

To: The Governing Board
Association Climate-KIC

Application for Membership as an Affiliate Partner

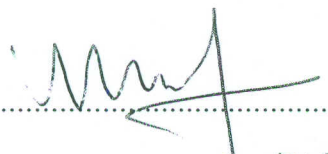
THE PROVINCE OF UTRECHT (PROVINCIE UTRECHT)
GOVERNING BODY (BESTUURSORGaan).....(the "Applicant Institution")
[Name and legal form of Applicant Institution]

hereby applies to be an Affiliate Partner of Association Climate-KIC (the "Association").

The Applicant Institution agrees to be bound by the Articles, By-laws and Regulations of the Association.

Enclosed with this application is a copy of the Internal Agreement between the Applicant Institution and the Association, signed by the Applicant Institution on condition of acceptance as an Affiliate Partner of the Association.

Dated 7 FEBRUARY 2011

Signed 

for and on behalf of THE PROVINCE OF UTRECHT
[name of Applicant Institution]

Name of signatory: W.M. de Jong

Title of signatory: Vice governor

Address of Applicant Institution: Postbus 80300
3500 TH UTRECHT
THE NETHERLANDS

eit

KIC

**CLIMATE KIC
INTERNAL AGREEMENT**

dated 7-2- 2011

between

ASSOCIATION CLIMATE KIC

and

THE PROVINCE OF UTRECHT
(PROVINCE UTRECHT)

PARTIES

- (1) **ASSOCIATION CLIMATE KIC**, an association incorporated under the laws of the Netherlands, having its business address at (2628 CN) Delft, The Netherlands, Stevinweg 1 5e etage, hereinafter referred to as "**the KIC LE**";

and

- (2) [Full Legal Name of KIC Partner]:

PROVINCIE UTRECHT

[Legal status]:

BESTUURSORGaan (GOVERNING BODY)

[Address of registered office]:

POSTBUS 80300

3508 TH UTRECHT

hereinafter referred to as "**the KIC Partner**";

the KIC LE and the KIC Partner hereinafter also referred to as "Parties" or, individually, as Party.

RECITALS

- I. The EIT has selected and designated the KIC as a KIC for the purposes of the EIT Regulation and has offered to co-finance the KIC upon the terms of a Framework Partnership Agreement ("FPA") and Grant Agreement ("GA"). The FPA remains in force for the Term and a new GA will apply to the EIT Grant awarded for each successive Grant Period.
- II. The KIC Partner is (or shall be, upon acceptance of its application for membership) a [Core Partner][Affiliate Partner]¹ of KIC-LE, as defined in the KIC Articles and wishes to receive the benefit of EIT grant funding made available to KIC-LE under the FPA and annual GAs.
- III. The activities of the KIC are conducted in accordance with successive Business Plans and Budgets submitted to the EIT and annexed to the applicable GA. The details of the specific activity to be undertaken by the KIC Partner in respect of each agreed GA will be prescribed in a Partner Grant Agreement.
- IV. The EIT wishes the terms of the FPA and GA to be directly enforceable against any KIC Partner who receives EIT Funding and requires certain protections from KIC Partners in respect of KIC-LE Residual Liability, subject to internal agreement between the KIC Partners on how to share responsibility for KIC-LE Residual Liability.

¹

Delete as applicable.

- V. This Agreement sets out the core terms which will apply to any EIT Grant funding paid to the KIC Partner by KIC-LE, as distinct from any specific operational requirements set out in a Partner Grant Agreement (as agreed and amended from time to time, for each Grant Period).
- VI. This Agreement is subject to the EIT Regulation, and the Commission Decision Ref. C(2009)2661 of 3 April 2009 granting consent to the derogations requested by the European institute of innovation and technology from Regulation (EC, Euratom) No 2343/2002 on framework Financial regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002.

IT IS HEREBY AGREED AS FOLLOWS:

1. Definitions

- 1.1 In this Agreement (including the Recitals) the following terms shall have the meanings set opposite them unless the context requires otherwise:

Affiliate Partner	has the meaning given in the KIC Articles. Whether the KIC Partner is an Affiliate Partner is set out in recital II above;
Budget	the budget applicable to a particular Grant Period and annexed to the applicable GA;
Business Plan	the business plan applicable to a particular Grant Period and annexed to the applicable GA;
Core Partner	has the meaning given in the KIC Articles. Whether the KIC Partner is a Core Partner is set out in recital II;
Effective Date	the date on which this Agreement is executed by the Parties or (if earlier) the date on which the 2011 Grant Period commenced (as set out in the 2011 GA);
EIT	the European Institute for Innovation and Technology, established in accordance with the EIT Regulation;
EIT Contracts	all agreements between the KIC LE and the EIT under which EIT funding will ultimately flow to the KIC Partner (via KIC-LE), including the FPA and each executed GA, but excluding the 2010 GA;

EIT Grant	the grant payable under a GA;
EIT Regulation	Regulation (EC) No 294/2008 of the European Parliament and of the Council of 11 March 2008;
FPA	has the meaning given in recital I;
GA	the agreement between the EIT and KIC LE covering the terms on which the EIT Grant is made available; successive GAs will be issued for successive Grant Periods;
Grant Period	the period specified during a GA (in principle a calendar year, but which may under a GA be a longer or shorter period), being the period covered by the applicable EIT Grant;
KIC	the knowledge and innovation community named "Climate KIC" established in accordance with the EIT Regulation and governed by the Articles and KIC By-Laws, subject to the terms of the EIT Contracts;
KIC Articles	the articles of association of the KIC LE;
KIC By-Laws	the KIC By-Laws adopted by the KIC LE to regulate the rules of membership of the KIC LE;
KIC-LE Residual Liability	shall have the meaning assigned to it in Clause 6.2 hereof <i>[Note: the amount of each EIT Grant to be retained by KIC LE as "final recipient" (to fund the administration costs of KIC LE) shall be as specified in the applicable Business Plan and Budget];</i>
KIC Partner's Share	the share of the EIT Grant payable to the KIC Partner as determined with reference to the applicable Business Plan and as set out in the Partner Grant Agreement;
Liabe Member	shall mean a party who was a Member at the time of execution of the Annual Grant Agreement, in respect of which KIC Partner's obligation under Clause 6.2 is invoked, and that is party to an Internal Agreement with KIC LE equal or substantially similar to this Agreement, and who is not prevented from accepting the liability under Clause 6.2 due to any applicable mandatory or statutory provision;

Member	shall mean a legal entity that is a Core Partner of KIC-LE in accordance with the KIC-LE Articles;
Partner Grant Agreement	a separate agreement to be agreed and updated annually between KIC-LE and the KIC Partner, setting out the detail of the KIC Partner's activity to which the KIC Partner's share will be applied;
Term	the period of seven (7) years during which the FPA remains in force.

- 1.2 References to any statute, enactment, order, regulation or other similar instrument shall be construed to include any subsequent re enactment, modification or statutory extension thereof.
- 1.3 Except where the context requires otherwise the singular includes the plural and vice versa; a reference to one gender includes all genders; words denoting persons include firms and corporations and vice versa.
- 1.4 Headings are included in this Agreement for ease of reference only and shall not affect interpretation or construction.
- 1.5 References to Clauses and Schedules are, unless otherwise provided, references to clauses and schedules of this Agreement.

2. Purpose and Duration

- 2.1 The purpose of this Agreement is to set out certain core terms which will apply in the event that the KIC Partner receives EIT funding from KIC-LE, pursuant to an EIT Grant. This Agreement shall be supplemented by (but shall take precedence over) the Partner Grant Agreement, once such document has been agreed between and signed by the Parties.
- 2.2 Once signed by both Parties, this Agreement shall take effect from the Effective Date and shall remain in force for the Term unless and until terminated in accordance with the provisions of **Clause 5**.

3. The EIT and EIT Contracts

- 3.1 The KIC Partner shall be deemed a KIC Partner for the purposes of the EIT Contracts and shall perform all of its obligations under this Agreement in a manner consistent with the EIT Contracts so as not to cause a breach of the EIT Contracts.

- 3.2 The KIC Partner agrees that where, due to the default of the KIC Partner, the EIT is entitled pursuant to the applicable GA to recovery of the KIC Partner's Share, the EIT is entitled to recover from the KIC Partner, and the KIC Partner shall refund, all or any amounts of the KIC Partner Share that have been paid to the KIC Partner.
- 3.3 The KIC Partner shall ensure that the KIC LE shall receive such reports and other supporting documentation as relate to the KIC Partner and which the KIC LE is required to submit to the EIT under the EIT Contracts, no later than 30 days after the KIC LE has requested the same in writing.
- 3.4 On receipt from the EIT of a draft GA relating to a forthcoming Grant Period, the KIC LE will promptly send a copy to the KIC Partner and provide the KIC Partner with a reasonable opportunity to express its views on the said draft GA before the KIC LE governing board approves the same for execution. Any comments from Affiliate Partners should be directed via the relevant Co-Location Centre.
- 3.5 In the event of any conflict or inconsistency between the terms of the EIT Contracts and this Agreement, the terms of the EIT Contracts shall take priority (to the extent of such conflict or inconsistency).

4. KIC Partner's Share of EIT Grant

- 4.1 The KIC LE shall receive each EIT Grant from the EIT in accordance with the timetable agreed with EIT and, provided that the relevant instalment of the EIT Grant has been received (and no suspension is in force pursuant to the applicable GA), and in consideration of the performance by the KIC Partner of its obligations under this Agreement and the Partner Grant Agreement, shall pay to the KIC Partner the KIC Partner's Share less any deductions or claw-back made by the EIT in respect of the KIC Partner's Share under the EIT Contracts.
- 4.2 The KIC Partner recognises and accepts that the KIC Partner's Share may only be:
 - 4.2.1 expended on the activity defined in the Business Plan, as specified in greater detail in the Partner Grant Agreement; and
 - 4.2.2 applied in defraying costs that meet the eligibility criteria set out in the applicable GA.
- 4.3 All amounts stated to be paid by one Party to another under this Agreement are exclusive of VAT and/or any other applicable taxes or levy, which shall be charged in addition at the rate in force on the date payment is required, if applicable.
- 4.4 Payment of the KIC Partner's Share is conditional upon the Partner Grant Agreement having been signed by both Parties, in respect of the relevant EIT Grant.

5. Termination

5.1 Breach or insolvency: Either Party may give notice in writing to the other terminating this Agreement with immediate effect if:

5.1.1 the other commits a breach of this Agreement or the requirements of the Partner Grant Agreement, which in the case of a breach capable of remedy shall not have been remedied within 30 days of the receipt of a notice from the complaining Party identifying the breach and requiring its remedy;

5.1.2 an order is made or a resolution is passed for the other's winding-up, or the other convenes a meeting of its creditors (other than for the purpose of effecting a reconstruction or amalgamation in such manner that the company resulting from such reconstruction or amalgamation, if a different legal entity, shall agree to be bound by and assume the obligations of that party under this Agreement); or if the other is unable to pay its debts as they fall due or has a receiver, administrator or similar officer appointed over any part of its business or assets, or ceases to carry on its business, or if events equivalent to such events occur in relation to the other party under the laws of its home jurisdiction.

5.2 Termination as a result of fundamental objections to GA: The Parties acknowledge that the KIC Partner may potentially be asked to sign this Agreement prior to the execution of the GA 2011, and has no individual rights of approval over the terms of the 2011 and subsequent GAs (other than the voting rights (if any) given to it as a KIC Partner under the KIC Articles and KIC By-Laws). Therefore, in the event that:

5.2.1 the KIC Partner has fundamental objections to a proposed GA; and

5.2.2 the KIC Partner has notified the KIC LE thereof in writing; and

5.2.3 the KIC LE's governing board executes the proposed GA in a form that fails to address the KIC Partner's objections, to the KIC Partner's satisfaction

the KIC Partner is entitled, within thirty days of execution of the proposed GA by the KIC LE, to terminate this Agreement by written notice, and such notice shall be deemed to take effect immediately from commencement of the proposed GA.

5.3 Termination on notice: Either Party may terminate this Agreement upon at least six months' written notice, such notice to take effect on expiry of the final day of the then current Grant Period.

5.4 Failure to agree Partner Grant Agreement: Unless the Parties agree otherwise in writing, this Agreement shall terminate automatically if, in respect of any Grant Period following the

Effective Date, no Partner Grant Agreement has been agreed and signed by the Parties within three (3) months of the commencement of such Grant Period.

5.5 Withdrawal or removal as KIC Partner: This Agreement shall terminate automatically in the event that the KIC Partner ceases to be either a Core Partner or Affiliate Partner within the meaning of the KIC Articles.

5.6 Termination of this Agreement for any reason shall:

5.6.1 have no effect on any obligations which expressly or impliedly survive termination;

5.6.2 not affect the accrued rights or remedies of the Parties arising in any way out of this Agreement as at the date of termination.

6. Financial Responsibility

6.1 The total financial responsibility of the KIC Partner referred to in Article 5.1 of the respective annual Grant Agreement (which states that "*Each KIC Partner shall be responsible for its own debt vis-à-vis the EIT*") shall be limited to the amounts received by the KIC Partner under the respective Grant (including interest).

6.2 KIC-LE Residual Liability: ***This Clause 6.2 and 6.3 only apply to the KIC Partner if the KIC Partner is a Liable Member.*** KIC LE's liability towards EIT is limited to the amount of the Grant received by KIC LE under an Annual Grant Agreement from the EIT as "final recipient" for its own activities and is herein referred to as "**the KIC LE Residual Liability**". In case KIC-LE is unable to honour all or part of its KIC LE Residual Liability towards EIT, KIC Partner agrees to have the obligation towards KIC LE to pay to EIT a share of such not honoured part of the KIC LE Residual Liability, such share ("**S**") to be determined as follows:

$$S = \frac{\text{not honoured part of KIC LE Residual Liability}}{\text{Number of Liable Members}}$$

where the "Number of Liable Members" is equal to the total of all Liable-Members who are bound to the provisions of this Clause 6.2 with respect to the annual Grant Agreement in relation to which KIC Partner's obligation under this Clause 6.2 is invoked. *For the avoidance of doubt each Core Partner will be a Liable Member under this Clause 6.2 unless (a) it is prevented from accepting the liability under this Clause 6.2 due to any applicable mandatory or statutory provision and (b) such fact has been notified in writing to KIC-LE and to all other Core Partners in writing in advance of the execution of the relevant GA.*

Clause 6.2 Worked Example (figures are hypothetical and included for the purpose of illustration only):

EIT lawfully terminates a GA under which €2,500,000 was allocated to KIC-LE as "final recipient", for KIC-LE's administration costs. EIT is unable to recover any of the monies from KIC-LE and demands payment from the Liable Members. In respect of the GA, there are 25 Liable Members and 2 Core Partners who are prevented from accepting liability (and have served notice to that effect under Clause 6.2). Each Liable Members share of the liability ("S") will be as follows:

$$S = T \div N$$

$$S = €2,500,000 \div 25$$

$$S = €100,000$$

Where:

T = the KIC-LE Residual Liability for the relevant Grant Period which KIC-LE is unable to honour

N = the total number of Liable Members for the relevant Grant Period

- 6.3 Where the KIC Partner makes any payment to EIT under **Clause 6.2**, such payment is in discharge of its obligation under **Clause 6.2** to KIC-LE, and KIC-LE shall be obliged to reimburse the KIC Partner for any amount so paid.
- 6.4 Where the KIC Partner is liable for a share of the KIC-LE Residual Liability under **Clause 6.2**, such liability shall survive the termination of this Agreement under **Clause 5** except in the case of termination under **Clause 5.2**, in which case the KIC Partner shall have no liability for the KIC-LE Residual Liability in the Grant Period in question.
- 6.5 For the avoidance of doubt, Affiliate Partners shall bear no liability for KIC LE Residual Liability (as defined).

7. Governing law and disputes

- 7.1 This Agreement (with the exception of the EIT Contracts) shall be governed by the laws of the Netherlands.
- 7.2 If a dispute (the "Dispute") arises out of or in connection with this Agreement, or the performance by either Party of their obligations under the Agreement, the Parties shall first attempt in good faith to resolve the Dispute between themselves. If for any reason the Parties are unable to resolve the Dispute within thirty (30) days of it first arising the Parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure² (as amended from time to time). Unless otherwise agreed between the Parties, the mediator shall be nominated by CEDR and the mediator shall nominate the place of mediation.

²

<http://www.cedr.com/solve/>: CEDR Solve claims to be Europe's leading commercial and workplace mediation service and alternative dispute resolution provider.

7.3 If the Dispute cannot be settled pursuant to **Clause 7.2**, within thirty (30) days of the date on which a mediator is appointed, it may be referred at the instance of either Party to the District Court of Amsterdam shall have non-exclusive jurisdiction.

7.4 Nothing in this Agreement shall limit the Parties' right to seek injunctive relief before the Amsterdam District Court or any other courts having jurisdiction.

8. Miscellaneous

8.1 This Agreement represents the entire agreement of the Parties in relation to the subject matter thereof and supersedes all previous arrangements and understandings between the Parties in relation to the same, but nothing in this clause shall operate to exclude or limit liability for fraudulent misrepresentation.

8.2 Should any provision of this Agreement become invalid, illegal or unenforceable, it shall not affect the validity of the remaining provisions of this Agreement.

8.3 Except as expressly provided for in this Agreement, neither party shall in any way represent itself as being the other or an agent, partner, employee or representative of the other and shall not hold itself out as such or as having any power or authority to incur any obligation of any nature whether express or implied on that other's behalf.

8.4 Any variation, including any additional terms and conditions, to this Agreement shall only be binding when agreed in writing and signed by the Parties.

8.5 The Parties undertake to preserve the confidentiality of any document, information or any other material directly related to this Agreement that is classified as confidential, if disclosure could cause prejudice to the other party.

SIGNATURES OF DULY AUTHORISED REPRESENTATIVE OF EACH PARTY

Signed by: _____

Title: _____

For and on behalf of Association Climate KIC

Signed by: W.M. de Jong

Title: Vice governor

For and on behalf of Provincie Utrecht (KIC Partner)

