The ETI may also require that one or more Patent Studies be carried out in the course of the Project. The cost of such Patent Studies will be considered by the ETI and the selected Respondent(s) during the Project Shaping and Contract Negotiation Stage and appropriate provision made in the Project Contract.

3. Project Contract

The Project will be governed by a Project Contract. Depending on the nature of the RfP a draft Project Contract may be made available to Respondents prior to RfP Submission following receipt by the ETI of a signed NDA in accordance with Appendix C of the RfP.

The Project Contract will be negotiated following selection of the preferred Respondent(s), during the Project Shaping and Contract Negotiation Stage of the Project Commissioning Process.

The Project Contract will comprehensively deal with the Project risks, specifically setting out the accountabilities for key risks to be managed by the Participant(s) and exceptionally, risks that may be attributable to ETI and/or risks that should be jointly managed.

Any issues that any Respondent has with the terms of the Project Contract must be set out in the Statement of Compliance to be provided as part of the Proposal/Submission (see the Annex A3 - Statement of Compliance document).

In addition to this general requirement, there are aspects of the Project Contract that are of particular importance to the ETI and that the ETI wishes to highlight. **The ETI expects that each of the Respondents will provide an initial detailed view on these aspects in their Proposal, as part of the Statements of Compliance.**

The particular aspects of the Project Contract that the ETI would like to highlight for Respondents' initial consideration are as follows.

Intellectual Property

The ETI expects that Respondents will review the ETI's contractual mechanisms for dealing with Arising IP and Background IP in the ETI's Project Contract in relation to their proposed Value Return. The Respondents should provide comments in their Proposal on the ETI's standard mechanisms in the Project Contract to deal with Arising IP and Background IP such as, depending on the project and as set out in the Project Contract, ownership or (sub)licensing of Arising IP to the ETI and its Members, terms for the licensing of Background IP both during the Project and after the Project for the exploitation of Arising IP and requirements under the general IP conditions for protection and maintenance of Arising IP.

If the Respondents have any fundamental issues with these mechanisms, the ETI expects the Respondents to make alternative suggestions regarding how the Arising IP and Background IP will be dealt with under the Project Contract if the standard mechanisms are not appropriate. For any alternatives, early discussions with the ETI are strongly recommended in order for the ETI to advise if the alternatives are possible within ETI's structure and whether they will meet the selection criteria and requirements for the project and to optimize the likelihood of a successful proposal.

IP Warranties and Due Diligence

The Project Contract contains a number of warranties and undertakings related to IP. The ETI will conduct an appropriate level of due diligence before the start of the Project which relates to IP and the IP warranties. The wording of any warranties may be amended to reflect IP due diligence performed.

Indemnities

The ETI will invest funds in this Project but has no control over any risks and associated liabilities that may arise from the Project. Therefore the Project Contract contains a number of indemnities in favour of the ETI, including for third party claims and for IP infringement. Respondents should review and comment on the indemnity position in their Submission.

As is normal across industries, the ETI will expect the indemnity in respect of third party IP infringement to be uncapped in liability to ensure that the risk is properly allocated to the Participant(s). The ETI will work with any down-selected Participants to ensure that the indemnity is appropriately scoped according to the Project, IP and due diligence.

The indemnity for third party claims may be capped but any cap must ensure there is a full allocation of risk to the Participant(s). Evidence of the risks (including maximum financial value of any claims under the indemnity) must be provided during down-selection to support any requested cap.

Reporting

The ETI requires regular information updates throughout the life of the Project, which includes regular contact and monthly financial and Project reporting. These requirements are necessary under ETI's governance. Any questions about the level of reporting should be made early, to enable the reporting costs to be included in the Project management costs included in any Proposal.

State Aid Requirements

ETI utilises a mix of funds from its industry members and Her Majesty's Government. Where the ETI utilises its public funds, such funds will constitute State aid. The ETI has a specific State aid clearance from the European Commission. A copy is available on request. Respondents should note:

- Respondents may be required to provide further information during the Project Commissioning Process to support any specific State aid requirements of the Project, including any applications for further State aid clearance;
- Participants are required to provide full transparency of costs throughout the Project to ensure both the Participant(s) and the ETI comply with EU State aid law;
- Participants are required to agree to certain obligations in the Project Contract related to the State aid requirements including the duration of the retention of records, and obligations to return ETI Investment monies in certain exceptional circumstances (including in the event the European Commission adopts a decision that there has been a grant of illegal State aid or misuse of State aid); and
- Respondents are required to confirm in their Proposals that there are no potential, threatened, pending or outstanding recovery orders by the European Commission in respect of any funding received by any proposed Participant (see the **Annex A1 – Due Diligence Information Requirements** document).

The Project Contract has requirements that relate to State aid (through the provision of public monies to the ETI and therefore to the Project).

This includes requirements to return ETI Investment monies in certain exceptional circumstances and record keeping requirements. **Please note, the ETI cannot award a contract to any organisation unwilling to accept these requirements.**

4. Insurance

The Respondents should confirm that liability and indemnity insurance cover is held, or will be put in place, and should confirm the current levels of cover and expiry for each. See the **Annex A1 – Due Diligence Information Requirements** document for further detail.

5. Participant Contracting Structure

When it is expected that more than one organisation will be required to deliver the Project. Respondents may propose either of the following contracting structures.

Prime Contractor A single Respondent will enter into the Project Contract with the ETI and act as primary interface with the ETI. Specified parts of the Project may be performed by Subcontractors (including, as appropriate, companies within the same group as the Respondent). The ETI will require that there are Subcontracts in place between the Prime Contractor and its Subcontractors that are consistent in all material respects with the Project Contract. The appointment and use of Subcontractors by the Prime Contractor will be subject to prior ETI approval and the ETI reserves the right to approve the terms of Subcontracts.

Consortium Respondents form a Consortium to undertake the Project. All Consortium Members enter into the Project Contract with the ETI, although the Consortium will be required to enter into its own Consortium Agreement for internal governance purposes. A Lead Coordinator (a Respondent nominated by other Consortium Members) manages the Project and acts as primary interface with the ETI. The Consortium Agreement will require approval by the ETI before execution of the Project Contract. Consortium Members may choose to subcontract part of their work.

The RfP will set out if the ETI has a preference for one these contracting structures but otherwise Respondents should assume that either will be acceptable to the ETI, provided that the Respondent(s) can demonstrate that the most effective approach has been followed to manage the Project and associated risks.

Whatever the contracting structure, there must be a single organisation (Prime Contractor or Lead Coordinator) leading and acting as the primary interface with the ETI.

Under the chosen contracting structure, it is critical that the Prime Contractor or Lead Coordinator, as appropriate, is sufficiently empowered to lead the Project and accept accountability for delivery of the Project to the ETI. It is also important that the chosen contracting structure enables sufficient flexibility for ongoing delivery optimisation to maximise Value Return and achieve the Project objectives.

The ETI will need to approve Subcontractors and will require sight of key Subcontracts to ensure compliance with the ETI's requirements on subcontracting. Certain requirements around IP, health and safety, audits and confidentiality will be required to be flowed down to all Subcontractors. Exceptionally, the ETI may require collateral warranties or equivalent with key Subcontractors.

The ETI will only select Respondents who have the required skills, experience and capability (either themselves or within their Subcontractors/Consortium) to complete all parts of the Project.

Alternative contractual structures may be acceptable to the ETI in exceptional circumstances. Any Respondents considering an alternative structure are strongly advised to consult the ETI before making a Submission based on an alternative structure.

6. ETI Investment

ETI Investment can be provided according to one of two mechanisms.

Capped Cost Payment will only be made in respect of eligible costs¹ actually incurred by a Participant in the performance of the Project, up to a contractually agreed cap for each accepted Milestone. Where ETI is not the sole funder, this will either be on the basis of identified Project costs to be supported by the ETI or an agreed percentage of all eligible costs; or

Fixed Price Agreed fixed payments will be made against each accepted Milestone.

The RfP will set out if the ETI has a preference for one these mechanisms but otherwise Respondents should assume that either will be acceptable to the ETI, provided that the Respondent(s) can demonstrate that the most effective approach has been followed to manage the cost risks for the ETI.

Whichever mechanism is proposed, risks associated with any cost over-run will lie with the Participants and the ETI will not be liable for any payment over and above the agreed cap or fixed price. For either mechanism, the ETI will require transparency of cash flow and cost breakdown to ensure value for money, to fully understand financial risks to the Project and to comply with State aid requirements.

Proposals must clearly state the Respondents' proposed Total Project Cost, ETI Investment, the proposed source(s) of funding to address any gap (Participant Funding and/or Third Party Funding, and the identity of relevant third parties), current status of these funds and plans to secure funding before execution of the Project Contract. Any other commercial impacts associated with any proposed reliance on Participant Funding and/or Third Party Funding must also be clearly stated.

7. Project Payment Structure

Payments will be made by the ETI against agreed Milestones. Payment for a Milestone will be subject to the deliverables within the Milestone meeting agreed acceptance criteria and to the Participants complying with the ETI's reporting requirements in relation to the Milestone.

For the Capped Cost mechanism, payment will only be made in respect of eligible costs actually incurred by a Participant in the performance of the Project. One or more accountant's reports will be required to support selected financial reports and invoiced amounts, dependent upon the amount of the ETI Investment to be paid to each Participant. The ETI will not pay for the costs of obtaining the accountant's report.

Details of the Project payment structure and related requirements will be set out in the draft Project Contract and agreed during negotiation of the Project Contract.

8. Health, Safety And Environmental (HSE) Management

For any Project which is not entirely desk-based², the ETI's approach to the management of HSE in Projects is based on three key elements:

- Competency Assessment.
- Performance Assurance.
- Project Incident Protocol.

How the ETI applies this approach to a specific Project depends upon the nature and content of the Project.

¹ Further information is available on request from the ETI on what costs are eligible for ETI investment.

² "desk-based" includes travel between office locations for meetings in the course of the Project

Respondents should ensure their Proposal makes the nature of the Project clear, demonstrates and evidences their competence to undertake the Project, and describes how they intend to organise themselves and their approach to manage and coordinate health, safety and environmental issues in the Project. Specifically:

- Respondents should advise if any work to be undertaken during the Project is not desk-based (e.g. site visits, field trials, construction, experimental or laboratory work).
- Respondents should identify any specific HSE issues related to specific facilities or sites to be used in the Project. To the extent that parts of the Project take place outside of the UK, the Respondents should deal with the analogous issues as they apply in the local laws of the relevant country.
- If any part of the Project falls under the Construction Design and Management Regulations (CDM):
 - Respondents should provide details of their proposals to appoint a Principal Designer and a Principal Contractor;
 - The ETI expects that the Lead Coordinator or Prime Contractor (as appropriate) will elect to act as Client and details should be included in the Proposal to confirm which Participant will elect to be the Client.
- Respondents should demonstrate their experience of identifying and managing HSE issues in Projects of equivalent complexity and scale, including:
 - coordination of HSE across multiple participants and contractors, if applicable; and
 - incorporating safety into design, if applicable.
- Respondents are required to provide evidence throughout the Project that HSE is being managed and that such arrangements are adequate. The Respondents are required to set out in their Proposal how their management arrangements will enable such evidence to be provided.
- Respondents should set out their approach to managing contractors. This should include key roles and responsibilities of different Participants in the Project.
- Respondents should indicate if the Project will involve the design/manufacture of equipment which will attract the requirements of The Supply of Machinery (Safety) Regulations 2008 (as amended). If relevant, Respondents should outline their procedures for complying with the requirements of the Regulations, particularly with respect to CE marking and/or dealing with declarations of incorporation.

Respondents should note that:

- Specific HSE requirements will be included in the Project Contract including reporting against HSE performance on a periodic basis.
- To the extent that a Respondent's proposed scope of work under the Project is not entirely desk-based, the ETI will carry out a full HSE competency assessment against the selected Respondents (the Prime Contractor and the members of any Consortium) prior to (and HSE competency being pre-condition of) execution of the Project Contract (see also Section 2 of Annex A1).

If relevant the ETI will wish to explore the management of environmental issues with the Respondent prior to contract award.