

## **Notes on the ARBIT 2018 Model Contract**

### **1. Introduction**

The model contract is intended for IT Public Service Contracts awarded under the General Government Terms and Conditions for IT Contracts (ARBIT). The model contract contains the key provisions (such as the price and quantity) of the Contract which may not form part of the General Terms and Conditions (see article 231 (a) of Book 6 of the Civil Code). The model also contains a number of provisions for inclusion in every Contract and some optional provisions. A table at the end of these notes lists specific subjects for which additional arrangements may have to be made in the Contract if the situation so requires.

The primary purpose of the ARBIT is to meet the need for model contracts for average IT purchases (i.e. small and medium-sized projects and standard products). For large purchases, tailor-made contracts are generally drafted.

This model is intended for one-off contract award procedures and not for call-off contracts concluded under a framework agreement. The Model Framework Agreement should be used for framework agreements with two or more Counterparties who are repeatedly invited to tender for further contracts as and when they arise.

### **2. Signature**

The model has been drafted on the basis that the largest Contracting Authority within central government is the State of the Netherlands and the minister concerned is generally authorised to act independently in concluding transactions under private law. In other cases the Contract must be modified accordingly. If the 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 32 of the Government Accounts Act and the Juristic Acts under Private Law Decree 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. Recitals**

For a proper understanding of the arrangements contained in the Contract it is essential for it to explain the motives of the Contracting Authority. This is the purpose of the recitals in the 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). The more accurately the Contracting Authority describes in the Specifications the use that it intends to make of 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 supplied.

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 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.

## **4. Open source software**

### **4.1 Open Source Software is Standard Software**

As in the case of closed source software, ownership of open source software (hereinafter referred to as 'OSS') is not transferred and a licence for its use is instead granted by the Copyright Owner. For the purposes of the ARBIT, OSS is thus treated as Standard Software (article 1.30 of the ARBIT) and not as Custom Software (article 48.2 in conjunction with article 8.1 (a) of the ARBIT).

As OSS is thus treated as Standard Software for the purposes of the ARBIT, it is not necessary to include a separate definition of OSS. For the sake of clarity, it should be noted that OSS is Software whose Source Code is freely available to everyone, unlike that of closed source software. In the case of OSS licences the intellectual property and right to use/re-use the Software and accompanying Source Code are regulated in such a way that the licensee may always read, use, modify and distribute the Source Code.

### **4.3 OSS licence conditions**

The ARBIT are not applicable if OSS is used after being downloaded directly from the internet. However, the ARBIT may be declared applicable if a Counterparty is contracted who wishes to use OSS to perform all or part of the contractual obligations in relation to the Deliverable.

It was decided that the ARBIT should simply record the minimum number of conditions considered desirable for the licensing of Standard Software, irrespective of the licence model applied by the Counterparty. In general, these ARBIT conditions do not clash with the various OSS conditions that are in circulation since the latter tend to provide for a virtually unlimited Licence.

The licensee's right will not be reduced by any increase in the licensor's obligations due to the application of the ARBIT.

If a Counterparty is contracted to provide a Deliverable for which all or part of the contractual obligations will be performed with the help of OSS, the Contracting Authority is generally obliged to accept the OSS licence conditions explicitly and in full. This acceptance applies, in principle, only in relation to the Owner(s) of the Copyright in the OSS. There are two possible roles for the Counterparty in this connection:

- a) either the Counterparty passes on the Licence of a third-party Copyright Owner to the Contracting Authority (a type of sublicense); or
- b) the Counterparty declares that it will perform the contractual obligations in relation to the Deliverable on condition that the Contracting Authority itself first downloads and uses an OSS product specified by the Counterparty.

If the Counterparty passes on a Licence (situation (a)), the contractual situation in relation to the OSS does not differ from that in relation to closed source software and the key provisions in relation to the Licence must be included under serial number C1 in the tables of the model contract.

If the Counterparty advises that a particular OSS product be acquired and used (situation (b)), this constitutes for the purposes of the ARBIT a recommendation that must be processed under serial number B1 (consultancy services) in the tables of the model contract. However, the Agreed Use is then also determined in part by the Special Provisions on Licences. If OSS recommended by the Counterparty subsequently proves unsuitable for the Agreed Use, which, as noted above, must be determined in part by the Special Provisions on Licences, it follows that the Counterparty's recommendation to download the relevant OSS was incorrect and the Counterparty can accordingly be held liable. Ultimately, therefore, it makes no difference to the Contracting Authority's legal position whether situation (a) or situation (b) exists.

## **Notes on individual articles of the Model Contract**

### **Article 2. Subject of the 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 Contract, either separately or together. The Contract may involve the purchase of Products, the performance of a Public Service Contract or the provision of Standard Software (including OSS) 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 5.3), 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. If and in so far as the Software is not OSS, 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 whom 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.

If the Counterparty recommends to the Contracting Authority as part of the Deliverable that use be made of Standard Software of third parties (e.g. OSS) the licence that the Contracting Authority is to acquire on the basis of this recommendation should meet the requirements specified in this respect in the Special Provisions on Licences.

The tables showing the breakdown of the Deliverable are simply intended as an aid. It follows that the summary and breakdown in the tables are no more than indicative of which Special Provisions of the Terms and Conditions apply to the Contract. Which Special Provisions apply in a specific case is therefore determined not by the breakdown in this table, but by the nature of the Deliverable.

## **Article 2.2**

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

The highest-ranking document is the present one (including any amendments to it). Specifically, this means articles 1 to 9 of the Model Contract. The ARBIT come next in rank and are followed by the contract award documents and the Schedules based on them. The Specifications take precedence over the tender because the Contract will often have been preceded by an EU contract award procedure. The Specifications list first the requirements from which the tender cannot derogate and, second, wishes that have been met in the tender in a given way. This ranking thus provides extra assurance that when the contractual obligations are performed there will be no derogation from the requirements set out in the Specifications. It should also be noted that the possibility of amending a Contract concluded as the result of an EU contract award procedure is limited for reasons of procurement law (see, for example, Court of Justice, Pressetext Nachrichtenagentur, C-454/06). If a Schedule nonetheless derogates from the Specifications, article 2.2 should be amended accordingly.

The Model Contract is therefore intended primarily for one-off purchases, but may also be used for delivery-on-demand contracts. In the latter case, the call-off procedure should be described in the Delivery-on-Demand Procedure Schedule.

## **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 development 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 Contract**

### **Article 4.1**

A 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. It is therefore important for both parties to enter the date when signing the document.

### **Article 4.2**

As regards the term of a 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. 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 contractual obligation has been performed.

The optional article 4.2 is intended to record the term of the 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 Contract should be expressly mentioned.

### **Article 4.3**

Article 4.3 provides for the possibility of renewing the 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 right can be exercised need be mentioned in the text.

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

### **Article 4.4**

Where contracts are concluded for an indefinite term, it should always be possible to terminate them. In general, a reasonable period of notice should be observed. In such a case it is merely necessary to specify the period of notice in the text.

Article 30.6 of the ARBIT already provides for the termination of a Contract.

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

The moment of Delivery or Completion is important because it marks the start of the Acceptance Procedure (article 11.2 of the ARBIT).

### **Article 5.1**

Basically, 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 Contract gives the Contracting Authority the right to demand Delivery of Products as and when needed. 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 66 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 52 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 B6 of the tables can be used for Completion, Acceptance and Fees. Only if these provisions are not sufficient should the Model Contract be amplified.

Reasons for amplifying 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 agrees 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 8.5 elaborates this system on the basis that payment for Maintenance is made annually in advance.

## **Article 5.3**

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 5.3, 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 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*

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

Maintenance is generally paid in advance by the Contracting Authority. The moment when the advance may be invoiced by the Contractor should be regulated in article 8. Article 8.5 states that no prior Acceptance is required for the payment of the Maintenance 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. Serious pressure can be exerted on the Counterparty by withholding part of the Fee. The amount withheld should 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 remuneration 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**

The indexation clause is optional and refers to the price index figure that is also taken as the basis for annual rate changes in the General Government Terms and Conditions for Public Service Contracts (ARVODI). The price index figure can be consulted on the website of Statistics Netherlands ([www.cbs.nl](http://www.cbs.nl)).

The chosen price index relates to business services and is thus less well suited to the purchase of equipment and the acquisition of Licences. Nonetheless, it can still be applied to these contracts by analogy.

### **Article 7.3**

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 7.4**

If the Deliverable is not completed or delivered within the agreed period, the amount entered in article 7.4 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 set aside (article 14.3 of the ARBIT)

### **Article 7.5**

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 7.5 also provides an extra incentive to ensure that the Deliverable does not have any Defects at the time of Completion or Delivery. If a Contracting Authority rejects a Deliverable, an amount may, where this has been agreed, be deducted from the Fee for each day needed by the Counterparty to repair the identified Defects.

## **Article 8. Invoicing, indebtedness 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 fees (article 8.5);

c) upon Acceptance of parts of the Deliverable.

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

### **Article 8.2**

The information to be included in the invoice can be specified in paragraph 2.

If the parties make payments or submit invoices electronically, article 8.2 should specify the particulars to be included for this purpose or should refer to an Electronic Ordering and Invoicing Schedule

### **Article 8.4**

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 a Maintenance Fee is, in practice, often paid in advance, a separate arrangement is included in the Model Contract. Basically, this means that Maintenance is paid in advance, that no completion takes place (article 5.2) and that the Counterparty is held responsible for providing the Service levels agreed in the Service Level Agreement (SLA) (article 6.1).

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

### **Article 8.5**

If the Contracting Authority wishes to make payments to the Counterparty before Acceptance of the Deliverable, this should be expressly agreed. Under the Granting of Advance Payments Rules, 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 enclosed with the Model Contract. A copy of the signed bank guarantee should be attached to the 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.

Article 11.1 of the ARBIT provides that a Contracting Authority is not obliged to make any payment until after it has accepted the Deliverable. As Maintenance is not subject to Completion for the purposes of Acceptance (see notes on article 5.2), this paragraph provides that article 11.1 of the ARBIT does not apply to the payment and invoicing of Maintenance.

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

### **Article 9.1**

In principle, only the Terms and Conditions, the text of this document, the Specifications, the Tender and the Schedules form part of the Contract. This provision expressly excludes the application of other general terms and conditions.

## **Article 9.2**

The basic principle is that the 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 paragraph 1). 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 9.2 in the Model 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 9.2 relates only to general or special terms and conditions that form part of the Tender. It does not therefore cover cases in which the Counterparty requires the Contracting Authority to sign not only this document (the Model 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 Terms and Conditions may form part of the 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 9.2, 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 9.2 provides that the Agreed Use may not be excluded or restricted by the applicability thereof.

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 9.2 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 9.2 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 9.2 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 9.3**

Software is often provided subject to conditions of use which a user automatically accepts either by opening the package (shrink-wrap licence) or by clicking on a virtual button (click-wrap licence). In keeping with article 3 of the ARBIT, this paragraph expressly provides that a physical act of this kind is not binding on the Contracting Authority and is without prejudice to the full applicability of the Terms and Conditions.

In practice, the conditions of use referred to above are generally presented to the Contracting Authority not by the Counterparty but by a third party (often the producer). This is why the Counterparty is required to indemnify the Contracting Authority against claims by third parties for infringement of such conditions of use, in so far as they restrict the Agreed Use.

### **Article 9.4**

A Counterparty must be given the opportunity by the Contracting Authority to familiarise itself with Terms and Conditions when or before it concludes the Contract. If it is not given this opportunity the Counterparty may be able, in certain circumstances, to successfully challenge the operation of some or all of the Terms and Conditions. It is therefore important for the Terms and Conditions to be appended to the Contract as a schedule. This paragraph provides that Terms and Conditions have been appended to the Contract. This is to ensure that the parties do not sign the Contract before this has actually been done.

If the Contract is concluded electronically, it is logical for the Terms and Conditions to be made available electronically as well. This should be done in such a way that the Terms and Conditions can be saved by the Counterparty and accessed for perusal at a later date. In exceptional cases it is sufficient for the Counterparty to be informed of the location where the Terms and Conditions can be accessed electronically and for the Terms and Conditions to be sent on request (article 234, paragraph 1 of Book 6 of the Civil Code).

## **Article 10**

### **Paragraphs 1 and 2**

If this model agreement 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 and Customs Authority, as it does for staff employed on the basis of a permanent or temporary appointment.

According to the Tax and Customs Authority'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 and Customs Authority 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 the model agreement therefore provide an option to depart from the ARBIT, including in the sense that the Contractor is free to replace persons charged with performing the agreement and that the Contracting Authority cannot refuse the replacement staff. The text of the model agreement 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 agreement 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 agreement. 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 and Customs Authority to be such a relationship. The Tax and Customs Authority can issue additional tax demands and fines in such instances.

### Paragraph 3

Article 10 provides scope for the inclusion of additional provisions. The table below lists a number of subjects for which provision may need to be made. Article 10 is also suitable for the inclusion of any derogations from the Terms and Conditions. In that case the provisions should be prefaced by the following words: 'Notwithstanding the provisions of article <article> of the Terms and Conditions, <derogation>.' Clearly, derogations should be avoided where possible and any such provision needs to be assessed to ensure that it is correctly worded. A derogation may also affect other parts of the Terms and Conditions or the Contract. If there are two or more additional provisions or derogations, it is best to number them consecutively (10.3, 10.4 etc.).

Subject	Notes
Sustainable purchasing	If specific sustainability requirements are laid down in the tender documents, in particular environmental or social requirements, it may be necessary to record the arrangements separately in or under the Contract.
Intellectual property rights	Article 8 of the ARBIT contains the basic provision on whether intellectual property (IP) rights are transferred and, if so, which ones. In more complex situations express provision should be made in the Contract as to which IP rights are transferred to the Contracting Authority and which are not.
Escrow	The Terms and Conditions contain a generic provision. Specific agreements about Escrow must be recorded in the Contract.
Quality assurance	If the quality assurance provisions of article 5 of the ARBIT are insufficient in a specific case, additional provisions should be included in the Model Contract.
Project phasing	The ARBIT provide scope for projects involving consultancy services to be completed in phases. Where necessary, the Contracting Authority should adjust the tables in the model in keeping with the phases.
Service level agreement (SLA)	Generally detailed arrangements about Maintenance are included in an SLA. Article 68 of the ARBIT defines the terms to be used in the SLA: (Corrective Maintenance, Repair Time, Innovative Maintenance, Preventive Maintenance, Response Time, Service Levels, Service Hours and Fault).
Exit clause	Article 30.6 of the ARBIT contains a general provision regulating the consequences of early termination of a Public Service Contract by notice of cancellation. Where there is a different type of Deliverable or termination, or if a special dependence on the Counterparty arises as a result of the Contract, it is advisable to include a more specific arrangement in the Contract.

These instructions were drawn up under the responsibility of the interministerial Advisory Committee on Corporate Legal Affairs. Further information may be obtained from the CBA Secretariat ([cba@minbzk.nl](mailto:cba@minbzk.nl)). Published in May 2018