



1st Memorandum of information European tender 'Determining Weighted Average Cost of Capital for tariff-regulated industries'

Date: 17 August 2021

In this memorandum of information, the contracting authority provides answers to the questions asked and remarks posted in the context of the above-mentioned European tender. This memorandum of information forms an integral part of the tender document (with reference IUC 202101067).

Question	Chapter or topic from the tender document	Question	Answer
1.	Question on Tender document	The Tender Document refers to a requirement to provide 5 CVs as well as hourly rates at three different grades. The scoring for CVs refers to the need to cover all industries regulated by the ACM, and that the CVs should show a depth of experience and knowledge with WACC and tariff regulation, having prepared reports across multiple regulators. We assume from this that the scoring will not be reduced if the 5 CVs all relate to staff who would expect to operate at the "senior advisor" grade? Or do the CVs also need to demonstrate experience of medior and junior advisors? We note that the scoring also refers to the need for CVs to identify "many senior or medior consultants in the pool, with scientific background." – if we submitted CVs for 5 senior consultants would this be acceptable to ACM?"	Yes, 5 CV's of senior consultants is acceptable to ACM. This will not reduce the score on the CV's.
2.	Question on Tender document	Does ACM only accept submission of reports in Dutch or English language? Or are other languages also allowed (e.g. German)? Would there be a requirement for some translation?	ACM only accepts submission of reports in Dutch or English language. A professional translation into Dutch or English language is also acceptable.

3.	Obligation to deliver	Based on Art. 1.1 and 3.1 there seems to be an obligation to deliver. Can you explain how the phrase "Contractor must submit a quotation" should be interpreted?	Article 3.1 merely indicates that a Quotation must be submitted within a certain number of working days, depending on the type of request. The Contractor does not have the obligation to deliver a quotation on a request for quotations. However, the Contracting Authority expects that a contractor has the intention to submit an offer on each request for quotation.
4.	Determination by drawing lots	In section 6.4 you indicate that in the event that the highest scoring Tenderers also achieve an equal score for this subcriterion, then determination of the Tenderer to which the Contract will be awarded will be made by drawing lots. Can you indicate in what way exactly that draw will take place?	This is done by one of the most senior legal advisors of the Ministry of Economic Affairs and Climate Policy, prof. mr. dr. H.B. van Romburgh. He will serve as the independent and objective party and draw the lots. A report is made of the process and will be shared with all parties involved.
5.	Confidentiality agreement	You indicate in Section 3.3 under requirement 3.7 that the Project Manager and other members of the project team must each sign a confidentiality agreement. We consider it undesirable and unnecessary to subject our personnel to individual declarations of confidentiality as demanded by requirement 3.7 of paragraph 3.3. The reason for this is that the Contractor is the contracting party and not the individual employees of the Contractor. Furthermore, the Contractor's employees already signed a secrecy declaration when they started working for the Contractor. Moreover, the employees are not only bound to secrecy by their terms of employment, but also by the obligations arising from our Code of Conduct. Therefore, the secrecy declaration under requirement 3.7 should be agreed with the Contractor instead of the individual employee(s) of the Contractor. Can you confirm that it is the Contractor who signs and agrees the Confidentiality Agreement with you?	Agreed. Article 13 Confidentiality of the ARVODI-2018 is applicable on all Further Agreements. In case there is a Further Assignment where sensitive data (e.g. cost data or company confidential data) is being provided to the Contractor, the Contracting Authority can choose to enter a Confidentiality Agreement with the Contractor. The Contractor will be asked to sign the Confidentiality Agreement. Individual employees don't have to sign the Confidentiality Agreement.

6.	Dutch Tax and Customs Administration	<p>It is stated on page 12, 3.6 (tax-related requirements), 6.1: "The Tenderer indemnifies the Contracting Authority against any claims from the Dutch Tax and Customs Administration (Belastingdienst) or other tax authorities." We note that this statement is considered too broad by Contractor given it indemnifies any claims. This is interpreted by Tenderer as that a claim by the Tax Authorities to the Contracting Party, which is not related in any way to this Tender / Engagement, is still to be indemnified by the Tenderer. We expect that this possibility is not the intention of the Contracting party, but that the statement should relate to claims which are directly relating to the activities performed by Tenderer on the engagement. We request to adept and limit the statement in 6.1.</p>	<p>Agreed in so far that Contracting Authority means any claims by authorities (as stipulated under requirement 6.1 of the Tender Document) that directly relate to the activities performed by Tenderer under the Framework Agreement.</p>
7.	Reference contracts	<p>From the template for reference contracts it is not clear to us what information will need to be supplied and whether there are any restrictions to format. Could you please clarify this?</p>	<p>The reference contracts should prove the key competences. Please fill in the boxes in the form. You can use the second box to describe the reference (and the assignment) in a few sentences.</p>
8.	Reference contracts	<p>In the template for reference contracts it is noted that the ACM may contact reference contacts to verify the information provided. As reference contacts are often existing clients or persons with whom we maintain a professional relationship, it would be appreciated if we would be informed beforehand when one of our contacts will be contacted. Could you please confirm this will be the case?</p>	<p>You will be informed beforehand when one of your contacts will be contacted.</p>

9.	WACC template	On ACM's website a standard WACC template / model is available. Is it expected that Contractors will use this model for the execution of Services under Further Agreements or is it expected that the Contractors will use own / independently developed models?	There is no template and there is no simple and easy way to fill out any form or template to determine the WACC. The WACC method of ACM is a complex whole of principles and practical choices, which may differ somewhat between regulated sectors due to differences between these sectors and sometimes due to legislation. An example of the WACC method can be found in a recent report (see the link on the bottom page 8 of the tender). ACM aims at using the same method in different sectors or, if that is not feasible, at least applying the same principles in different sectors to arrive at good choices with respect to the WACC in that sector. Most of the WACC determinations are challenged in court, in which consistency with the past and with others regulated sectors may be used as an argument for or against the method or aspects of it. In that sense it is not possible to use a completely different method in each regulatory decision, and changes can only be applied with good reason and taking precedent towards other sectors in consideration. At the same time, the method should be improved where necessary. By way of example, the ACM does take the outcomes of DGM into consideration when deciding on adjusting the historical market risk premium or not. However, the ACM does not use the DGM-market risk premium directly in the determination of the market risk premium. A suggestion of a consultant to change this, is a major change that requires very careful consideration and will definitely lead to Court proceedings. ACM tries to find a middle ground by in principle using the method as it is, at times seeking advice with respect to specific, usually recent, issues (such as whether the energy transition should lead to an adaptation in the WACC method for energy utilities) and giving some room to consultants to indicate that parts of the method can or should be changed.
10.	CVs / GDPR	Are there any restrictions to the format / content of the CVs in terms of the GDPR? For instance, is it allowed to use photos?	There are no restrictions. However, please limit the amount of personal information on the CV's to the necessary amount. When it comes to personal information, the CV's should indicate the name of the consultant.

11.	Reference reports	On page 17 of the Tender Document, under 5.1, reference is made to two reports. Could you please clarify what is expected as 'evidence' for this. Does it suffice to describe the engagement / report, key procedures carried out and key results (case study format)? Or is it envisaged that the actual reports will be provided as an appendix? In case of the latter, it is noted that the reports are often confidential. How should this be handled?	It is envisaged that the actual reports will be provided. This is necessary to give the Contracting Authority a good indication of the quality of the reports as they would be submitted for a Further Assignment. The Contracting Authority will treat the reports as confidential. See article 2.57 of the Dutch Procurement Law. The reports of the Tenderers with whom no contract is concluded will be deleted by the contracting authority after the final contract award.
12.	Publication of reports	In item 4.2 on page 11 of the Tender Document it is mentioned that reports should be suitable for publication. Is it the expectation that all or most reports will need to be published? Or will there also be cases where the report is for internal use and hence confidential?	Yes, generally reports will be published. But it is conceivable that in some cases the report is for internal use and hence confidential, but this is the exception to the general rule. Also, even in that case, stakeholders can request such a report by filing a request based on governmental transparency legislation. It is therefore required that all reports are suitable for publication.
13.	Confidentiality agreement	On page 11, item 3.7, it is mentioned that a confidentiality agreement will need to be signed for each further assignment. Is this actually the case or does the Contracting Authority envisage that Contractors enter into a confidentiality agreement shortly after the Framework Agreement is awarded? If so, is it possible to share a template confidentiality agreement for our review?	Please see the answer to question 5.
14.	Awarding further assignments	On page 29, the way further assignments are awarded is described. Is it expected that for every further assignment a mini competition will be organised, irrespective of the expected budget of the further assignment? Or is the ACM considering to directly award smaller assignments to a selected Contractor?	A mini competition will be organised, irrespective of the expected budget of the further assignment.
15.	Markets vs. Company specific advice	In the examples mentioned on page 8, both assignments related to markets as well as specific companies are mentioned. Do you expect further requests to mostly relate to markets or are you often looking for company specific advice?	In most cases (but not all), further requests will mostly relate to companies or industries in the context of regulated tariffs. In some industries several (regional) monopolists are active, such as in energy and drinking water. In other industries there is only one monopolist, or the regulation only applies to one company. This is for example the case when it comes to harbour pilotage and the Dutch National Railways.
16.	Presentation of proposal	Will there be the possibility to present our proposal to the selection committee?	No, a presentation is not part of the procedure.

17.	Proposal content	Does Contractor understand correctly that no other elements, such as a Background, Our understanding of the request, Plan of Approach etc., are required in the proposal, but that only the elements outlined are expected (two reports, CVs, budget and the required evidence and signed documents).	That is correct. The Tenderer will be awarded based on the criteria presented in chapter 5 (for clarity, these are two reports, five CVs and the hourly rates (not budget)), as well as the evidence requested in chapter 4.
18.	Sharing of models / data	Are the calculations (e.g. a database, spreadsheet), considered to be "supporting files", which will become property of the ACM?	Yes, calculations are considered to be supporting files.
19.	Potential conflicts	Given that the WACC is an important driver for tariff setting in regulated markets, it is not unreasonable to assume that third parties (operating in the regulated market or otherwise) may commence legal procedures following the publication of a report. What are the ACM's expectations in this regard? What is the ACM's view on the involvement of the Contractor in such proceedings? And is the ACM willing to indemnify the Contractor for any damages resulting from these third parties claims?	As a rule the decisions of ACM, which may be based on WACC-reports for regulated tariffs, are disputed in court proceedings. The ACM will deal with the court proceedings under Administrative Law. Occasionally the ACM will need an additional memorandum during the court proceeding or, rarely, the presence of the Contractor during the oral phase of the court proceedings. The costs of these (that is, the additional memorandum or presence of the Contractor during the proceedings) will be contracted separately. See also the answer to question 20. The Contracting Authority will not indemnify the Contractor for any damages resulting from these third party claims.
20.	Supporting potential disputes	In case third parties dispute the outcome by the ACM, which are partially based on the outcome of the Report(s) provided by the Contractor, does the Tenderer expect support on the dispute? Will potential support be considered to be part of the total contract value, or will this be considered separately?	Usually, additional support during court proceedings is not expected. In the case it is necessary, this will be contracted separately.
21.	Datasources used	Is it acceptable by ACM that data is not solely based on Bloomberg, but on other widely used and accepted data providers (for example, S&P Capital-IQ, Thomson Reuters, MergerMarkets etc.). We note that Bloomberg does not provide all details required for the analyses and more efficient tooling/software is available and used by Contractor.	Data on share prices (for beta-regression), share market indices and yields on bonds which are routinely used in WACC determinations, should be based on Bloomberg. Other types of data can be taken from other sources especially if Bloomberg does not provide that type of data. However, this should be mentioned in the offer for the Further agreement and agreed upon in advance in the Further Agreement. The reason for this is that ACM has experienced that values of bond yield indices from Bloomberg and Thomson Reuters, which in all respects seemed to be equivalent differed from each other, more than just rounding errors. With the assistance of the consultant in that procedure and heavy time investment on the side of the Contracting Authority, this could not be explained. In addition, some of the regulated firms have access to Bloomberg as well and tend to replicate the calculations. Note that the Contracting Authority has also access to Bloomberg.

22.	Sharing of models / data	As the Contractor's spreadsheets and models to derive and calculate (financial) parameters are considered IP of the Contractor and are moreover intertwined with databases by live feeds, software and macro's, Contractor is not able to provide the exact underlying spreadsheets and databases. Please confirm that you agree that output sheets or simplified models can be shared, without sharing our templates (i.e. our intellectual property)?	Not agreed. ACM is aware that in some cases, for example on certain raw data, the provider of the data has IP of that data. ACM can also understand that it may not be possible to provide certain live feeds, software and macro's. Thus, the Contracting Authority understands and accepts that in such cases simplified models have to be shared. However, the Contracting Authority has the experience that if no models and spreadsheets are shared, part of the methodological approach remains hidden or unclear, and Contracting Authority is not capable to ask the relevant questions and understand what the approach of the consultant is, and this may result in inconsistencies and also inability to track the approach of a report compared to an earlier one, which is likely to result in legal procedures. The Contracting Authority wants to prevent this.
23.	Sharing of models / data	On page 8 it is mentioned that data and/or models may need to be shared with the ACM. How often do you expect this to be the case? In case models will need to be shared, our standard model release letter will need to be in place. Is this acceptable to the ACM?	Not agreed. Most WACC-reports include a WACC-determination. In all cases where a WACC is determined, the ACM will ask for the models and spreadsheets underlying the calculation. In addition to the answer on question 22, this also relates to the legal obligation of ACM to investigate whether the consultant has prepared a good report, and that ACM can rely on that report.
24.	Sharing of models / data	As it is required that the data is based on Bloomberg and needs to be shared. What is the level of detail required? (e.g. raw data for stock prices underlying beta calculations can be sizeable.)	Current practice is that the daily returns of bonds and shares are included in the spreadsheets. This is expected for this Tender as well. ACM also has a subscription to Bloomberg, there will therefore be no issues on copyright. See also question 21.
25.	Proposals for Further Assignments	We assume that upon request for a proposal for a Further Agreement, the Contractor will have the opportunity to not participate (for instance in case of a conflict). This is not explicitly mentioned in the Tender Document nor in the Draft Framework Agreement (albeit that in the definitions, it is mentioned that it is an invitation to submit). Could you please confirm that there is no obligation for Contractors to participate in RfP's for Further Agreements?	Yes, the Contractor does not have the obligation to deliver a quotation on a request for quotation. However, the Contracting Authority expects that the Contractor has the intention to submit a quotation on each request for quotation. If a quotation is submitted, there should be no conflict of interest. So if in a specific case, there is a conflict of interest, this means the Contractor may not submit a quotation. The Contractor should inform the Contracting Authority of the conflict of interest. However, the Contracting Authority expects this will not be the case in the majority of requests for quotations
26.	ACM WACC method	Given that the ACM WACC method serves as the basis for the WACC derivations. Is there an option for the Contractor to reflect on the ACM WACC method in case the Tenderer does not ask this specifically in a Further assignment?	Without further notice from the Contracting Authority, the ACM WACC is applicable. If the Contracting Authority wishes the Contractor to reflect on (a part of) the ACM WACC method, then it will be described in the Further Agreement.

Remarks regarding draft framework agreement and ARVODI-2018

No.	Article from draft framework agreement or Arvodi	Reason for objection	Textual suggestions	Answer
1.	Framework Agreement	Retaining a file of the engagement (missing provision): Due to laws and regulations applicable to the Contractor, Contractor is required to retain an internal file of the engagement with Contracting Authority. Therefore Contractor requests Contracting Authority to add the following clause:	Contractor will keep a file on Contracting Authority's engagement. Contractor will take appropriate measures to safeguard the confidentiality and safekeeping of the file and to retain the files for a period which is acceptable by the professional practice standards and which is in accordance with the statutory regulations and professional rules on retention periods. The files are the property of	Your question seems not to be finished. If the Contracting Authority understands correctly, you wish to retain a copy of the Framework Agreement and enclosed documents. That is, the signed copies of the documents provided in this Tender. This is standard practice and does not need to be written down in an extra provision. If you mean something else, please clarify?
2.	Framework Agreement	Indemnification in favor of Contractor (missing provision) The Agreement lacks an indemnification in favor of the Contractor. An indemnification in favor of the Contractor is customary in our sector and, in our opinion, also reasonable in the context of the division of responsibilities and the associated allocation of risks. We propose that the following indemnification be included in the Framework Agreement:	Contracting Authority shall indemnify Contractor against all third party claims arising from or related to the work performed or to be performed for Contracting Authority, unless Contracting Authority proves that the claims are not related to culpable acts or omissions of Contracting Authority or caused by intent or gross negligence of Contractor. The indemnity is also stipulated on behalf of the persons within the Contractor's assignment team, both individually and collectively.	Not agreed. Contractor must take responsibility for the services rendered, as Contract Authority relies on -and pays for- its quality. Of course, culpability will always be a factor in liability cases.

3.	Framework Agreement	<p>Clause relating to legislation and regulations applicable to the Contractor (missing provision)</p> <p>The Agreement lacks a generally formulated clause relating to legislation and regulations applicable to the Contractor, including rules of conduct and professional practice. Are you prepared to agree the following text additionally?</p>	<p>The Contractor shall perform the Assignment with due observance of the rules of conduct and professional rules applicable to the persons performing the Assignment. The Contractor shall never be obliged to perform any act or omission that is in conflict with or incompatible with the aforementioned rules.</p>	<p>The Contracting Authority appreciates the sensitivity to legislation and regulations. It, perhaps as a Dutch government subsidiary superfluous to mention, does not demand any Contractor to perform any act or omission that is in conflict with legislation or regulations including rules of conduct and professional practice.</p> <p>Rules that are instated by the Contractors themselves or their sector cannot be part of the agreement, as it not clear beforehand to the Contracting Authority what the rules of each individual interested party entail. Tenderer has the option to not submit an offer if its own rules would be in conflict with the requirements in the Tender.</p>
4.	Framework Agreement	<p>Dissolution of the Framework Agreement (art. 7.3 under a and b Framework Agreement)</p> <p>On the basis of article 7.3 under a and b, the Contracting Authority is entitled to dissolve the Framework Agreement with immediate effect outside court by means of a registered letter, without any demand or notice of default, if the Contractor or the Staff of the Contractor have been convicted of discrimination. The Contractor deems it unreasonable and far-reaching to dissolve the Framework Agreement with immediate effect without any warning or notice of default in the cases referred to in article 7.3 under a and b. Consequently, article 7.3 of the Framework Agreement must be declared inapplicable.</p>		<p>Not agreed. Please note that Contractor must have been convicted by a final and unappealable judgement in both article 7.3a and 7.3b. Considering the length of such a process, it does not seem unreasonable to the Contracting Authority to dissolve the Framework Agreement once the verdict is reached.</p>

5.	Framework Agreement	<p>Unilateral option for early termination (Art. 2.4 Framework Agreement)</p> <p>In accordance with Article 2.2 of the Agreement, the Contracting Authority has a unilateral option to terminate the Agreement. On the basis of regulations applicable to us, such as the safeguarding of our independence, we wish to have a termination option at all times that allows us to terminate if continuation of the assignment would be in conflict with regulations or professional standards applicable to us. We therefore propose to add the following to Article 2 of the Agreement:</p>	<p>The Contractor may terminate this Agreement by giving thirty (30) days' written notice in the event of a change: i) in laws and/or regulations, including rules of conduct and professional standards ii) in applicable regulations or professional standards iii) or a change in circumstances, as a result of which the Contractor would have to act in conflict with the aforementioned laws or regulations, including rules of conduct and professional standards, with the continuation of the provision of services under the Framework Agreement.</p>	<p>The Contracting Authority cannot agree to these terms, for they are too broad. Also: see the second part of the answer to question 3.</p>
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6.	Framework Agreement	<p>Copyright on final report (Article 1.6 Framework Agreement)</p> <p>You have indicated in Article 1.6 that you would like to hold the copyright to the results of our services. Please note that a transfer of copyright is not required in order to use the results of the services. With regard to the results of the services provided, we grant you a non-exclusive and cancelable right of use for an indefinite period of time. This right of use includes all use of the results of the services within the purpose for which and the persons for whom these results have been prepared. Publication of the results (the report drawn up by us) is thereby permitted to the extent that this is in line with the purpose of the Framework Agreement. Use of the results outside the objective of the Framework Agreement and disclosure to other persons for whom these results have been compiled in accordance with the Framework Agreement may only take place with the written permission of the Contractor. We therefore propose that, in deviation from the obligation to transfer the copyright on the results of the services provided, the following provision be included in the Framework Agreement:</p>	<p>With regard to the results of the Services performed, the Contractor grants to the Contracting Authority a non-exclusive and terminable right of use of indefinite duration. This right of use includes all use of the results of the Services within the purpose for which and the persons for whom these results have been produced. Publication of the results (the report drawn up by us) is thereby permitted to the extent that this is in line with the purpose of the Framework Agreement. Use of the results outside the objective of the Framework Agreement and provision to other persons for whom these results have been compiled in accordance with the Framework Agreement may only take place with the written permission of the Contractor. On the basis of the Framework Agreement, the right of use is granted by the Contractor to the Contracting Authority free of charge at the moment it comes into being, which grant is accepted by the Contractor in advance.</p>	<p>Not agreed. Please see the answer to question 22 for more information on the issue of Intellectual Property.</p>
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7.	Framework Agreement	<p>Order of precedence (Article 1.2 of the Framework Agreement)</p> <p>In the order of precedence provision of article 1.2 of the Agreement, the Framework Agreement prevails over the Memorandum of Information. The Contractor deems this unreasonable since the Memorandum of Information results in amendments to both the Framework Agreement and the other documents which must take precedence. The Contractor therefore requests that Article 1.2 of the Framework Agreement be amended to provide that the Memorandum of Information shall prevail over both the Framework Agreement and the other documents. If you are not prepared to allow the Memorandum of Information to prevail over the Framework Agreement and the other documents, please confirm that the amendments to the Memorandum of Information will be incorporated in the Framework Agreement and the other documents.</p>		<p>Agreed in so far that the Contracting Authority will provide a new Draft Framework Agreement enclosed with this Memorandum.</p>
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8.	Framework Agreement	<p>Based on requirement 4.5 to 4.7 of paragraph 3.4 it appears that the intellectual property rights to both the data and models used (know-how) and the final reports are transferred to Contracting Authority.</p> <p>Based on the professional regulations applicable to our organization, it is necessary that the intellectual property rights to statements and reports accrue to the contractor. If this were, otherwise, it would mean that a Contracting Authority would be entitled to amend the statement or report. From our discipline, we bear the technical responsibility for our statements and other reports. It is therefore important to us that a provision be included in the agreement stipulating that the intellectual property rights to the reports and statements to be delivered by us remain with us and that you cannot proceed to further distribution or modification of the work products to be delivered by us without our prior consent.</p> <p>With regard to the results of the services provided, we grant you a non-exclusive right of use for an indefinite period of time. This right of use includes all use of the results of the services within the purpose for which and the persons for whom these results have been created.</p> <p>For the above reasons, we request you to include the following provision in the Framework Agreement:</p>	<p>Contractor retains all intellectual property rights. All intellectual property rights which Contractor uses or has used or develops or has developed during the execution of the order for the Contracting Authority or resulting from it, belong to Contractor. Subject to a statutory obligation, Contracting Authority is explicitly forbidden to reproduce, disclose or exploit products containing intellectual property rights of the Contractor, or products which are subject to intellectual property rights for which the Contractor has acquired user rights, including computer programmes, system designs, working methods, advice, (model) contracts and other intellectual products of the Contractor, all in the broadest sense of the word. Contracting Authority does, however, receive an extensive right of use in respect of the products delivered.</p>	<p>Not agreed. See article 24 of the ARVODI-2018, which is applicable to this contract, in accordance with article 1.2 of the contract.</p>
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9.	ARVODI-2018	<p>Processing of personal data (Article 14 ARVODI-2018)</p> <p>To the extent that personal data is processed when providing our services, the Contractor considers itself to be a data processor within the meaning of the GDPR. This means that Contractor does not conclude processing agreements with customers. The reason for this position is that the Contractor provides its services as a professional, independent adviser. The Contractor is fully independent in determining how it will perform its work, what resources it will use for that purpose and independently draws up its recommendations. This independence is essential for the Contractor to be able to continue to guarantee the quality of its services. The obligation to follow the Contracting Authority's instructions, as a processor must do, inherently impairs the quality of its services.</p> <p>Do you share our view that, since the Contractor, as the party responsible for processing, will not receive any instructions from the Contracting Authority regarding the processing of personal data, no processing agreement as referred to in Article 14.2 ARVODI-2018 will be concluded in the context of this contract. If not, why not?</p>		<p>There is no Processing Agreement for personal data to be concluded with this contract, as there is no personal data to be processed.</p>
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10.	ARVODI-2018	<p>Confidentiality (Article 13 ARVODI-2018) It is also important for us to be able to share information within the framework of legal obligations with affiliated entities and third parties engaged by us for support services of an administrative and IT nature. In particular, this includes being able to share specific Contracting Authority confidential information in order to identify and mitigate any quality, conduct or risk management issues, both within the member firm and by other members of Contractor network. In order to avoid any ambiguity or confusion, we would like to explain that the aforementioned third parties are not directly involved in the execution of the services that we may provide to you. These third parties only support us with respect to our internal processes. Of course, we are responsible for the use of these third parties and the confidentiality of all confidential information. We require third parties who process data on our behalf to comply with the applicable laws and professional regulations. We would like to ask you whether you can agree to the following text, considering the above explanation:</p>	<p>Unless prohibited by applicable law, the Contractor is permitted to use all information provided by or on behalf of the Contracting Authority ('Contracting Authority Information') and to provide it to (i) other affiliated entities and their staff and/or (ii) other parties which support the Contractor's administration or infrastructure and/or the provision of other support services of an administrative and IT nature for the purpose of (a) performing Contracting Authority and engagement acceptance procedures, (b) conflict assessment of internal risks and independence and (c) to identify and mitigate any quality, conduct or related risk management issues, facilitate requests by regulators, or the establishment and maintenance of knowledge databases)in relation to the Work or services.</p>	<p>Not agreed. In general, the Contracting Authority expects a professional partnership with Contractor where both sides keep shared information confidential. The exclusions to this rule where Contractor can share the information with an unidentified number of other entities are therefore not appreciated.</p>
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11.	ARVODI-2018	<p>4. Assessment and Acceptance</p> <p>We are a wholly-owned subsidiary of a U.S. publicly traded company. Acceptance rights and a client's rights to satisfaction with our work could create revenue recognition problems for us under US GAAP accounting rules. We suggest clarifying that we shall be held to the standard of performing at all times in accordance with the mutually agreed requirements, and if we fail to do so, we shall correct or re-perform the services and deliverables at no additional cost to the Contracting Authority .</p>		<p>Not agreed. In case a report is judged by the Contracting Authority not to meet quality standards, as stipulated in the Tender, or does not meet the terms of the Request for Quotation or the Quotation itself, the Contracting Authority will first discuss this with the Contractor. If finally the report still does not satisfy these quality standards, the Contracting authority may withhold the payment completely or partially. The Contracting Authority cannot accept that withholding payment is impossible. Please also see article 21.1 of the ARVODI-2018.</p>
12.	ARVODI-2018	<p>13. Confidentiality</p> <p>We suggest clarifying that obligations of confidentiality hereunder will not apply to information (i) that is publicly available (not as a result of a breach by a party); (ii) already known to a party; (iii) disclosed by a third party with a right to disclose; (iv) independently developed by a party without reference to the other party's confidential information; or (v) required by law or court order.</p>		<p>Agreed.</p>
13.	ARVODI-2018	<p>13. Confidentiality</p> <p>We suggest that Client not either during the term of the agreement or at any time thereafter, disclose to any third party any confidential information of Consultant, which shall include, without limitation, information with respect to Consultant's pricing and the ContractorIC (as herein defined in paragraph 24), except as expressly permitted by the agreement.</p>		<p>This is already covered under Article 2.57 of the Dutch Procurement Law (Aanbestedingswet).</p>

14.	ARVODI-2018	<p>18. Payment and invoice audits</p> <p>Article 18.3 and 18.4 : We suggest that any audit must be (i) reasonable (including, without limitation, with regard to scope, timing and duration), (ii) subject to reasonable confidentiality restrictions and (iii) limited by any confidentiality obligations Contractor may have to any employee or third party.</p>		The Contracting Authority will not accept your suggestion. Audits are performed only if deemed necessary. If so, they will be performed under Dutch Law and the terms and conditions mentioned in the ARVODI-2018.
15.	ARVODI-2018	<p>18. Payment and invoice audits</p> <p>Article 18.5 : We suggest clarifying that Contractor may suspend the provision of services in the event of non-payment by Contracting Authority .</p>		Not agreed. The Dutch government is a reliable partner in paying for services provided. In the highly unlikely case that problems arise during payment it is expected that Contractor continues with the agreed upon services, as to not delay other projects.
16.	ARVODI-2018	<p>21. Liability</p> <p>We suggest that Contractor and Contracting Authority not be liable for any indirect, special, punitive, consequential or incidental damages, including loss of profits. We suggest that except as set out in Clause 21. a, b and c, Consultant's liability (whether based on any action or claim in contract, tort, or otherwise) to Contracting Authority arising out of or relating to services provided by Additional Terms We suggest including provisions substantially similar to the following:</p>	Contractor will not exceed the total professional fees paid to Contractor for such services arising under applicable Contracts.	In principle, based on Dutch Law, Parties have unlimited liability for damages they cause. In the ARVODI-2018 this liability is already limited. This is stipulated under Article 21.3, where no distinction is made between causes of damage. Dutch Law does not make this distinction and the Contracting Authority does not see any reason to do so for this Tender.
17.	ARVODI-2018	<p>22. Cancellation and notice of termination</p> <p>We suggest that Contracting Authority provide thirty (30) days prior written notice of termination for convenience.</p>		Not agreed. Article 22 is concerned with cancellation in exceptional circumstances. The Contracting Authority sees no arguments for changing this. Also, see answer to question 18.

18.	ARVODI-2018	<p>22. Cancellation and notice of termination</p> <p>We suggest that Contracting Authority provide fifteen (15) days prior written notice with an opportunity to cure within such fifteen (15) day period in the event Contracting Authority wishes to terminate the agreement for cause.</p>		<p>Not agreed. The Dutch government does not cancel a contract without sufficient reason. There is always a legal argumentation given underneath such a decision. It is therefore not necessary to foresee in another step in the process. In the (exceptional) case that a contract is dissolved, a reasonable and fitting notice period is observed.</p>
19.	ARVODI-2018	<p>22. Cancellation and notice of termination</p> <p>We suggest clarifying that, in the event of termination for any reason, Contractor be entitled to payment for all services properly performed and all expenses properly incurred, in each case through the effective date of termination. And the Contractor shall not be liable to pay any statutory interest on the amounts already paid by the Contracting Authority in the event of repayment.</p>		<p>Not agreed. There is no need for further clarification of a financial settlement, other than already provided in article 22.6.</p>

20.	ARVODI-2018	<p>24. Intellectual Property Rights</p> <p>We suggest clarifying that, all materials prepared by Contractor specifically and exclusively for Contracting Authority pursuant to the agreement shall be owned by Contracting Authority. We suggest further clarifying that Contractor shall retain all of its rights in its methodologies and methods of analysis, ideas, concepts, expressions, know how, methods, models, tools, techniques, skills, generic industry information, knowledge and experience (and any graphic representations of any of these) whether now possessed or hereafter acquired by Contractor ("Contractor IC"), and that Consultant's deliverables will inherently contain and/or embed Contractor IC. We also suggest clarifying that any license with regard to Contractor IC be non-transferable.</p>		Not agreed. Contracting Authority sees no reason for amending article 24 for this contract.
21.	ARVODI-2018	<p>24. Intellectual Property Rights</p> <p>We suggest clarifying that Contractor be permitted to retain copies of work product in accordance with its legal, disaster recovery and records retention requirements, but subject to its confidentiality obligations.</p>		Agreed.
22.	ARVODI-2018	<p>24. Intellectual Property Rights</p> <p>We suggest clarifying that we are liable only where we have infringed a third party's IP rights and any warranty or indemnity for infringement of a third party's IP rights not apply (i) to the extent the applicable infringement was caused by Contracting Authority.</p>		Not agreed. This is sufficiently regulated in art. 24.7 of the ARVODI-2018. Of course, if and when this occurs, any culpability of the Contracting Authority will be taken into account.

23.	ARVODI-2018	<p>31 Publicity</p> <p>We suggest to make the clause mutual.</p>		<p>Not agreed. The Contracting Authority is not a commercial party, and therefore has no interest in using the Contractor's name for publicity. When the Contractor is referred to in a publication of any kind, this will only be because of legislation and/or regulations. The Contracting Authority cannot exempt itself from these.</p>
24.	ARVODI-2018	<p>Additional Terms:</p> <p>We suggest clarifying that Contractor will use all information supplied by Contracting Authority without independently verifying the same and that Contractor assumes no responsibility for the accuracy or completeness of such information.</p>		<p>In general, the Contracting Authority agrees in cases where The Contractor uses information supplied by Contracting Authority. However, a 'sanity check' is expected by Contractor. This means that that suspicions of inaccuracy will be reported to the Contracting Authority, so the Contracting Authority can take steps to confirm the accuracy of the information or improve the data.</p>
25.	ARVODI-2018	<p>Additional Terms:</p> <p>We suggest clarifying that while the services and deliverables provided by Contractor may include advice and recommendations, all decisions in connection with the implementation of such advice and recommendations shall be the sole responsibility of, and made by, the Contracting Authority.</p>		<p>Please refer to question 19 (p.6) of the first set of questions. The Contracting Authority has to assess the report, advices and recommendations of the Contractor, and in its decisions the Contracting Authority decides whether to follow advises and recommendations of the Contract or not. The Contracting Authority has to defend its decision in court procedures, including a decision to follow or not follow an advice of the Contractor.</p>
26.	ARVODI-2018	<p>Additional Terms:</p> <p>We suggest clarifying that Contracting Authority shall be responsible for paying any sales, use, or value added taxes (as applicable) that may be applicable to the services provided by us, including those taxes that may be assessed by the relevant tax authorities subsequent to Contracting Authority 's payment of our invoices.</p>		<p>The Contracting Authority follows Dutch Tax Law and sees no reason to deviate from standard practices. The Framework Agreement and Further Agreements will be concluded in the amount to be paid before tax and Contracting Authority will pay all taxes it is legally required to pay.</p>