

## **Explanatory notes to the General Government Terms and Conditions for Public Service Contracts 2018 (ARVODI 2018)**

Although these explanatory notes are public, they are not part of the Contract. They may be used to dispel any doubts about the meaning or interpretation of the General Government Terms and Conditions for Public Service Contracts 2018 (ARVODI 2018). They do not, however, affect any agreements made by the Parties in a specific situation.

### **1. General introduction**

#### **1.1 Object of the ARVODI**

The General Government Terms and Conditions for Public Service Contracts (ARVODI) were first adopted by prime ministerial order of 5 March 2004, and have since undergone a number of amendments. They provide a uniform set of general terms and conditions for public service contracts between the State of the Netherlands (i.e. all ministries and public authorities and agencies for which the ministries are responsible) and third parties. For the sake of convenience, the ARVODI 2018 are referred to in these notes simply as the ARVODI.

#### **1.2 Changes in the 2018 version compared with the 2016 version**

The ARVODI 2016 have been revised in connection with the entry into force of the General Data Protection Regulation (GDPR) on 25 May 2018. The amendments concern the clauses on processing personal data and on liability. In addition, a number of provisions have been reformulated or improved for the sake of clarity.

#### **1.3 Use of the ARVODI**

The Contract states that it is governed by the ARVODI. Model contracts have been drawn up for this purpose that are available for use by civil servants. The models should be used as the basis for the draft contract; the user will need to add or insert details at various points.

Both in the event of an award procedure and in the case of limited bidding, a draft of the Contract should be sent, together with a copy of the ARVODI and the other tender documents, to the tenderers or the selected candidates.

In principle, the ARVODI are designed to cover all forms of Services, with the exception of legal relationships that are so specific as to warrant the use of different terms and conditions for the contract in question. The General Government Terms and Conditions for IT Contracts (ARBIT) and the relevant model contracts should be used for IT projects, for example.

Other terms and conditions, such as the General Provisions for Contracts Awarded to Architects and Consultants (ABAA DNR 2005) may be used for work contracted to architects and engineering consultants in relation to the design of buildings. However, the ARVODI are generally suited for use in relation to other types of public service contract. Please contact the legal department in case of doubt.

The General Government Purchasing Conditions (ARIV) should be used for all purchases and deliveries of physical goods.

#### **1.4 Deviation from the ARVODI**

It is possible to deviate from the ARVODI in exceptional situations, although any such departures must be guided by the relevant text of these explanatory notes and the relevant model contracts. You are advised to contact the legal department in any such eventuality.

#### **1.5 Suggestions and queries**

It remains important to keep the ARVODI up to date and, where necessary, to make further adjustments to them based on users' experiences. If you have any suggestions or queries in this connection, please contact the secretariat of the interministerial Advisory Committee on Corporate Legal Affairs (CBA, email: cba@minbzk.nl). This committee is part of the Directorate-General for the Public Sector (DGOO) at the Ministry of the Interior and Kingdom Relations.

### **2. Notes on individual articles**

Notes on a number of articles follow below. Certain articles are self-explanatory, which is why no separate explanation has been given.

#### **Section I: General**

##### **Article 1 Definitions**

A number of terms are defined in article 1 of the ARVODI. This means that, whenever one of these terms appears with initial capitals in the ARVODI, its meaning is as defined in article 1. The same applies to the use of these terms in the model contracts.

The term 'Schedule' is defined as a document attached to the Contract which, when initialled by the parties to the Contract, is considered to form an integral part of it. It is therefore important to ensure that all schedules are indeed initialled by the Parties.

The definition of 'Contractor's Staff' implies that the term covers not only staff employed by the Contractor, but also people engaged or deployed by the Contractor for the sole purpose of

performing the Contract. These are designated here as 'assistants' (see also article 5 of the model contract).

The definition of the term 'Working Day' refers to the General Extension of Time Limits Act. The official public holidays as defined in the General Extension of Time Limits Act are: New Year's Day, Easter Monday, Whit Monday, Christmas Day, Boxing Day, Ascension Day, the day on which the monarch's birthday is celebrated, and 5 May. Where a Contract is signed with a foreign partner, it is worth making sure that there is no confusion about days classified as official public holidays, especially as the contractual partner may be used to other public holidays.

As the term 'Party' is used to refer to both the Contracting Authority and the Contractor, it is important to take careful account of the context in which the term is used.

## **Article 2 Application**

Only the ARVODI apply to public service contracts, and not any terms and conditions the Contractor may have drawn up. This is why the model public service contract explicitly excludes the applicability of other general terms and conditions (see article 6.1 of the model public service contract).

## **Section II: Performance of the Contract**

### **Article 3 Guarantees given by the Contractor**

Under article 3, the Contractor guarantees that the Services provided by it or on its behalf meet the requirements laid down in the Contract and will be performed in a professional manner. It is important to note here that any failure to fulfil this guarantee automatically constitutes an attributable failure and hence automatically creates an obligation to pay damages.

### **Article 4 Assessment and acceptance**

The acceptance and assessment of the Services provided are important milestones in the performance of the Contract. After all, these are the points at which you decide whether or not the Contractor has discharged its contractual obligations.

In assessing the Services, it is important to decide within 30 calendar days whether they have been provided in accordance with the description of the object of the Contract and with the requirements set out in it. The Contracting Authority will accept the Services if they meet these requirements. As the Contracting Authority will be deemed to have tacitly accepted the Services if it fails to respond within 30 days, it is important to respond within the 30-day period in any event. The 30-day acceptance period is a statutory time limit (see article 119b (2) (c) and (4) of Book 6 of the Civil Code).

For the Contractor, acceptance is a milestone as it signals the start of the 30-day payment period. This period commences once the Services have been accepted and the invoice has been received (see article 18). The period of time between the acceptance and payment dates may be extended in certain cases. For example, in the case of high-value Contracts, you can arrange for the Services to be provided in instalments, although you should then clearly define in advance both when the assessments are to take place and the deliverables concerned.

Although the Contracting Authority is free to instruct a third party to assess the Services on its behalf (see paragraph 3), the 30-day time limit for acceptance still applies in this case. If you decide to use a third-party assessor from the same branch of industry as that in which the Contractor is active, you must ensure that the assessor, who is also one of the Contractor's competitors, does not gain access to any of the Contractor's confidential company data. You can do this, for example, by providing the deliverable you wish to have assessed without disclosing any company data.

#### **Article 6 Replacement of staff responsible for performing the Services**

It is important to try and avoid situations in which a Contractor replaces staff who it has said will be working on the project and whom the Contracting Authority has approved. Both the performance of the Contract in question and the relationship with the Contracting Authority benefit from a measure of continuity in relation to the staff deployed by the Contractor. Nevertheless, a situation may arise in which the Contractor is no longer able to assign a particular member of its staff to the Contract. The Contractor is not, however, entitled to replace the employee in question without the Contracting Authority's consent.

The Contracting Authority may not withhold its consent on unreasonable grounds and may attach certain conditions to its consent. It is also entitled to ask the Contractor to replace certain members of its staff if it believes that this is either necessary or desirable in the interests of the Contract. The Contractor must comply with such a request unless it is unreasonable to expect it to do so, for example because it is demonstrably impossible to find an adequate replacement.

### **Section III: Relationship between Parties and supervision**

#### **Article 9 Progress reports**

In the light of the above, it is worth making arrangements about progress reports in the Contract, particularly in the case of long-term projects (see article 6.3 of the model contract).

#### **Article 10 Contacts**

Contacts are entitled to perform any activities (irrespective of whether or not they are intended to have a legal effect) that need to be undertaken in order to perform the Contract. However, the only

people entitled to agree on amendments to the Contract are the original signatories, their legal successors and/or persons they have specifically authorised for this purpose.

### **Article 12 Method of notification**

All notices given by the Parties under the terms of the Contract must be in writing. It is becoming increasingly commonplace to make use of electronic means of communication, with email proving particularly popular. Notices may be given by email, provided that the email in question meets the criteria set out in paragraph 2. The text of this article is based on article 227a of Book 6 of the Civil Code.

### **Article 13 Confidentiality**

Public service contracts often involve a Contractor being supplied with information that is not intended to be made public, which is why this article imposes a duty of confidentiality on the Contractor. The Contractor is also obliged to impose this duty of confidentiality on its own Staff. To prevent any misunderstandings, the Contracting Authority should clearly indicate in advance which type of information is definitely to be regarded as confidential.

Under this provision the Contracting Authority may, if it considers this to be important, require the Contractor to return information that it has in its possession to the Contracting Authority. However, professionals in certain fields, like lawyers and auditors, are bound by the rules of their profession to keep certain information. The Contracting Authority cannot demand that such information is returned.

A penalty clause may be included in the Contract imposing a penalty on the Contractor if it breaches its duty of confidentiality (see article 6.5 of the model contract). This provides an extra stimulus for the Contractor to fulfil its duty of confidentiality.

### **Article 14 Processing of personal data**

#### Paragraph 1

Paragraph 1 gives the Parties a contractual basis for calling on one another to comply with obligations already applicable to them under legislation.

#### Paragraph 2

If, in performing the Contract for the Contracting Authority, the Contractor processes personal data, the law requires this to be regulated in a data processing agreement. As a rule, the data processing agreement will be signed at the same time as the Contract. If, however, cause to conclude a data processing agreement arises only during the term of the Contract, paragraph 2 gives the Parties a contractual basis to call on one another to conclude such an agreement.

## **Article 15 Security**

The Contracting Authority attaches great value to the security of its Staff, premises and information, which is why the Contractor is required to follow the Contracting Authority's codes of conduct and internal rules.

The Contracting Authority must inform the Contractor in good time about these rules. The Contractor, in turn, is required inform its own Staff about them. The Contracting Authority is also entitled to remind the Contractor's Staff about the existence of these rules, as and when the need arises during the course of their work, and to call them to account if they fail to observe them.

If desired, the Contracting Authority may require the Contractor to present 'certificates of good conduct' on behalf of the Staff it is intending to deploy. This may be necessary, for example, if the Contracting Authority has doubts about certain people or if the project is such that the Contractor's Staff will or may gain access to confidential information. In such cases, the Contracting Authority is also entitled to require the Contractor to submit its Staff to security screening by the General Intelligence and Security Service (AIVD) before they start work on the project.

## **Section IV: Financial provisions**

### **Article 16 Payment and upward and downward contract variations**

#### Article 16.1 Payment

The ARVODI assume that the Contractor is paid retrospectively for the time actually spent working on the project in question, based on the agreed rates. To this end, the Contractor is entitled to submit monthly invoices for the actual costs incurred and the actual time worked during the past month, if necessary subject to a maximum ceiling specified in the Contract.

It is also possible to agree a fixed fee with the Contractor instead of payment based on the actual costs incurred and time worked. It is worth agreeing on a fixed fee only if it is possible to give an accurate description of the end product in advance, and if it is easy to assess the quality of the end product once it is ready.

#### Articles 16.2 to 16.4 Upward contract variations

Irrespective of whether the Parties have agreed that the Contractor should be paid a fixed fee or should invoice for the actual costs incurred and time worked, it is essential to ensure that the Contract contains the clearest possible description of the Services the Contractor is to provide, if necessary in a separate Schedule. The description is not just a means of assessing the quality of the Services performed, but also provides a framework for deciding whether any additional work constitutes an upward contract variation (for which the Contractor is entitled to charge a fee). After all, this is only the case if, due to additional requirements stipulated by the Contracting Authority, the Contractor demonstrably needs to spend more money and/or time than originally agreed in

order to supply the Services, possibly in adjusted form. An upward contract variation arises only if the Contracting Authority makes certain demands over and above those laid down in the original Contract. If this is not the case, the Contractor is in principle responsible for paying for the cost of any additional work. This also applies if the Contractor has to perform extra work in order to replace or improve a service that is found to be of poor quality.

Under paragraph 3, the Contractor is not entitled to undertake any additional work that constitutes an upward contract variation until the Parties have agreed in writing on the amount of work that needs to be performed, and its duration and cost.

Under paragraph 4, the Contractor is obliged to carry out an order for additional work subject to the provisions of the Contract, as long as its cost does not exceed 10% of the originally agreed contract value. In such an event, the Contractor has no choice but to carry out the additional work at the originally agreed hourly rate. If the cost of the additional work represents more than 10% of the original contract value, the Contractor is entitled to renegotiate the terms of the additional work with the Contracting Authority. This obligation applies, however, only if the additional work does not represent a substantial change in the nature of the Contract.

#### Article 16.5 Downward contract variations

Downward contract variations are also possible in certain circumstances. If one of the Parties (usually the Contracting Authority) takes the view that less work needs to be performed than was originally agreed, it should notify the other Party as soon as possible so as to prevent the latter from wasting time and money on activities that are no longer required.

#### **Article 17 Invoicing**

The government is keen to promote electronic invoicing. For this reason, it has decided that, in principle, all invoices should be submitted and processed electronically. If this is not feasible or desirable in a particular case, the model contract contains provisions enabling the Parties to decide on a different course of action so that the Contractor can submit printed invoices.

#### **Article 18 Payment and invoice audits**

Payment should be made as quickly as possible, and in any event by no later than 30 days after the date on which the Services are accepted and the invoice received. The 30-day payment term is a statutory time limit (see article 119b (2) and (5) of Book 6 of the Civil Code) that may be departed from only in exceptional circumstances.

The right to payment arises only after the Services have been accepted (see article 4) and a correct invoice has been received. If the invoice does not comply with the Contract provisions, you should contact the Contractor as soon as possible to ask for a new invoice. The payment period does not start until the date on which a correct invoice is received. If the Contractor submits an

invoice before the results of the Services have been accepted, the payment period commences on the day after the date on which the Services are accepted.

The Contracting Authority is liable to pay statutory interest on any amount outstanding after the expiry of the time limit for payment, as from the day after the date agreed as the deadline for payment. Statutory interest is charged at the rate applying to commercial transactions.

If the Contracting Authority fails to pay on time, it also automatically becomes liable to pay a debt collection charge under article 96 of Book 6 of the Civil Code to cover the cost of out-of-court settlement. The Civil Code stipulates a minimum charge of €40. The Contracting Authority's liability for this charge arises without any notice having to be served, on the day after the date of expiry of the 30-day payment period referred to above. With a view to finding out how much is owed, the Contractor needs to send the Contracting Authority a separate invoice for the statutory interest and the debt collection charge.

The Contracting Authority can ask an accountant to perform a confidential audit of the invoice. The information presented to the accountant for this purpose should be restricted to that needed for the purpose of the audit.

#### **Article 19 Advance**

Although the basic rule is that no payments should be made until the Contractor has provided the Services in question, an exception may be made if the Contractor is able to prove that it first has to invest substantial amounts of money in order to perform the Services. Before an advance is paid, an assessment must be made of the risk that the Contractor will not fulfil its obligations, or will not do so fully. If the Contracting Authority considers that risk to be substantial, it may require the Contractor to issue it with an on-demand bank guarantee. This is a statement issued by a credit institution at the Contractor's request and expense, in which the credit institution guarantees to pay up to a given maximum amount in response to a claim to this effect. Reference is made in this connection to article 2 of the Prepayments Order 2007.

The credit institution will generally insist on the Contractor's account being blocked for the value of the guarantee, thereby running little risk. This does mean, however, not only that the Contractor will be unable to access the blocked funds in its account, but also that it will have to pay a fee for the issue of the guarantee. For this reason, too, the expediency of requiring a bank guarantee must be weighed up carefully.

A model on-demand bank guarantee is appended to the ARVODI.

## **Section V: Non-performance**

### **Article 21 Liability**

If a Party fails to discharge any of its contractual obligations (also referred to as 'non-performance'), it is obliged to compensate the other Party for the damage thus caused, unless the failure is not attributable to the defaulting Party. A failure arises only once a Party is in default. In most cases, this requires the issue of a notice of default.

#### Action to be taken in the event of an attributable failure:

1. If the Contractor fails to comply with any of its contractual obligations, the Contracting Authority should give written notice of default as soon as possible. It must allow the Contractor a reasonable period in which to remedy the problem. A notice of default is not required if there is no prospect of the Contractor ever discharging its obligation or if the Contractor fails to observe a vital deadline, i.e. a clearly agreed date or time limit by which the service must have been provided and which has not previously been extended.
2. The Contractor is still in default if it fails to discharge its obligation within the reasonable period it has been given in which to do so.
3. If the Contractor still fails to immediately discharge its obligation, the Contracting Authority is in any event entitled to demand compensation on account of the delay in the performance of the Contract during the period in which the Contractor is in default.
4. If the Contractor is in default, the Contracting Authority is entitled to demand either that the Contractor perform the Contract as agreed (and, if necessary, that the Contractor pay for the damage caused by its failure to discharge its obligations in good time) or that the original Contract be converted into an undertaking to pay compensation in lieu of services provided. In such an event, the Contracting Authority is also entitled to cancel the Contract and may, if it so wishes, submit a claim for compensation of present and future damage (see article 22).

#### Damage

The term 'damage' is understood to include financial loss and any other intangible loss in so far as there is a legal right to compensation of such losses. 'Financial loss' includes both actual loss and loss of profit. The extent of any damage is determined on the basis of lost revenue, which means that the situation of the Party incurring the damage is compared with the situation it would have been in if the Contract had been properly performed. It should be noted that the term 'event' is not used in this article in its insurance sense.

### Extent of liability

Although the law does not, in principle, limit the Parties' liability for any damage they may cause, the current version of the ARVODI nonetheless places a limit on the Parties' liability. The ARVODI limit the Parties' liability by basing it on a rising scale. This is a flexible method, in which the limit of liability depends on the agreed value of the Contract, including any amendments made during the term of the Contract. Roughly speaking, the Parties' liability is limited to three times the Contract value. Damage are not divided into categories, e.g. direct, indirect and consequential damage, given that the law does not make such a distinction either and also that the State does not believe in placing further limits on the extent of the Parties' liability. After all, one of the consequences of limiting liability is either that the State itself has to pay for some of the damage occasioned by the Contractor and/or that such losses have to be met from public funds. For these reasons the ARVODI do not seek to limit the Parties' liability any further. Besides a limit on liability per event that causes damage, there is an annual limit that applies to each year since the Contract came into force ('contract year'). If damage is caused by several events in a single contract year, liability in that year is limited to the amount in question. The limit applies again in the following contract year. If the Contract has a duration of less than a year, the maximum liability applicable to one contract year still applies to the entire duration of that Contract. In other words, the maximum liability is not adjusted on a pro rata basis. If one or more years have passed since the Contract entered into force and the last contract period is shorter than a year, the maximum liability applicable to one contract year still applies to that last contract period in its entirety. In other words, here too the maximum liability is not adjusted on a pro rata basis.

In certain situations, there may be grounds for making different arrangements about the extent of the Parties' liability. The model contract contains an optional clause (article 6.7) that may be used for this purpose. An assessment must be made on a case-by-case basis as to whether the provisions on liability laid down in article 21 are appropriate. Important considerations in such an assessment include in any case the possible scope of the damage if the Contractor fails to fulfil its obligations and the likelihood that this situation will arise (once or several times) during the lifetime of the Contract. If the potential damage far exceeds the Contractor's maximum liability, there may be grounds for raising the Contractor's maximum liability. The Contracting Authority must bear in mind that a higher maximum liability may result in a higher price for the Services, since this risk is factored into that price.

You are advised to contact the legal department if you are planning to make use of this clause.

### Paragraph 3

This paragraph contains three (customary) exceptions to the limitation of liability set out in the first part of this paragraph. The exception under b relates to intent or gross negligence not only on the part of the board of the Contractor's business but also on the part of its staff. That is important because the work is usually performed by the staff and not the board.

The exception under d relates to damage resulting from breach of legislation on the protection of personal data. The protection of natural persons during the processing of personal data is a fundamental right. Violation of this fundamental right can cause natural persons serious damage and lead to substantial damage on the part of the controller. The latter may, for example, be confronted with costs to prevent or limit the damage suffered by data subjects or fines imposed on it by the supervisory authority.

If, in performing the Contract for the Contracting Authority, the Contractor processes personal data, the Parties will regulate this in a data processing agreement. If the Contractor breaches this data processing agreement by failing, for example, to secure the personal data, it is not disproportionate to hold it liable for any damage caused, in accordance with the 'polluter pays' principle.

The fact that the processor can best manage the risk of such damage is another reason why an exception to the general liability limitation set out in article 21 applies in its regard. The Contract may depart from this principle if the Contracting Authority believes there is reason to do so in a particular case.

## **Article 22 Cancellation and notice of termination**

Article 22 refers to two ways in which the Contract may be ended prior to its expiry, i.e. by cancellation (articles 22.1 to 22.4) or by giving notice of termination (article 22.6).

### Cancellation

Under article 265 of Book 6 of the Civil Code, a failure by a Party to discharge any of its contractual obligations entitles the other Party to cancel the Contract either in full or in part, unless the failure is so unusual or insignificant as not to warrant cancellation and the attendant consequences. The wording of article 22.1 of the ARVODI follows the wording of the law. If it is not already clear that the defaulting Party is permanently or temporarily unable to fulfil its obligations, the right to cancel the Contract arises only after the defaulting Party has been given notice of default.

The Party who wishes to cancel the Contract must be able to prove that the other Party has failed to discharge its contractual obligations. In other words, the burden of proof rests on the Party claiming default. In addition, the failure itself must be so grave as to warrant the cancellation of the Contract. The burden of proving that the failure does not warrant the cancellation of the Contract rests on the defaulting Party.

A situation may arise in which one of the Parties is unable to discharge its obligations due to force majeure. This is known as a non-attributable failure. A failure cannot be attributed to the defaulting Party if the latter is not to blame for it and may not be held responsible in accordance with the law, a legal act or generally accepted standards. The ARVODI contain a list of circumstances in which

the Contractor is not in any event entitled to invoke force majeure. In the event of force majeure, the Contract may be cancelled after a period of 15 Working Days.

The ARVODI also list a number of other circumstances in which the Contract may be cancelled. One of these is if the Contractor is declared bankrupt (article 22.4). If necessary, the Contract may be cancelled in part, thus enabling the Contractor to perform some of the agreed activities. In some instances, however, the two Parties have lost so much confidence in each other that even partial cancellation is not a realistic option. Because this is generally a complex matter, it is worth contacting the legal department before proceeding.

The cancellation of the Contract releases the Parties from their obligations and creates a commitment to 'undo' everything that has been done in the past (see article 271 of Book 6 of the Civil Code). In principle, the beneficiary of the service is obliged to 'return' the service in the condition it was in when it was provided. If the nature of the service precludes the possibility of 'undoing' it, the beneficiary may be obliged to pay compensation.

#### Notice of termination

The Contracting Authority's right to terminate the Contract at any time is (also) enshrined in article 408 of Book 7 of the Civil Code. The Contracting Authority is not required to explain why it is terminating the Contract, nor does the Contractor necessarily have to be in default for the Contract to be terminated. In the event of termination, the Contracting Authority is however required to pay the Contractor a reasonable fee for the work it has already carried out and for commitments it has already made for the future. Moreover, the Contracting Authority is not entitled to compensation in the event of termination.

Other than in the case of cancellation, termination does not create a requirement to 'undo' everything that has been done in the past.

In principle, the Contract may be terminated with immediate effect on the basis of article 22. A number of industry bodies have referred to the impact that termination without a notice period would have on a Contractor. Should the case arise, therefore, the Contracting Authority is expressly advised to consider observing a notice period if possible.

## **Section VI: Miscellaneous**

### **Article 24 Intellectual property rights**

#### General

Making provision in a Contract to deal with intellectual property rights is a matter that raises all kinds of questions and requires a great deal of care. That is why the subject is discussed in some depth here.

All forms of intellectual property rights (IPRs) are absolute rights to intangible objects, also known as 'products of the mind'. The literature on IPRs divides them into two categories: copyright and neighbouring rights on the one hand and industrial rights on the other. The latter category includes patent rights (designed to protect technical inventions), trademark rights (designed to protect signs and marks for distinguishing goods and services traded in commercial transactions), design rights (designed to protect works of applied arts and industrial designs and models) and plant breeders' rights (designed to protect new plant varieties). Database rights are also IPRs and are protected both as a form of copyright and in their own right.

Industrial rights need to be established, i.e. they need to be registered or filed. As the Contracting Authority will not normally wish to establish an industrial right itself or have an industrial right transferred to it, the ARVODI do not contain a standard clause for the transfer of industrial rights. If the Contractor claims an industrial right, this should not have a detrimental impact on a Contracting Authority making use of the results of the Services. For this reason, article 24.9 stipulates that a non-exclusive<sup>1</sup> right of use (also known as a licence) is assigned to the Contracting Authority, so that the latter can continue to make use of the results of the Services for an indefinite period of time.

#### Copyright and database rights

Unlike the industrial rights referred to above, the performance of activities by the Contractor under the ARVODI will regularly involve the establishment of copyright and occasionally also database rights.

#### *Copyright*

Copyright is defined in the Copyright Act as 'the exclusive right of the author of a work of literature, science or art, or his or her legal successors, to publish and reproduce the work, subject to the restrictions imposed by the law'. Copyright arises automatically (i.e. there is no registration or filing requirement) as long as the work satisfies two criteria formulated by the courts: originality and authorship. Most Contracts covered by the ARVODI, such as for the production of a policy report or a research report, satisfy both of these criteria. It is important to note that copyright relates to the subjective aspects of the work in question, such as the choice of subject matter, the way in which it is ordered, as well as the structure of the work and the way in which it is worded. In other words, copyright is **not** concerned with objective aspects such as facts, data, arguments, discoveries, methods, a specific style of writing, etc. Third parties are free to reproduce any of the latter from a research report, for example, unless they are subject to a confidentiality clause (such as that set out in article 13 of the ARVODI).

Under article 24.1, once the copyright has been assigned, the Contracting Authority gains an exclusive right to publish and reproduce the results of the Services, in accordance with the Parties'

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<sup>1</sup> The term 'non-exclusive' means that the Contractor is also entitled to grant licences to third parties.

intentions as set out in the Contract. 'Reproduction' includes the right to process the work (see section 13 of the Copyright Act), if necessary with the help of another service provider.

Even if transferred, a copyright lasts for 70 years after the author's death, after which it lapses.

#### *Database rights*

The statutory definition of a database is 'a collection of works, data or other independent elements that are systematically or methodically ordered and are separately accessible by electronic or other means, and in relation to which a substantial investment needs to be made in order to acquire or verify them or present their contents in qualitative or quantitative terms'. Such a collection may also be copyright-protected.

Under the Databases (Legal Protection) Act, a database is covered by its own independent IPR if and in so far as it complies with all the various aspects of the definition given in the Act. The right is legally vested in the 'Producer' of the database. In the framework of the Contract, the right accrues to the Contractor (as the Producer) but, under article 24.2 of the ARVODI, it is assigned to the Contracting Authority as soon as it arises.

The assignment of the database right gives the Contracting Authority two vital powers: firstly, the right to give permission for the transfer of all or part of the database to another medium (this is known as 'data retrieval' and includes downloading, printing and photocopying); and secondly, the right to give permission for the contents of the database to be published, by circulating copies of the database, renting it out or transmitting it online or in another form (this is also known as 'reuse').

The IPR arises once the database is complete and lapses after 15 years, starting from 1 January of the year following that in which the database was completed.

#### Assignment of intellectual property rights

In principle, any copyright or database rights that arise as the result of a Contract awarded by a government body are vested in the Contracting Authority. The reasons for this are as follows.

First of all, the Contract is the result of the Contracting Authority's own initiative. Without the existence of a Contract, the rights would not arise. Moreover, the fact that the Services are paid for with tax revenue justifies the Contracting Authority having the privilege of deciding which Party should be the ultimate holder of the IPRs. Secondly, the Contracting Authority should usually be able to use the results of the Services without any restrictions. This is not generally possible if the copyright and database rights have not been assigned. Thirdly, there are growing demands for the government to publicly disclose the data it holds by publishing it in the form of open data. If the copyright and database rights have not been assigned to the Contracting Authority, this may impede its ability to publish the data in question.

If an assignment of rights as described in articles 24.1 and 24.2 is not sufficient for whatever reason and a formal instrument needs to be drawn up, article 24.4 states that the Contractor irrevocably authorises the Contracting Authority to draft such an instrument and sign it on the Contractor's behalf. In other words, the Contractor can no longer block such an assignment at a later stage.

The Parties may decide not to follow the standard assignment procedure and to use a form of licensing instead. This will generally involve the granting of a non-exclusive right of use. The model contract contains an optional licensing clause in article 7.

#### Research models and methods

In certain cases, the Contracting Authority may need to continue to make use of certain special techniques, calculation models, data or systems that the Contractor has designed partly or entirely for the purpose of the research project. However, copyright law is not generally capable of independently protecting such 'products of the mind' against third parties because they do not usually satisfy the criteria referred to above. For this reason, it is worth deciding, before the Contract is signed or even before the award procedure gets under way, whether the project is going to involve the development of new research methods and models and, if so, whether the Contracting Authority wishes to retain these methods and models after the project has been completed. If it does, it is worth making explicit provision for this in the Contract beforehand. You are advised to contact the legal department in such cases.

#### Existing rights and third-party rights (paragraph 3)

In some instances, the Contractor will need to make use of certain existing copyrights (generally belonging to third parties) in order to perform the Service. Clearly, these IPRs did not arise for the specific purpose of producing the results in question. In most cases, there is no need for the IPRs in question to be assigned. All that is required is for the Contracting Authority to be granted a non-exclusive right of use of unlimited duration.

#### Moral rights (paragraph 6)

Even after the assignment of his or her copyright, the author still retains certain rights known as 'moral rights'. These allow him or her, for example, to object to the work being published without his or her name being mentioned or to radical changes being made to the work that the author cannot reasonably be expected to accept. The author is entitled to renounce certain of his or her moral rights. This does not apply, however, to his or her right to oppose 'any distortion, mutilation or other impairment of the work that could be prejudicial to the author's name or reputation or to his dignity as an author' or to the publication of the work under a name other than his or her own. Article 24.6 deals with the renunciation of moral rights, in so far as is feasible, and also covers any moral rights held by members of the Contractor's Staff. Although the general rule is that an employer owns the rights arising from the work performed by staff in its employment, the employer may have made a different arrangement with the employee in question.

Article 24.7 is an indemnity clause that takes effect if the Contractor, in performing the Services, is found to have made use of works in which third parties hold IPRs. In such an event, the Contracting Authority is also entitled, under the terms of article 24.8, to cancel the Contract without taking recourse to the courts and after consulting the Contractor.

### **Article 25 Assignment of rights and obligations under the Contract**

A Contractor is sometimes acquired by or merges with another company during the course of the Contract. The question is then what happens to the Contract if another party becomes the contractual party. Neither Party is entitled to assign to a third party the rights and obligations arising under the Contract without the written consent of the other Party. If this consent is not given, any assignment will not be valid and both Parties will remain bound by the Contract.

Paragraph 2 contains a clause explicitly precluding the need to obtain the Contracting Authority's written consent where only limited rights are established. This is intended to ensure that the ARVODI do not prevent Contractors from pledging their current and future receivables to a bank in exchange for a loan.

### **Article 26 Insurance**

The Contractor is obliged to take out an appropriate and customary form of insurance cover. Although the Contractor will normally already be insured when the Contract is signed, it is also possible for the Contractor to take out a separate insurance policy for the Contract with the Contracting Authority. Obviously, the fact that the Contractor is adequately insured offers greater security that the Contracting Authority will be able to recover any loss it may sustain.

In practice, some Contractors, particularly multinationals that are not based in the Netherlands, are reluctant to present copies of insurance policies and proof of payment of premiums. In such an event, a written statement from the insurance company to the effect that the Contractor is properly insured should suffice.

### **Article 27 Employment conditions**

The Contracting Authority considers it important that the Contractor, as far as its staff are concerned, complies with the legislation and the collective labour agreement applicable to the Contractor and its staff in relation to employment conditions (e.g. the Minimum Wage and Minimum Holiday Allowance Act, the Working Hours Act and legislation on working conditions). This is underlined in paragraph 1 of this article.

In the event of the transnational provision of services, as referred to in the Posting of Workers Directive (96/71/EC), the Employment Conditions (Posted Workers in the European Union) Act (WAGWEU) is important for determining what employment conditions are applicable to workers

from other member states. This Act applies to service providers (businesses/employers) from other EU countries that, in the framework of the transnational provision of services, have their staff temporarily perform work in the Netherlands, after which they return to the member state of origin. As far as the performance of work in the Netherlands is concerned, these staff are in any event entitled to the main employment conditions prescribed in Dutch legislation, such as:

- the minimum wage;
- adequate rest periods;
- safe working conditions;
- equal treatment of men and women;
- a minimum number of paid leave days.

In addition, European employers must adhere to the same collective labour agreement provisions as Dutch employers on a number of points, provided the provisions are more favourable. This follows from section 2, subsection 6 of the Collective Agreements (Declaration of Universal or Non-Universal Application) Act (AVV Act), which provides that the key provisions in collective labour agreements that have been declared universal also apply to posted workers of service providers from other EU countries who perform temporary work in the Netherlands.

The other paragraphs (2 to 5) are included in connection with the provisions of the Sham Employment Arrangements Act (WAS), such as the vicarious tax liability system introduced in the Civil Code (whereby the main contractor is liable for any salaries tax and social insurance contributions that subcontractors fail to pay). The above-mentioned paragraphs are ultimately designed to prevent the Contracting Authority from being held liable, under the WAS, for the payment of salary owed to employees of a subcontractor which has not treated the staff it has engaged in accordance with the applicable legislation referred to above, including the payment of the correct salary owed.

#### **Article 28 Bribery and conflict of interests**

The provisions of this article are concerned mainly with ethical standards and the prevention of a conflict of interests. This version of the ARVODI no longer contains any specific provisions on employing or engaging the Contracting Authority's current or former staff. Nevertheless, the Contracting Authority still attaches great importance to high ethical standards. Conflicts of interests and other breaches of integrity must be avoided at all times. The government believes strongly in combating corruption and upholding high ethical standards of behaviour. For this reason, paragraph 1 lays the basis for a 'declaration of integrity', which is included as a clause in the model contract (see article 10). The forms of conduct referred to in this article are all offences under the Criminal Code and provide sufficient grounds for cancelling the Contract.

### **Article 31 Publicity**

This article does not cover a situation in which a Contractor wishes to cite the Contract as a reference in an award procedure. This is because the only way in which a candidate or tenderer can satisfy the requirement is by submitting references from a number of past and present clients.