

DUTCH CONSTRUCTION CONTRACTS: VIEWS FROM ABROAD

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Precontractual information duties associated with DBFM Contracts

- Contents of the information obligation
- Sanctioning in the event of non-fulfilment
- Comparison with Dutch model agreements

Contents of the information obligation

- Information duty :
 - Both parties
 - Gather all necessary information
 - Provide sufficient correct information
 - This duty applies in private construction and public work contracts

Contents of the information obligation

Contractor - tenderer	Contracting authority
Art. 96 § 2 - 98 RD 8 January 1996 Art. 86 RD 10 January 1996	No specific legal provisions
To inform of errors or lacunae in the specifications	To provide correct and useful information

The tenderer

- The tenderer must check in certain circumstances the quantities mentioned in the documents of the contracting authority.
(Art. 96 § 2 Royal Decree 8 January 1996)

The tenderer

- The tenderer must inform the contracting authority of errors or lacunae in the specifications if, as a result thereof, it is impossible for him to calculate a price or if a comparison of tenders is impossible

(Art. 98 Royal Decree 8 January 1996)

The tenderer / contractor

- A contractor may not blindly rely on the plans and specifications of the contracting authority.

(R.v.St., 11 June 1982, nr. 22.333, NV Aannemingsmij CFE)

The contracting authority

- No specific legal provision concerning the information duty of the contracting authority :
not only correct information, but also useful information

Sanctioning in the event of non-fulfilment

No Agreement	Agreement between parties
Art. 1382 – 1383 Civil Code (= Culpa in contrahendo)	AAV (\geq 22.000 EUR) -Art. 16, §1 GCC -Art. 16, §2 GCC
	Separate Regulation -Art. 3 RD 26 September 1996 -Special requirements contract -List of departures from GCC -Justifications of those departures

Sanctioning in the event of non-fulfillment

- No agreement between parties :
Art. 1382-1383 Belgian Civil Code

Sanctioning in the event of non-fulfilment of the duty to inform :

- The General Contracting Conditions dated 26th September 1996 (GCC)
- Departure from GCC : risk-allocation matrix

General Contracting Conditions :

- GCC (AAV) (≥ 22.000 EUR)
 - Art. 16, §1 GCC
 - Art. 16, §2 GCC

Art 16 §1 GCC

Under art. 16, §1 GCC, both the contractor and the contracting authority can invoke omissions or facts for which the counterparty is responsible in order to obtain revision or cancellation of the contract or, if applicable, damages.

Art. 16 §2 GCC

The contractor is entitled to an extension of the period or revision/cancellation of his contract when he suffered significant harm, if he can demonstrate circumstances which he could not reasonably have anticipated at the time of submitting his tender or the awarding of the contract, which he could not reasonably avoid and whose consequences he could not remedy, although he did everything possible to achieve this.

Departure from GCC

The contracting authority can depart from provisions of the General Contracting Terms in so far as the special requirements of the contract under consideration make this necessary, a list of the departures appear at the beginning of the specifications, and the departure for certain articles is justified in the specifications.

(Article 3 Royal Decree 26/9/1996)

Contractual regulation: the risk-allocation matrix

- Specifications departing from Art. 16 GCC
 - Regulation in contract : Risk- allocation matrix :
 - Various potential risks
 - Distributed between contracting authority and tenderer
 - Possible compensation or franchise

Comparison with the Dutch model

Dutch Law	Belgian Law
Art. 2,1 (c) DBFM	
Art. 9,3 (a) DBFM	Art. 16, § 1 GCC
Art. 9,3 (g) DBFM (more restricted)	Art. 16, § 2 GCC
Clause 44-1 (b) UAV-GC 2005	Art. 16, § 1 GCC
Clause 44- 1 (c) UAV-GC 2005	Art. 16, § 2 GCC