

Aanbesteding	Delivery and maintenance of a Digital Asset Management and Preservation System (DAMPS)
Aanbestedende Dienst:	Koninklijke Bibliotheek
Referentie:	20190523

Omschrijving:

The delivery of a system (or potentially a combination of systems) for the permanent retention and preservation of, and access to, the digital heritage for which KB is responsible, meeting our (non-mandatory) requirements to the maximum possible extent.

Toelichting:

Nr:

Categorie Bestek/beschrijvend document

Betreft Tendering guidelines DAMPS FINAL 6.4.5 & 6.4.7

22

Vraag

Would it be possible to extend the number of words for the Implementation Plan & the Technical design document with 1000 word each? It would be very helpful.

Thank you.

Antwoord

Vrijgegeven: 15-07-2019

"The technical design has already been increased by 2000 words (total max. 7000), see the 2nd Information Note for this. The Contracting Authority does not think that a further increase is necessary.

It is agreed to extend the implementation plan by 1000 words. So in total max. 6000 words."

Nr:

Categorie Contractvoorwaarden

Betreft Runner-up Contractor Agreement (2)

23

Vraag

Document Runner-up Contractor Agreement concerning DAMPS, article 2 section 4: Can the Contracting Authority please clarify what is being referred to by "meeting" in the last part of the sentence?

Antwoord

Vrijgegeven: 15-07-2019

This is a textual error, it should have been Agreement instead of Meeting.

Nr:

Categorie Contractvoorwaarden

Betreft Runner-up Contractor Agreement (1)

24

Vraag

Document Runner-up Contractor Agreement concerning DAMPS, article 1 section 4: we note that the original Agreement from the Tendering Document may be amended by the Contracting Authority by way of additional information & changes. Can the Contracting Authority please clarify that in article 1 section 4, "equivalent to the original Agreement from the Tendering Document" shall be understood as "equivalent to the original Agreement from the Tendering Document and as amended by the Contracting Authority by way of additional information & changes, if any"?

Antwoord

Vrijgegeven: 15-07-2019

Agreed

- Nr:**
- Categorie** Contractvoorwaarden
- Betreft** Personal data ARBIT 26.4 (d)
- 25
- Vraag**
- Assignment agreement in connection with ARBIT section 26.4 (d):
In a digital asset management and preservation solution, the quantity and nature of personal information stored on the system are determined and controlled solely by the customer. And, as is inherently the case with an on-premise solution, data privacy and security are handled almost exclusively by the customer. Thus the risk associated with personal data is controlled primarily by the customer. Also, the clause would appear to leave a party exposed to liability for which it is not culpable (i.e., regardless of which party failed to comply with the agreement). Accordingly, would the Library be amenable to adjusting article 26.4(d) to read: "In the event of an agreement concluded between the parties under article 18, paragraph 2: to a claim by one party ("First Party") against the other ("Second Party") for compensation of any fines imposed by the supervisory authority against the First Party arising directly and solely from the failure by the Second Party to comply with that agreement."?
- Antwoord** **Vrijgegeven:** 15-07-2019
- Agreed, the text proposal will be used
- Nr:**
- Categorie** Contractvoorwaarden
- Betreft** Clarification ARBIT section 26.4 (b)
- 26
- Vraag**
- Assignment agreement in connection with ARBIT section 26.4 (b):
The word "intent" can be ambiguous, since an individual may take an action intentionally but not intend any harmful consequence. Accordingly, in article 26.4(b), can it be clarified that the word "intent" refers to "intent to cause damage or loss" or "intentional misconduct"?
- Antwoord** **Vrijgegeven:** 15-07-2019
- Agreed, the text proposal will be used
- Nr:**
- Categorie** Contractvoorwaarden
- Betreft** ARBIT Section 26 alternative
- 27
- Vraag**
- Assignment agreement in connection with ARBIT section 26:
In case the contracting authority is not amenable to exclude liability for consequential loss or damage but would be willing to limit it, and Contracting Authority can accept the proposal above (Re.: "Liability ARBIT Section 26") regarding limit of liability i.e. three times the annual (subscription) fee, would the Contracting Authority agree to a further adjustment of the first sentence of article 26.3 as follows: "The liability for any consequential loss or damage, together with the liability referred to in article 26.1 for loss or damage other than that referred to in article 26.2, is limited to an amount equal to three times the annual (subscription) fee under the Contract."?
- Antwoord** **Vrijgegeven:** 15-07-2019
- "This question has already been answered in the 2nd information note. see below:
- Agreed, the text of Article 26.3 then becomes as follows:
The liability referred to in Article 26.1 for damage other than that referred to in Article 26.2 is limited to an amount not exceeding once the amount of the Compensation per event. Related events are considered as one event."
- Nr:**
- Categorie** Contractvoorwaarden
- Betreft** Liability (ARBIT Section 26)
- 28
- Vraag**

Assignment agreement in connection with ARBIT section 26:
Vendors manage risk by agreeing with the customer on a limit of liability that is proportional to revenue (and does not apply separately to each "event"). Accordingly, would it be possible to agree upon a limit of liability that is customary in our industry, such that the first sentence of article 26.3 would be deemed adjusted to read: "The liability referred to in article 26.1 for loss or damage other than that referred to in article 26.2 is limited to an amount equal to three times the annual (subscription) fee under the Contract."?

Antwoord

Vrijgegeven: 15-07-2019

"Not Agreed, the second memorandum of information promises that the damage will be limited to a maximum of one time the amount of the compensation per event.
The Fee means the amount included on the Annex 7 Price Sheet at TCO."

Nr:

Categorie Contractvoorwaarden

Betreft Liability for consequential loss or damage (ARBIT 26.2)

29

Vraag

Assignment agreement in connection with ARBIT section 26.2:

In our industry, contracts generally entirely exclude (rather than merely limit) liability for consequential loss or damage. Accordingly, in article 26.2, could the phrase "and consequential loss or damage" be deemed omitted, and could the following sentence be added: "Neither party shall be liable for consequential loss or damage."?

Antwoord

Vrijgegeven: 15-07-2019

Not Agreed

Nr:

Categorie Contractvoorwaarden

Betreft ARBIT 26.1

30

Vraag

Assignment agreement in connection with ARBIT section 26.1:

On a related point, notice and an opportunity to remedy a breach are widely considered fundamental elements of fairness in contracts in our industry, all the more so where, as in this case, timely performance depends in part on full and timely cooperation of the customer (for example, in the implementation of the software solution). Accordingly, would it be possible to clarify that the third sentence of article 26.1 does not apply? And that, in the fourth sentence of that article, the word "imputably" shall be disregarded?

Antwoord

Vrijgegeven: 15-07-2019

Not Agreed

Nr:

Categorie Contractvoorwaarden

Betreft Termination conditions/ARBIT 26.1

31

Vraag

Assignment agreement in connection with ARBIT section 26.1:

Since a default by one party gives the other party the right to terminate the Contract, defaults should occur only in connection with material (i.e., important) obligations. Accordingly, in the first sentence of article 26.1, would it be possible to clarify that "an agreed obligation" refers to "an agreed material obligation"? Similarly, in the fourth sentence of that article, would it be possible to clarify that the phrase "discharge its obligations" shall be interpreted to mean "discharge its material obligations"?

Antwoord

Vrijgegeven: 15-07-2019

Not Agreed

Nr:

Categorie Contractvoorwaarden

Betreft Payment terms/Assignment Agreement/Arbit 15.5

32

Vraag

Assignment agreement in connection with ARBIT section 15.5:
Can the Contracting Authority please clarify what remedies Contractor has if Contracting Authority never paid, or did not pay for an extended period? We ask that a provision be inserted to the Assignment agreement to the effect that the waiver cannot be "forever" or for an extended period of time.

Antwoord

Vrijgegeven: 15-07-2019

Regarding a situation to which you refer, the appropriate principles in the Civil Code of The Netherlands apply, meaning that if the contracting authority repeatedly fails to meet its obligations (in this context: payment of outstanding invoices), grounds for dissolution of the agreement may arise.

Nr:

Categorie Contractvoorwaarden

Betreft Subscription model

33

Vraag

Assignment agreement in connection with ARBIT sections 8.1 b) and "place", "hardware" in 43.2 d):

For tenderers that offer Standard Software under a time-limited subscription model for the term of the agreement, can the Contracting Authority please confirm that a license grant provision shall be inserted to the assignment agreement e.g. to the effect of:

In consideration of the payment of the annual subscription fee (the "Subscription Fee") for the system, and subject to the terms and conditions herein contained, Supplier hereby grants to Contracting Authority a non-exclusive non-transferable right to: (a) use the system during each annual subscription period for which the Subscription Fee has been paid in full, installed in the approved hardware environment at the agreed place of installation, only for the purpose of operating and managing a DAMPS for its internal use for the agreed places for the scope defined in the tender documentation specification and Supplier's tender response; and (b) receive, during such periods, the maintenance and support services described on Annex D SLA.

Antwoord

Vrijgegeven: 15-07-2019

Not agreed. The hardware configuration will be jointly determined by the contracting authority and the supplier, such that the configuration can be supported by the supplier.

Nr:

Categorie Contractvoorwaarden

Betreft License/Subscription

34

Vraag

Assignment agreement in connection with ARBIT sections 1.10, 8.1 b), 43.1 and 43.2 d):

For tenderers that offer Standard Software under a temporary license as a time-limited subscription for the term of the agreement, can the Contracting Authority please clarify that ARBIT sections 43.1 and "duration" in 43.2 d) shall not apply?

Antwoord

Vrijgegeven: 15-07-2019

"This question has already been answered in the 2nd information note. see below:
Article 43.1 will be deleted.

In Article 43.2d the phrase 'duration' will be deleted."

Nr:

Categorie Contractvoorwaarden

Betreft Assignment Agreement/ARBIT 1.9 - compliance

35

Vraag

Assignment agreement in connection with ARBIT sections 1.9: can the Contracting Authority please clarify that a defect shall be understood to be a material non-compliance with mandatory requirements set forth in the tender documentation and those non-mandatory requirements set forth in the tender documentation for which the tenderer indicated compliance in its tender response?

Antwoord

Vrijgegeven: 15-07-2019

Yes, this is what the contracting authority means.

Nr:

Categorie Contractvoorwaarden

Betreft Assignment Agreement/ARBIT Section 8.5

36

Vraag

Assignment agreement in connection with ARBIT section 8.5:

For suppliers that develop standard software there are provisions on third-party IPR infringement indemnity that are customary in the industry, see sample provisions below. We raise this point as from the provision provided in the ARBIT it could be interpreted that if and only if the Contracting Authority so requests the obligation of the Counterparty to assume responsibility for the defense arises, and hence if the Contracting Authority did not make such a request, it would have a right to defend on its own. Can the Contracting Authority please clarify that Supplier shall defend the Contracting Authority in any case, as reflected in the provisions below?

1.1. Supplier will defend Contracting Authority to the extent any claim, suit, action or proceeding (each, a "Claim") brought by any third party against Contracting Authority alleges that the System infringes or misappropriates any copyright, trade secret or trademark, and shall pay any amounts awarded by a court pursuant to such Claim or amounts paid to settle the Claim. Notwithstanding the foregoing, Supplier shall have no obligation with respect to any Claim based on (1) the use of a version of the System, other than the current version, (2) the use of a version of the System modified by a party other than Supplier, (3) the combination, operation, or use of the System with any product not supplied by Supplier or in a manner inconsistent with the instructions provided by Supplier or (4) any use of the System other than as permitted by this Agreement.

1.2. The obligations set forth in the immediately preceding paragraph shall be subject to the Contracting Authority (i) giving Supplier prompt notice of such Claim; (ii) giving Supplier the sole authority to defend or settle such Claim; and (iii) providing full cooperation in such defense or settlement at Supplier's expense and not taking any action that prejudices Supplier's defense or settlement of such Claim.

1.3. If the System becomes the subject of a Claim, or in Supplier's opinion is likely to become the subject of a Claim, then Supplier may, at its expense and option, either: (a) replace or modify the System to make it non-infringing, while maintaining equivalent functionality; (b) procure for Contracting Authority the right to continue using the System pursuant to this Agreement; or (c) terminate this Agreement and refund to Contracting Authority, on a pro-rata basis, the amount of any Subscription Fee that Supplier has received from Contracting Authority for the period between the effective date of termination of the Agreement and the expiration of the subscription period for which the Subscription Fee has been paid. This Section states Contracting Authority's sole and exclusive remedy under this Agreement in the event that the System infringes the intellectual property right of a third party.

Antwoord

Vrijgegeven: 15-07-2019

All of Article 8 will be deleted

Nr:

Categorie Contractvoorwaarden

Betreft ARBIT Section 8.4/Standard Software

37

Vraag

Assignment agreement in connection with ARBIT section 8.4:

For tenderers that offer Standard Software, can the Contracting Authority please clarify the relevance of ARBIT section 8.4?

Antwoord

Vrijgegeven: 15-07-2019

All of Article 8 will be deleted

Nr:

Categorie Contractvoorwaarden

Betreft ARBIT/Standard Software

38

Vraag

Assignment agreement in connection with ARBIT sections 6, 7 and 8.1 a), 8.2 and 8.3:

For tenderers that offer Standard Software, can the Contracting Authority please clarify that ARBIT sections 6, 7, 8.1 a), 8.2 and 8.3 shall not apply?

Antwoord

Vrijgegeven: 15-07-2019

All of Article 8 will be deleted

Nr:

Categorie Contractvoorwaarden

Betreft SLA Assignment Agreement/ARBIT

39

Vraag

Assignment agreement Service Level Agreement in connection with ARBIT sections 12.3 and 12.5:

We note the Service Level Agreement being part of the agreement as Annex D and being applicable for the term of the agreement while such Annex D is ranked lower in order of precedence than the ARBIT which includes e.g. sections 12.3 and 12.5. Can the Contracting Authority please clarify if the following understanding is correct: In the event of any material non-compliance with mandatory requirements set forth in the tender documentation and those non-mandatory requirements set forth in the tender documentation for which the tenderer indicated compliance in its tender response prior to the switch to production, the Supplier shall rectify such non-compliance prior to switch to production, and in the event of any non-compliance after such switch to production, the Supplier shall address the non-compliance in accordance with the SLA in Annex D?

Antwoord

Vrijgegeven: 15-07-2019

Agreed the text proposal will be used

Nr:

Categorie Contractvoorwaarden

Betreft Non-mandatory requirements (3)

40

Vraag

Assignment agreement in connection with ARBIT sections 1.4 and 11:

In view of non-mandatory tender requirements to which the tenderer shall respond with explanations and taking into account the remark to section 1.4 above, can the Contracting Authority please clarify that acceptance testing per section 11 shall consist of testing for any material non-compliance with mandatory requirements set forth in the tender documentation and those non-mandatory requirements set forth in the tender documentation for which the tenderer indicated compliance in its tender response?

Assignment agreement in connection with ARBIT section 11.1:

From our perspective the combination of acceptance provisions and payment conditions could lead to abuse i.e. not accepting the system and claiming 100% of implementation fees back. Can the Contracting Authority accept that in case of failed acceptance, only 50% of the implementation fees shall be paid back?

Antwoord

Vrijgegeven: 15-07-2019

The KB does not test parts of non-mandatory requirements for which it is stated in the registration that the tenderer cannot comply with this.

Nr:

Categorie Contractvoorwaarden

Betreft Non-mandatory requirements (2)

41

Vraag

Assignment agreement in connection with ARBIT section 1.23 and 4.:

In view of non-mandatory tender requirements to which the tenderer shall respond with explanations, can the Contracting Authority please clarify that Agreed Use (1.23) shall be understood as the mandatory requirements set forth in the tender documentation and those non-mandatory requirements set forth in the tender documentation for which the tenderer indicated compliance in its tender response?

And can the Contracting Authority please add an acknowledgement in the Assignment agreement that the duty of inquiry and disclosure per ARBIT section 4 shall be understood as the documentation exchanged under the European Tendering Procedure?

Antwoord

Vrijgegeven: 15-07-2019

The contracting authority can confirm that these assumptions are correct.

Nr:

Categorie Contractvoorwaarden

- 42 **Betreft** Compliance non-mandatory requirements
Vraag
 Assignment agreement in connection with ARBIT section 1.4:
 In view of non-mandatory tender requirements to which the tenderer shall respond with explanations, can the Contracting Authority agree that the definition of Specification (1.4) shall be modified to reflect this e.g. the Specification shall be the mandatory requirements set forth in the tender documentation and those non-mandatory requirements set forth in the tender documentation for which the tenderer indicated compliance in its tender response? Failing that, can Contracting Authority agree to insert a new definition e.g. "Agreed Specification" to that effect?
Antwoord **Vrijgegeven:** 15-07-2019
 The contracting authority is of the opinion that the description of the term in ARBIT 1.4 is correct and requires no adjustments.
- Nr:**
- 43 **Categorie** Contractvoorwaarden
Betreft Installation of new versions
Vraag
 Assignment agreement in connection with ARBIT section 84.4: for standard software for which New Versions are provided with a straightforward installation process designed to be run by customers at their own schedule and without vendor involvement, can the Contracting Authority agree that section 84.4 does not apply?
Antwoord **Vrijgegeven:** 15-07-2019
 Article 84.4 will be deleted.
- Nr:**
- 44 **Categorie** Contractvoorwaarden
Betreft Assignment agreement in connection with ARBIT section 30.6 (termination for convenience)
Vraag
 Assignment agreement in connection with ARBIT section 30.6 (termination for convenience): both parties will be investing considerable amounts of time and effort to establish a solution and business relationship and the price to be offered is for the scope outlined in the tendering documents and for an initial term of 4 years. Can the Contracting Authority agree that section 30.6 of the ARBIT shall apply only after the initial term of 4 years?
Antwoord **Vrijgegeven:** 15-07-2019
 "This question has already been answered in the 2nd information note. see below
 'The phrase 'Without prejudice to the provisions laid down in the Contract or in the Terms and Conditions, the Contracting Authority may terminate a Contract by registered letter, where applicable with immediate effect' will be deleted. The following text will replace this;
 'The Client has the right to terminate the Contract with immediate effect if the Contractor fails to fulfill any obligation under the Contract, or fails to do so properly or in time and even after a written notice of default, the inaccurate / improper / late performance is continued.'
 The full text of Article 30.6 is then as follows:
 The Client has the right to terminate the Contract with immediate effect if the Contractor fails to fulfill any obligation under the Contract, or fails to do so properly or in time and even after a written notice of default, the inaccurate / improper / late performance is continued. In such an event, the account between the Contracting Authority and the Contractor will be settled on the basis of articles 30.7 to 30.9. This method of settling accounts will never result in the Contracting Authority owing the Counterparty more than the Fee or the as yet unpaid part thereof due to its termination of the Contract. The Contracting Authority is not obliged to indemnify the Contractor in any way other than that specified in articles 30.7 to 30.9 for the consequences of terminating the Contract.
 "
- Nr:**
- Categorie** Contractvoorwaarden

- 45 **Betreft** Contract reductions
Vraag
Annex B section 4 Contract Reductions: the price to be offered is for the scope outlined in the tendering documents. Can the Contracting Authority please clarify that no Contract Reductions are planned in regard to this scope during the initial contract term of 4 years?
Antwoord **Vrijgegeven:** 15-07-2019
The contracting authority can confirm this.
- Nr:**
- 46 **Categorie** Contractvoorwaarden
Betreft Payment terms/schedule
Vraag
Assignment Agreement concerning DAMPS page 8 section 7.1 and Annex B section 2: it is customary in the software industry that payment of fees for recurring services e.g. maintenance, support, subscription are paid upfront. Can the Contracting Authority agree to payment upfront for recurring fees e.g. at the beginning of a 12 month period? Failing that, can the Contracting Authority agree to payment upfront at the beginning of a quarter, for such respective period? Or failing that, in the middle of a quarter?
Antwoord **Vrijgegeven:** 15-07-2019
Agreed, the contracting authority can pay recurring costs in advance.
- Nr:**
- 47 **Categorie** Contractvoorwaarden
Betreft Termination/Breach
Vraag
Assignment Agreement concerning DAMPS page 6 section 3.2: Contractor should have a right to terminate in case of material breach by the Contracting Authority. Can the Contracting Authority agree to add such right e.g. "Contractor may terminate this Agreement, effective upon Contracting Authority's receipt of written notice, if Contracting Authority is in default in payment of any sum due hereunder or is otherwise in material breach of this Agreement and Contractor has given written notice of such default or material breach and Contracting Authority has failed to cure such default or material breach within thirty (30) days of such notice"?
Antwoord **Vrijgegeven:** 15-07-2019
Not Agreed, Regarding a situation to which you refer, the appropriate principles in the Civil Code of The Netherlands apply, meaning that if the contracting authority repeatedly fails to meet its obligations (in this context: payment of outstanding invoices), grounds for dissolution of the agreement may arise.
- Nr:**
- 48 **Categorie** Bestek/beschrijvend document
Betreft eBook App & Audiobook App
Vraag
Assignment Agreement concerning DAMPS page 4 section (E): the provision includes "eBook App & Audiobook App". Can the Contracting Authority please clarify if this is meant to say "DAMPS" instead?
Antwoord **Vrijgegeven:** 15-07-2019
This is wrong and will be adjusted. "eBook App & Audiobook App" must be "DAMPS".
- Nr:**
- 49 **Categorie** Bestek/beschrijvend document
Betreft DTAP
Vraag
Tendering Guidelines page 13 section 2.2
Can the Contracting Authority please clarify if DTAP shall be understood as development, testing, acceptance and production?

Antwoord

Vrijgegeven: 15-07-2019

Yes, we made a mistake. Hardware is not part of this tender.

Nr:

Categorie Eisen en criteria

Betreft SLA

50

Vraag

Tendering Guidelines page 10: the definition of the term Service Level Agreement (SLA) includes the following "to be performed by the Contracting Authority for the Contractor." Can the Contracting Authority please clarify if this is meant to say "to be performed by the Contractor for the Contracting Authority"?

Antwoord

Vrijgegeven: 15-07-2019

Yes, your improvement is correct

Nr:

Categorie Bestek/beschrijvend document

Betreft Support/Maintenance

51

Vraag

Tendering Guidelines page 1, 11 and 13: on page 1 the title is "Delivery and maintenance of a Digital Asset Management and Preservation System (DAMPS)". On page 11, the term "Support = maintenance" is defined. In the first paragraph the first sentence of this definition states "Support is defined as the provision of maintenance (through the supplier) in the role of SPOC by the manufacturer of the servers and storage (tier1 support)". The second paragraph includes the following: "support also includes performance and/or organization of the resolution of defects in the hardware" and "proactive monitoring and replacement". On page 13, in section 2.2 subsections 1 and 2 the term "system" is used ("delivery of a system", "full maintenance and support for the entire lifetime of the system").

Can the Contracting Authority please clarify that on page 13, section 2.2 subsections 1 and 2, the term "system" shall be understood as "DAMPS" and shall not include hardware?

Can the Contracting Authority please clarify that the Contractor for DAMPS will not be expected to provide monitoring, maintenance, defect resolution or replacement for servers and storage or any other hardware in whatever shape or form?

Antwoord

Vrijgegeven: 15-07-2019

"Yes, we made a mistake. Hardware is not part of this tender.

Yes, servers and storage are not included in this tender. This is an error in the tender"

Nr:

Categorie Bestek/beschrijvend document

Betreft DAMPS software and DAMPS storage

52

Vraag

Tendering Guidelines page 1 and page 6: on page 1 the title is "Delivery and maintenance of a Digital Asset Management and Preservation System (DAMPS)" which is defined on page 6 of this document as being made up of two components: DAMPS software and DAMPS storage. Can the Contracting Authority please clarify that DAMPS storage does not include hardware?

Antwoord

Vrijgegeven: 15-07-2019

Yes, the tender doesn't include storage or hardware.