

## **TEMPLATE SOURCING AGREEMENT v1.0**

Unofficial translation of the original Dutch language template sourcing agreement of the  
Dutch Outsourcing Association (Platform Outsourcing Nederland,  
[www.platformoutsourcing.nl](http://www.platformoutsourcing.nl))

Translation sponsored by Capgemini and Vondst Advocaten.

between

[...]

and

[...]

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### Contract Sheet

Annex 1: Legal terms and conditions

Annex 2: Definitions

Etc.<sup>1</sup>

### Legal information:

This is an unofficial translation of the Template Sourcing Agreement v1.0 of the Dutch Outsourcing Association (Platform Outsourcing Nederland). The translation has been sponsored by Capgemini and Vondst Advocaten.

This template sourcing contract has been drawn up by the PON Sourcing Contract Task Force of the Netherlands Outsourcing Platform association (*Platform Outsourcing Nederland* - [www.platformoutsourcing.nl](http://www.platformoutsourcing.nl)). The task force comprised the following individuals: Polo van der Putt (Vondst Advocaten, Chairman), Jan Aernout (Philips), Gert Jaap Das (PGGM), Hans van Dijk (UWV), Erwin van der Heijden (Quion), Louis Jonker (Van Doorne), Ad Kuus (Rabobank), Maaïke Nijensikkens (Logica), Liselore Sauer (KPMG), Joop Schuilenburg (Emtio), Marco van der Vet (Capgemini), Eliane de Vilder (Brinkhof), Marjo Wildvank (Software Improvement Group), Michiel de Vries (ING) and Dennis Zieren (Ploum Lodder Princen). The members participated in the task force in a private capacity. The template contract does not necessarily reflect the views of the individual members of the task force or those of their employers.

The Netherlands Outsourcing Platform community repeatedly requested a template contract for sourcing transactions that can serve as an example/source of inspiration for their own contracts. The purpose of this template contract is to meet that need.

The contract has been written for outsourcing transactions with a major IT component. The contract can be used by both SMEs and larger companies, although smaller deals are more likely to benefit from the Supplier's (and in some cases the Client's) standard agreement and usually offer less room (and budget) for extensive negotiations. The agreement assumes two Dutch parties entering into a contract under Dutch law, but can also be used in an international context, although additional attention must then be paid to aspects such as export restrictions (e.g. personal data) and the dispute resolution procedure (competent court or alternative dispute resolution such as arbitration).

The contract is based on best practices, assuming mature clients and suppliers. Best efforts have been made to draw up the contract such that neither party has a disproportionate advantage over the other party. The authors realise that template provisions will always entail

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<sup>1</sup> Other Annexes may include: Takeover Agreement, Transition Plan, Transformation Plan, SLA, DAP, Fees, Change Procedure, Continuity Processes, Escrow Agreement, Sustainability, Consultation, Acceptance Procedure, Bonus/Malus (Service Credits) Scheme, Exit Protocol, Processing Agreement, Project Agreement, Exit Plan.

a certain degree of arbitrariness. Adequate alternatives are often available for certain formulations or contractual solutions. However, actual practice requires one reference example, not a catalogue full of alternative contractual provisions from which the reader must pick and choose. The present template was created with these basic premises in mind.

Every transaction has its own unique aspects that should be taken into account in the contract. By their nature, template contracts can rarely be put into practice unchanged, as most projects call for specific provisions (depending on factors such as subject matter, the parties' maturity, the budget (also for creating the contract), regulations and/or terms and conditions applicable to a particular sector, and geographic scope). The present template therefore serves as a point of departure for creating a sourcing contract and cannot be equated with a fully negotiated contract for every random transaction.

Use of this template is at the user's expense and risk. The Dutch Outsourcing Association, the PON Sourcing Contract Task Force, the individual members of the task force and their employers do not accept any liability with regard to this contract.

**The undersigned:**

1. [...], having its registered office at [...], [...], [...], represented in this matter by its director [...] (“**Client**”)  
  
and
2. [...], having its registered office at [...], [...], [...], represented in this matter by its director [...] (“**Supplier**”)

**Whereas:**

- (A) The Client is engaged in [...].
- (B) The Supplier is engaged in [...].
- (C) By means of the Request for Proposal of [...] with the subject [...], the Client asked the Supplier to make an offer for the supply of services as referred to in the Request for Proposal. The Supplier responded to the Request for Proposal with its tender of [...], reference number [...].<sup>2</sup>
- (D) The parties then entered into negotiations and performed reciprocal due diligence studies.<sup>3</sup>
- (E) The Supplier issued its Best and Final Offer on [...], reference number [...].
- (F) The Parties reached an agreement on that basis and wish to enter into a sourcing contract under the following conditions.<sup>4</sup>

**And have agreed as follows:**

1. The parties herewith enter into a sourcing contract under which the Supplier provides services to the Client in the area of [workspace management, application management, hosting, client administration, software development, etc.].
2. This sourcing contract commences on [...] and is entered into for the period of [...] years.

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<sup>2</sup> One option is to include objectives of the Client here (such as reducing the number of applications used), along with a confirmation that the Supplier has indicated to have endorsed these objectives. The Supplier’s objectives are sometimes also included here (such as the objective of performing generic platform services). Whether or not such objectives are included will depend on aspects such as the contents of the contract (are the objectives already provided?) and the degree to which the other party may influence their achievement.

<sup>3</sup> The parties could consider recording exactly what information will be shared, thus preventing any future difference of opinion on that point.

<sup>4</sup> To be changed according to the actual situation. Multiple quotes are not always issued. Public tendering procedures do as a principle not allow negotiation other than by means of a competitive dialogue.

3. The parties' rights and obligations are laid down in the Annexes to this Contract Sheet, with regard to which **Annex 1 (Legal Terms and Conditions)** prevails, including the priority arrangement.

**Thus agreed and signed in duplicate:**

**[Client]**

**[Supplier]**

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By:  
in:  
Date:

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By:  
in:  
Date:

## ANNEX 1: Legal Terms and Conditions

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## **I. DEFINITIONS**

### **1. Definitions**

- 1.1. The terms in this Agreement that are capitalised are defined and have the meaning laid down in **Annex 2 (Definitions)**.

## **II. TAKEOVER**

### **2. Takeover<sup>5</sup>**

- 2.1. Within the context of this outsourcing, on this day the parties entered into the takeover agreement attached as **Annex 3 (Takeover Agreement)**.

## **III. TRANSITION AND TRANSFORMATION**

### **3. Transition and Transformation**

- 3.1. The objective of the Transition is to transfer responsibility for performing the Services to the Supplier. The Parties undertake to perform the Transition Plan to that end. The Transition will be concluded with an acceptance test in accordance with the Acceptance Procedure. After acceptance, the Transition will be considered to have been concluded.<sup>6</sup>
- 3.2. The objective of the Transformation is to transform the manner in which the sourced activities are performed and/or offered as Services immediately following the Transition (or regarding some parts of the Transformation even during the Transition), so that the Services can be performed [in a more standard / cost-efficient manner, etc.]. The Parties undertake to perform the Transformation Plan to that end. The Transformation will be concluded with an acceptance test in accordance with the Acceptance Procedure. After acceptance, the Transformation will be considered to have been concluded.<sup>7</sup>

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<sup>5</sup> The Takeover Agreement falls outside the scope of the present template contract. The Takeover Agreement may also address the possible applicability of the Dutch Transfer of Undertakings Act ('*Wet overgang ondernemingen*') upon the contract commencement date. Because a takeover is a one-off event and the provision of services may continue for years after that event, keeping the two contracts separate might be considered. A takeover agreement will primarily be aimed at the takeover of assets and liabilities. However, the Transfer of Undertakings Act may also apply in the absence of such a transfer. The takeover of assets and liabilities is not a constitutive requirement. This means that even in the absence of a takeover agreement, there may still be a need for arrangements for the Transfer of Undertakings Act.

<sup>6</sup> It is usually preferable to include the acceptance criteria in the Transition Plan if possible.

<sup>7</sup> It is usually preferable to include the acceptance criteria in the Transformation Plan if possible.

## IV. PROVISION OF SERVICES

### 4. General obligations of the Supplier

- 4.1. From the Commencement Date, the Supplier undertakes to perform its obligations by virtue of this Agreement (including the Transition Plan, the Transformation Plan, SLA and DAP).<sup>8</sup>
- 4.2. In the performance of this Agreement, the Supplier undertakes to act with the care that may be demanded from a reasonable, competent and professional supplier under comparable circumstances and under comparable contractual terms and conditions.
- 4.3. The Supplier undertakes to perform the Agreement in accordance with the laws and regulations that apply to it. [The Supplier also undertakes to perform the Agreement in accordance with the Client's internal rules and procedures as laid down in **Annex [...]**.] [Moreover, the Supplier undertakes to act in accordance with the provisions of the relevant regulatory laws and regulations specifically applicable to the Services if the Client itself were to perform the Services [and as further described in **Annex [...]**]. The costs incurred by the Supplier from performing its obligations by virtue of the previous [two] sentence[s] will be borne by the [Supplier/Client].<sup>9</sup>
- 4.4. The Supplier undertakes to ensure that its personnel is sufficiently familiar with the Client's business and the manner in which the Services are used to the extent necessary for proper performance of the Agreement.
- 4.5. The Supplier undertakes to provide training for the Client's personnel upon first reasonable request and at the agreed rates, in order to familiarise this personnel with the Services and their possible uses.
- 4.6. In so far as the Supplier performs activities at the Client's site, it undertakes to ensure its personnel complies with the Client's applicable house rules to the extent that these have been made available to the Supplier in advance. If the applicable house rules are changed, the parties will agree on any consequences this change has on the Services or Fees by means of the change procedure laid down in Article [14].
- 4.7. If the Supplier needs one or more permits for performing the Agreement, including work permits, the Supplier undertakes to ensure that it has said permits in good time and for the entire term of this Agreement and/or as long as the permit is necessary, and

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In some situations, the Transition and the Transformation could also be regarded as one package of activities, as a result of which they could be combined in a single "Transition Plan". In that regard, the standardisation or efficiency effort considered desirable could also be incorporated in the SLA.

<sup>8</sup> It is not unusual for the SLA (or the Transition and/or Transformation Plans) to provide that the Services will be performed on the basis of efforts made during a particular period (e.g. 3 months). During that period, the parties may assess whether the situation described is in line with the as-is situation. The same may apply with regard to obligations that could ensue from other annexes, such as the Client's house rules.

<sup>9</sup> If applicable. The costs incurred by the Supplier in order to meet its obligations under regulatory laws and regulations that apply to the Client are usually subject to negotiation. On the one hand, a Client will often assert that the Supplier, as a specialist supplier, should treat these costs as ordinary operating costs. On the other hand, a Supplier will often assert that these are specific costs that are not taken into account in the standard services and that a Client would also have borne without outsourcing. In addition, this situation often involves long-term contracts, which can make it difficult to estimate the costs that will be involved.



to comply with the relevant requirements. The lack of a permit does not constitute force majeure within the meaning of Article [25]. [The Supplier indemnifies the Client against any loss incurred by the Client and any penalties imposed on the Client due to the Supplier's failure to perform the obligations ensuing from this article.]<sup>10</sup>

## 5. General obligations of the Client

- 5.1. From the Commencement Date, the Client undertakes to perform its obligations by virtue of this Agreement (including the Transition Plan, the Transformation Plan, SLA, DAP and DFA).
- 5.2. In the performance of this Agreement, the Client undertakes to act with the care that may be demanded from a reasonable and competent client under comparable circumstances.
- 5.3. The Client undertakes to reasonably cooperate with the Supplier so that the Supplier is capable of performing the Agreement.<sup>11</sup> [Specifically, the Client undertakes to perform the obligations laid down in **Annex [...] (Client Obligations)**.]<sup>12</sup>
- 5.4. The Client undertakes to perform the Agreement in accordance with the laws and regulations that apply to it.
- 5.5. The Client undertakes to ensure that its personnel is sufficiently familiar with the manner in which the Services are provided and the possible uses of the Services.

## 6. Obligations with regard to hardware and software

- 6.1. The Supplier is responsible for obtaining, maintaining and paying for the necessary licenses for all hardware and software it uses in the performance of the Agreement and that it makes available, unless otherwise agreed. [**Annex [...] (List of Licenses)** lists the licenses to be made available to the Client by the Supplier.] [In deviation from the above, the parties have agreed that the Client is responsible for obtaining, maintaining and paying for the licenses and maintenance arrangements and the license management of the hardware and software listed in **Annex [...] (Client Hardware and Software)**.]
- 6.2. The Supplier shall take fitting technological and organisational measures against computer viruses and other malicious and/or harmful software on the hardware and software that it uses and makes available. If the Supplier fails to take these measures and a computer virus or other malicious and/or harmful software in the hardware and software it uses and makes available causes impediments to the Services or to the Client's operations, the Supplier must take measures to remove these impediments and,

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<sup>10</sup> If applicable.

<sup>11</sup> In some cases in which the Supplier structurally uses business space or other facilities of the Client, separate arrangements (including financial arrangements) are made in this respect, for example by means of a lease agreement.

<sup>12</sup> The Transition Plan, Transformation Plan, SLA and Exit Plan often include supplementary terms and conditions entailing specific obligations to be performed by the Client. In that case, a separate annex is not necessary. The Client may sometimes ask for a provision stating that the Agreement describes all of its obligations; depending on the circumstances (foreseeability, complexity, etc.), a Supplier will or will not agree (possibly under other conditions, e.g. with reference to the change procedure). Suppliers are generally not willing to give such completeness guarantees.

if possible, to repair any damage caused to the Client, without prejudice to the Client's other rights under this Agreement.

- 6.3. In so far as the Supplier makes hardware, software or on-line applications available to the Client in performing this Agreement, the Client undertakes to use such as a reasonable client and in accordance with the relevant user instructions and/or terms and conditions of use, to the extent that the Supplier has made these available to the Client. Upon termination of this Agreement, the hardware and software must be returned to the Supplier upon first request, unless the parties agree otherwise within the context of the termination. This provision applies vice versa if the Client makes hardware, software or on-line applications available to the Supplier in performing the Agreement.
- 6.4. Unless otherwise agreed<sup>13</sup>, the Supplier undertakes to ensure that the hardware and software it uses and/or makes available is always a type or version commonly used.
- 6.5. [The Client's Architecture Plan is guiding in the setup of the systems used to perform the Agreement. The Parties may deviate from the Architecture Plan by mutual agreement.]<sup>14</sup>
- 6.6. [The Supplier undertakes to ensure that the technical quality of the software systems will be maintained or improved when customising the software systems it uses in performing the Agreement.]<sup>15</sup>
- 6.7. [The Supplier shall not add any third-party software, including open source software, to the software described in **Annex [...] (Software)**.]<sup>16</sup>
- 6.8. In so far as the Supplier develops software for the Client, the Supplier guarantees that said software does not contain any computer viruses or other malicious and/or harmful software. The provisions laid down in the last sentence of Article 6.2 apply equally if the Supplier acts in contravention of the present article.

## 7. **Innovations**

- 7.1. The Parties strive to implement improvements that benefit the Client because:
  - (a) the quality of the Services improves;

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<sup>13</sup> This may be the case with legacy systems, for example.

<sup>14</sup> This option could be particularly relevant if the services are performed on a client-specific system, the management of which is transferred back to the Client or a third party to be designated by the Client after the end of the contract. This article is not intended for services performed from a generic platform of the Supplier.

<sup>15</sup> Optional article, which could be particularly relevant if the services are performed on a client-specific system, the management of which is transferred back to the Client or a third party to be designated by the Client after the end of the contract. The technical quality could be described in more detail, for example by means of a reference to minimum standards in respect of maintainability.

<sup>16</sup> This option could be particularly relevant if the services are performed on a client-specific system, the management of which is transferred back to the Client or a third party to be designated by the Client after the end of the contract. However, depending on the Client's wishes, the most obvious solution will often be the addition of a third party's standard software or open source software.

- (b) a higher level of standardisation is achieved in performing the Services;
  - (c) the Fees decrease;
  - (d) the Client achieves cost reductions based on increased efficiency; and/or
  - (e) the Client can bring innovative solutions to the market giving it a competitive advantage over its competitors.<sup>17</sup>
- 7.2. The Parties shall always discuss the types of improvements that will receive focus for which periods when discussing the Service Management or Contract Management.<sup>18</sup>
- 7.3. [The Parties will always reach agreement as to whether improvements will be implemented as a Project or otherwise, and as to whether or not these are included in the Fees.]<sup>19</sup>
- 7.4. The Supplier and the Client understand that IT is continuously developing and that sound management necessitates attuning to the relevant developments, unless there is good cause not to do so. Within that context the Parties shall periodically consult on the available options for (continued) attuning to the state of the art commonly seen in the relevant market, unless there is good cause not to do so or unless otherwise agreed.
- 8. Projects**
- 8.1. The Parties can agree on Projects from time to time. A Project is agreed on the basis of a Project Agreement, which will constitute an inseparable part of the Agreement after being signed by both Parties.
- 8.2. Unless and to the extent the Supplier has informed the Client in writing prior to concluding the Project Agreement, and unless explicitly agreed otherwise in the Project Agreement, the Supplier guarantees that the Project Agreement will not adversely affect the provision of or use of the Services.
- 9. Business continuity**
- 9.1. The Supplier undertakes to provide for the continuity processes described in **Annex [...]** (**Continuity Processes**) in order to safeguard the continuity of the provision of the

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<sup>17</sup> This article expresses the intention to innovate, but does not provide any specific details. Innovation is a complex matter, the details of which are often difficult to specify as they are strongly dependent on the specific circumstances. The parties are encouraged to lay down further details if they have concrete ideas about innovation, for example in an annex. With regard to software, for example, one option might be to measure the software's current quality and to indicate where improvements are feasible and how much will be saved as a result. This could be a specific innovation method that allows both the Supplier and the Client to objectively determine what they should do.

<sup>18</sup> If more specifics are laid down, the parties may agree to set up an innovation board that will focus specifically on innovation. An annex could then provide how often the innovation board will meet and what output will be expected.

<sup>19</sup> Arrangements regarding the cost of innovations are often complex, and a general standard is lacking. Sometimes the Client must pay for everything, sometimes a certain innovation effort included in the Fees is provided for, or other arrangements are agreed.

Services on its part in the event the performance of the Services in accordance with the provisions of the Agreement is interrupted.

9.2. The Client undertakes to have implemented the continuity processes, as can be reasonably expected of it in the given circumstances, for the event that the Services are interrupted.

9.3. [With regard to [...], the Parties have made escrow arrangements. The Escrow Agreement is attached as **Annex [...]** (**Escrow Agreement**).]<sup>20</sup>

9.4. [Step-in rights]<sup>21</sup>

## 10. **Sustainability**

10.1. The Parties endorse the objective of sustainable business operations. Within that context, the Parties will devote every reasonable effort to minimising the waste of natural resources in the performance of the Agreement.

10.2. [The Supplier undertakes to take the measures described in **Annex [...]** (**Sustainability**). The Client undertakes to cooperate in the implementation of the relevant measures where necessary.]

## V. **FEES AND PAYMENT**

### 11. **Fees and Payment**

11.1. The Client owes the Supplier only the Fees for performance of the Agreement and provision of the Services.

11.2. Unless otherwise agreed, each party shall bear its own costs related to performance of this Agreement.

11.3. For the term of the Agreement, for the first time on [...], the Supplier is entitled to adjust its prices each year as per 1 January[, with a maximum of the increases in the (preliminary) Statistics Netherlands index figure [Producer Price Index for Services (SPPI) / Union-negotiated wages for Commercial Services (including special remuneration)/etc.] over the most recent period from October to October]. The

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<sup>20</sup> In an escrow arrangement, particular attention should be paid to the release criteria (the situations in which the Client is entitled to release from escrow) and to the release procedure (at a party's first request or after a full hearing). A regular escrow arrangement provides for periodically putting new versions of the source code into escrow and provides that the escrow comprises the documents as well. It sometimes also provides that the escrow will comprise the test code as well as all other information that is important to maintaining the software. (This is also important in the event of an exit.)

<sup>21</sup> Step-in rights are very rare, often involve numerous supplementary conditions, and are rarely exercised in actual practice. Step-in rights are rights that allow the Client to temporarily take responsibility for the performance of the agreement. Step-in rights are mainly relevant in larger transactions concerning the provision of client-specific services. Given the interests of the Supplier's other clients, step-in rights are more difficult to implement if the Supplier uses a generic platform. In the event of a client-specific system, the management of which is transferred back to the Client or a third party to be designated by the Client after the end of the contract, step-in rights may be a valuable addition to the range of continuity warranties.

adjustment intention must be announced as soon as possible, no later than 1 December of the preceding year.<sup>22</sup>

11.4. [Market Conformity]<sup>23</sup>

11.5. The amounts stated in this Agreement are expressed in euros and do not include VAT due or other taxes and levies imposed by the government.<sup>24</sup>

11.6. The Fees are charged on a monthly basis [in arrears/in advance].

11.7. To obtain payment, the invoices must contain the following information:

(a) [...]

11.8. Payment must be made within 30 days [after receipt by the Client/after invoice date].<sup>25</sup>

## **VI. GOVERNANCE**

### **12. Consultation**

12.1. The Parties undertake to immediately inform one another of matters or circumstances that preclude proper performance of the Agreement.

12.2. The Parties will consult on the level of [Contract Management, Service Management and Assignment Management, in accordance with **Annex [...]** (**Consultative Structure**)].<sup>26</sup>

12.3. A written report will be compiled of each consultation by Contract Management and Service Management by the [Supplier/Client], as quickly as possible but within [5] Work Days, which will record at least any decisions that are relevant to management of the Agreement. This report will be submitted to the other party for comments. The other party will notify the [Supplier/Client] of any comments as quickly as possible but within [5] Work Days. The report will then be adopted during the next consultation, if necessary indicating any points in the report over which the parties do not agree.

12.4. Communication between the parties will take place in Dutch unless otherwise agreed.

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<sup>22</sup> In some cases, indexation is completely dispensed with. This is not done very often.

<sup>23</sup> Depending on the supplementary terms and conditions, the parties may agree that the fees must be consistent with market practice. The term “consistent with market practice” is often defined in more detail, for example by providing what type of services this involves, describing the peer group in more detail, providing for acceptable margins, taking into account the transaction’s specifics, etc. In some cases, there is no relation to prices that are consistent with market practice, for example if large investments must be made.

<sup>24</sup> Transactions with an international component may call for arrangements regarding currency risks.

<sup>25</sup> As a rule, a specific arrangement about disputing invoices is included. One provision that is often used is that if an invoice is disputed, in any event the undisputed part must be paid within the payment term. The consequences of late payment (interest and costs) are also often specified.

<sup>26</sup> Other consultative structures are, of course, possible. In actual practice, a distinction is often made between Strategic/Tactical and Operational consultations, which is why we used it as a basis in this template. Consequently, the corresponding articles must be modified if a different consultative structure is used.

### 13. **Service Level Agreement Evaluation**

- 13.1. The Parties will evaluate the SLA [each year], always [...] before the end of the Contract Year, or more frequently or earlier as agreed, and modify it where necessary for the subsequent Contract Year in accordance with the Change Procedure.

### 14. **Change Procedure**

- 14.1. Changes to this Agreement (including the Services) will be agreed by means of the Change Procedure laid down in **Annex [...] (Change Procedure)**.

### 15. **Acceptance Procedure**

- 15.1. The results of the Transition, the Transformation and Projects will be subject to the Acceptance Procedure laid down in **Annex [...] (Acceptance Procedure)**, unless otherwise agreed. [The results of other Services will be subject to the Acceptance Procedure laid down in **Annex [...] (Acceptance Procedure)** to the extent agreed.]

### 16. **Contract Management**

- 16.1. The [Supplier/Client] manages the Agreement and the list of current change proposals, and ensures that these are up to date at all times. The other party will cooperate with that management. In the event of disputes between the parties regarding the contents of the Agreement, the last text agreed between the parties is guiding (with due observance of current change requests in so far as these result in a change in the Agreement).

## **VII. MONITORING**

### 17. **Reporting**

- 17.1. The Supplier undertakes to supply the reports stated in the SLA.

### 18. **TPA**

- 18.1. The Supplier shall submit to the Client each calendar year, no later than in [...] and for the first time [...], a Third Party Assurance (“**TPA**”) from a registered EDP auditor regarding the quality of the Supplier’s processes. The TPA must describe whether the measures for safeguarding [the reliability and continuity of the automated data processing/protection of the Client’s data/the reliability and continuity of the Services to be provided/the reliability of the reports referred to in Article 17.1/etc.] have been implemented sufficiently with due observance of the relevant arrangements laid down in the Agreement. The costs for submitting the TPA will be borne by the [Client/Supplier].<sup>27</sup>

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<sup>27</sup> Provisions of this type are mainly used in larger transactions or in supervised transactions. The availability of a TPA depends on a great number of factors, such as the type of service and the fees. Some suppliers issue generic TPAs, while others regard it as a specific service that must be paid for. In some cases, the Supplier is obliged to issue not a TPA but a statement in accordance with the ISAE 3402 standard of the International Auditing and Assurance Standards Board (IAASB) (which standard will replace the SAS 70 Type II statement) or similar statements.

18.2. Should the TPA referred to in paragraph 1 indicate that the Supplier's processes do not provide the safeguards referred to in Article 18.1, the Supplier will submit an improvement plan to the Client within three months. This improvement plan will be discussed with the Client and the Supplier will actually execute the improvement plan. The improvement plan must describe measures for remedying the objections evident from the TPA. The costs for executing the improvement plan will be borne by the Supplier unless otherwise agreed. The provisions of this article do not affect the Client's other rights.

## 19. **Audit**

19.1. The Client is entitled to have a registered EDP auditor<sup>28</sup> perform an audit no more than [*indicate maximum frequency*] of the [Supplier's compliance with the following obligations [...]/Supplier's compliance with the Agreement/correctness of the Supplier's Service Level reporting/quality of the software developed/correctness of [the configuration management/the invoicing]/etc.], to the extent this is not covered by the TPA referred to in Article [18]. The Supplier undertakes to cooperate in this regard.<sup>29</sup>

19.2. The Client undertakes to have the monitoring performed in accordance with the rules of the profession and code of conduct of the professional organisation of registered EDP auditors, NOREA. The Supplier is entitled to expect the registered EDP auditor to sign a confidentiality statement to the Supplier's benefit, a copy of which will be given to the Supplier. The confidentiality statement must contain the terms and conditions commonly found in statements of this type.<sup>30</sup>

19.3. The time at which an audit is to be performed will be determined in mutual consultation. The Client will ensure that the audits disrupt the Supplier's operations as little as possible.

19.4. In order to enable an audit as referred to in Article 19, the Supplier undertakes to establish and maintain the relevant adequate administrative records, financial records and archives (to the extent applicable). The Supplier undertakes to organise and manage these records and archives in accordance with the usual market standards, at least for the term of the Agreement and as long thereafter as is required by law.

19.5. [The Supplier acknowledges the authority of certain regulatory authorities and/or bodies (e.g. De Nederlandsche Bank, the AFM or the NMa) to:

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<sup>28</sup> See note to 19.2.

<sup>29</sup> Provisions of this type are mainly used in larger transactions or in supervised transactions. It is common practice to make additional arrangements about, in any event, frequency, the necessity of a reason to perform an audit, and costs. As regards frequency, one audit per year is generally the standard (excepting follow-up audits). For Clients that fall within the scope of the provisions of the Dutch Financial Supervision Act ("*Wet op het financieel toezicht*"), Article 19 should provide for arrangements regarding regulatory authorities. See optional Articles 19.5 and 19.6 below.

<sup>30</sup> It goes without saying that a different type of auditor or third-party expert can be chosen. For example, audits/investigations regarding the software's product quality may be performed by an IT expert. The parties will then often agree process arrangements, for example with regard to the Supplier's right of prior inspection and the right to have its comments included in the report.

- (a) collect information from or about the Supplier, or through third parties engaged by the Supplier or the Supplier's external accountant, regarding the Services; and/or
- (b) if desired, to investigate the Supplier or third parties engaged by the Supplier or to have such investigated, e.g. investigations into the business operations and operating processes within the context of the provision of the Services;

and undertakes to provide full cooperation with regard to such requests for information and investigations. To the extent necessary, the Supplier will ensure that the third parties it engages and its (external) accountant also cooperate in full with regard to these audit activities.<sup>31</sup>

19.6. [The Supplier will immediately inform the Client if a business, body or other authority reports to it requesting permission to perform auditing activities within the context of the Services that the Supplier performs under the Agreement on behalf of the Client.]

## 20. **Benchmarking**

20.1. The Supplier undertakes to cooperate with the Client upon first request in a study commissioned by the Client (the Benchmark Study), into the market conformity of the price-quality ratio of the Services in their entirety.<sup>32</sup>

20.2. A Benchmark Study will be allowed for the first time [in the third Contract Year], and will not be performed more often than once every [three years].

20.3. The Client undertakes to immediately share the contents of the report of the Benchmark Study immediately after it is published. The Parties undertake to discuss the outcome of the Benchmark study within a period of [...] after the report has been issued to the Supplier and to modify the Agreement accordingly if necessary.<sup>33</sup>

20.4. The following applies to the costs of a Benchmark Study: [...]<sup>34</sup>

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<sup>31</sup> Arrangements are also usually made in respect of the costs. It is common practice to provide that the Supplier may charge the costs to be reasonably incurred with regard to a regulatory audit to the Client, unless the audit is the result of the Supplier's conduct.

<sup>32</sup> Provisions of this type are mainly used in larger transactions in which standard services are provided. The term "consistent with market practice" is often defined in more detail, for example by providing what type of services this involves, describing the peer group in more detail, providing for acceptable margins, taking into account the transaction's specifics, etc. Benchmarks other than price-quality benchmarks are also conceivable, such as benchmarks regarding the level of quality of the software, or the costs per application or software portfolio. However, such benchmarks are currently relatively unknown.

<sup>33</sup> The parties sometimes agree that if the differences observed are not material, the Agreement does not need to be amended. In order to avoid discussions, the parties should preferably describe what is considered "not material", for example by providing that rate differences of up to 5% are not material.

<sup>34</sup> The arrangements regarding the costs of the benchmark studies are so specific that we cannot provide a standard in this respect. For example, a provision is sometimes included stating that if the rates differ less than 5% from the market average, the costs of the benchmark will be borne by the Client.

<sup>35</sup> The parties sometimes specify which third party may perform the Benchmark Study. In any event, they often provide that said party may not be one of the Supplier's competitors. The parties may also specify the period within which a study must be performed and the period within which the Supplier must be informed of the outcome. The agreement sometimes provides that the assignment description for the benchmark study will be drawn up jointly by the Client and the Supplier.

There are many templates for bonus/malus (service credits) schemes. Sometimes a transition period is agreed during which the scheme does not apply. Bonus/malus schemes usually assign a bonus or malus to a limited



- 20.5. The Benchmark Study will be performed by a qualified, independent third party, at the Client's discretion.<sup>35</sup>

## VIII. SANCTIONS

### 21. Bonus/Malus Scheme

- 21.1. The Parties have agreed on the bonus/malus scheme laid down in **Annex [...]** (**Bonus/Malus Scheme**).<sup>36</sup>
- 21.2. Any malus does not affect the Client's right to claim performance or compensation for damage, with the understanding that the malus paid will be deducted from any damages due from the Supplier with regard to the relevant failure.

### 22. Liability

- 22.1. The parties' liability for damage is limited to direct damage with a maximum of [...] per event. A series of related events is considered a single event. Liability is furthermore limited to [...] per Contract Year.<sup>37</sup>
- 22.2. Liability for indirect damage and consequential damage is excluded. In any event, indirect damage and consequential damage include:
- (a) [loss due to lost profits;
  - (b) loss due to lost savings;
  - (c) non-material damage;]
  - (d) [damage other than direct damage].<sup>38</sup>
- 22.3. The limitations and exclusions referred to in this article will not apply in the event of:
- (a) intent or wilful recklessness of a party, its subordinates or assistants; or
  - (b) damage resulting from death or injury; or

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number of service levels. Schemes may provide for some flexibility on the part of the Client (freedom to shift a malus or parts thereof from one service level to another). Schemes usually provide for a maximum malus/credit.

<sup>36</sup> There are many templates for bonus/malus (service credits) schemes. Sometimes a transition period is agreed during which the scheme does not apply. Bonus/malus schemes usually assign a bonus or malus (service credit) to a limited number of service levels. Schemes may provide for some flexibility on the part of the Client (freedom to shift a malus or parts thereof from one service level to another). Schemes usually provide for a maximum malus/credit. A bonus/malus is usually applied in the framework of regular services, but may also be used for matters such as innovative projects, e.g. application management improvements. Being able to objectively determine the bonus/malus triggers is an important part of a good bonus/malus scheme.

<sup>37</sup> Because Dutch law does not define direct damage and consequential damage/indirect damage, the term "direct damage" is sometimes defined in more detail, restrictively or otherwise. The parties may also opt to define indirect damage or to define both direct and indirect damage.

(c) [damage ensuing from actions contrary to the provisions of [...]<sup>39</sup>].

## **23. Indemnification**

23.1. The Client undertakes to indemnify the Supplier from all claims from the Client's contracting parties that are directly or indirectly based on the ground that the Supplier has failed in the performance this Agreement.

## **24. Insurance**

24.1. The Supplier must be adequately insured against liabilities under this Agreement.<sup>40</sup>

## **25. Force Majeure**

25.1. In the event of force majeure, the performance by the party involved of the obligations ensuing from this Agreement will be suspended in part or in full for the term of such force majeure, without either party being liable to pay any damages to the other. The relevant party will notify the other party in writing of an event of force majeure as soon as possible, simultaneously submitting any requisite proof.

25.2. Force majeure is understood to mean a situation in which a party fails in the performance of this Agreement if the failure is not attributable to it, or if it is not responsible for the failure by virtue of the law, a legal act or generally accepted standards.<sup>41</sup>

25.3. A party that is affected by force majeure for a period of more than [...] consecutive days or that can be reasonably assumed to be affected by force majeure for a period of more than [...] consecutive days is considered to be in Default.

# **IX. INTELLECTUAL PROPERTY AND DATA**

## **26. Data - General**

26.1. This Agreement does not affect the rights the parties may exercise regarding their respective data.

## **27. Intellectual Property and Licences, Indemnification**

27.1. This Agreement is not intended to change any of the parties' or third parties' entitlement to intellectual property rights. If not otherwise agreed, each of the parties

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<sup>38</sup> Because Dutch law does not define direct damage and consequential damage/indirect damage, the term "consequential damage/indirect damage" is sometimes defined in more detail, restrictively or otherwise. Liability for losses due to lost profits and lost savings and non-material damage is practically always excluded. See also the note to Article 22.1.

<sup>39</sup> These could include breaches of confidentiality or IP violations, for example.

<sup>40</sup> Sometimes the parties agree a minimum amount to be insured and a provision stating that, upon request, the Supplier must prove that it is insured. On occasion, they also explicitly agree the type of liability in respect of which the Supplier must take out insurance, such as business liability (for damage to property and personal injury) and professional liability (for purely financial losses).

<sup>41</sup> The parties sometimes agree that specific events/circumstances do or do not constitute force majeure.

or issuers of the parties' licenses is exclusively entitled to the intellectual property rights of all its works, including software and documentation, including all supplements, changes, improvements and derived works.

- 27.2. All intellectual property rights of software or any other work that is specifically developed by the Supplier on behalf of the Client are vested in the [Client/Supplier].<sup>42</sup>
- 27.3. Each of the parties ("**the Indemnifying Party**") indemnifies the other party ("**the Indemnified Party**") against rights of action by third parties on the grounds that use by the Indemnified Party of the software, hardware or other matters supplied or made available by the Indemnifying Party violates the intellectual property rights of the relevant third party, except in so far as the violation was caused by a failure by the Indemnified Party to meet its obligations under this Agreement. This indemnification is subject to the condition that the Indemnified Party immediately notifies the Indemnifying Party in writing of the third party's claim as the case arises, and leaves handling of the claim, including any settlement, to the Indemnifying Party.

## 28. **Confidentiality**

- 28.1. The Parties reciprocally undertake to treat all information and data of which the parties take note in the performance of this Agreement, including all company data, client data, buying data and selling data, as confidential. The Parties undertake not to disclose such information and data to third parties without written consent from the other party, other than necessary in the performance of this Agreement. The duty of confidentiality applies for [the term of this Agreement / an indefinite period / [...] years after taking note of the relevant information].
- 28.2. The Parties will require their subordinates who are charged with the performance of this Agreement to comply with a comparable confidentiality obligation.
- 28.3. The confidentiality obligation as laid down in this article does not apply to information and data:
- (a) that are public and/or known without the disclosure being the result of an unauthorised act by the disclosing party; or
  - (b) regarding which disclosure is required on the basis of any statutory provision or regulation, a request from a regulator, or within the context of legal proceedings, all subject, if reasonably possible, to the prior written notification to the other party and to consultation in good faith regarding the contents of the disclosure.
- 28.4. At the discretion of the party from whom the information originates, in the event this Agreement is terminated the other party must destroy the information it received from the other party during the performance of this Agreement, including copies made by the receiving party and digital or other documents produced on the basis of this information, or return such to the other party, without prejudice to the parties' right to retain information in so far as necessary in compliance with a statutory obligation or a regulation.

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<sup>42</sup> As a rule, the rights on client-specific work rest with the Client (and the Client is entitled to release of the relevant source codes and accompanying documentation), unless the Supplier can present well-founded rules to the contrary. If the agreement provides that the rights will rest with the Client, it usually also provides for a Supplier licence, the substance of which is often a subject of consultation.

28.5. [If the previous paragraphs of this article are breached, the breaching party will owe to the other party an immediately exigible fine to the sum of [€ ...], without prejudice to the right to damages and other legal rights.]

28.6. The Supplier is [not] entitled to report the existence of its relationship with the Client without prior written consent from the Client[, which will not be withheld on unreasonable grounds], in publications or advertisements. [Any consent is granted until further notice.]

## 29. **Security**

29.1. The Supplier undertakes to take security measures in accordance with [ISO 27001 and 27002].<sup>43</sup>

## 30. **The Dutch Data Protection Act**

30.1. Each of the parties will comply with its obligations by virtue of the Dutch Data Protection Act (*Wet bescherming persoonsgegevens* or “Wbp”).<sup>44</sup>

30.2. Pursuant to Article 13 Wbp, the Supplier undertakes to implement fitting technical and organisational measures to secure personal data against loss or any form of unlawful processing. The Supplier undertakes to ensure that these measures guarantee a fitting security level, taking into account the state of the art and the costs of implementation, considering the risks associated with the processing and the nature of the data to be protected. The measures will be aimed in part at preventing unnecessary collection and further processing of personal data.

30.3. The Parties will indemnify one another against any action that third parties might bring against the indemnified party due to a violation of the Wbp attributable to the indemnifying party, unless the indemnifying party demonstrates that the relevant violation is (also) attributable to the other party.

30.4. The Client is entitled at all times to verify the Supplier’s compliance with the provisions of this article, at its own expense, by a registered EDP auditor. The Supplier entitled to expect the registered EDP auditor to sign a confidentiality statement to the Supplier’s benefit. The confidentiality statement will contain the terms and conditions commonly found in statements of this type. Verifications of this type will be scheduled in consultation with the Supplier so that the Suppliers’ operations are disturbed as little as possible.

30.5. Unless otherwise agreed, the Supplier will not bring any personal data originating with the Client outside of the European Economic Area without prior written consent from the Client. Such consent will not be withheld on unreasonable grounds, but reasonable conditions may be attached to it.

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<sup>43</sup> The article on security is given more substance depending on the information to be processed. In the past, reference was often made to BS7799 or the corresponding standard ISO 17799, but nowadays reference is more often made to its successor, ISO 27001, on its own or in combination with ISO 27002. Any security standards of the Client’s are often attached and declared applicable. A more comprehensive provision often also provides for control, consultation and improvements following incidents.

<sup>44</sup> Depending on the nature of the services, the Supplier may be a processor within the meaning of the Wbp. This is preferably stated explicitly. In that case, a separate processing agreement is often attached as an annex (pursuant to Article 14 Wbp).

## **X. TERM, TERMINATION AND EXIT ASSISTANCE**

### **31. Term and Termination**

- 31.1. This Agreement enters into force on the Commencement Date and is concluded for the term stated on the Contract Sheet. After this period, the Agreement will be automatically extended for a period of [...] unless the Agreement is terminated in writing by one of the parties towards the end of the term with due observance of a notification period of at least [...] months.<sup>45</sup>
- 31.2. Notwithstanding any other provisions of this Agreement, each of the parties is entitled to terminate this Agreement by means of registered letter, in part or in full, if:
- (a) the other party is in Default, unless the failure, in view of its special nature or minor significance, does not justify such termination and its consequences;
  - (b) the other party applies for or is granted suspension of payments;
  - (c) the other party files for bankruptcy or is declared bankrupt;
  - (d) the business of the other party is wound up; or
  - (e) the other party terminates its present business.<sup>46</sup>
- 31.3. [The Client is entitled to prematurely terminate the Agreement without stating its reasons [towards the end of any Contract Year, for the first time towards the end of the [...] Contract Year], with due observance of a notification period of at least [6] months, in which case the following termination fee is owed by the Client:
- (a) [...] in the event of termination towards the end of the [...] Contract Year;
  - (b) [...] in the event of termination towards the end of the [...] Contract Year;
  - (c) [...] in the event of termination towards the end of the [...] Contract Year.]<sup>47</sup>

### **32. Exit Assistance**

- 32.1. The Parties undertake to provide one another with all reasonable exit assistance in accordance with the exit plan, in order to:
- (a) ensure that the Services are smoothly transferred back to the Client as at the end date of the Agreement; or

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<sup>45</sup> Of course, other mechanisms are possible, for example arrangements in which the agreement is tacitly extended for an indefinite period of time after the initial agreement period, with an option to terminate the agreement with due observance of a notice period of [...] months, for the first time by the end of the initial agreement period.

<sup>46</sup> Other grounds for termination are conceivable depending on the circumstances, such as the loss of a licence or a change of control.

- (b) ensure that the Services are smoothly transferred to the next supplier as at the end date of the Agreement;

such that the Client's operations are disturbed as little as possible.

- 32.2. During the term of this Agreement, the Parties will keep the exit plan up to date.
- 32.3. With regard to the exit assistance referred to in this article, the Parties will comply with the Exit Protocol (*Gedragcode Retransitie*) of the Netherlands Outsourcing Platform attached to this Agreement as **Annex [...]** (**Exit Protocol**). The Parties have agreed to the deviations from the Exit Protocol as listed in the annex attached to the Exit Protocol.
- 32.4. At this time the Parties hold the opinion that the Dutch Transfer of Undertakings Act (Book 7, Articles 622 et seq. Dutch Civil Code) [is/is not] applicable to the end of this Agreement. If this act applies when the Agreement ends, the following scheme applies:[...]<sup>48</sup>

## **XI. APPLICABLE LAW AND DISPUTE RESOLUTION PROCEDURE**

### **33. Applicable Law**

- 33.1. This Agreement and agreements ensuing from it are governed exclusively by the laws of the Netherlands.

### **34. Dispute Resolution Procedure**

- 34.1. The Parties will devote their best effort to amicably settling disputes before turning to [the court/arbitrators]. The Parties agree that every dispute will be escalated to Service Management and then to Contract Management (giving each of these consultative bodies a period of [10] Work Days to reach agreement) before initiating a [court case/arbitration case] or taking other legal action, without prejudice to the right deviate from this procedure for the sake of urgency.

### **35. Competent [Court/Artibral tribunal]**

- 35.1. If the dispute has not been resolved as laid down in Article 34.1, it will be exclusively brought before [the competent court in [...]/[arbitration]].<sup>49</sup>

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<sup>47</sup> A Client may sometimes want to have the option of a termination for convenience, and the parties will then reach a consensus in that regard. The agreement usually provides that a termination fee will be owed, often linked to the period that the contract would have continued without termination. The termination fee is sometimes expressed as a fixed amount, but often a variable fee is provided for that may depend on investments not yet recouped or lost profits.

<sup>48</sup> The parties may not exclude the applicability of the Transfer of Undertakings Act. However, the parties may make arrangements regarding actions/methods that can affect its applicability, such as provisions concerning the extent to which the relevant Supplier's employees work specifically for the Client. The parties may also make arrangements about aspects such as the costs that could be involved in the transfer of the undertaking and which costs are to be borne by which party.

## **XII. GENERAL PROVISIONS**

### **36. Priority**

- 36.1. If the Contract Sheet and this Annex are contradictory, the provisions of this Annex will prevail. The Contract Sheet will prevail over the other Annexes. If the various Annexes are contradictory, the following priority sequence will apply, in which an Annex with higher priority will prevail over an Annex with lower priority: [...].

### **37. Subcontracting**

- 37.1. The Supplier is authorised to subcontract only if prior written consent is obtained from the Client. The Client will not withhold such consent on unreasonable grounds, but may attach reasonable conditions to its consent. No consent is required for subcontracting to a Dutch group company if ultimate control over the group company is the same as ultimate control over the Supplier. With regard to third parties engaged by it, the Supplier bears full responsibility for proper performance of the obligations under this Agreement.<sup>50</sup>

### **38. Assignment**

- 38.1. With the exception of the instances referred to above, a Party cannot assign its rights and obligations under this Agreement without prior written consent from the other party, which consent will not be withheld on unreasonable grounds. However, the other Party is entitled to attach reasonable conditions to its consent. Assignment within the group to which the party belongs requires no consent from the other party in so far as ultimate control over the new party is the same as ultimate control over the assigning party.

### **39. Notifications**

- 39.1. All notifications sent between the parties within the context of the Agreement and that the Agreement requires to be given in writing will (also) be made by registered post, courier or fax, to the attention of the management board, to the addresses stated with the names of the parties or to a different address if such has been indicated beforehand in writing by the relevant receiving party.

### **40. Miscellaneous**

- 40.1. General terms and conditions neither of either party nor of any third party will apply to this Agreement.
- 40.2. This Agreement takes the place of all earlier agreements between the parties with the same subject, including verbal and implicit agreements.

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<sup>49</sup> The article may also provide for mediation. If the parties opt for arbitration, use of the standard texts of the relevant arbitration institute is recommended. Institutes including the Netherlands Arbitration Institute and the Foundation for the Settlement of Automation Disputes have published standard texts that the parties may use if they agree on arbitration by that particular institute.

<sup>50</sup> The agreement sometimes provides that temporary personnel also may not be engaged without prior written consent.

- 40.3. The invalidity of any provision of this Agreement does not prejudice the other provisions of this Agreement. If a provision proves to be invalid, the parties will strive to replace it by a provision that is not invalid and that is in accordance with the invalid provision to the extent possible.
- 40.4. If any matter is not regulated in this Agreement, the parties will strive to regulated it in a supplement to this Agreement.
- 40.5. Deviations from that agreed in this Agreement or in one of the Annexes will only be binding on the parties if laid down in writing and signed by duly authorised representatives of the parties.



## **Annex 2      Definitions**

<b>Acceptance Procedure</b>	The procedure for testing the results of the Transition, the Transformation and Projects [and, in so far as specifically agreed, of other Services] laid down in <b>Annex [...]</b> ( <b>Acceptance Procedure</b> ).
<b>Architecture Plan</b>	The description of the architecture, including technical design, functional design and manuals attached as <b>Annex [...]</b> ( <b>Architecture Plan</b> ).
<b>Benchmark Study</b>	The benchmark study referred to in Article 20.1 of Annex 1 (Legal Terms and Conditions).
<b>Annex</b>	An annex to the Contract Sheet that is an inseparable part of the Agreement.
<b>Contract Sheet</b>	The contract sheet regarding outsourcing of [...] signed by the parties.
<b>Contract Year</b>	The year commencing on the Commencement Date and ending 12 months later, as well as every subsequent period of 12 months.
<b>Contract Management</b>	Consultation about and monitoring of the performance of the Services on a strategic level.
<b>DAP</b>	The Dossier of Arrangements and Procedures attached as <b>Annex [...]</b> ( <b>DAP</b> ).
<b>Services</b>	All activities to be performed by the Supplier on behalf of the Client under this Agreement.
<b>Indemnified Party</b>	The indemnified party referred to in Article 27.3 of Annex 1 (Legal Terms and Conditions).
<b>Commencement Date</b>	<i>[insert date]</i>
<b>Assignment Management</b>	Consultation about and monitoring of the performance of the Services on an operational level.
<b>Agreement</b>	The sourcing agreement laid down in the Contract Sheet and the accompanying Annexes.
<b>[PSC]</b>	The Products and Services Catalogue included in Annex [...] (PSC) giving a list and description of the various standard products and services that the Supplier can supply.] <sup>51</sup>

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<sup>51</sup> A PSC is mainly used with commodity services, serving as a menu from which a client may select the appropriate products and services. The agreement usually provides that the SLA contains the selection from the PSC that the Client wishes to purchase.

<b>Project</b>	An assignment to be agreed separately for the performance of project-based activities.
<b>Project Agreement</b>	An agreement for the performance of a Project.
<b>Service Level</b>	The level of a sub-aspect of the Services to be provided by the Supplier, expressed by means of an indicator.
<b>Service Management</b>	Consultation about and monitoring of the performance of the Services on a tactical level.
<b>SLA</b>	The Service Level Agreement attached as <b>Annex [...]</b> ( <b>Service Level Agreement</b> ), in which the Services and the Service Levels are described.
<b>Third Party Assurance, TPA</b>	The assurance of a registered EDP auditor referred to in Article 18.1 of <b>Annex 1 (Legal Terms and Conditions)</b> .
<b>Transformation</b>	The transformation activities referred to in Article 3.2 of <b>Annex 1 (Legal Terms and Conditions)</b> .
<b>Transformation Plan</b>	The plan for the performance of the Transformation laid down in <b>Annex [...]</b> ( <b>Transformation Plan</b> ).
<b>Transition</b>	The transition activities referred to in Article 3.1 of <b>Annex 1 (Legal Terms and Conditions)</b> .
<b>Transition Plan</b>	The plan for the performance of the Transition laid down in <b>Annex [...]</b> ( <b>Transition Plan</b> ).
<b>Fees</b>	The fees laid down in <b>Annex [...]</b> ( <b>Fees</b> ).
<b>Default</b>	<p>A situation in which a party has failed to perform when due and:</p> <ul style="list-style-type: none"> <li>(a) a term explicitly agreed as deadline for performance has lapsed without performance; or</li> <li>(b) proper performance is permanently or temporarily impossible; or</li> <li>(c) that performance will not be forthcoming can be derived from notifications or behaviour of the other party; or</li> <li>(d) even after a reasonable term of no more than 30 days given in a notification of default, the other party fails to comply with any provision of the Agreement;</li> </ul> <p>or a situation existing before the claim against the other party under the Agreement is due if:</p> <ul style="list-style-type: none"> <li>(a) it has been established that performance without failure is impossible; or</li> <li>(b) that a party will fail to perform must be derived from a notification from the other party; or</li> </ul>

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(c) good grounds exist for fearing that the other party will fail to perform and fails to comply with a written demand, stating those grounds, for it to express its willingness to comply with its obligations within a reasonable period of no more than 30 days given in that demand.

**Indemnifying Party**

The indemnifying party referred to in Article 27.3 of **Annex 1 (Legal Terms and Conditions)**.

**Work Day**

Every day from 8:00 a.m. to 5:00 p.m. CET, with the exception of Saturdays, Sundays and national holidays.

**Change Procedure**

The procedure regarding changes to the Agreement included in **Annex [...] Change Procedure**.

## **ANNEX [...] Change Procedure**

1. Each of the parties may propose a change to this Agreement to the other party from time to time. In response to such a proposal, the parties will consult within a reasonable period, but within [...] Work Days, about the proposed change and its possible consequences.<sup>52</sup>
2. With regard to the consultation referred to in the first paragraph of this article, each of the parties may make a written proposal for a change to the Agreement. If this proposal is made by the Client, the Supplier will then report to the Client in writing within 10 Work Days, or so much later if this term is not reasonably realistic, indicating whether it agrees with the change and, if so, the manner in which the change should be implemented in the text of the Agreement and any financial consequences to be connected to the change. If this proposal is made by the Supplier, it will indicate therewith the manner in which the change should be implemented in the text of the Agreement and any financial consequences to be connected to the change.<sup>53</sup>
3. The Client will make notification in writing within [...] Work Days after said written report from the Supplier, or so much later if this term is not reasonably realistic, that it:
  - (a) agrees to the proposed changes including the financial consequences connected with these;
  - (b) prefers an alternative, after which the parties will strive in good faith to reach agreement; or
  - (c) does not agree to the proposed change and the financial consequences connected with it.
4. Once the parties have reached agreement, they will lay this down in a supplement to the Agreement signed by both parties.

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<sup>52</sup> A provision may be included stating that a shorter response time applies.

<sup>53</sup> The parties may pre-determine the financial consequences associated with particular requests for amendment or the absence of financial consequences in respect of particular requests for amendment. Further substantiation of the costs is sometimes also required, for example if certain changes are taken into account in the Agreement as a principle and should not result in additional costs.

## ANNEX [...] Acceptance Procedure

1. Except to the extent to which it has been agreed that no acceptance test will be performed, the results of the Transition, the Transformation and Projects will be subjected to an acceptance test. [The same applies to results of other Services if such has been specifically agreed.] The manner in which the acceptance test will be performed and the acceptance criteria are laid down in the Transition Plan, the Transformation Plan and the Project Plan [or another document agreed by the parties in this matter]. Unless otherwise agreed, the acceptance test will be performed by the Client [in which the Client is entitled to have the acceptance test performed by an expert third party<sup>54</sup>. The Supplier entitled to expect the expert to sign a confidentiality statement to the Supplier's benefit, a copy of which will be given to the Supplier. The confidentiality statement must contain the terms and conditions commonly found in statements of this type.] When engaging the relevant third party, the Client will also consider the reasonable interests of the Supplier, under certain circumstances including the interest in the independence of the third party.
2. [The Client/The Supplier] will make a Development, Test and Acceptance (DTA) environment available for each acceptance test.
3. The parties draw up and sign a report immediately after an acceptance test has been performed. This report will specifically state any aspects of the results of the Services offered for acceptance in accordance with the above fail to comply with that which has been agreed, and whether these results of the Services are approved or rejected by the Client. If the Client fails to reject the results within [...] Work Days after the agreed completion or puts the Services provided into operation within that period, the Services provided are deemed to have been accepted.<sup>55</sup>
4. Minor shortcomings, which are understood to include shortcomings the nature and/or number of which does not reasonably prevent putting the results of the Services into operation, will not give cause to withhold approval, without prejudice to the Supplier's obligation to remedy such shortcomings free of charge.<sup>56</sup>
5. As quickly as possible but within [10] Work Days after the date of the report referred to in paragraph [3] [or so much later if this term is not reasonably realistic], the Supplier will remedy the shortcomings laid down in the report, free of charge.

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<sup>54</sup> The Agreement may set additional requirements with regard to the expert to be engaged, for example that this expert may not be one of the Supplier's competitors.

<sup>55</sup> Note: the Services provided are sometimes accepted conditionally, in which respect the parties agree when the shortcomings must have been resolved.

<sup>56</sup> A more detailed description is sometimes included stating which types of shortcoming are considered minor shortcomings in any event. The agreement occasionally provides that minor shortcomings are not understood to include the absence of the reports agreed and other means that allow the Client to verify its financial obligations with regard to the Services provided. After all, the absence of reports will generally not impede "putting the results into operation". Accordingly, a Client using this as an acceptance criterion will run the risk of matters such as (financial) reports and governance models agreed not receiving sufficient attention.

6. If the Client has not approved the results of the Services the first time an acceptance test is performed, and providing the Supplier has remedied the shortcomings in accordance with the previous paragraph in good time and offered the results for acceptance again within that term, the acceptance test referred to in paragraph 3 will be repeated no later than within [...] Work Days. The second report will state whether the shortcomings stated in the first report have been remedied and - in the event of rejection - whether the results of the Services are now approved.
7. If the results of the Services are rejected by the Client again after the second acceptance test, the Client is entitled to terminated the relevant Project Agreement, also conditionally or partially, without intervention of the court, without any demand or notification of default being required and without the Client being required to make any compensation in that respect. The provisions of this article do not prejudice any other powers to terminate or rights.<sup>57</sup>
8. If the results of the Services are approved by the Client, the date on which the relevant report was compiled and signed will apply as the date of acceptance.

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<sup>57</sup> It was noted within the task force that a “third” chance before the agreement may be terminated is also regularly laid down. Departures from the contractual consequences of repeated failure are not rare in actual practice, with clients offering their suppliers an extra chance as yet.

## **ANNEX [...] Exit Protocol (Netherlands Outsourcing Platform)<sup>58</sup>**

### **1. Objectives of this exit protocol**

1. Increasing the transparency of the outsourcing process in order to safeguard the continuity of the provision of services to the client.
2. This protocol provides the basic principles/minimum requirements endorsed by all participating service providers.
3. Sections of the protocol do not replace or create any contractually agreed arrangements.
4. Naming the items that must be discussed in the primary negotiating phase within the context of a possible transfer of the provision of services after termination of the contract.
5. In time, if possible indicating best practices.

### **2. Points of departure of this exit protocol**

1. A transfer is made to a provider of services other than the incumbent provider or to the client's organisation. The "future service provider" may therefore also be understood to mean the client's organisation.
2. All of the parties involved respect the interests, intellectual property and confidentiality of information of all parties.
3. The Client must suffer as little as possible from termination of the contract and the transfer of the provision of services to the future service provider.
4. All of the parties involved are committed to cooperative collaboration throughout the exit process.
5. A new exit protocol will also be immediately agreed, if necessary, in the event of extension.

### **3. Basic exit/transition principles**

1. The exit is organised as a project, in which the incumbent service provider transfers the activities to the future service provider. This project is performed under the client's responsibility.
2. The incumbent service provider is responsible for ensuring that the service levels agreed in the contract for the services, that it (still) manages until the services are transferred to the future service provider, are maintained.

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<sup>58</sup> The parties may have departed from certain provisions of the Exit Protocol in the remainder of the Agreement. Even if the Exit Protocol is ranked lower in the order of precedence, it is still generally advisable to explicitly identify such deviations in this Annex. In addition, some provisions of the Exit Protocol cannot always be applied or are not always reasonable. In the context of this template contract, the following deviations might be conceivable:

"In derogation from the Exit Protocol, the parties have agreed, in any event, the following, without prejudice to the order of precedence from the Agreement:

- The provisions of Article 3.2 do not apply to the extent that the exit plan deviates from those provisions.
- The transfer of knowledge, documentation and resources referred to in Article 3.6 will be effected with due observance of the provisions concerning confidentiality and intellectual property rights.
- Article 3.7 does not apply.
- Article 3.8 does not apply.
- In derogation from Article 3.12 (e), the documents referred to in that article are transferred to the extent that they pertain to matters developed specifically for the services provided to the Client."

3. When the service provider and client enter into an agreement, a general project plan for the exit is compiled. Before the actual exit, this plan is fleshed out through mutual consultation between the service provider(s) and the client.
4. The exit plan will be expeditiously addressed. The future service provider will attune its transition plan for taking over the provision of services to the exit plan and will have the transition performed as quickly as possible.
5. The incumbent service provider provides the efforts for the exit based on costs actually incurred, which will be estimated in a budget. The terms and conditions and rates of the original agreement remain applicable during the exit.
6. The incumbent service provider is responsible for the transfer of essential knowledge, documentation and resources necessary for the continuity of the provision of services. Within that context, the incumbent and future service providers and the client will consult with the staff involved to determine which of the incumbent service provider's employees can transfer to the future service provider. The incumbent and future service providers will cooperate in contacts with social partners and employee representative bodies.
7. The ownership of all items that are developed during the provision of services will be recorded. Items that are owned by the client will be transferred by the incumbent service provider; the incumbent service provider will grant a right of use for items that are essential to the continuity of the provision of services.
8. The incumbent service provider will return all confidential information of the client at the end of the agreement and/or at the end of the exit to the client, without retaining any copies.
9. If such is opportune, the transfer of resources will be on an as-is basis. In other words: during the exit, no resources will be modified for the purpose of the transfer. If the client wants modifications, these can be made in advance (project assignment) or after the fact (under the new service provider's responsibility).
10. The end of the exit is always recorded and agreed in a formal discharge document.
11. All of the parties involved will cooperate in the requisite legal acts, such as contracts with suppliers and acts of transfer.
12. The incumbent service provider is not required to transfer the following items in an exit:
  - a. Internal procedures and operating instructions. These are owned by the client from the point of common ground (as described in a DAP).
  - b. Internal tools, including the (setup of the) management tools. The client information in such tools is owned by the client.
  - c. Reporting systems. The reports themselves are owned by the client.
  - d. Resources used specifically for the exit unless otherwise agreed.
  - e. Intellectual property. The provision of services is based on concepts, working methods, systems and standards conceived, developed and fleshed out by the provider. Their results are available in documents that are the intellectual property of the relevant provider. These items are also used for other clients, meaning that the relevant rights cannot be transferred.



## **ANNEX [...] Consultative Structure<sup>59</sup>**

The parties have agreed a governance model consisting of three layers, operational, tactical and strategic, with participants from both organisations on each of these layers. If useful or desired, representatives of other suppliers or partners may be added at specific points in time.

### **Operational Consultation**

The operational consultation focuses on the performance of the provision of services, in keeping with the SLA. The operational level:

- Is concerned with service levels, changes, incidents and problems on a daily basis.
- Monitors the SLA and reports summaries to the tactical consultation.
- Shares information about activities scheduled for the coming period that can affect the outsourced processes and activities.
- Takes the initiative to escalate matters to the tactical level if these cannot be sufficiently or sufficiently structurally resolved on the operational level. For example: incidents/problems, improvement measures or innovations.
- Discusses matters that relate to contractual and commercial matters on the operational level. If no agreement is reached, the matter can be escalated to the tactical consultation.
- Receives input for processes, SLA, monitoring, etc. from the tactical consultation.

### **Tactical Consultation**

The tactical consultation has a number of items on its agenda that have a somewhat longer time horizon, and also deals with matters originating on the operational or strategic level. The tactical consultation provides input for the Strategic Consultation and, if necessary, can escalate matters to that level. The tactical consultation deals with:

- Matters escalated from the operational consultation concerning SLA, performance, escalated matters, architecture impact, etc.
- Proposals for changes to the SLA, to the reporting, to the processes or to other arrangements.
- Monitoring and analyses of the trends in performance and capacity, and any follow-up actions to be taken.
- Initiatives for innovation and the provision of additional services.
- Initiatives concerning common ground with the server, back-up and network environments.
- Reporting to the strategic consultation.
- The tactical consultation can assign tasks or action items to the operational consultation.

### **Strategic Consultation**

In general, the Strategic Consultation focuses on the alignment of the provision of services with the Client's objectives and priorities.

It receives input from the tactical and operational consultations and from developments in both the Client's and the Supplier's organisations. The strategic consultation can formulate objectives or tasks for the tactical consultation. The strategic consultation:

- Focuses on the alignment of the provision of services with the Client's objectives and

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<sup>59</sup> This annex contains an example of a consultative structure. Many organisations use their own templates.

- priorities.
- Is concerned with strategic developments.
- Focuses on developing the relationship on a high level.
- Is concerned with innovation.

### **Frequency**

The following frequencies have been agreed for the various consultation levels:

- Operational consultation: once every month
- Tactical consultation: once every quarter
- Strategic consultation: once every six months

### **Participants**

The various representatives from each of the parties that attend the various consultations will be named in the list below. This list does not identify individuals due to the possible changes that will regularly take place in that respect.

	<b>Client</b>	<b>Supplier</b>
<b>Operational Consultation</b>		
<b>Tactical Consultation</b>		
<b>Strategic Consultation</b>		