

Notes on how to use the Model Amendment Agreement (ARVODI 2018)

I Introduction

General

These notes are public. They are intended to help you to adapt the Model Amendment Agreement to your own purposes, so that you can amend or supplement an existing contract.¹ First, however, we consider the restrictions that procurement law imposes on amending or supplementing a contract resulting from an **EU** award procedure, as referred to in part 2 of the Public Procurement Act 2012.

Use

The Model Amendment Agreement can be used if a contract has been concluded that is subject to the ARVODI.

Restrictions under procurement law

According to the general principles of private law, any contract may be amended or supplemented provided the parties concerned are in agreement and observe the restrictions imposed by legislation. Following the implementation of Directive 2014/24/EU, new rules have been incorporated into the Public Procurement Act 2012. Sections 2.163a to 2.163g of the Act place fairly strict limits on the possibility of amending or supplementing a public contract (hereafter 'contract'). Under section 2.163b a contract can be amended without a new contract award procedure if:

- the amendments alone do not exceed the applicable EU procurement threshold;
- for works, the amendment is not more than 15% of the original contract value and for supplies and services, the amendment is not more than 10% of the original contract value;
- the general nature of the contract is not amended.²

Other options are if:

¹ 'Contract' may be taken to include 'agreement'.

² The general nature of the contract is amended when a contract for the supply of products becomes a contract for the provision of services (e.g. the contracting authority is so pleased with the way cleaning supplies are being provided that the supplier is contracted to undertake cleaning work too and the nature of the original contract is amended).

- the amendment is referred to in a review clause, which is included in the original tender documents. The review clause must be formulated in a clear, precise and unambiguous manner (section 2.163c);
- the amendment to a work, supply or service has become necessary, the supplementary works, services or supplies were not included in the original tender documents, changing the contractor is not possible for economic or technical reasons and would lead to significant inconvenience or significant cost increases for the contracting authority and the increase in the price does not exceed 50% of the value of the original contract (section 2.163d);
- the need to make the amendment could not be foreseen by a diligent contracting authority, the amendment does not affect the general nature of the contract and the increase in price does not exceed 50% of the value of the original contract (section 2.163e);
- the amendment concerns a new contractor/supplier/service provider that will take the place of the original contractor/supplier/service provider, on the basis of a review clause or by universal or singular succession (section 2.163f) or;
- the amendment is not substantial (section 2.163g).

When is an amendment considered substantial under the Public Procurement Act 2012?

An amendment to a public contract is in any event substantial when:

- the content of the public contract is materially different from the original contract;
- the amendment introduces conditions that would have led to the admission of other candidates or tenderers, or would have attracted other interested parties;
- the amendment changes the economic balance of the public contract in favour of the contractor in a manner that was not provided for during the contract award procedure;
- the amendment considerably extends the scope of the public contract or;
- a new contractor is replacing the original contractor but not for one of the reasons given in section 2.163f.

II Notes on completing the model agreement

The model agreement includes as many articles and other parts of the contract as possible that may need to be amended or added.

Dotted lines indicate where text has to be added. Italicised text indicates that a choice has to be made.

Provisions or words that are not applicable should be deleted.

The final provision makes clear that the amendment agreement does not replace the original contract but merely amends or supplements it. Any provisions that are not amended or supplemented remain in force.

Publication information

These notes were drawn up under the responsibility of the Corporate Legal Advisory Committee (CBA) for central government.

Further information can be obtained from the CBA Secretariat (cba@minbzk.nl).

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