



## Notes on the Model Call-off Contract (ARBIT-2022)

### 1. Introduction

The Model Call-off Contract is intended for IT Public Service Contracts awarded under a Framework Agreement to which the General Government Terms and Conditions for IT Contracts (ARBIT) apply. The model contains a number of provisions that apply to all Call-off Contracts and some optional provisions.

This model is intended for Call-off Contracts that fall under a Framework Agreement that the Contracting Authority is concluding with more than one Counterparty. The Framework Agreement enables the Contracting Authority to invite these Counterparties to participate in competitive selection (mini-competition under article 5 of the Framework Agreement). A Call-off Contract is then concluded with the Counterparty that, during a second round, submits the best tender on the basis of the established award criteria.

### 2. Signature

The principle underlying the model is that a contract is being entered into on behalf of the State of the Netherlands and that the minister concerned is authorised to act independently in concluding transactions under private law. In other cases the Call-off Contract must be modified accordingly. If the Call-off Contract is signed on behalf of rather than by the minister concerned, a power of attorney for this purpose must have been granted to the signatory in accordance with section 4.6 of the Government Accounts Act 2016 and the Central Government Financial Management Order based on this section.

The Counterparty's competence to act should be verified by the Contracting Authority on the basis of an extract from the Commercial Register and, where necessary, a power of attorney, whether limited or otherwise, presented to the Contracting Authority.

### 3. Considerations

For a proper understanding of the arrangements contained in the Call-off Contract it is essential for it to explain the motives of the Contracting Authority. This is the purpose of the recitals in the Framework Agreement and the Call-off Contract

The first step in an IT contract award procedure is for the Contracting Authority to formulate its functional requirements in Specifications (invitation to tender) and in the further call for competition in the Call-off Contract. The more accurately the Contracting Authority describes – in the Specifications and the further call for competition – how it intends to use the Deliverable, the better able the market will be to tender. The description of the intended use of the Deliverable should also provide the Counterparty with sufficient information about the organisational unit of the Contracting Authority to which the Deliverable is to be provided.

The economic operator is in turn deemed to have obtained sufficient information about the organisation of the Contracting Authority and what the Contracting Authority wishes to achieve by concluding the Call-off Contract to enable it to offer a solution that does full justice to the use that the Contracting Authority intends to make of the Deliverable. In other words, a solution that fulfils the requirements set by the Contracting Authority and completely meets its wishes.

The wording of the recitals is based on the Parties' duty of inquiry and disclosure under article 4 of the ARBIT. In keeping with the notes on article 4, this emphasises once again that a proactive approach by both Parties in the pre-contract phase is of great importance to the success of the Deliverable.

At present, the Model Call-off Contract is framed in such a way that the description (in the recitals) of the Contracting Authority's intended use of the Deliverable leads on to the Agreed Use, the purpose of which is to provide the Contracting Authority with a Deliverable that fulfils the requirements listed in the Specifications and meets the wishes of the Contracting Authority as far as possible.

## **Notes on individual articles of the Model Call-off Contract**

### **Article 2. Subject of the Call-off Contract**

#### *Article 2.1*

This paragraph defines the Deliverable mainly in legal terms. The purpose of the table is to help the user to classify the Deliverables that form the subject of the Call-off Contract, either separately or together. The Call-off Contract may involve the purchase of Products, the performance of a Public Service Contract or the provision of Standard Software or a combination of them. This breakdown of the Deliverable into its component parts forms the blueprint for the further elaboration of the subject of the Deliverable in the articles that follow.

By way of illustration, the purchase, installation and implementation of Hardware can be broken down into the Delivery of a Product and the performance of two Public Service Contracts (Installation and Implementation)

At least the essence of the Deliverable should be described by the user in the various tables in clear and comprehensible terms. This requires a description of the nature of the Deliverable (article 2), the manner of Delivery/Completion (article 5), the manner of Acceptance (article 6), the related Fee (article 7) and, finally, the manner of invoicing and payment (article 8).

When a Licence is acquired, its scope and nature and also the system of payment (e.g. per user or per machine) should be described in article 2. Special attention should be given to the description of the user group because although the State of the Netherlands is the Contracting Authority, a Licence is generally granted for the benefit of a specific organisational unit of the State. If the difference between the State of the Netherlands as the legal person to which the Licence is granted and the user group entitled to use the Licence is not reflected in the contract award procedure, this will inflate the price. This is because the size of the user group is an important determinant of price for most business models in the IT market.

The table showing the breakdown of the Deliverable is simply intended as an aid. It follows that the summary and breakdown in the tables are only indicative of which Special Provisions of the Terms and Conditions apply to the Call-off Contract. Which Special Provisions apply is therefore determined not by the breakdown in this table, but by the nature of the Deliverable. This must be carefully checked each time. As a result, it is also important that purchasers are familiar with the content and structure of the Terms and Conditions (the ARBIT).

#### *Article 2.2*

This paragraph determines what documents form part of the Call-off Contract and sets out their order of precedence.

The highest-ranking document is the Call-off Contract (that is to say, the recitals and articles 1 to 9 of the Call-off Contract). It is followed successively by the Framework Agreement on the basis of which the Parties conclude the Call-off Contract, the further call for competition, the further tender and the other Schedules. It was decided to rank the Call-off Contract higher than the Framework Agreement because the former contains the most specific agreements concerning the delivery of the Deliverable, or agreements that elaborate the provisions of the Framework Agreement. This is also in line with the order adopted in the ARVODI.

It should be noted, however, that deviating from the Framework Agreement in the Call-off Contract is not always permitted. This is because the Framework Agreement is in most cases preceded by an EU contract award procedure and the scope for amending an agreement concluded as the result of such a procedure is limited due to procurement law (see sections 2.163a to 2.163g inclusive of the Public Procurement Act 2012).

If amending the Framework Agreement is permissible under procurement law the Parties should in some cases agree the amendment at the level of the Framework Agreement so that it does not need to be repeated in each subsequent Call-off Contract.

#### *Article 2.3*

In certain circumstances, two Contracts between the same Parties may be interrelated to such an extent that the value of one of the Contracts to the Contracting Authority may depend on the success of the other Contract. For example, a Contracting Authority may enter into two Contracts with the same Counterparty, one for the purchase of software and the other for its Implementation. Naturally, the implementation contract would be pointless if the software contract were to be cancelled. In such cases it can be explicitly agreed that the two Contracts are interrelated to such an extent that a ground for cancellation of one Contract also constitutes a ground for cancellation of the other (article 30.5 of the ARBIT).

### **Article 3. Contacts and reporting**

#### *Article 3.1*

The designation of contacts results from article 2 of the ARBIT.

#### *Article 3.2*

Paragraph 2 describes the nature and scope of the Counterparty's reporting obligation. This concerns not only the subject matter of the report but also the frequency of the reporting.

The basis of the Counterparty's reporting obligation in the case of Public Service Contracts is set out in article 51 of the ARBIT.

### **Article 4. Entry into force and term of the Call-off Contract**

#### *Article 4.1*

The Call-off Contract enters into force as soon as it has been signed by both Parties and not therefore as soon as oral agreement has been reached. For this reason important for both Parties to enter the date when signing the document.

Service provision relating to Maintenance or cloud services may start later; see the table in article 5. This does not alter the fact that the Call-off Contract may enter into force earlier and consequently must be (signed and) dated. This is why there is an option to set a fixed date for the Call-off Contract's entry into force so that it is clear when the Call-off Contract ends if, for example, it has a term of one year.

#### *Article 4.2*

As regards the term of a Call-off Contract, a distinction can be made between Contracts for an indefinite term and fixed-term Contracts. A Contract for an indefinite term is relatively rare in the case of IT contract award procedures involving framework agreements. Fixed-term Contracts can in turn be divided into Contracts that end on the expiry of a given period and Contracts that end when the Deliverable has been provided.

The optional article 4.2 is intended to record the term of the Call-off Contract in the case of a fixed-term Contract that ends when a given period has expired.

For the purposes of contract management, it has been decided that the end date of the Call-off Contract should be expressly mentioned.

#### *Article 4.3*

Article 4.3 provides for the possibility of renewing the Call-off Contract referred to in article 4.2 on the same terms and conditions. In such a case only the term of the renewal and the last date on which this option can be exercised need be mentioned in the text.

If, for the sake of certainty, the Parties wish renewal to be effected by notice given by recorded delivery, paragraph 3 should be amended accordingly.

## **Article 5. Delivery and Completion**

The Model Call-off Contract provides for the date of Delivery to be recorded in the table. However, where the date of Delivery is not determined until later it cannot be included in the table. Such a situation may occur, for example, where the Call-off Contract gives the Contracting Authority the right to have Products delivered on demand. In such a case, a period after the actual demand may be specified in the 'Delivery date' column. The dates specified in the 'Delivery date' column are Vital Deadlines within the meaning of article 1.8 of the ARBIT.

The Supplier is issued with a dated receipt by the Contracting Authority for the Products it has received (article 6.4 of the ARBIT).

### *Article 5.2*

The Completion of Custom Software, Standard Software and consultancy services is generally linked to the provision of a copy of, for example, the Software or a research report on a given date and at a given place. This manner of Completion is therefore included in the table.

### Other Public Service Contracts

Public Service Contracts other than the types specifically referred to in articles 54 to 67 of the ARBIT (i.e. consultancy services, the development of Custom Software and Secondment) are governed only by the general provisions for Public Service Contracts in articles 48 to 53 of the ARBIT. The rules applicable to these other types of Public Service Contract can be elaborated in the Model Call-off Contract. Where appropriate, category B\* of the tables can be used for Completion, Acceptance and Fees. Only if these provisions are not sufficient should additions be made to the Model Call-off Contract.

Reasons for making additions to the Model Contract might be the use of specific forms of contract, for example for webhosting, cloud computing, outsourcing, etc.

### Maintenance

A Maintenance Contract is different in that the Contracting Authority is entitled to a given level of service over an agreed period. This is why it is not possible to specify a single Completion date. It follows that Maintenance is not subject to Completion and is therefore not included in the table. Article 8.2 elaborates this system on the basis that payment for Maintenance is made annually in advance.

### *Article 5.3*

A Maintenance and cloud services Contract is different in that the Contracting Authority is entitled to a given level of service over an agreed period. Because Maintenance and cloud services are not subject to Completion and there is therefore no Completion date, the table indicates the start date of the service. Article 8.3 elaborates this system on the basis that payment for Maintenance and cloud services is made periodically in advance.

### *Article 5.4*

Article 58 of the ARBIT obliges the Counterparty to hand over to the Contracting Authority the Source Code of Custom Software. If the Contracting Authority is also entitled to the release of the Source Code in relation to Standard Software, as in the case of OSS, the Counterparty is always obliged (apart from any provisions about this in the relevant OSS licence) to provide the Contracting Authority, pursuant to article 5.4, with a copy thereof at its request.

## **Article 6. Acceptance**

### *Article 6.1*

This paragraph regulates Acceptance. Where appropriate, the details of the Acceptance Procedure can be included in a Schedule to the Call-off Contract. Sometimes, however, the procedure is so simple that it can be included in the table. The period in which the Acceptance Procedure is to take place starts after Delivery or Completion of the Deliverable in accordance with article 5.

In accordance with article 11.2 of the ARBIT, the Contracting Authority should, in principle, inform the Counterparty whether it accepts the Deliverable within 30 days (30 days entered in *italics* in the table). The parties may derogate from this 30-day period by including a different period in the column intended for this purpose in the Contract.

## Secondment

As a rule, secondment contracts are generally invoiced monthly in arrears on the basis of approved timesheets. The approval of the timesheets by the Contracting Authority then constitutes the Acceptance, which is required for payment under article 11.1 of the ARBIT. Article 5.2 should specify when the submitted timesheets are to be approved (e.g. monthly) and what requirements the timesheets should fulfil (to be included in a Model Timesheets Schedule).

## Maintenance and cloud services

As Maintenance and cloud services are not generally presented for Acceptance, approval of the service and the Acceptance required for payment are regulated differently. Quality is assessed by or on behalf of the Contracting Authority in accordance with the provisions of the Service Level Agreement Schedule.

Maintenance and cloud services are generally paid in advance by the Contracting Authority. The moment when the advance payment may be invoiced by the Counterparty should be regulated in article 8. Pursuant to article 8.3, no Acceptance is required before payment of the Fee.

## *Article 6.2*

In certain circumstances it may be necessary to accept the Deliverable despite the presence of Defects. Articles 11.6 and 12.5 of the ARBIT provide that where Defects are discovered the Counterparty will repair them with due dispatch. Pressure can be exerted on the Counterparty by withholding part of the Fee.

The amount withheld should be a serious incentive to carry out the repair and be in reasonable proportion to the Contracting Authority's interest in having the repairs carried out quickly.

## **Article 7. Fee**

### *Article 7.1*

The table should specify the price and the fee criterion for each part of the Deliverable. The most usual remuneration criterion has already been entered in each case: for example, the price per Product in the case of purchases and the hourly rate in the case of Secondment.

### VAT

The Fee is shown exclusive of VAT. The price is stated in the table both inclusive and exclusive of VAT so that it is clear to the Contracting Authority what parts of the Deliverable are exempted from VAT or to which parts the low rate of VAT applies.

### *Article 7.2*

This paragraph specifies the service levels that may confer entitlement to a discount on the Fee if the agreed service level is not achieved.

### *Article 7.3*

If the Deliverable is not Completed or Delivered within the agreed period, the amount entered in article 7.3 will be deducted from the Fee. The discount may not be set off against any compensation and is without prejudice to the Contracting Authority's right to demand performance of the contract, claim compensation and/or apply for the contract to be cancelled (article 14.3 of the ARBIT).

### *Article 7.4*

As the quality of Deliverables upon Completion or Delivery is variable, situations still regularly occur in which they have to be rejected. The resulting damage suffered by the Contracting Authority can in many cases be recovered from the Counterparty. Article 7.4 also provides an extra incentive to ensure that the Deliverable does not have any Defects at the time of Completion or Delivery. If the Contracting Authority rejects a Deliverable, an amount may be deducted from the Fee for each day needed by the Counterparty to repair the identified Defects.

## **Article 8. Invoicing and payment**

### *Article 8.1*

In keeping with the accounting rules applicable to the central government, the Contracting Authority is, in principle, not obliged to pay the Counterparty until after it has accepted the Deliverable. This is reflected in article 15.1 of the ARBIT, which provides that a payment period starts to run only after Acceptance, even if the Counterparty has sent an invoice much earlier. This is why the table in article 8.1 will generally mention 'Acceptance' as the time when the amount becomes due and payable. However, this may also occur earlier as in the case of payment:

- a) of an advance (article 16 of the ARBIT);
- b) of maintenance and cloud fees (article 8.3);
- c) upon Acceptance of parts of the Deliverable.

Where this situation arises, the different time of indebtedness may be entered in the table.

### *Article 8.3*

Article 11.1 of the ARBIT provides that the Contracting Authority is not obliged to make any payments before the Deliverable has been accepted. However, as Maintenance and cloud services are, in practice, often paid for in advance, a different arrangement is included in the Model Call-off Contract. Basically, this means that Maintenance and cloud services are paid in advance, that no completion takes place (article 5.3) and that the Counterparty is held responsible for providing the Service levels laid down in the Service Level Agreement (SLA) (article 7.2).

The SLA also contains the sanctions that can be imposed on the Counterparty if it fails to provide the agreed service levels.

### *Article 8.4*

If the Contracting Authority wishes to make payments to the Counterparty before Acceptance of the Deliverable, this should be expressly agreed. Under the Central Government Financial Management Order, the Contracting Authority should in certain circumstances require the Counterparty to provide a bank guarantee (see also the notes on article 16 of the ARBIT). A model bank guarantee is attached to the Model Call-off Contract. A copy of the signed bank guarantee should be attached to the Call-off Contract as a Schedule. The original of the guarantee is deemed to constitute a security and should be returned after the expiry of the guarantee period. It is therefore important to ensure that proper security arrangements are made for any guarantee that is issued. The above does not apply to Maintenance and cloud services.

## **Article 9. General and special terms and conditions**

The basic principle is that the Call-off Contract is governed only by the Terms and Conditions of the Contracting Authority and not by the terms and conditions of the Counterparty or of third parties (see article 8.1 of the Framework Agreement). In practice, however, it is not always possible to exclude completely the application of the terms and conditions of the Counterparty or third parties. This may occur, for example, because the Counterparty has such a strong negotiating position that it can simply insist on the application of its own terms and conditions, or because third-party software used in performing the obligations in relation to the Deliverables is subject to non-negotiable terms and conditions of use. In such circumstances the Contracting Authority may include the optional article 9 in the Model Call-off Contract. Under this provision the licence conditions of the Counterparty or of third parties involved in providing the Deliverable may be applied, subject to strict conditions. Needless to say, this is possible only if the Specifications do not prohibit their application.

Article 9 relates only to general or special terms and conditions that form part of the Further Tender. It does not therefore cover cases in which the Counterparty requires the Contracting Authority to sign not only this document (the Model Call-off Contract) but also a separate licence agreement. However, the conclusion of a separate licence agreement would in itself infringe the principle that no terms and conditions other than the ARBIT form part of the Call-off Contract. Where the conclusion of such a separate licence agreement is unavoidable (and also permissible under procurement law) the agreement must in any event explicitly indicate:

- a) the position of the licence agreement in the ranking referred to in article 2.2, and
- b) that article 9, third and fourth indents apply *mutatis mutandis*.

The applicability of the licence conditions of the Counterparty or third parties in any form whatever may never detract from the Agreed Use. Nor is this likely in some cases, for example licence conditions relating to OSS. OSS licence conditions such as the GNU General Public Licence (GPL)

tend to provide such wide-ranging rights that the scope of the Agreed Use is more likely to be expanded than restricted by them. In other cases, however, there may be a restriction on the Agreed Use. It is therefore necessary to ensure that the minimum scope of the Licence required in the ARBIT is not restricted by the application of other general terms and conditions. This is why the third indent of article 9 provides that the Agreed Use may not be excluded or restricted by the applicability of such licence conditions.

Moreover, if the Contracting Authority is subject to additional obligations under the licence conditions this may entail extra expense, for example for licence management. This is why article 9 also includes a provision that any additional obligations apply only if the Counterparty can show that the Contracting Authority's obligations would not become unreasonably onerous as a result. An example of an unreasonably onerous obligation would be a provision under which the Counterparty is entitled to alter the licence conditions unilaterally. Finally, the exception under article 9 applies only in so far as the licence conditions concerned relate to a Licence made available to the Counterparty.

If tenderers already wish to know during the contract award procedure whether certain conditions meet the requirements set out above in article 9 the reply should preferably be guarded, if only because at that stage the tender that will be submitted by the tenderer is not yet known. Whether such conditions might infringe the as yet undetermined Agreed Use, and if so to what extent, can therefore not be established at that time. However, it is advisable in answering such questions to emphasise immediately that other conditions cannot in any event detract from the Counterparty's own responsibility for the final result (i.e. the Deliverable). If the Contracting Authority has doubts about the impact of such conditions at the time of the tender, clarification about this should be immediately requested from the Counterparty. Such clarification should be provided by the Counterparty in its Tender.

## **Article 10. Other provisions**

### *Paragraphs 1 and 2*

If this model is used to hire a self-employed person without employees, the Contracting Authority must assess beforehand whether the contractual relationship that the Parties are entering into qualifies as employment. If so, the Contracting Authority must withhold salaries tax and social insurance contributions from the salary of the self-employed person without employees and remit these to the Tax Administration, as it does for staff employed on the basis of a permanent or temporary appointment.

According to the Tax Administration's website, the question of whether a contractual relationship qualifies as employment must be assessed on the basis of the following criteria: 1) Does your contractor have an obligation to personally perform work?; 2) Is there a relationship of authority between you and your contractor?; and 3) Does your contractor receive a wage? If the answer to all these questions is 'yes', your contractor is considered to be your employee. If the answer to one or more of these questions is 'no', then your contractor is not considered to be your employee. Please note: you should still check whether your contractor is considered an employee for tax purposes.

As regards the first criterion, the Tax Administration has stated that it is likely to assume that there is an obligation to personally perform work if conditions are set for replacement staff. The optional articles 10.1 and 10.2 in this model therefore make it possible to depart from the ARBIT, including in the sense that the Counterparty is free to replace persons charged with performing the Call-off Contract and that the Contracting Authority cannot refuse the replacement staff. The text of this model therefore no longer creates the impression that there is an obligation to personally perform the work (criterion 1).

If the Contracting Authority, prior to hiring a self-employed person without employees, believes that the Call-off Contract to be concluded does not give rise to a contractual relationship that qualifies as employment, the optional articles 10.1 and 10.2 must be included in the Call-off Contract. If the articles are not included, there is a risk that a contractual relationship that is not in fact an employer-employee relationship will be deemed by the Tax Administration to be such a relationship. The Tax Administration can issue additional tax demands and fines in such instances.

#### *Paragraphs 3 and 4*

If the performance of the Call-off Contract entails the processing of data, the optional provisions set out in paragraphs 3 and 4 can be used. These paragraphs do not concern personal data since, in the event that personal data is processed, a separate Data Processing Agreement containing comparable provisions will already have been concluded.

By including paragraph 3 it is possible to specify the period within which the Counterparty must erase or return data. The article also provides that the Counterparty owes the Contracting Authority a penalty for each day it is in default. The amount per day and the maximum amount must be filled in. The amounts should be proportional.

'Returning' is understood to include delivering the data to a third party designated by the Contracting Authority.

Paragraph 4 gives two alternatives if the data must be returned to the Contracting Authority. The first alternative provides that the format in which the data must be returned will be determined by the Contracting Authority in due course. The second alternative allows the procedure for return to be included in the Call-off Contract.

#### *Paragraph 5*

The general exit arrangements described in article 32 of the ARBIT can be elaborated in an Exit Arrangements Schedule to which this paragraph refers. The importance of exit arrangements grows as dependence on the Counterparty increases or to the extent that the transition to a new counterparty demands an active contribution from the existing Counterparty. Specifically with regard to cloud services, the Government-wide Cloud Policy always requires the inclusion of an exit strategy in the contract.

#### *Paragraph 6*

If the Deliverable consists in part of the delivery of an AI system that poses a high risk to individuals' health and safety or fundamental rights, European legislation requires that further rules be laid down governing its use. Where applicable an AI impact analysis will indicate that additional contractual agreements must be made with the Counterparty. These will set requirements concerning the functioning of the AI system and accountability for its use. These additional conditions can be included in the AI Schedule referred to in this paragraph.

At the time of writing these explanatory notes, a working group of the Corporate Legal Advisory Committee (CBA) is involved in the drafting of European model conditions for high-risk AI systems by the European Commission. It appears that the AI model provisions of the Municipality of Amsterdam will serve as the starting point for the European model provisions. To this end, the Amsterdam conditions must among other things be brought into line with the legal framework of the upcoming AI regulation.

A future European model will be adapted for use in an ARBIT context and made available via Rijksportaal as an AI module to the model contracts. In the meantime, information can be requested about the development and content of the (European) model conditions via the email address given on Rijksportaal.

#### *Paragraph 7*

Article 10 offers scope for including provisions that supplement and/or deviate from the ARBIT and/or the Call-off Contract. In the case of deviations, the provisions should be prefaced by the following words: 'Notwithstanding the provisions of article <article> of the ARBIT, [...].' Clearly, deviating provisions should be avoided where possible and any such provision needs to be assessed to ensure that it is correctly worded. A deviating provision may also affect other parts of the ARBIT or the Call-off Contract. If there are two or more additional or deviating provisions, it is best to number them consecutively (10.7, 10.8, etc.).

#### **Publication information**

These instructions were drawn up under the responsibility of the interministerial Advisory Committee on Corporate Legal Affairs (CBA). Further information may be obtained from the CBA Secretariat (see contact details on Rijksportaal).

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