



Notes on the Model Framework Agreement (ARBIT 2018)

1. Introduction

The Model Framework Agreement is intended for IT Public Service Contracts awarded under the General Government Terms and Conditions for IT Contracts (ARBIT). The model contains a number of provisions that apply to all Framework Agreements and some optional provisions. At the end of these Notes is a table listing specific issues on which additional provisions may, in certain situations, have to be included in the Framework Agreement or Call-off Contract.

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 Framework Agreements that the Contracting Authority is concluding with more than one Other Party. The Framework Agreement enables the Contracting Authority to invite these Other Parties to participate in competitive selection (mini-competition under article 5 of the Framework Agreement). A Call-off Contract is then concluded with the Other Party that, during a second round, submits the best tender on the basis of the established award criteria (Schedule: Model Call-off Contract under the ARBIT Framework Agreement).

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 Framework Agreement must be modified accordingly. If the Framework Agreement 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 Other Party'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 Framework Agreement it is essential for it to explain the motives of the Contracting Authority. This is the purpose of the recitals in the Framework Agreement.

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 Other Party 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 Framework Agreement 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 OSS is Standard Software

As in the case of closed source software, ownership of open source software 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.

4.2 OSS licence conditions

The Notes on the ARBIT (under the heading 'Open source' in the 'Special Provisions on Licences' section) state that the ARBIT are not applicable if OSS is used after being downloaded directly from the internet. However, the ARBIT may be declared applicable if an Other Party 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 Other Party. 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 an Other Party 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 Other Party in this connection:

- a) either the Other Party passes on the Licence of a third-party Copyright Owner to the Contracting Authority (a type of sublicense); or
- b) the Other Party 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 Other Party.

If the Other Party 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 Other Party 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 Other Party 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 Other Party's recommendation to download the relevant OSS was incorrect and the Other Party 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

Article 2. Subject of the Framework Agreement

Article 2.3

This paragraph determines what documents form part of the Framework Agreement 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 8 of the Model Framework Agreement. The Specifications take precedence over the tender because the Framework Agreement 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 Framework Agreement concluded as the result of an EU contract award procedure is limited for reasons of procurement law (see, for example, Court of Justice, Presetext Nachrichtenagentur, C-454/06). If a Schedule nonetheless derogates from the Specifications, article 2.3 should be amended accordingly.

Article 2.4

In certain circumstances, two Contracts (for the meaning of 'Contract' see article 2.2 of the Call-off Contract) 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 Other Party, 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 Other Party's reporting obligation. This concerns not only the subject matter of the report but also the frequency of the reporting. The basis of the Other Party'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 Framework Agreement

Article 4.1

The Framework Agreement 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 Framework Agreement, a distinction can be made between agreements for an indefinite term and fixed-term agreements. A Framework Agreement for an indefinite term is

relatively rare in the case of IT contract award procedures, partly because of the time limits laid down in procurement law. Fixed-term Framework Agreements can in turn be divided into agreements that end on the expiry of a given period and agreements that end when the contractual obligation has been performed.

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

Article 4.3

Article 4.3 provides for the possibility of renewing the Framework Agreement 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 5. Mini-competition

Article 5 sets out a strictly organised mini-competition on the basis of which the Contracting Authority can invite the Other Party to participate in competitive selection.

The Other Party is obliged to submit a tender, unless the Contracting Authority grants a request for exemption (article 5.5). The Contracting Authority, in the model text at least, has no obligation to purchase under the Framework Agreement. If there is such an obligation, the Contracting Authority should include it in article 5.

Article 5.1

Article 5.1 enables the Contracting Authority to invite the Other Parties to participate in competitive selection for the duration of the Framework Agreement. The mini-competition is preceded by a further call for competition.

Article 5.2

Paragraph 2 can be used to specify the period in which a further tender must be submitted. The term set out in article 5.2 is a Vital Deadline, as referred to in article 1.8 of the ARBIT. This means that it is not necessary to provide notice of default in order to establish that the Other Party is in default (article 26.1 of the ARBIT).

Article 5.3

If the further tender is not received within the period referred to or it does not meet the requirements set for this purpose, the Other Party will be deemed not to have submitted the further tender. This prevents the Other Party from evading its obligation to submit a tender.

Article 5.4

Paragraph 4 enables the Contracting Authority to impose a penalty on the Other Party for each occasion that the Other Party fails to submit a further tender. This penalty must be sufficiently large to act as an incentive for Other Party to fulfil its obligation to submit a tender. The penalty is without prejudice to any right to compensation, to cancellation or to claim performance of the obligation (article 14.3 of the ARBIT).

Article 5.5

The obligation to tender in this model is not absolute. The Other Party can make a reasoned request to the Contracting Authority for exemption from submitting a further tender.

Article 5.6

Most Framework Agreements are subject to EU public procurement rules and so paragraph 6 expresses the requirement under procurement law that the criteria against which further tenders are evaluated are recorded in the Specifications.

Two options are given with regard to rejecting further tenders. Any rejection by a public authority can be expected, at the very least, to explain the rejection. The alternative – stating the relevant reasons – reflects the higher requirements for explanations that are set out in the public procurement rules.

Article 5.7

The public procurement rules do not require a standstill period to be taken into account before the awarding of a contract under the Framework Agreement. However, such a period is advisable for higher-value contracts, particularly if not all parties involved in the Framework Agreement are invited to participate in competitive selection. The term 'contract' is used here within the meaning of procurement law and not in the sense of Public Service Contract.

Article 5.9

If none of the Other Parties submits a further tender in response to a request to this effect, the Contracting Authority has no option but to award the contract to a third party. Under article 5.9, in such a case, the Other Parties cannot contest the award of the contract to a third party.

It probably goes without saying that an assessment must be made on a case-by-case basis as to whether the contract should (once again) be subject to an award procedure.

Article 6. Prices and rates

Although the Fee is normally only agreed in the Call-off Contract, an indicative framework is often included in the Framework Agreement. A Fee article is therefore included in both the Framework Agreement and the Call-off Contract.

Article 6.1

Fee agreements for the Framework Agreement can be recorded in the Financial Agreements File Schedule.

Article 6.2

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).

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. Invoicing and payment

Article 7.1

The information to be included in the invoice can be specified in article 7.1.

If the parties make payments or submit invoices electronically, article 7.1 should specify the particulars to be included for this purpose or should refer to an Electronic Ordering and Invoicing Schedule.

Article 8. General and special terms and conditions

Article 8.1

In principle, only the Terms and Conditions, the text of this document, Financial Agreements File, the Specifications, the Tender and the Schedules form part of the Framework Agreement. This provision expressly excludes the application of other general and special terms and conditions. In practice, however, it is not always possible to exclude completely the application of the terms and conditions of the Other Party or third parties. In such circumstances the Contracting Authority may include the optional article 9.1 in the Model Call-off Contract. Under this provision the licence

conditions of the Other Party or of third parties involved in providing the Deliverable may be applied, subject to strict conditions.

Article 8.2

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 Other Party but by a third party (often the producer). This is why the Other Party 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 8.4

An Other Party must be given the opportunity by the Contracting Authority to familiarise itself with Terms and Conditions when or before it concludes the Framework Agreement. If it is not given this opportunity, the Other Party 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 Framework Agreement as a Schedule.

This paragraph provides that Terms and Conditions have been appended to the Framework Agreement. This is to ensure that the parties do not sign the Framework Agreement before this has actually been done.

If the Framework Agreement 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 Other Party and accessed for perusal at a later date. In exceptional cases it is sufficient for the Other Party 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 9. Other provisions

Articles 9.1 and 9.2

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 9.1 and 9.2 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 the agreement to be concluded does not give rise to a contractual relationship that qualifies as

employment, the optional articles 9.1 and 9.2 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.

Article 9.3

Article 9.3 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 9.3 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 Framework Agreement.

If there are two or more additional provisions or derogations, it is best to number them consecutively (9.3, 9.4, 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 Framework Agreement.
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 Framework Agreement 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 Framework Agreement or Call-off 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 Other Party arises as a result of the Framework Agreement, it is advisable to include a more specific arrangement in the Framework Agreement.