



**FUSION
FOR
ENERGY**

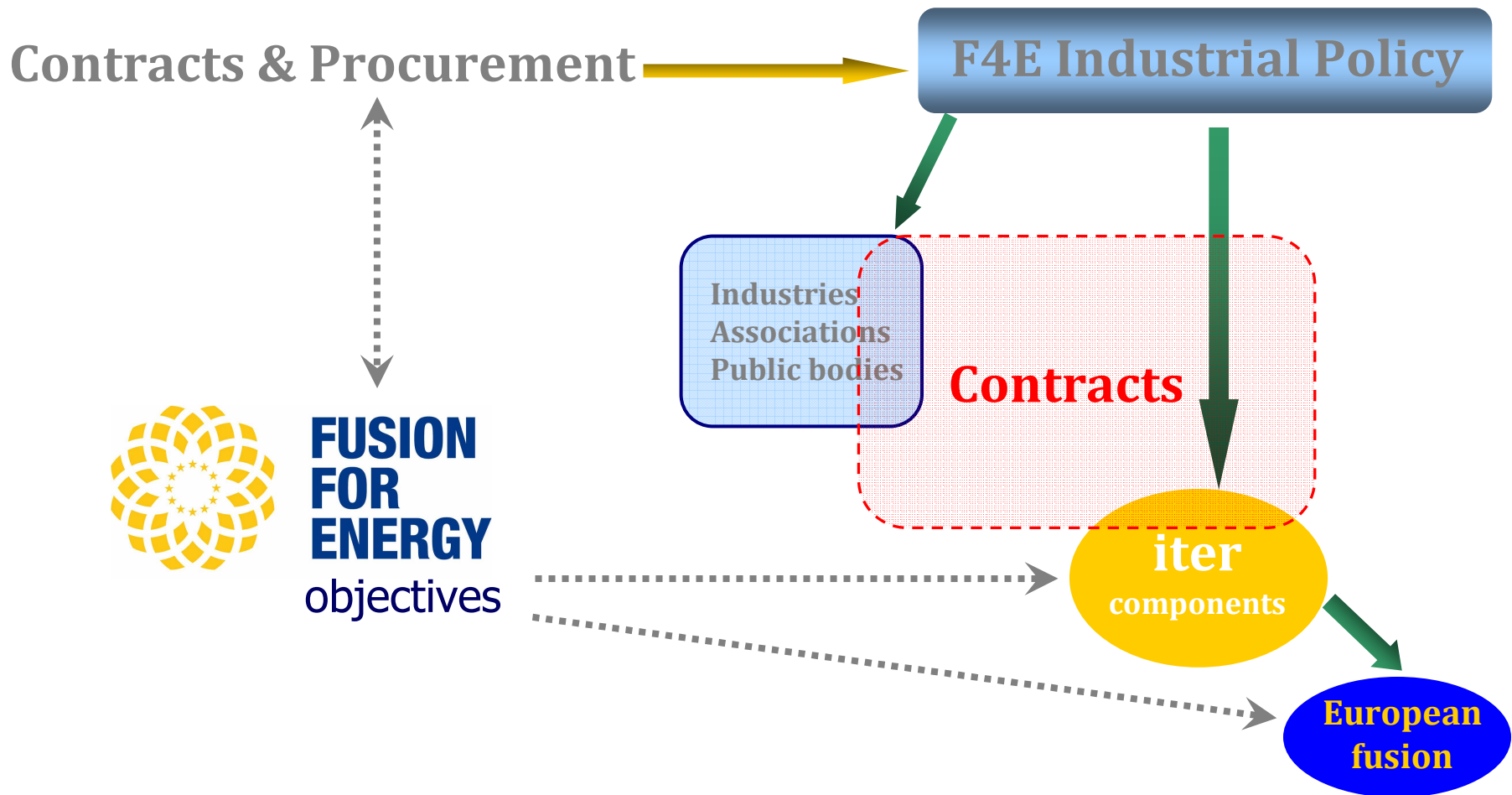
Fusion for Energy The European Domestic Agency for ITER

**5th ILO Meeting
Part 1
Industrial Policy &
business-oriented Legal improvements**

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1. Industrial Policy
2. Business-oriented Legal improvements





- F4E global objectives

- Provide Euratom contribution to ITER
- Provide Euratom contribution to BA
- Prepare and coordinate activities in preparation of DEMO



- F4E Industrial Policy



- ✓ Priority 1: **MUST** ensure that F4E delivers as expected to ITER (through associations and industries)
- ✓ Priority 2: **SHOULD** steer a competitive European fusion industry



- Generic definition

"a set of actions executed by an organization in order to affect factors of production related to its activities".

- F4E Industrial Policy definition and rationale

" F4E Industrial Policy relies on a set of principles, actions and tools which form a global framework for relations with industries, associations and public bodies...

... in order to match fusion industrial capacities with F4E mission "



- Core principles of F4E Industrial Policy
 - Best value for money principles in procurement activities
 - European public procurement rules respected
 - Consistency with the founding decision and reference documents of the Joint Undertaking (FR and IR)
 - Long-term partnership with industries and associations
 - Contribution to the global European industrial framework for competitiveness, innovation, SME participation in business and sustainable development
 - Alignment with Lisbon strategy.



- An ad-hoc internal organisation
 - C&P is responsible for Industrial Policy and is directly linked to F4E Director
 - C&P manages ad-hoc Steering Committees
 - Identify **risk areas** that require specific care
 - Define and enforce an **action plan**
 - Build and escalate recommendation to F4E Management for decision

F4E Industrial Policy: framework (2)



- Clear, fair and pragmatic procurement processes
 - 4 clear procedures
 - Joint Team acting during procedures
 - Exceptional process to open calls worldwide (1 worldwide call in 2009)
 - information on WP in advance to facilitate European and vertical grouping
 - Adapted selection and award criteria
- F4E Project Plan
 - F4E reference document adopted by ExCo, to be adopted by GB.
- The ILO network
 - 18 ILOs appointed
 - 5 ILOs Network meetings performed



- Industrial events and workshops
 - F4E is introducing its project and needs to European industries & SMEs
 - Visits hosted by ILOs: 150+ companies met
 - Done in France, Germany, Greece, NL, Poland, Spain, CH
 - Planned in Austria
 - Information Days organized (Buildings, Heating and Current Drive)
 - Bilateral meetings and on-site visits with major European companies
 - Participation in events for the promotion of F4E and steering of European industry
- Networking with other DAs planned for 2010
- SMEs dedicated policy
 - 54 CFTs identified <250 K€ in the WP 2010
 - Bonus points for prime contractors sub-contracting to SMEs



- The Industry Portal: **operational in November 2009**
 - to identify best partners (register+assess)
 - **We expect +100 SMEs and +600 companies after 1 year**
 - to manage supplier portfolio (database => mapping)
 - to add efficiency to our procurement process (electronic calls)
 - to spread capacities around fusion (enabling competitiveness clusters, grouping)



- Research Innovation Development approach
 - Grants
 - To support associations, industries and share benefits
 - In 2009, 12 grants have been attributed (17 bidders)
 - In 2010, 78 grants to be launched
 - IPR Framework
 - In 2009, rules meet the “business as usual” (cf. Víctor Sáez briefing)
- Adapted legal positions:
 - Liabilities, Liquidated damages, Suspensions & terminations of contracts
 - In 2009, rules now converge vs. the industrial “business as usual” framework

1. Industrial Policy
2. Business-oriented Legal improvements

- Key issues addressed:
 - Liability
 - Liquidated Damages
 - Suspension of the contract
 - Termination of the contract

Up to now

1. First step

- Unlimited liability** for direct and consequential damages
- Unlimited Nuclear liability



2. Second step :Transitional period with 2 alternative scenarios

- Basic scenario: unlimited liability for direct & consequential damages and nuclear liability
- Variant scenario: liability capped for direct and consequential damages, except for wilful misconduct, personal injury, non compliance with the law

Consequences and assessment



- ❑ Less competition :
 - some tenderers **refused to bid** without cap on contractual liability,
 - some tenderers introduced amendments in open and restricted procedures
=> tenders rejected.


- ❑ More delay: non-compliant tenders => F4E cancel the procedure

- ❑ Cost increase: companies accepting unlimited liability offered an higher price for the unlimited liability scenario.

- ITER is an industrial and technological challenge, first of its kind
=> Not to be treated same way as usual off-the-shelf supplies or services.

Proposed Solution



- ❑ Liability for direct damages : **cap on liability on the basis of an individual risk assessment** 
- ❑ Liability for consequential/indirect damages: same as above
 - ❑ Exception = Unlimited liability retained for :
 - damages caused by gross negligence or wilful misconduct
 - personal injury or death
 - damages caused to items or materials delivered by
 - F4E, IO or another DA
 - non compliance with the law
- ❑ Nuclear liability treated separately: implementation of the ITER Council's decision, June 2009

Proposed Solution : Risk Assessment



- Traceable to **QA risk management** practice in force at F4E
- Financial impact of risks quantified** to the extent possible
- Risks not otherwise mitigated to be listed and compared to the contract value
- Liability cap set on basis of maximum possible damage to F4E**

Up to now



- Liquidated Damages – LDs (for delay) amounting to 0.2% of the total contract value per calendar day of delay.
- The daily rate for liquidated damages may be modified in the specific conditions *(to be adapted according to the subject of the contract)*
- No Cap

Assessment



- ❑ Pre-determined LDs are a protection for both parties :
 - they provide certainty on the financial consequences of the delay
 - autonomy of the parties: no court decision necessary.

- ❑ Retain the possibility to adapt the rate (per days, weeks, or months), depending on :
 - ❑ the duration of the contract
 - ❑ the delivery schedule of the contract

- Need to set a cap to provide security to industry and enforceability of LDs before courts

Proposed Solution



- ❑ Retain LDs for delay amounting to 0.01% - 0.2% of total contract value per calendar day of delay.
- ❑ Retain flexibility to determine rate for LDs on the basis of each contract
- Introduce a cap between 5 to 10% of the total contract value (Setting such a cap is common practice)

Suspension of the Contract (1)



Up to now



- Suspension of performance of the Contract by F4E at any time and for any reason
- No limitation in time (notice period and duration)
- No compensation for the Contractor

Assessment



- ❑ Rejected in previous calls by industry because of:
 - F4E's complete discretion
 - Lack of compensation
 - No time limit

- ❑ Cost to F4E: potential impact of suspension factored into overall contract price by industry

Proposed Solution



- Suspension modification of the work programme
 - any unforeseen modification set by IO only in the event of duly justified reasons

- Compensation for the Contractor for direct injury due to suspension.

- Possibility for the Contractor to ask for the termination of the Contract in the event of suspension exceeding 12 months.

Suspension of the Contract (4)



Example from CERN

- No limitation on time*
- Reimbursement of extra costs incurred by the Contractor*

Example from French public entities submitted to Directive 2004/18 and Code des Marchés publics

- Suspension limited to one year, and possibility to terminate the Contract if the suspension exceed one year*
- Compensation of the prejudice suffered by the Contractor*

Termination of the Contract (1)



Up to now
(mostly based on Commission's Model Contract)



- Termination by F4E where the Contractor is at fault

- No compensation for the Contractor

- No termination by F4E where the Contractor is not at fault

Assessment



- Clause on Termination for fault considered standard and satisfactory
- Need to address other scenarios not based on fault
- No flexibility afforded to F4E to adjust to external changes (e.g. modifications introduced by IO)

Proposed Solution



- Retain clause on termination for fault unchanged

- Introduce Termination for convenience by F4E
 - At any time
 - Possibility of compensation for the Contractor for costs borne as a direct result of termination