

PUBLIC PROCUREMENT OF DBFM(O)-CONTRACTS UNDER EUROPEAN AND DUTCH-LAW

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INTRODUCTION

DBFM(O) contracts have become increasingly more popular in The Netherlands over the last decade. During this period, a number of DBFM(O) contracts have been entered into in connection with major projects.¹ Furthermore, the Dutch Government has introduced a policy to the effect that, with respect to each major building project, initiated by the central Government, a Public Private Comparator ("PPC") should be made. This PPC is an instrument that aims to assess whether or not DBFM(O) contracting is suitable for a particular project.² The Ministry of Transport and the Ministry of Housing have also developed standard documentation for the procurement of DBFM(O) Contracts. Recently, the Dutch Government has announced that a number of new DBFM(O) projects will shortly be brought to the market.³

This paper provides an introduction into the tendering of DBFM(O) contracts in The Netherlands by means of competitive dialogue. This paper also provides a brief comment on standardized procurement documentation for DBFM(O) Contracts in The Netherlands.

CHARACTERISTICS OF A DBFM(O)-CONTRACT

Generally, DBFM(O) contracts are concluded between Government bodies and market parties and are therefore considered to be a form of Public Private Partnership ("PPP"). DBFM(O) is the abbreviation of Design, Build, Finance, Maintenance and Operate.

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Contrary to traditional contracts, the DBFM(O) contractor is responsible for the design, construction, maintenance, operation and financing of a project. Because of the fact that the contractor is responsible for design, construction, operation and maintenance, the contractor has to take full responsibility for e.g. lifecycle costs. The financing, which should initially be obtained by the contractor, generally includes the development costs, the total contract price and the costs of operation and maintenance during term. The contractor has to earn back these investments by exploiting a project over a relatively long period of time. In many instances, the contractor receives payment in installments from the contracting authority as from completion up to expiry of the contract. Such payments are, in many cases, related to the level of "availability" of the project – e.g. the availability of lanes in a road project or cubic meters of treated waste-water in a water project.

Compared to traditional contracts, the risk allocation in DBFM(O) contracts is relatively favorable towards the contracting authority. In essence, the contracting authority only pays for the project (i.e. the service) if and to the extent that the project actually works. Another advantage to public sector contracting, over that of traditional contracting, is that a DBFM(O) Contract allows for more certainty with respect to the overall costs of a public service service over a relatively long period of time. The term of a DBFM(O) Contract would generally be in a time-frame of 30 years. The payment obligations of the contracting authority under such a contract should cover all costs relating to the project; hence the Contracting Authority should be in a position to make a reliable estimate of such costs when entering into the Contract.

PUBLIC PROCUREMENT OF DBFM(O) CONTRACT

When tendering a DBFM(O) contract, the contracting authorities shall, in most cases, make use of the competitive dialogue procedure. As a rule, DBFM(O) contracts are complex and should be focused on the details of a particular project. The specifications should be output-related and negotiations on riskallocation and contractual conditions are inevitable. In a traditional project, the contracting authority decides precisely which particular facilities it requires in order to deliver a particular service and these facilities are described in an input specification which provides the basis for a construction contract. In a DBFM(O) contract, the contracting authority generally defines the

service required and leaves the design of the facilities necessary to deliver this service to the private-sector contractor. This description of the operational requirements comprises an output specification.

Course of the competitive dialogue (in brief)

Prequalification under the competitive dialogue is the same as under the restricted procedure. Following a selection of at least three candidates, the contracting authority shall commence the 'dialogue'. The aim of the dialogue is to identify and define the solution that would best satisfy the output specification.

During the dialogue, all aspects of the contract can be discussed. However, equal treatment of competitors and confidentiality must be assured. After concluding the dialogue, the competitors have to submit their final tenders based on the solution(s) presented and specified during this dialogue. These tenders may be clarified, specified and fine-tuned at the request of the contracting authority.

Finally the contracting authority shall award the contract on the sole basis of the award criterion "economically most advantageous tender". After awarding, the contracting authority may ask the winning candidate to clarify aspects of the tender or to confirm the commitments as set out therein, provided that this does not – in short - adversely affect competition.

Application of the Competitive Dialogue Is Allowed?

Pursuant to Article 29 paragraph 1 of the General Directive,⁴ the competitive dialogue should only be used for the procurement of particularly complex contracts. The European Commission has issued an explanatory note in which it explains the concept of particularly complex contracts and the circumstances in which the competitive dialogue may be applied.⁵

According to the Commission, technical complexity exists where the contracting authority is unable to define the means to satisfy its needs, or the means to achieve its objectives. The Commission states that a financial or legal complexity "...may arise in particular ... with the implementation of ... projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance.

Furthermore, the explanatory note provides: "...Other examples of projects that most often justify recourse to the competitive dialogue could be projects in which the contracting authorities wish to have at their disposal a facility (school, hospital, prison, etc.) to be financed, built and operated by an economic operator (i.e. the latter would take care of maintenance works, maintenance services, guard services, catering services, etc.), often for a fairly long period."

In the light of this explanation, procurement of DBFM(O) contracts through the competitive dialogue should in most cases be deemed to be appropriate.

BEST PRACTICES / ISSUES

Standard Documentation and Risk Allocation

Both the Ministry of Transport and the Ministry of Housing have developed standard documentation relating to DBFM(O) Contracts. This documentation includes standard contracts and standard documentation.

Risk allocation is, in many instances, one of the most important issues when tendering a DBFM(O) Contract. Negotiations during the competitive dialogue may result in an allocation of risk that differs per bidder. However, in spite of these differences, the bids should be assessed against the same evaluation criteria, in order to ensure equal treatment and transparency. In this context, the tender documentation of the Ministry of Transport gives provision for an interesting concept: at the beginning of the tender, the Ministry provides all bidders with a list of the major risks related to the project. In the course of the tender, these risks will be priced by both the bidders and the contracting authority. On the basis of this pricing exercise, the risks are allocated to either the public or the private sector. Although the system is not ideal – i.a. because of the fact that the contracting authority one-sidedly identifies and defines the risks concerned – the system does provide for more objectivity when compared with more "traditional" systems.

Risk Allocation and Proportionality

An interesting issue in connection with the tendering of DBFM(O) Contracts is the issue of "unquantifiable risks". In case of DBFM(O) Contracts, contractors are often required to take over public sector infrastructure which should be refurbished and/or extended –take the

example of a hospital that should be refurbished and to which a new wing should be added. In many cases, the authority responsible for the project cannot provide the bidders with complete information on the existing structures (e.g. as-built drawings). In The Netherlands, it has been argued that the principle of "proportionality" does not only apply to formal criteria – such as prequalification criteria – but also has a material aspect to it [memorie van toelichting aanbestedingswet]. If this approach is correct, one could argue that the transfer, by the public sector to the private sector, of "unquantifiable risk" is disproportionate and therefore violates procurement law.

The Role of Financiers during the Tender

Due to the nature of the DBFM(O) contracts, financiers play an important role during negotiations of these contracts. In the past, it was not uncommon that contractors first made a bid for a DBFM(O) contract and then, subsequently, after winning the contract, involved their financiers. This could easily lead to the reopening of the negotiations on the DBFM(O) contract following contract award. Already at a very early stage in the development of the DBFM(O) contract in The Netherlands, contracting authorities identified renegotiating contracts after contract award as being undesirable. At the time, the reason for this was mainly commercial: contracting authorities did not want to renegotiate contracts in the absence of competition. Consequently, the tendering of the DBFM(O) contracts in the Netherlands developed as such: financiers were required to commit themselves to the financing of a project/bid before bid submission. In light of the strict provisions in the procurement directives prohibiting negotiations following contract award under the competitive dialogue, the practice of 'committed bids' is now obligatory.

Change Orders

In light of the relatively long term of DBFM(O) Contracts a clause that deals with changes during term is inevitable. It may very well happen that, during term, the authority would want the Contractor to realize extra lanes in a road's project, to provide for extra parking space near a government building, etcetera. Due to the nature of the DBFM(O) Contract – whereby the contractor takes a long-term risk on the cost and the quality of the service to be provided – it will in most cases not be feasible to put these change orders out to contract. In most cases, the contractor who originally had won the DBFM(O) Contract – and its financiers – would not accept a third party interfering with the works and

services as agreed under the original contract. In general, the EU and national regulations on public procurement do not stand in the way of clauses in DBFM(O) Contracts that govern such changes as referred to above. In general, changes to a contract, following the award thereof, are deemed to be allowed, provided that the tender documentation had expressly provided for that possibility. However, if such changes involve a material change to the scope of the contract as it had originally been tendered, EU procurement rules could stand in the way of the effectuation of such change.⁶

NOTES

1. Including the HSL-infraprovider, the Harnash Polder/Waste Water Treatment Project, the A59 High Way Project, the Coentunnel Project and a number of housing projects.
2. It concerns projects of which the value exceeds a certain threshold. The threshold for the Directorate-General for Public Works and Water Management (Dutch: "Rijkswaterstaat") a department of the Ministry of Transport, Public Works and Water Management (Dutch: "ministerie van Verkeer en Waterstaat") is set at € 112,500,000.-. The threshold for the Government Buildings Agency (Dutch: "Rijksgebouwendienst") a department of the Ministry of Housing, Spatial Planning and the Environment (Dutch: Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer) is set at € 25,000,000.-.
3. It concerns the A15 road project, the A12 road project and a series of detention centre projects.
4. Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
5. See CC/2005/04_rev 1 of 5.10.2005.
6. Judgment of the Court of 19 June 2008 in Case C-454/06 P: *pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*.