

Explanatory notes on the General Government Purchasing Conditions 2018 (ARIV 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 Purchasing Conditions 2018 (ARIV 2018). They do not, however, affect any agreements made by the Parties in a specific situation.

1. General introduction

1.1 Object of the ARIV

The General Government Purchasing Conditions (ARIV) were first adopted by prime ministerial order of 1 September 1993. They provide a uniform set of general terms and conditions for purchase and supply 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 ARIV 2018 are referred to in these notes simply as the ARIV.

1.2 Changes in the 2018 version compared with the 2016 version

The ARIV 2016 have been revised in connection with the entry into force of the General Data Protection Regulation (GDPR) on 25 May 2018. A standard clause on the processing of personal data has been included in the ARIV and the liability clause has been amended, in case a purchase and supply contract involves the processing of personal data. In addition, a number of provisions have been reformulated or improved for the sake of clarity.

1.3 Use of the ARIV

The Contract states that it is governed by the ARIV. 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 ARIV and the other tender documents, to the tenderers or the selected candidates.

The ARIV are designed to cover purchases of movable property, i.e. physical goods that can move or are capable of being moved. The ARIV are expressly excluded from application to IT projects, which means that they do not apply to software, whether standard or customised. The General Government Terms and Conditions for IT Contracts (ARBIT) are specifically designed for purchases

of software, both standard and customised, and should be used for this purpose. In principle, the General Government Terms and Conditions for Public Service Contracts (ARVODI) are designed to cover all forms of services.

Please contact your own legal department if you are in doubt as to which terms and conditions should be used for a given purchase.

1.4 Deviation from the ARIV

It is possible to deviate from the ARIV 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 ARIV 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 Government Sector (DGOO) at the Ministry of the Interior and Kingdom Relations.

2 Notes on individual articles

Section I: General

Article 1 Definitions

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

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

Section II: Performance of the contract

Article 3 Delivery

The basic principle is that the Supplier should deliver the Products at the agreed delivery address and should bear all the costs and risks associated with the transportation of the Products to that location, including, where applicable, complying with customs formalities and paying the relevant charges and taxes (such as VAT) and other import duties. The term used by the International Chamber of Commerce to describe such supplies is 'delivered duty paid' (DPP). A DPP contract is one in which the Supplier's obligations extend the furthest.

However, if certain costs are not included in the purchase price and are to be charged separately to the Purchaser, the relevant contract should contain a specific statement to this effect (see article 3.1 of the model contracts). The same applies if the Supplier is not capable of arranging the transportation of the Products and wishes the Purchaser to take care of this. In such a case, the Supplier will probably prefer to sign an 'ex works' (EXW) contract. The term 'ex works' means that, from a legal viewpoint, the Supplier is considered to have delivered the goods by ensuring that the Products are made available to the Purchaser at the Supplier's premises. In other words, an EXW contract is one in which the Supplier's obligations extend the least far: the Purchaser is required to bear all the costs – *and risks* – involved in picking up the goods at the Supplier's premises. As this means that the Purchaser bears the risk of the Products being damaged or stolen en route, the Purchaser should be wary of EXW contracts.

All time limits applying to the delivery of the Products should be regarded as strict deadlines. In other words, the Supplier must deliver the Products within the stipulated time limit, and no notice of default needs to be given if it fails to do so.

Article 4 Guarantee

Any failure to comply with a guarantee automatically constitutes an attributable failure and hence automatically imposes an obligation on the Supplier to pay compensation for any loss incurred as a result of non-compliance with the guarantee.

The Purchaser is obliged to make clear in good time that the Product does not comply with the terms of the Contract. In line with the provisions of article 23 of Book 7 of the Civil Code, this clause is designed to protect the Supplier against any complaints that are submitted late and are for this reason difficult to contest. The Purchaser is required to notify the Supplier in writing within 30 days of discovering the problem.

Under article 4.5 of the ARIV, in the case of large, complex deliveries, the Supplier may be required to provide a bank guarantee that the Products in question will work properly. A model guarantee is available for this purpose. It would not be appropriate to insist on a bank guarantee

for relatively small, straightforward deliveries. This is why article 6.2 of the model contracts allows the Parties to exclude the applicability of article 4.5 of the ARIV.

Article 5 Inspection

If desired, the Purchaser can inspect the Product, or have it inspected, on the Supplier's premises before it is delivered. This is likely to apply particularly to large, complex deliveries. If the Purchaser rejects the Products at this point, this is before the transfer of title takes place. This means that the Supplier will have committed an attributable failure if it does not subsequently supply Products, within the agreed delivery period, that comply with the agreed specifications.

Incidentally, the fact that the Purchaser has approved the Product does not automatically relieve the Supplier from fulfilling its guarantee obligation. This is because a Product inspection is a check for visible defects (see the definition given in article 1.4 of the ARIV). If no visible defects are found, this does not therefore mean that the Product is free of any intrinsic defects that might emerge during its use after Delivery.

Generally speaking, relatively small, straightforward deliveries do not need to be inspected prior to delivery. In other words, the Purchaser does not need to exercise the right to inspect the Product granted to it in article 5.1 of the ARIV. If the Purchaser does not wish to inspect the Product and the Product is subsequently found to be defective, the Purchaser can always invoke the guarantee in article 4.

Section III: Relations between parties

Article 6 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 authorised specifically for this purpose.

Article 7 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 8 Confidentiality

The Contract may involve the Supplier being given information that is not intended to be made public, which is why this article imposes a duty of confidentiality on the Supplier. The Supplier is also obliged to impose this duty of confidentiality on any persons it engages for the purpose of performing the Contract. To prevent any misunderstandings, the Purchaser should clearly indicate in advance which type of information is definitely to be regarded as confidential.

A penalty clause may be included in the Contract imposing a penalty on the Supplier if it breaches its duty of confidentiality. This gives the Supplier an extra incentive to fulfil its duty of confidentiality.

Article 9 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 Purchaser, the Supplier 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.

Section IV: Financial provisions

Article 10 Prices

The basic principle is that the price of the Product includes all costs arising up to and including delivery, so that the Purchaser is not confronted with any surprises after the Product has been delivered. This principle is consistent with the delivery terms set out in article 3.1 of the ARIV (see the relevant passage in the explanatory notes). If necessary, the Contract may depart from articles 3.1 and 10.1 of the ARIV.

Article 11 Invoicing and payment

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 contracts contain provisions enabling the Parties to decide on a different course of action so that the Supplier can submit printed invoices.

The right to payment arises only after the Product has been delivered (see article 3.5) and a correct invoice has been received.

Payment should be made as quickly as possible, and in any event by no later than 30 days after the date on which the invoice is 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. If the invoice does not comply with the terms of the Contract, you should contact the Supplier 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.

The Purchaser 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 Purchaser fails to pay on time, it also automatically becomes liable to pay a debt collection charge to cover the cost of out-of-court settlement. The Civil Code stipulates a minimum charge of €40. The Purchaser'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 term referred to above. The Supplier is required to demand payment of these charges by invoicing the Purchaser separately for them.

The fact that the Purchaser has paid may on no account be taken to mean that it has lost its right to invoke the guarantee (paragraph 4), as defects affecting the Product may not come to light until a later stage.

Provided it has obtained the Purchaser's consent, the Supplier is entitled to assign, i.e. transfer, its rights to payment to a third party. If it does so, this may make it difficult to set off any sums owed by the Supplier to the Purchaser, such as a penalty, against any contractual payments that need to be made to the Supplier. For this reason, a clause has been included stating that the Purchaser is entitled to deduct any penalties from sums owing to the Supplier under invoices submitted by the latter, even if the rights to such sums have been assigned to a third party (paragraph 5).

Article 12 Advance

Although the basic rule is that no payments should be made until the Supplier has delivered the Product, an exception may be made if the Supplier is able to prove that it has first to invest substantial amounts of money in order to deliver the Product. In such an event, the Supplier should be asked to issue an on-demand bank guarantee to cover any advance payment of more than €500,000. A bank guarantee is a statement issued by a credit institution at the Supplier's request and expense, in which the credit institution guarantees to pay a given maximum amount in response to a claim to this effect.

This type of guarantee is particularly useful in situations in which there is a relatively long period between the date on which the Purchaser pays the invoice amount and the date on which the Product is supplied. The Purchaser may invoke the guarantee, for example, if the Supplier is declared bankrupt or fails to supply the Product during this period, i.e. after the date on which the Purchaser has already paid it an advance. What happens is that the credit institution refunds the Purchaser for the value of the advance and then seeks to recover it from the Supplier. The credit institution will generally insist on the Purchaser's account being blocked for the value of the guarantee, thereby running little risk. This does mean, however, not only that the Supplier 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, it is worth asking for a guarantee only in relation to high-risk advances.

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

Section V: Non-performance and cancellation

Article 13 Non-performance

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 Supplier fails to comply with any of its contractual obligations, the Purchaser should give written notice of default as soon as possible. It must allow the Supplier a reasonable period in which to remedy the problem. A notice of default is not required if there is no prospect of the Supplier ever discharging its obligation or if the Supplier has failed to observe a strict deadline (see article 3.2 of the ARIV).
2. The Supplier 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 Supplier still fails to immediately discharge its obligation, the Purchaser is entitled to have the defective Product repaired or replaced by a third party at the Supplier's expense, or to cancel the Contract and reclaim the purchase price. The Purchaser is also entitled to demand compensation on account of the delay in the performance of the Contract during the period in which the Supplier is in default.
4. If the Supplier is in default, the Purchaser is entitled to demand either that the Supplier perform the Contract as agreed (and, if necessary, that the Supplier 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 supplying the Product in question. In such an event, the Purchaser is also entitled to cancel the Contract and may, if it so wishes, submit a claim for compensation of present and future losses (see article 16).

Article 14 Liability

Loss

The term 'loss' 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 loss is determined on the basis of lost revenue, which means that the situation of the Party incurring the loss 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 ARIV nonetheless places a limit on the Parties' liability. The ARIV 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. Losses are not divided into categories, e.g. direct, indirect and consequential losses, because the law does not make such a distinction either and also because the State does not believe in placing further limits on 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 Supplier and/or that such losses have to be met from public funds. For these reasons the ARIV do not seek to limit the Parties' liability any further.

In certain situations, there may be grounds for making different arrangements about the extent of the Parties' liability. The model contracts contain an optional clause (article 6.3) that may be used for this purpose. You are advised to contact the legal department if you are planning to make use of this clause.

The article contains a number of (customary) exceptions to the limitation of liability. The exception under b relates to intent or gross negligence not only on the part of the board of the Supplier's business but also on part of its staff. That is important because the work is usually performed by the staff and not the board.

The exception under c relates to loss or 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 Purchaser, the Supplier processes personal data, the Parties will regulate this in a data processing agreement. If the Supplier 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 limitation of liability set out in article 14 applies in its regard. The Contract may depart from this principle if the Purchaser believes there is reason to do so in a particular case.

Article 15 Force majeure

The term 'force majeure' is not defined by law. The law refers to 'attributable' and 'non-attributable' failures. 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 term commonly used in such a situation is 'force majeure', which the Parties to a Contract are entitled to define as they think fit. However, the aim should be to place the narrowest possible interpretation on it. The ARIV contain a list of circumstances in which the Supplier is not in any event entitled to invoke force majeure.

Article 16 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 16.1 of the ARIV 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 ARIV also lists a number of other circumstances in

which the Contract may be cancelled. One of these is if the Supplier is declared bankrupt (paragraph 3).

If necessary, the Contract may be cancelled in part, thus enabling the Purchaser 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 no longer 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 recipient of the Product is obliged to return it in the condition it was in when it was delivered. If the nature of the Contract precludes the possibility of 'undoing' it, the recipient may be obliged to pay compensation.

Section VI: Miscellaneous

Article 19 Assignment of rights and obligations under the Contract

A Supplier 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 other Party's written consent. If this consent is withheld, 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 Purchaser's written consent where only limited rights are established. This is intended to ensure that the ARIV do not prevent Suppliers from pledging their current and future receivables to a bank in exchange for a loan.

Article 20 Insurance

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

In practice, some Suppliers, 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 Supplier is properly insured should suffice.

Article 21 Bribery and conflict of interests

The government believes strongly in combating corruption and upholding high ethical standards of behaviour. For this reason, paragraph 2 lays the basis for a 'declaration of integrity', which is included as a clause in the model contracts. The forms of conduct referred to in this article are all offences under the Criminal Code and provide sufficient grounds for cancelling the Contract.