

DUTCH CONSTRUCTION CONTRACTS: VIEWS FROM ABROAD

1. INTRODUCTION

The theme for the annual meeting of the ESCL in 2010 is Dutch construction contract law, to be more specific: two sets of model contracts conditions, currently in use in the Netherlands for two specific project delivery methods: DBM (design build maintain) and DBFM (design build finance and maintain). These contract conditions are: The Uniform Administrative Conditions for Integrated Contracts 2005 for DBM projects (UAV-GC 2005) and the Directorate-General for Public Works and Water Management (RWS) DBFM Agreement Standard 2.0, of 30 July 2009 (DBFM 2.0). These two sets of contract conditions represent the current state of general opinion in the Netherlands as to how such contract models should be drafted.

But is this general opinion a good one?

In order to answer that question we call upon you, members of the ESCL, to take a good look at these standards. Given most current opinions on construction law, recent developments in the theory of contract law in general and construction contract law in particular and bearing in mind the choices which have been made in contracts in use in your jurisdictions: what are your views with respect to these models? What can you tell the Dutch construction law community and the authors of these two sets of general conditions.

This, obviously, is too broad a question to answer for the complete sets and it is certainly not the idea of the conference organizers that you need to go into the 'nitty-gritty' of the individual clauses. To guide you through this 'assignment', ten general themes have been chosen. These are universal, cross-national, themes which play a role in almost every jurisdiction. You are kindly requested to reflect – for each theme – on the aforesaid UAV-GC 2005 and DBFM 2.0 from the perspective of your jurisdiction. To facilitate this exercise, each theme is accompanied by a case study. Although reference is made to relevant

clauses in each theme, please do feel free to take into consideration any other clauses you think might be relevant to the respective theme.

The eleventh theme is an actual allocation of risks used in the project on Highway A90. The Directorate-General for Public Works and Water Management (RWS) is very interested in learning what you think of this allocation.

Provided all members of the ESCL participate, all your reflections will be gathered, edited and published in a book to be presented at the congress or in a special issue of our magazine. A number of you will also be asked to speak during the conference. Information on that will follow later.

2. THEMES AND QUESTIONS

You are kindly requested to shape your reflections while responding to the following questions:

- 1) In your view, are the mutual interests of the parties to the contract sufficiently balanced, given the way the theme has been dealt with in the particular clause(s)?
- 2) Comparing the clauses with similar broadly used contract conditions in your jurisdiction: what suggestions do you have for the Dutch conditions and perhaps also: what – if anything at all - did you learn from the way this theme is being dealt with in the Dutch conditions?

When answering these questions, please feel free to share with us how in your jurisdiction this theme is being dealt with for the project delivery methods discussed.

Instruction: the idea of this conference is to learn on a practical level (what is your opinion as regards these general conditions), but also to learn on a more abstract level. Therefore you are expressly invited to elaborate on the abstract themes. This way a 'state of the art' on these themes will be formulated which is of great interest for future developments.

THEME 1: PRECONTRACTUAL DUTIES TO NOTIFY AND TO INVESTIGATE

INTRODUCTION

Parties entering into a contract are (under Dutch law) under a “duty” to protect themselves from entering into a contract without a sufficient level of information as to what the contract is about. They are also under a “duty” to notify the other party in order to protect that party from entering into a contract while not being informed sufficiently (either because they lack knowledge of certain information or because they did not have any information at all). The word "duty" is put in between quotation marks, because such duty will only become relevant in law once the parties have entered into a contract. One of the parties might subsequently argue that the other party is in breach of his duty to inform. Contrary, the other party might argue that his counterpart should have carried out (more thorough) investigations into relevant facts and circumstances beforehand. In this way, it becomes apparent that there is a confrontation of the duty to notify the other person and the duty to ensure that one has duly performed an investigation of all relevant fact an circumstances. Obviously, cases like this are very much dependent on the facts and circumstances of the particular case, but it would nevertheless be of interest to learn how they are generally being approached and dealt with in your jurisdiction.

As sated before, this first theme relates to a precontractual matter. In providing your response, please take into consideration that the UAV-GC 2005 and DBFM 2.0 are used by professional clients. These clients can either be public authorities or private entities. When used by public authorities, the contract will usually have been put out to tender by means of a tendering procedure governed by (European) public procurement law.

ILLUSTRATION

Contractor A is invited to submit a bid for the construction of a work on the basis of a preliminary design made by an engineer employed by the client. After the work has been awarded to him the (design & construct-)contractor claims extra money and time because the water to be pumped away from the site cannot be removed by the pumping installation prescribed in the preliminary design; instead it must be removed by a more expensive and more time consuming facility. The client refuses to recognise the claim: the contractor could and should have seen this in advance and should have given notice to the client of this risk. The contractor says the client should have investigated the sub soil conditions more thoroughly in order to provide the contractor with more accurate data.

RELEVANT CLAUSES

UAV-GC 2005: Clause 44.1

DBFM 2.0: See clause 2.1 (c): all such circumstances are for the risk of the Contractor, except to the extent that such rights are specifically stipulated in this Agreement or result from public law.

See footnotes 2 and 3 on page 54: if during the tender process such risks will have identified as Compensation or Delay Events, than this will be the case.

THEME 2: LIABILITY FOR DEFECTS NOT NOTICED BY THE CLIENT AT THE TIME OF TAKE-OVER

INTRODUCTION

The general rule in Dutch construction contract law is that after take-over the contractor is no longer liable for any defects in the works that become apparent after take-over. There are however important exceptions to this (default) rule codified in Dutch Civil Code and in model contract conditions. The exception boils down to the following: if the client did notice or could reasonably have noticed any defects at the time of take-over but failed to invoke the contractor's liability thereupon, the defects are considered to be apparent and the contractor will not be liable. This way a balance is reached between the interests of the contractor (who needs to know as much as possible what his future position will be) and the client (who is able to check the work done at the time of take-over as extensively as he chooses to).

Considering the system in case of a DBFM-contract there is moment of Take Over directly after the realisation of the works. The general framework of the DBFM-contract is explained herinafter. Please take into account this system in relation to the above mentioned balance between the interests of the contractor and the client.

ILLUSTRATION

Contractor A has designed, constructed and completed a road. During take-over the client has had the road checked by a specialised consulting engineer. The road seems to be without defects. After two weeks of use the surface shows signs of wear and tear and users of the road need to slow down to prevent accidents. The client holds A liable for such defects. A's defence: if you would have had a better look at the time of take over you could have noticed that this particular asphalt has been used (which he was free to chose) and you know this asphalt has this characteristic and it does not affect the quality of the road.

In case of the DBFM-contract the situation is slightly different. There are in fact the principal milestone on which the performance-level of the contractor is measured:

1. Availability date;
2. Completion date;
3. Expiry date.

To ensure that the contractor has met the prerequisites for the said milestones five certificates are used in the DBFM-contract:

- (i) The Commencement Certificate:
The contractor meets the requirements necessary to start the maintenance of the Infrastructure;
- (ii) The Availability Certificate:
The contractor meets the Availability Requirements. These Availability Requirements ensure that the Infrastructure can be used in a safe way.
- (iii) The Completion Certificate:
The Completion Certificate states that the Infrastructure meets the Completion Requirements, i.e. the Infrastructure is entirely finished;
- (iv) The Part Completion Certificate:
This is a declaration that states a (coherent part of) the Third Party Infrastructure meets the requirements set upon that (part of) the Infrastructure;
- (v) The Hand Back Certificate:
This Certificate states that the Infrastructure complies with the .

The requirements related to these different Certificates are enclosed in a Certificate Plan ('schedule 9, part 4' of the DBFM-contract). The Payment System of the DBFM-contract relies heavily on these certificates. Relevant clauses

UAV-GC 2005: Clause 4-1, 4-9, 28.

DBFM 2.0: Clause 2.1(a)(iv), 4.4(b) and 4.4(c), 4.1, 4.5, 4.6, 5.5 and 7

THEME 3: PAYMENT SCHEDULES

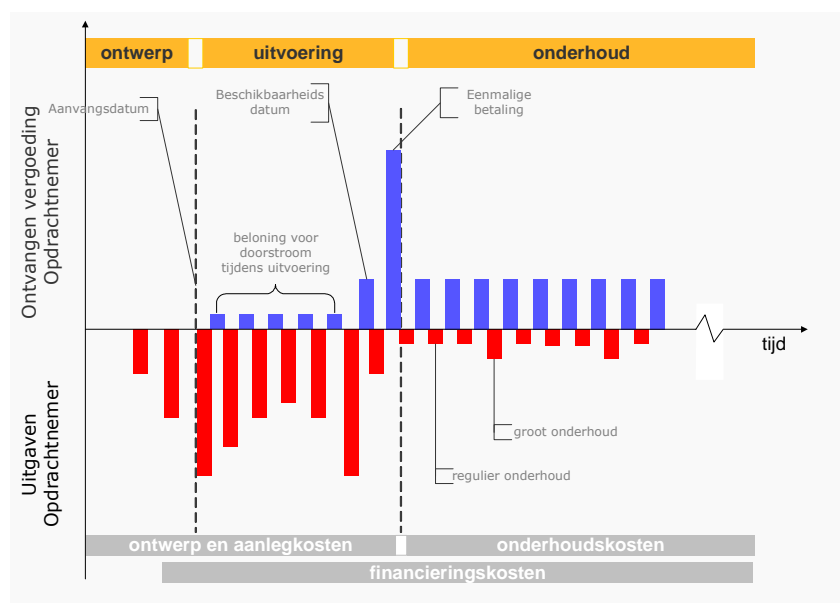
INTRODUCTION

Under the UAV-GC 2005 parties agree in advance on the payments to which the contractor is entitled. In addition to this a scheme of bonus payments and penalties is available as well. Under the DBFM standard the payment schedule is different. The schedule, put down in Schedule 2, grants the contractor a payment a) on the day of commencement based on the fact that the contractor is obliged to upkeep the infrastructure; b) on receiving the availability certificate; c) on receiving the completion certificate. This system put in graphics:

Yellow (top): Ontwerp = design; uitvoering = execution; onderhoud = maintain;

Grey (bottom): ontwerp- en aanlegkosten= design and realisation costs; onderhoudskosten=costs of maintaining; financieringskosten=total costs of financing

Vertical text: bottom: uitgaven opdrachtnemer=costs contractor; uitgaven opdrachtgever=costs client



ILLUSTRATION

Now, these difference in payment clearly demonstrate the key difference between a design build (maintenance) and a DBFM-regime. In the DBFM agreement at the time of completion, the contractor has prefinanced all works carried out (minus the one off payments) and the remaining lifetime of the contract is required to pay debt service and to carry out the operation and maintenance services. Generally, the service to be supplied under a DBFM-contract is "availability" according to the pre-agreed conditions. The penalty for not having the asset available as to these standards is that the contractor will have difficulties in paying back the banks. The banks therefore play a key role in making sure that the contractor performs up to standard. In a DB(M) contract, such as the UAV-GC 2005, the "penalty" of non-performance is not as painful as under the DBFM-regime. The contractor will almost have received payment for carrying out the works and is now in the process of receiving an operation and maintenance fee. The incentive is only a fraction of the incentive under the DBFM-regime: non performance will lead to (partial) non-payment (by applying a penalty) covering the operation and maintenance fee over the respective period. This will have no further repercussions whereas under the DBFM-regime the repercussions of (partial) non payment will be felt for a long time thereafter.

Assuming that this explanation will be clear enough, no further illustration is provided.

RELEVANT CLAUSES

UAV-GC 2005: Article 2.4, 14 (Model Agreement); clause 33, 34 (general conditions)

DBFM 2.0: Schedule 2, clauses 1.4, 2 and 3

THEME 4: EARLY TERMINATION BY THE CLIENT IN THE EVENT OF CONTRACTOR'S NON-PERFORMANCE

INTRODUCTION

The (default) rule under Dutch Civil Code is that the client is always entitled to *cancel* the (construction) contract for reasons other than the contractor being in breach. Another (default) rule is that the client is entitled to *terminate* the contract in the event that the contractor is in breach. This theme only involves the latter situation. The consequences of termination vary in the general conditions depending on, among other things, the reason of the termination.

Mind you, the wording and concepts used both in DBFM 2.0 and UAV-GC 2005 may cause some difficulties! The following remarks are meant to clarify this.

DBFM 2.0 uses the word 'termination' to deal with the aforesaid two situations. The regime under DBFM 2.0-contract, the termination regime is laid down in clause 10, where six different causes giving right to 'terminate' the contract are being described, including 'termination' for convenience. That is, however, a situation of cancellation in the sense that no breach of the contractor is required. As said, situations of cancellation are not being dealt with in this theme. The consequences of early termination under DBFM 2.0 are provided in Schedule 4. Note that the client may only terminate the contract early after first applying the "Direct Agreement" (the agreement between the client, the contractor and the security agent on behalf of the lenders).

UAV-GC 2005 uses the word 'termination' when dealing with situations referred to above as 'cancellation' (see particularly cause 16.8), whereas the word 'dissolution' is used when dealing with situations referred to above as 'termination' (see for instance clause 16.5, 16.7, 16.9 and 16.10). Clause 43 – the main provision dealing with the client's remedies in the event of breach of contract by the contractor – does not specify or restrict the client's civil code remedy to 'resolve' the contract. Contractual specifications of the

legal remedy are to be found, however, in clause 16.5, 16.7 and 16.9, whereas contractual restrictions are to be found in clause 10. The latter clause is of particular relevance in the framework of theme five below.

ILLUSTRATION

A contractor is obliged to mow the grass between two roads in order for the grass not to block the view between both roads. The client notices more than once that the contractor fails to perform his duties under the contract and has given him notice in writing and a reasonable time to cure the situation. When the contractor fails to do so, the client wants to terminate the contract. The contractor's defence: the client has no right to intervene with his work other than the agreed upon moments of control.

RELEVANT CLAUSES

UAV-GC 2005: Clause 10, 16, 43

DBFM: Clause 10.2, 10.7, Schedule 4, Section 1 (it will be apparent that in this case early termination is not an option at all, given the array of other remedies the client will have, such as the performance regime in the payment mechanism).

THEME 5: PUBLIC LAW RISKS (PERMITS, CHANGE IN LEGISLATION, ETC.)

INTRODUCTION

Under traditional construction contracts the client takes care of the permits required for the permanent works and the contractor for the permits required for the temporary construction works. Under the UAV-GC 2005 and the DBFM 2.0 models this regime is different because of the more elaborate (design) tasks imposed upon the contractor. Under the UAV-GC 2005 the main principle is that the client takes care of the permits mentioned specifically in an annex, whereas all other permits (not mentioned in the said annex) will have to be taken care of by the contractor. The Notes to the model advise the client to impose upon the contractor (via the said annex) the task (and therefore the responsibility) to acquire all permits required for the permanent works, to the extent that the contractor is capable of doing so. Clause 10 subsequently both specifies and limits the duty of the contractor in various ways.

Under the DBFM 2.0 contract the main principle is that the contractor takes care of all permits with the exception of permits pertaining to the Flora and Fauna Act and the Nature Conservation Act, which will be obtained by the client in its own name. However, although this is not reflected in the DBFM 2.0 contract,

the client will take the delay risks of certain construction permits not being issued on time: these will become Delay Events. In case of a prolonged delay, this may even lead to early termination under clause 10.5 of the DBFM Contract.

INTERMEZZO: Listed Risks. Whether or not such risks will become delay (or even compensation) events is something which during the tender will be decided in the "Listed Risks" procedure, part of the standard tender guidelines for DBFM contracts. The concept followed in the DBFM 2.0 contract is such that, in principle, all risks of carrying out the scope are for the DBFM contractor, unless the contract specifically identifies risks which are either a defined force majeure event, compensation event or delay event, or unless the contract makes the client liable for certain obligations. An example of such a liability is the obligation to keep the contractor free and harmless for damages or claims outside certain insured loss limits. For other categories of risks, it can not be certain at the time of drafting the tender documentation that there is value for money in allocating certain risks to the contractor. In some cases, the authority will be able to price the consequences of taking on the responsibilities or consequences of such risks at a lower level. Therefore, at a given time before the tenders are submitted, the tenderers are requested to complete a risk matrix, in which certain categories of risk have been listed as 'listed risks'. For each of these risks, the tenderers are requested to price these, either as a delay event, or as a compensation event, unless the authority has limited the choice to only one of these categories. The client will go through the same, process for each tenderer. The client then compares the pricing of each risk in each category, tenderer by tenderer. For each risk category, the client then compares the respective pricings. Subsequently, the 'risks' will be allocated to that party which is capable of pricing that risk at the lowest possible level. If the risk falls to the client, it will become either a Delay or a Compensation Event. Should it fall to the Tenderer, it will not be listed anymore, since dealing with it is as from then deemed to be included in his scope. (Note: the aforesaid 'listed risks' procedure can also be applied in a tendering procedure for DBM-projects under the UAV-GC 2005 as set out in the Guideline "Leidraad Aanbesteden van Geïntegreerde Contracten".)

Since in the DBFM 2.0 Contract the Compensation Events will automatically become Delay Events, if these result in a Critical Delay (a defined term in that model), in the case where the client has priced one event lower as both a Compensation Event and a Delay Event, the risk will become a Compensation Event

There is an interesting element of competition inherent in this: where certain risks remain with the client, the evaluated tender sum of that tenderer will be increased with the total sum of all such risks. Why it is that in the case of one risk category the client is capable of pricing such risks at a lower level where in the event of another category it is the tenderer will depend on various reasons. All of these reasons have their roots in the well known Abrahamson Principles.

For instance, the Tenderer may not be able to insure damage to existing works over a certain loss limit, whereas the client is capable of doing so, or decides it can just take that risk at a very low price (self insurance). In the case of the obstacles, the tenderer may have calculated that it may be able to deal with those by using some extra equipment, which it owns, whereas the extra time to him seems manageable. The result of all this is that the tenderer no doubt will include the net result of its risk analysis in the tender price, after having submitted the remaining risk to a 'Monte Carlo' analysis in which all risks will be analysed using a probabilistic analysis method. The result of that method is that the pricing of the risks remaining with the contractor will be much lower than in the situation such risks would have remained with the client.

The DBFM 2.0 contract includes a risk sharing mechanism for risks remaining with the client (Compensation Events, Delay Events, Force Majeure Events). The contractor, in the end, will keep some responsibility for expenditure should such risks materialise.

RELEVANT CLAUSES

UAV-GC 2005: Article 6 (Model Agreement); clause 9, 10 (General Conditions)

DBFM 2.0: Depending on the tender process, a delay in the issuance of a permit may become a Compensation Event (clause 9.3) or a Delay Event (clause 9.2). In the latter case the Contract may even be terminated should the Delay Event become prolonged over a certain long stop date (Clause 10.5 and Schedule 4 Clause 3).

THEME 6: SUBSOIL CONDITIONS

INTRODUCTION

It is well known fact that subsoil conditions contain a large risk for construction works. Only upon actually digging in the ground will there be certainty on these conditions. The UAV-GC 2005 imposes the risk on the contractor as the main principle, but his liability ceases if he proves he has taken all precautions that

may be expected from a prudent contractor. The DBFM 2.0 standard contains no similar clause; therefore it is assumed that risks will be for the contractor unless they can be said to be a compensation event. Whether or not and to what extent this will be the case will depend on the tender process and the outcome of the listed risks procedure, if applied (see theme 5 above). As said, that procedure can also be applied in the framework of the UAV-GC 2005 in order to adapt the aforementioned main principle and its exception.

ILLUSTRATION

During the works on a tunnel remnants are discovered of a Roman military stronghold. This stronghold is situated more than a 100 kilometres north of where archaeologists had determined in advance of the works that remnants could be expected. The contractor claims extra time and money. The client refuses: everybody knows that the studies of archaeologists are never 100% secure, so the contractor could have taken this risk into consideration in advance.

RELEVANT CLAUSES

UAV-GC 2005: Clause 13, 44

DBFM: See Theme 5

THEME 7: EXTENT OF THE LIABILITY, LIABILITY TO THIRD PARTIES

INTRODUCTION

The extent of the defects liability (i.e. the damages to be paid by the contractor) under the Dutch Civil Code is unlimited, subject to general principles of causation and mitigation. General conditions deviate in general from this general rule. In the UAV-GC 2005 the extent of the liability is limited to 10% of the price stated in the Agreement (i.e. the price to be paid for the design and construction works. Breach of a duty related to the maintenance works is excluded from the limitation). The limitation is nuanced (to the detriment of the contractor) in the event of defects in small and medium projects (see clause 28.3). If the contractor is liable to third parties this liability will be governed by tort law provisions of the Civil Code. The UAV-GC 2005 do not have a rule shifting this risk to the client (nor vice versa).

The DBFM standard in clause 12.3 contains rules on the obligation of the contractor to indemnify the client up to the limits to be specified in clause 12.3(c), which is a limit which under clause 12.2(a)(iv)

provides double protection to the contractor. The limits, set in clause 12.3, will be used by the contractor to take out the necessary (non-obligatory) insurances. Non-obligatory since the lenders will require the Contractor to take out the necessary insurance to comply with the provisions of the DBFM Contract.

ILLUSTRATION

In the city of Delft a railway tunnel is being constructed. During the construction works the contractor damages an electricity cable after which half of the city is without electricity for 4 hours. The client is being sued by inhabitants of Delft and feels forced to indemnify the inhabitants. Subsequently the client holds the contractor liable. The contractor refuses to pay damages: the amount being claimed exceeds the 10% limitation agreed upon in the contract. The client refused to allow the Contractor to check the estimated costs for the permanent protection, rerouting or removal of the cable or pipeline and therefore the client is liable for this damage.

RELEVANT CLAUSES

UAV-GC 2005: Clause 28

DBFM 2.0: Clauses 12.1, 12.2 and 12.3 in relation to clause 2.1(b) and 2.1(c).

THEME 8: DEFECTS LIABILITY IN RELATIONSHIP TO THE CLIENT'S REQUIREMENTS ("FIT FOR PURPOSE")

INTRODUCTION

There is a close relationship between the responsibility for the quality of the permanent works and the Requirements of the client. In general it can be said that if the client has issued detailed requirements and limits the freedom of the contractor, the liability of the contractor will diminish accordingly.

ILLUSTRATION

The client is aware of his reputation as a 'green' client and insists in the requirements on all sorts of sustainable aspects of the building project. During the design phase of a swimming pool annex Turkish bath he notices that the contractor has decided to use tropical wood for the construction. He orders the

contractor to alter his design and to use wood from trees from Northern Europe. The contractor follows the instruction of his client. Two weeks after the building is in use the wood starts to show cracks and the paint comes off. It is obvious that this is the wrong wood to use for a building in which high temperatures are custom. The client holds the contractor liable, but he defends himself: this was not his design.

RELEVANT CLAUSES

UAV-GC 2005: Article 3.4, 3.5, 5 (Model Agreement); clause 3 (particularly 3.3, 3.4, 3.5, 3.6, 3.8), 4, 14, 28 (General Conditions)

DBFM 2.0: This will be a Contracting Authority Change (Variation): clause 13.1.

THEME 9: QUALITY ASSURANCE, TESTING, DUTY TO NOTIFY

INTRODUCTION

In Dutch construction practice it is considered that the client is not supposed to inspect and supervise the design & construct contractor in the same way (i.e. as thorough) as is (generally) customary under a traditional construction contract. This idea is, for instance, also reflected in the Notes to the UAV-GC 2005. On the other hand, the client (still) wants to be in the position of checking on progress and quality of the works other than just only at the time of take-over. The interests involved are now balanced in the model contracts in the form of quality assurance. Besides this parties are under mutual obligations to give each other notice under certain circumstances.

ILLUSTRATION

In the case of the wrong wood, mentioned in the previous illustration, it is possible the client noticed that the client decided to use the tropical wood when checking the design of the contractor, while it was stipulated in the client's requirements that such use was not allowed. After completion the client holds the contractor liable for defective work. The contractor rejects this claim pointing to clause 20.4 UAV-GC 2005. The client should have given notice, he contends.

RELEVANT CLAUSES

UAV-GC 2005: clause 19, 20, 21

DBFM: clause 8

THEME 10: SETTLEMENT OF DISPUTES

INTRODUCTION

There is a tendency to insert provisions in construction contracts that enable parties to use alternative mechanisms of dispute resolution (other than ordinary and arbitration courts). Often one finds the clause that parties will try, before going to court to solve a dispute in an amicable way or will make use of mediation or Dispute Review Boards. In the UAV-GC 2005 this modern tendency has been codified as well as in the DBFM 2.0 standard.

Please share with us your views as to the solutions provided in the documents which are the subject of this conference.

RELEVANT CLAUSES

UAV-GC 2005: Article 18 (Model Agreement); clause 47 (general conditions)

DBFM: clause 21, with many references throughout the contract (3.5.(f), 8.5.(a), 9.1(e), 11.2(b), 20.1, Schedule 2, clause 5.4, etc.

THEME 11 RISK ALLOCATION: HIGHWAY A90

INTRODUCTION

You are finally invited to give your view on the allocation of the risks in the DBFM-contract for the (virtual) highway A90.

In this figure most project risks have been allocated. Risks not mentioned in this scheme are the responsibility of the contractor. For the risks that have not been allocated, please give you view what allocation in you opinion would be preferable.

| Risk | Risks remaining with the Client | | Listed Risks (see Intermezzo Theme 5) ¹ | | Force Majeure |
|--|---------------------------------|--------------------|--|--------------------|---------------|
| | Delay Event | Compensation Event | Delay Event | Compensation Event | |
| According to art. 18,3 the Contractor must acquire (almost all) permits. If a permit is withdrawn or annulled but the Contractor shows his application is up to the required standard and he fights the withdrawal or annulment, this will than be the risk of the client. | | | X | | |
| The discrepancy between the actual geotechnical situation of the RWS Area and the situation the Contractor was allowed to expect on the basis of the Project Data . | | | X | X | |
| A discrepancy between the actual situation and the information given by RWS ² . | | | | | |
| Growth of traffic beyond a specifically described threshold. | | | | X | |

¹ In the case of listed risks the Contractor has the possibility either to take the risk or leave the risk with the client. Whether he can leave the risk with the client as a Delay Event or a Compensation Event is indicated by the “x”-marks in the table.

² RWS = Directorate-General for Public Works and Water Management of the Ministry of Transport Public Works and Water Management.

| | | | | | |
|---|---|---|--|--|---|
| Finding archaeological artefacts during execution of the work. | | | | | |
| Presence of pollution in the ground. | | | | | |
| Presence of non registered cables and Pipelines. | | | | | |
| Damages as a result of an Incident as defined in the DBFM-Contract | X | X | | | |
| Damages due to activities third parties. | X | X | | | |
| Measurements to limit damages in case of force majeure. | X | X | | | |
| Disruption of the financial markets before reaching Financial Close. | X | | | | X |
| War, civil war, or terrorist actions in the Netherlands. | X | | | | X |
| Nuclear explosions or detonations of explosive substances, insofar as they are not caused by the Contractor; | X | | | | X |
| Ionising radiation or radioactive, chemical, or biological contamination at or close to the RWS or Third-Party Area insofar as this arises after the Contract Date and insofar as it is not caused by the Contractor. | X | | | | X |
| A crashing aircraft (or a part thereof) or a pressure wave as a result of a supersonic aircraft. | X | | | | X |
| Impact of a meteorite. | X | | | | X |
| Volcanic eruption. | X | | | | X |
| A hurricane. | X | | | | X |
| An earthquake having a force greater than 6 on the Richter scale. | X | | | | X |
| A flood not caused by local precipitation [or leakage in the Infrastructure], insofar as it is not caused by the Contractor. | X | | | | X |
| A delay in planological procedures. | X | | | | |
| Relevant Change in Law as defined in the DBFM-contract. | X | X | | | |
| Access provided to third parties by the Contracting Authority | X | X | | | |