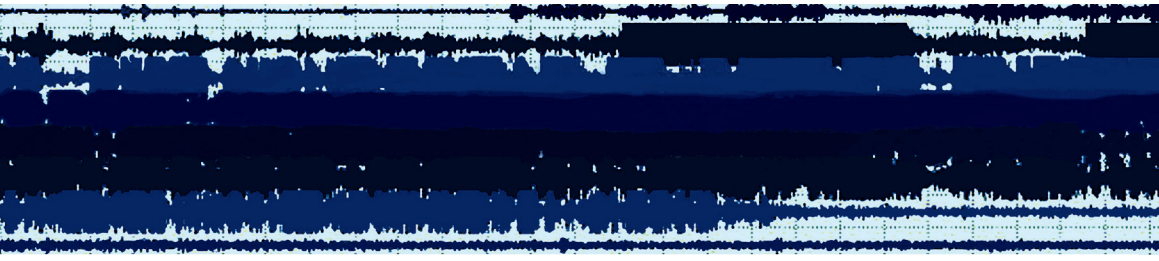
HOUTHOFF BURUMA

DOING INFRASTRUCTURE PROJECTS IN THE EUROPEAN UNION



FOREWORD

Although there are many similarities between large infrastructure projects around the world the success of a business venture will stand or fall with the attention to details. Houthoff Buruma has a long-standing tradition of advising Chinese companies on their investments abroad. This publication, which is part of a series, aims to provide an outline of the practical approach for Chinese companies seeking to participate in European infrastructure projects. Europe has an ambitious agenda in this arena and is regarded as one of the safest regions in the world to invest in. Houthoff Buruma has a long term vision on cooperation and partnership. The success of our firm is based on helping our clients achieve their business goals.

JAAP BOSMAN
Global Director of Business Development
Houthoff Buruma

TABLE OF CONTENT

1. INTRODUCTION

The quality of the existing infrastructure in the EU is high: good roads, efficient power plants, high-quality energy distribution and data communication networks and a first-rate public transport system. Despite this, the largest and most important projects in the EU in the next 5 to 10 years are predicted to be in the infrastructure sectors: roads, water, energy and logistics. European infrastructure spending amounted to €542 billion in 2012 and is set to increase in the coming years.
In October 2013 the European Commission adopted a list of some 250 key energy infrastructure projects1. These "projects of common interest" ("PCI") will benefit from accelerated permitting procedures and improved regulatory conditions, and may have access to financial support from a funding facility with a €5.85 billion budget allocated to trans-European energy infrastructure for the period 2014-2020.

The Netherlands has a long tradition of realising large projects. Due to its geographical location - 55% of the Netherlands is vulnerable to flooding - private parties and government have had to co-operate ever since the middle ages in order to ensure vital water defences and successful land reclamation. This has culminated in the Deltawerken project (a major sea defence project in Zeeland) and Rotterdam Mainport Development Project (the extension of the Port of Rotterdam with over 1000 hectares of harbour and industrial businesses). This tradition has proven to be a good basis for public private partnerships or PPPs, which are now common in large Dutch infrastructure projects.

PPPs also play a critical role in developing new infrastructure in the rest of the EU. Houthoff Buruma has been advising governments and private developers and financers on PPP projects for many years. We understand that each project has unique requirements with corresponding opportunities and challenges.

The increasing size of the upcoming projects in the EU and the need for technical expertise to implement them will present opportunities for consortia led by global construction companies. According to the Chinese government, Chinese engineering companies produced US$117 billion in revenues from contracts outside China in 2012. Five of the world's top 10 building contractors are Chinese according to the trade publication Engineering News Record. The EU, including the Netherlands, offers low-risk, longterm investment opportunities for technically and financially strong parties, irrespective of their origins.

The aim of this book is to outline the key practical challenges in bidding for and completing these projects successfully, and share lessons learnt from our vast experience.

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[1] *European Commission Press Release IP/13/932 - 14/10/2013.*

2. THE NETHERLANDS AT A GLANCE

2.1 QUICK FACTS

Country	Kingdom of the Netherlands
Membership	European Union
Capital	Amsterdam
Official language	Dutch and Frisian
Population	16.8 million
Area	41,526 km^2
Time zone	CET (UTC + 1)
Calling code	31
Currency	Euro (€)
GDP per country (2012) (IMF)	= CNY 4,733,143 million (US$ 773,116 million)
GDP per capita (2012) (IMF)	= CNY 282,470 (US$ 46,142)

2.2 THE COUNTRY: A BRIEF OVERVIEW

GEOGRAPHY & CLIMATE

The Netherlands (often called "Holland") is a modern, prosperous nation located in north-west Europe. With 16.8 million people and an area of 41,526 km, it is one of the world's most densely populated countries. The Netherlands is part of the Kingdom of the Netherlands, which also includes Aruba, Curaçao, St Maarten and three other islands in the Caribbean.

The Netherlands has a mild, maritime climate, with comparatively cool summers and mild winters. Summers are generally warmer with colder, rainy periods. Winters can be fairly cold, windy, with rain and some snow. The average temperature is 2°C (36°F) in January and 19°C (66°F) in July.

LANGUAGE

The official language is Dutch, a language spoken by 23 million people worldwide. English is also widely understood and spoken. A second official language, Frisian, is spoken by approximately 350,000 people in the province of Friesland.

CULTURE & RELIGION

The culture of the Netherlands is diverse, reflecting regional differences as well as foreign influences, thanks to the Dutch mercantile spirit and their zest for exploring, and the influx of immigrants.

The Netherlands has a liberal image, which stems from pragmatism and a "live and let live" attitude. Society in the Netherlands is consensus based. Making compromises and joint problem-solving are an essential part of the Dutch nature.

The business community in the Netherlands is rather close-knit and most senior-level people know one another. The Dutch are hospitable, but this is often reserved for family and friends. In business matters they tend to be reserved and formal. Their communication style has been described by some observers as "direct". Dutch people tend to avoid small talk and get to the point rather quickly. Punctuality for meetings is taken very seriously.

In the Netherlands, 40% of the population call themselves non-religious. The largest religious denomination is Roman Catholic (30%), followed by Protestant (21%), and Islam (4%). The rapid secularisation of the Netherlands since the 1960s has meant that religion plays a decreasing role in the social and cultural lives of many Dutch people.

CURRENCY

The euro is the official currency in the Netherlands. The exchange rate on 1 February 2014 was approx. €1 = CNY 8.26. Bank transfers within the euro area are relatively inexpensive.

FINANCE AND ECONOMY

The Netherlands has the 18th-largest GDP in the world (2012) (IMF). It has a modern banking and financial system fully integrated into the international system.

The Dutch economy has a strongly international focus. The Netherlands has had a long history as a trading nation. Foreign trade is the life-blood of Dutch prosperity: the Netherlands is the eighth-largest exporter of goods and capital in the world. Owing to its relatively small domestic market, the Dutch economy is one of the most open and outward-looking in the world. Royal Dutch Shell, Unilever, Philips and Heineken are just a few of the multinationals based in the Netherlands.

INFRASTRUCTURE

The Netherlands lies on the North Sea at the delta of three major rivers coming from the heart of Europe: the Rhine, Maas and Schelde. Due to its prime maritime location, the Netherlands has long played an important role as a key port and distribution centre for companies operating worldwide. The port of Rotterdam, handling some 441.5 million tonnes of goods in 2012, is the largest port in Europe. Inland waterways and ports (especially in the Amsterdam area) link the various parts of the Netherlands together and to its European neighbours.

Amsterdam Schiphol Airport is ranked as Europe's third-largest individual cargo airport, reporting an annual transfer in 2012 of just under 1.5 million tonnes of cargo. With passenger numbers totalling 52 million, Amsterdam Schiphol Airport was ranked as Europe's fourth-largest passenger airport in 2013 according to preliminary data. In addition, there are a number of regional airports in the Netherlands, the main ones being Rotterdam/The Hague Airport, Eindhoven Airport, Maastricht Airport and Groningen Airport.

Furthermore, the Netherlands has good roads, a first-rate public transport system and a close-knit network of trains and buses. Major European countries like France, the United Kingdom and Germany are within easy reach by rail and road.

COMMUNICATIONS

The communications network in the Netherlands is one of the best in the world. The highly developed and well-maintained telephone system has an extensive fixed-line fibre-optic network and its cellular telephone system is one of the largest in Europe, with three major network operators utilizing the third and fourth-generation of the Global System for Mobile Communications (GSM). Submarine cables and satellite earth stations enable international communication. Use of the internet is widespread at home and at work. Approximately 94% of Dutch people have an internet connection at home.

UTILITIES

The Netherlands is the largest natural gas producer in the European Union. Natural gas is used as a raw material by industry and in businesses and homes for heating and cooking purposes. NAM (a 50/50 joint venture between Shell and ExxonMobil) produces 75% of the natural gas in the Netherlands, and GasTerra (50% state-owned) is responsible for 45% of total gas supplies. The largest electricity producers in the Netherlands are foreign-owned private companies, such as Essent (RWE), GDF Suez, Nuon (Vattenfall) and E.ON. The largest electricity suppliers to end-users are Essent (RWE), Nuon (Vattenfall) and Eneco (publicly owned). The transmission and distribution system operators as well as all energy grids in the Netherlands are publicly owned. Gas and electricity transport tariffs are highly regulated, whereas gas and electricity (commodity) prices are market determined. In the Netherlands, the supply of drinking water is in the hands of ten drinking water supply companies, all of which are publicly owned.

2.3 DIPLOMATIC RELATIONS / EUROPEAN UNION

The Netherlands provides easy access to the single European market (including the financial and commercial centres in the UK, France and Germany) and every corner of the European Union.

The Netherlands is one of the founding members of the European Union and plays an important role in many international organisations. It has active diplomatic and economic relations with most countries in the world. In addition, the Netherlands is a member state of the European Economic Area (EEA), the Schengen Area, the EU Customs Union and the Council of Europe.

Visit *www.minbuza.nl* for further information (in various languages) about how to contact Dutch embassies, consulates and permanent representations.

Detailed visa information is available (in English and Dutch) at w*ww.ind.nl*.

2.4 DUTCH GOVERNMENT

DEMOCRACY AND STABILITY

The Netherlands is a constitutional monarchy with a parliamentary system. Although His Majesty King Willem-Alexander formally heads the government, it is the prime minister who governs in practice, together with the other ministers and state secretaries. The ministers are accountable to the Dutch parliament for the government's actions, including those of the monarch.

The Dutch parliament consists of the Second Chamber (the 150-member Tweede Kamer) and the First Chamber (the 75-member Eerste Kamer). Both houses together are officially referred to as the "States General" (Staten Generaal). The members of the Second Chamber are directly elected by the people (proportional representation). Elections usually take place every four years. The Second Chamber has the power to compel the government to resign by means of a motion of no confidence. Members of the First Chamber are elected by the provincial councils, i.e. by the elected members of the twelve provincial legislatures.

Every year, on the third Tuesday in September – a day known as Prinsjesdag – the government presents its budget for the coming year, and the King delivers a speech from the throne outlining the government's policy and plans for the coming year. The budget requires the approval of parliament. A Dutch government always consists of a coalition of various political parties. There are currently 12 political parties represented in the Second Chamber. Two of them form the current coalition government.

CENTRAL GOVERNMENT, PROVINCES AND MUNICIPALITIES

The Netherlands has three levels of government: central government, provincial government and municipal government. The Netherlands has 12 provinces and 431 municipalities.

LEGISLATIVE PROCESS

A legislative proposal is made by the minister responsible for the legislative domain (with government approval) or by one or more members of parliament (without government approval).

Before a legislative proposal is sent to the Second Chamber, it is reviewed by the Council of State (Raad van State). Sometimes the proposal is amended as a result of the Council of State's advice. The advice of the Council of State is sent to the Second Chamber at the same time as the legislative proposal and an explanatory memorandum (memorie van toelichting).

The legislative proposal is first discussed in the Second Chamber, which has the right to amend it. After a legislative proposal is adopted by the Second Chamber, it is sent to the First Chamber. The First Chamber does not have the right to amend the proposal. It can merely adopt or reject it.

2.5 LEGAL SYSTEM

CIVIL LAW

The Netherlands has a civil-law system similar to that used in France, Germany and many other continental European countries. As a member of the European Union, the Netherlands is also subject to European law.

CONSTITUTIONAL FRAMEWORK

Among many other things, the Dutch constitution provides for the legal system and enshrines the independence of the judiciary. It is the role of the legislature (with the advice of the Council of State) to ensure that laws are constitutional. In the Netherlands, the constitutionality of a law is not a matter for the courts.

THE CIVIL AND CRIMINAL COURTS

Civil and criminal cases are dealt with by eleven courts located throughout the Netherlands, five regional courts of appeal, and the Supreme Court of the Netherlands (Hoge Raad).
The courts are divided into various sectors (e.g. "family sector", "criminal sector" and "tax sector").

Some courts have specific expertise in and jurisdiction over cases in specific areas. For example, the Enterprise Chamber (Ondernemingskamer) of the Amsterdam Court of Appeal has exclusive jurisdiction over certain matters relating to corporate law.

Both at first instance and on appeal, cases are examined on both their facts and their legal merits. The Supreme Court, however, does not review the facts of a case.

Civil litigation in the Netherlands is often a relatively expeditious process – it may take only several months to a year (but occasionally longer) to obtain a final decision. However, even this is considered too slow in some situations. In Dutch civil law, it is possible to have a matter heard in summary proceedings (i.e. in the context of a request for interim measures). Sometimes a decision can be obtained in just a few days. It is not unusual for litigation to continue no further than these summary proceedings, the parties considering the summary decision to be a reliable indication of the eventual outcome.

MEDIATION AND ARBITRATION

Sometimes the courts try to expedite matters by calling on the parties to enter into settlement negotiations during a rather informal hearing (comparitie van partijen).

Mediation is also becoming common in certain proceedings, especially divorce cases. Arbitration is quite common in civil cases. Contracts often bind parties to rely on the rules of the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut) in the event of a dispute. More information on this (including standard clauses) is provided (in English and Dutch) at *www.nai-nl.org*.

ADMINISTRATIVE PROCEEDINGS

Most administrative law matters involving the government are heard by the courts. However, these cases are often preceded by objection proceedings (essentially requests for reconsideration) made to the administrative decision-makers themselves. Objection proceedings are very common in the Netherlands.

Certain administrative courts have specific expertise in and jurisdiction over certain types of proceedings.

The Administrative Jurisdiction Division of the Council of State is the highest administrative court in the Netherlands. It hears appeals lodged by members of the public against decisions or orders given by municipal, provincial or central government (decisions in individual cases as well as orders of a general nature). Applications for provisional relief (pending the outcome of the proceeding) can also be submitted to the Administrative Jurisdiction Division of the Council of State.

2.6 ENFORCEMENT OF FOREIGN JUDGMENTS

A judgment delivered by a foreign court is not automatically recognised and enforced by the courts of the Netherlands unless a treaty on such recognition or enforcement is applicable. However, if a person has obtained from a foreign court a final judgment for the payment of money which is enforceable in the relevant jurisdiction, and if that person files the claim with a court in the Netherlands, the Dutch court will generally recognise the foreign judgment if the court finds that the jurisdiction of the foreign court is based on grounds that are internationally acceptable and that the appropriate procedures were duly followed. In this event, the Dutch court will render a similar decision to that of the foreign court and that decision – as a Dutch decision – will be enforceable in the Netherlands. However, a Dutch court will not allow a foreign order to be recognised if the court finds that the foreign judgment is against "Dutch public order" according to Dutch legal standards.

For a judgment in civil or commercial matters issued by a court in another EU member state, the Dutch court's leave to enforce the foreign judgement can be obtained within a few weeks under Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, or for Denmark, under a similar Brussels Convention. For EFTA member states, a similar procedure applies. For judgments made under the European Enforcement Order or the European Payment Order, the enforcement of judgments by other EU member states in the Netherlands (and vice versa) is even quicker and easier because no leave to enforce is required in the country where enforcement is sought.

Dutch courts generally recognise contractual choice-of-law clauses and jurisdiction clauses, but not if they are considered to be a contravention of "public order" by Dutch legal standards.

3. PROJECTS IN THE NETHERLANDS – AN OVERVIEW

3.1 SECTORS TO WATCH

As mentioned in the Introduction, the important projects that will be realised in the EU in the next 5 to 10 years are expected to be in the infrastructure sector. Infrastructure is a broad term. It includes roads, rail, water, energy (for instance, generation and storage of renewable energy), industry, transport and logistics (both of goods and data). In this chapter we will take a closer look at each of these areas.

ROADS, RAIL AND WATER

The Netherlands is a small but densely populated country. This is especially true of the so-called Randstad (an area in the west of the Netherlands comprising Amsterdam, Rotterdam, The Hague and Utrecht). The Netherlands is a trading nation: Schiphol Airport near Amsterdam and the Port of Rotterdam are important hubs for the transport of goods from the Netherlands to the European hinterland, in particular to Germany. And because most of the economic heart of the country is below sea level, there is a constant need for large hydraulic infrastructure.

Modern, state of the art infrastructure is of vital importance to the economic success of the Netherlands. This includes roads, railways, bridges and tunnels but also dikes, (sea) locks, aqueducts, harbours and canals.

The Netherlands has been making significant investments in its motorways, as part of an ongoing large investment programme. Large motorways are being broadened with additional lanes, in many cases doubling the capacity of these roads.[2] The amounts invested in each of these projects range between €500m to €1bn. In most cases, these projects are tendered on a PPP basis.[3,4] What's more, there are still a large number of road projects in the pipeline. [5] Until 2028 central government has reserved over €50bn for new infrastructure, 42% of which has been earmarked for the Randstad[6]. More than €11.6bn has been earmarked for investments up until 2017 to replace and expand the Dutch railways (spoorwegnet)[7].

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2 *Examples include the A2 near Maastricht, the A15 near Rotterdam, the A4 between The Hague and Rotterdam and the corridor A9-A1-A6 from Schiphol to Amsterdam to Almere.*
3 *See also Chapter 9 on PPP.*
4 *See for instance www.ppsbijhetrijk.nl; www.ppsnetwerk.nl.*
5 *Examples include the N31, the A12 Arnhem-Zevenaar, the A1/A28 Hoevelaken, the N18 and the bypass A13-A16.*
6 *See Cobouw 23 July 2013.*
7 *See Meerjarenprogramma Infrastructuur, Ruimte en Transport 2012 (MIRT), (Financial overview of the available budget for central government)*

Hydraulic projects in the pipeline are equally ambitious. The government has plans to modernise the Afsluitdijk[8] and build new sea locks near IJmuiden and Terneuzen as well as a new tunnel under the Nieuwe Waterweg. Over €750m has been invested in each of these projects. Given rising seawater levels as a result of climate change, the Dutch government adopted a new Act on the Delta (Deltawet) in 2011. This act secures investments of between €1.2bn to €1.9bn per year until 2050[9]. PPP is likely to be the basis for many of these investments.

ENERGY

Energy policy in the Netherlands is currently very much focused on investments in renewable energy. At least 14% of electricity generated must come from renewable production sources by 2020. By 2023 a minimum of 16% of all electricity is required to be generated using renewable production methods. This figure is expected to stand at 4.6% for 2013.

In September 2013 the government and relevant stakeholders entered into an Energy Agreement for renewable energy ("Energieakkoord").[10] In this Agreement the Netherlands has committed itself to investing heavily in wind energy, both on land and offshore. By 2023 4,550MW a year must be generated by offshore wind farms (2013 = 288mW) and 6000MW on land (2013 = 2316MW).

These wind projects are expected to require large investments. Central government aims to involve the private sector in the financing for these projects. For instance, it wants to increase the role of institutional investors. PPPs have also been put forward as a means to achieve the targets in the Energy Agreement. In addition central government reaffirmed its commitment to the existing subsidy regime, the state-guaranteed SDE subsidy.[11] The Netherlands also has a number of deep-water harbours, state of the art offshore technology and relatively large exploitation area at sea.

INDUSTRY AND LOGISTICS

Netherlands is and remains first and foremost a logistics hub in Europe: it is a key player in the bulk transport (oil, coal, ore, but also biomass) and container transport – by water, road, rail and air. As mentioned above, this requires state of the art infrastructure. Demand is predicted for inland shipping terminals, interchanges for rail, roads and canals, and pipelines.

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[8] *The Afsluitdijk is the largest water defense annex road in the Netherlands. It was build in the 1932 to protect the heart of the Netherlands against flooding. The Afsluitdijk made the former Zuiderzee into a lake (the IJsselmeer).*

[9] *See www.rijksoverheid.nl.*

[10] *Energy Agreement for Sustainable Growth dated 6 September 2013 ("Energieakkoord voor Duurzame groei"). For more information see www.energieakkoordser.nl.*

[11] *See Chapter 11 for more information on SDE subsidies.*

The Netherlands also wants to increase its profile as an energy hub, especially in the fields of liquefied natural gas (LNG), CO_2 and biomass. In this sector we also expect to see complex, innovative and capital-intensive projects, such as subterranean storage, terminals and pipelines. An example of this is the planned second LNG terminal with a capacity of 20 bcm. It will be built next to the existing GATE terminal in Rotterdam.[12]

The Netherlands also has high ambitions for its industrial development. Together with Moerdijk, Terneuzen, Vlissingen and Antwerp, the municipality of Rotterdam aims to become part of one of the so-called European Industrial Clusters by 2030. The idea is to create one large, leading petro-chemical and energy-related industrial hub whose scale, integrated supply chains and energy efficiency will enable it to compete on the world stage. The driving forces behind this are the transition to renewable energy and bio-based chemicals. And by 2030, the Port of Rotterdam wants to attract €25 to €35bn of private investments from companies that are market leaders in their field.[13]

The Netherlands is also known for its High Tech Campus Eindhoven, which has been named the world's smartest region by the Intelligent Community Forum (ICF). The High Tech Campus, also called Brainport, is an area in the Netherlands where companies at the forefront of technological development locate for easy access to high-tech facilities and 8,000 researchers and international networks. The Campus is designed to accelerate companies' innovation. Campus companies (including Philips, ABB, NXP, ASML, IBM, Intel, Texas Instruments) share their knowledge, skills and R&D facilities strategically in order to achieve faster, better and more customer-oriented innovation in the fields of health, energy and smart environments. As a result, innovation is achieved faster and more cost-efficiently, and the developments are of better quality. This gives companies located in the campus a decisive competitive edge in a challenging market.

3.2 CHARACTERISTICS OF PROJECTS: ELEMENTS TO BEAR IN MIND

The legal structure and characteristics of a project are determined by the type of project and the sector in which it is realised. However, there are certain factors common to every project, regardless of type and sector. In this book we will look at some of these common factors. In doing so, we will first examine some elements that are relevant for any project, whether it is privately realised or procured by a governmental body (Chapters 5, 6 and 7). We will then look in more detail at the relevant rules for tendering of projects and pay particular attention to PPP in the Netherlands (Chapters 8 and 9). Next we will turn to finance with chapters on financing, subsidies and tax (Chapters 10 and 11). To put all this in context we will start off with a very brief outline of some of the specifics of Dutch contract law (Chapter 4).

[12] *See, for instance, Havenvisie Rotterdam 2030.*
[13] *Ibidem.*

4. DUTCH CONTRACT LAW: A FEW CHARACTERISTICS

4.1 INTRODUCTION

Before discussing specific rules, regulations and contract forms for projects, this chapter gives a brief overview of a few characteristics of Dutch contract law. Our overview includes some specific and noteworthy elements of Dutch contract that are atypical compared to other legal systems.

4.2 GENERAL PRINCIPLES OF DUTCH CONTRACT LAW

The Netherlands has a civil-law system similar to that used in France, Germany and many other continental European countries. As a member of the European Union, the Netherlands is also subject to European Law.

Dutch contract law is based on freedom of contract, consensualism and the binding force of contracts (pacta sunt servanda). This means that parties are in principle free to conclude any agreement with any person, in any form, in any language and under any set of rules. This also means that contracting parties are legally bound by their agreement and that each party to a contract can enforce performance of that contract by the other party.

According to the Dutch Civil Code, an agreement will exist when one party makes an offer that is accepted by another party. In practice it is often not possible to distinguish between an offer and the acceptance thereof, as in most cases negotiations will be more complicated and may result in partial agreement. In that case an agreement is considered to exist if parties have reached consensus on the essentials of the agreement. Which parts of an agreement are considered essential parts and which are not will depend on the type of agreement and the specifics of the matter at hand.

Please note that there is no need for parties to enter into a written contract in order for an agreement to come into being. An agreement can be entered into orally or in any other form, unless the law explicitly states otherwise. [14]

[14] *For example: the Dutch Civil Code stipulates that any agreement regarding the sale of residential property to a natural person that does not act for a company should be laid down in a written contract. See also Chapter 5.*

4.3 SPECIFIC PRINCIPLES OF DUTCH CONTRACT LAW

There are several principles that impact on the position of parties to a contract under Dutch law and in certain instances before a contract comes into force. This paragraph contains some of these principles which are relevant for the execution of projects.

PRINCIPLES OF REASONABLENESS AND FAIRNESS

The binding force of contracts can be subject to an exception based on the principles of reasonableness and fairness. The term "reasonableness and fairness" (redelijkheid en billijkheid) refers to the principle of bona fides or good faith.

The principles of reasonableness and fairness play a central role in Dutch contract law and have three functions:

1. all contracts must be interpreted in accordance with the principles of reasonableness and fairness. The literal meaning of the wording of the contract is not decisive, but the intention which the parties, given all circumstances, reasonably must have had when entering into the agreement and what parties could reasonably expect from each other;[15]
2. the principles of reasonableness and fairness can have a so-called supplementary effect. If an agreement does not provide a solution for a specific problem, then the contract can be supplemented based on these principles. This can result in (additional) rights and obligations for the contractual parties that have not been written down in the contract itself;
3. the principles of reasonableness and fairness can have a derogating or restrictive effect. This means that a contractual provision may not apply if, given all circumstances, this would be unacceptable according to the standards of reasonableness and fairness.

Although the principles of reasonableness and fairness are an important part of Dutch contract law, it should be noted that Dutch courts are not likely to alter a contract or deviate from its literal wording based on these principles. In this respect the Dutch Supreme Court has ruled several times[16] that when a contractual term between contractual parties would lead to an unacceptable outcome, a court may only use the principles of reasonableness and fairness to set aside or alter such a term in exceptional cases. In this respect the Supreme Court has also decided that, in the case of a contract between two professional parties, this applies all the more.[17]

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[15] *HR 13 March 1981, NJ 1981,635 (Haviltex). Please note that if professional parties only are involved, a court will in most cases rely on the literal wording of a contract in order to determine what intention the parties had when entering into the agreement; HR 19 January 2007, NJ 2007,575 (Meyer Europe/PontMeyer).*

[16] *HR 9 January 1998, NJ 1998,363.*

[17] *HR 15 October 2004, NJ 2005,141 (GTI/Zürich).*

PRE-CONTRACTUAL LIABILITY

Negotiating parties are in principle free to withdraw from their negotiations whenever they want and for whatever reason. However, if negotiations have progressed to an advanced stage, there are circumstances in which negotiations cannot be terminated without incurring liability to compensate the other negotiating party. Such liability may also exist if the negotiating parties have not yet signed a written agreement and even if they have not yet reached (oral) consent on the essentials of their (intended) agreement. This pre-contractual liability is based on the principles of reasonableness and fairness, which are also applicable to the pre-contractual stages of an agreement and according to which negotiating parties are obliged to take into account each other's justifiable interests.

Dutch case law on pre-contractual liability is very casuistic, and it is hard to give specific rules on the circumstances where such liability may exist. In general a party withdrawing from negotiations shall be liable for damages if the other party could reasonably expect that an agreement would result from the negotiations that parties had entered into. This liability may include compensation for costs incurred by the other party during negotiations or (in exceptional cases) for loss of profit.[18]

It should be noted however that the Dutch Supreme Court has ruled that Dutch courts should exercise restraint when awarding claims based on pre-contractual liability.[19] The general rule therefore is that a party can withdraw from negotiations without being liable for damages except in specific circumstances.

LETTER OF INTENT

In order to avoid pre-contractual liability and in order to make clear when an agreement will exist, it is advisable that parties enter into an intention agreement (letter of intent) before starting negotiations. Such intention agreement should include all conditions precedent that need to be satisfied before an agreement can be deemed to exist between the parties, and also the consequences of terminating negotiations.

THE INTERPRETATION OF CONTRACTS

Under Dutch law, a provision of an agreement is interpreted by determining the meaning that the parties in the given circumstances reasonably may have given to it when the agreement was concluded. This means that the meaning of a contractual clause should not only be determined on the basis of its literal wording, but also by looking at the other relevant circumstances and events at the time of contracting. These include, for instance, discussions that have taken place between the parties at the time of contracting, previous drafts of the agreement that have been exchanged, and customary behaviour.

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[18] *HR 23 October 1987, NJ 1988, 1017 (VSH/Shell).*
[19] *HR 12 August 2005, NJ 2005, 467 (CBB/JPO), r.o 3.7.*

It should be noted, however, that the Dutch Supreme Court has ruled that, in the case of a contract negotiated by professional parties, the wording of the contract shall in principle have decisive force in determining the meaning of the contract.[20]

[20] *HR 5 April 2013, RvdW 2013/521 (Lundiform/Mexx).*

5. ACQUIRING LAND AND REAL ESTATE

5.1 INTRODUCTION

This chapter describes the ways in which parties can hold rights with respect to Dutch land and real estate. Land and real estate like buildings and works on or under the land are also called "immovable assets".

The Dutch Civil Code and other relevant regulations do not distinguish between Dutch and "foreign" parties when it comes to owning and acquiring land or real estate. In the Netherlands one can either obtain full legal title to or ownership of immovable assets or a so-called "limited" right with respect to such assets. Examples of limited rights are the right of leasehold, the right of superficies and the so-called apartment right. We will provide a short overview of the main characteristics of each of these limited rights. We will further describe the legal requirements for obtaining full legal title or a limited right in relation to immovable assets. We will finish this chapter with a short description of certain tax issues relating to the acquisition and development of land and real estate.

5.2 OWNERSHIP OF LAND AND REAL ESTATE

FULL LEGAL TITLE TO IMMOVABLE ASSETS

Full legal title or ownership is the most encompassing right a person can have under Dutch law. When a person has full legal title to an asset he can exert its rights on that asset against any third party. An owner can use the asset without anybody else interfering. When exercising his rights the owner may, however, not impede on the rights of others and the laws of the Netherlands.

Full legal title to land includes all buildings and any works which are located thereon. This is a principle of Dutch law which can only be set aside by a so-called right of superficies ("opstalrecht"). The right of superficies and a few other limited rights which are used when realising projects in the Netherlands are described in more detail below.

THE RIGHT OF LEASEHOLD

A right of leasehold gives the holder the right to use immovable property of a third party as if it were his own property. The right of leasehold is a strong right: the holder can exercise its rights against any third party. A right of leasehold can be granted by the owner of the real estate for a limited time period or for an indefinite term.

When the right of leasehold is granted, the owner can negotiate a periodic ground rent or "canon". This will be included in the notarial deed of leasehold. This deed will also contain all the conditions of the holder's rights of leasehold. These conditions define the right of the leaseholder.

With respect to the canon, parties can agree that this will be adjusted periodically. It is also possible to buy out the canon in perpetuity. If a right of leasehold has been granted for an indefinite period and the canon has been bought out, the right of the leaseholder is nearly identical to that of a land owner. The only difference that remains is that the holder is bound by the conditions in the deed of leasehold. The right of leasehold is therefore seen as a useful tool by many of the large municipalities in the Netherlands to achieve their land policy.

THE RIGHT OF SUPERFICIES

A right of superficies entitles the holder to the ownership of a building or work which is located on or under the land of a third party. The right of superficies is in many ways similar to the right of leasehold. The deed by which the right of superficies is granted can entitle the land owner to a periodic user fee or "retribution". As with the right of leasehold, this deed will contain the conditions of the right of superficies. Many of the rules of the Dutch Civil Code which apply to the right of leasehold also apply to the right of superficies.

The right of superficies differs from the right of leasehold in that it does not give the holder a right to use but full legal title to or ownership of the buildings, works or cables it relates to.
The right of superficies has been popular for recent larger developments, for example multifunctional projects, where the ownership of different functions within the project is given to different legal entities.

APARTMENT RIGHTS

Ownership of land together with all works built thereon can be divided into so-called apartment rights. A right of leasehold and a right of superficies can also be split into apartment rights.[21] Where the division includes housing, it is necessary to check with the relevant municipality whether a permit is required for the division.

An apartment right gives the holder a share in the assets that have been divided. The holder has an exclusive right to use parts of the assets for private purposes and a shared right in respect of the public spaces of the building. Attached to the deed of division will be a drawing showing the private and public parts of the building. This deed and drawing will be registered in the public registers of the land registry.

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[21] *This does require the prior permission of the land owner. If the land owner refuses, the leaseholder or the holder of the right of superficies respectively can request court approval for the division into apartment rights.*

The deed of division also contains regulations concerning the use of the building. Each holder will become a member of the association of owners of the building. This association deals with the maintenance of the shared spaces of the building, amongst other things.

Apartment rights are a very useful tool for projects involving multifunctional buildings. The relationship between each of the owners of the separate functions can be detailed in the aforementioned regulations. Apartment rights are a more flexible tool than, for instance, co-ownership.

5.3 DUTCH LAND AND REAL ESTATE: HOW TO OBTAIN OWNERSHIP OR A LIMITED RIGHT

The requirements for obtaining legal title or a limited right with respect to land or real estate can be summarised as follows:

- authority of the seller to sell and transfer the asset;
- a valid legal basis for the transfer (usually a contract of sale); and
- legal transfer of the asset.

The two elements that require most attention when acquiring land or real estate are the contract of sale and the transfer of title. Both elements will be discussed below.

LEGAL BASIS: CONTRACT OF SALE

THE CONTRACT

In most cases the transfer of land and real estate is based on a contract of sale. There are no formal requirements for a contract of sale: a contract can even be concluded orally.[22]

In view of the fact that a contract of sale comes into effect simply by way of the parties agreeing the sale, parties often enter into written letters of intent or heads of terms in which they stipulate that there will be no binding contract until a formal contract of sale has been signed by both parties. These heads of terms may also include provisions regarding the due diligence of the buyer and conditions such as prior approval by shareholders or a supervisory board or the obtaining of financing for the sale.

[22] *This is different for consumers, for whom there are certain protections, including the requirement of a written contract. In this chapter we will only focus on professional commercial parties.*

OBLIGATIONS OF PARTIES TO A CONTRACT OF SALE

Obligations of the seller

Once the contract of sale is in place the seller has certain obligations in relation to the transfer. He needs to transfer the legal title (or limited right) to the buyer with all that belongs to it. This includes a copy of the title deeds, other relevant documents, such as guarantee certificates, manuals of installation, lease agreements, permits, etc. The seller also needs to execute the deed of transfer.

In addition, there are two points that we would like to highlight in relation to contractual position of the seller.

i) The seller needs to transfer the property free of any encumbrances and limitations.

Examples of such encumbrances are rights of third parties to go over or have cables through the sold land or a right of way.

Under Dutch law the seller is obliged to transfer the sold property free of any private and public law encumbrances other than those which the buyer has explicitly accepted.

It is possible for parties to deviate from this rule in their contract. The vendor can exclude liability in relation to encumbrances save for those encumbrances he was aware of or ought to have been aware of. An example of this is that the vendor has to guarantee the absence of all encumbrances and limitations which could be registered in the public property register but had not been so registered at the time of the sale.

ii) Liability for non-conformity

The seller has to transfer the ownership of the sold object in such a manner that it conforms to the contract. An object does not conform to the contract if it does not have the characteristics that the buyer was entitled to expect on the basis of the contract. This concept is referred to as "non-conformity".

There are exceptions to this rule. In sale agreements the seller often excludes liability for claims on the basis of non-conformity. However, this possibility is limited by the principles of reasonableness and fairness[23]: seller cannot pass this risk to buyer in the case of intent or gross negligence on seller's side.

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[23] *See also Chapter 4.*

In case the buyer wants to claim breach of contract based on non-conformity, the buyer has to notify the seller promptly after discovering or after he reasonably should have discovered that the sold object does not conform to the contract. In this respect it is important to note that the claim based on non-conformity expires within two years after such notification.

In respect of the question whether or not non-conformity exists, the prevailing doctrine is that the disclosure obligation of the seller prevails over the buyer's obligation to investigate. This means that, should the sold object not have the characteristics that the buyer was entitled to expect and the buyer could have been aware of this by performing a further investigation, but has not done so, non-conformity exists in the event that the seller has not fulfilled its disclosure obligation. In this respect the Netherlands is different from, for instance, the United Kingdom, where the main rule is "buyer beware" or caveat emptor.

OBLIGATIONS OF THE BUYER

Compared to the seller's obligations, the principal obligations of the buyer are relatively simple. The buyer is required by law to pay the purchase price. Furthermore, the buyer is obliged to co-operate with the delivery of and the transfer of title in the sold object. Naturally, the seller and buyer can also agree to other obligations on the part of the buyer.

LEGAL TRANSFER

The legal transfer of land or other real estate requires:

- a notarial deed of transfer executed by the parties;
- followed by the registration of the deed in the appropriate public registers.

A deed of transfer will be based on the purchase agreement. Everything which has been agreed in the contract of sale will remain fully applicable, unless the deed of transfer makes specific exceptions to that contract.

As mentioned above, the transfer of real estate can only be made by a notarial deed. A Dutch civil law notary is appointed by the King and plays a central and co-ordinating role in the process of the transfer of Dutch real estate. Before and after the transaction, the notary will conduct certain checks, including checks of the relevant public property registers. The notary is required to include the purchase price in the deed of transfer and has a designated client account to which the purchase price is to be transferred.

Parties to the deed of transfer have to be identified by the notary in accordance with applicable know-your-customer requirements. Parties are not required to appear in person but can give a power of attorney instead. It is common that, in that case, a power of attorney is granted to an employee of the office of the notary to sign the deed of transfer on behalf of the party.

After the deed of transfer has been executed, it is the notary who will register the deed with the relevant public property registers. Only when the notary has satisfied himself that the registration of the deed of transfer has been effected without any encumbrances, will he transfer the purchase price to the seller. Due to the time involved in processing the data with the registers, at least one day will pass between the execution of the deed of transfer and the payment of the purchase price to the seller.

5.4 PUBLIC REGISTERS AND CADASTRAL REGISTRATION

The public registers are held by the Land Registry Office or "kadaster". The Land Registry Office is also responsible for the registration of deeds of transfer. By requesting an extract in relation to a certain property one can ascertain (i) who owns the property and (ii) whether any limited rights or attachment exist in relation to the property. In the Netherlands, a so-called ''negative system'' applies. This means that a record in the property register does not per definition reflect the actual legal situation. Whether this information is correct should be determined on the basis of the information recorded, amongst others, in deeds recorded with the public registers. This is a very important task for the notary.

The Dutch Land Registry Office functions very well and contributes to efficient legal transactions and legal certainty. In recent years this has resulted in increased interest of certain countries in the Land Registry Office. The Land Registry Office has for instance shared its knowledge and expertise with the People's Republic of China.

PS: "Vormerkung"
The Dutch Civil Code includes the concept of "Vormerkung." This concept, which is derived from German law, entitles the buyer to register the sale of property in the public registers. This protects the buyer against transfer of the object to another buyer. The registration of the sale loses effect retroactively if the object has not been delivered to the buyer within six months from the registration. Professional commercial parties can agree that buyer may not register the sale. The underlying reason for such agreement may be that the parties do not want third parties to be aware of the essentials of the contract (including the purchase price) at that stage.

5.5 TAX CONSIDERATIONS

5.5.1 GENERAL

The Dutch tax rules for the acquisition of real estate are the same for Dutch and "foreign" entities. Below we will give a brief overview of some tax consideration regarding the acquisition of Dutch real estate.

5.5.2 TRANSFER TAX

The general rule applying to the transfer of real estate is that the acquisition is subject to transfer tax on the economic value of the property. This value is deemed to be at least equal to the purchase price for the property. In 2014 the transfer tax rate is 6%, except for the transfer of houses, which are subject to a lower tax rate of 2%.

5.5.3 VAT

VAT AND THE ACQUISITION OF REAL ESTATE

The acquisition of real estate is in principle exempt from VAT. There are two main exceptions to this rule. The first exception is that the transfer of real estate before, on or ultimately two years after the real estate has been brought into use, is subject to VAT. If the buyer runs an enterprise he is entitled to deduct any VAT thus charged.

The second exception is the situation in which seller and buyer opt for the transaction to be subject to VAT (also called "opting for a VAT-taxable transfer"). The buyer needs to use the property for at least 90% for activities which are subject to VAT in order to make use of this possibility. Further, the parties must request this option and must do so jointly and no later than at the time of transfer of the property. This request for a VAT-taxable transfer is usually mentioned in the notarial deed. Alternatively, a joint request can be filed with the Dutch tax authorities.

The VAT rate currently is 21%. VAT is charged on the purchase price of the property.

TRANSACTIONS SUBJECT TO BOTH VAT AND TRANSFER TAX

The acquisition of new real estate (which is subject to VAT) is, in contrast to the general rule, in principle exempt from transfer tax. However, this exemption from transfer tax does not apply if (i) the new property has already been put into use or has already been leased by the seller and (ii) the buyer is able to deduct part or all of the VAT charged.

However, in order to improve the ailing Dutch real estate market, the above rules have temporarily been relaxed. A buyer (who is able to deduct part or all of the VAT charged) of new property will still be eligible for the exemption from transfer tax if the first occupation or starting date of the lease is on or after 1 November 2012 and the real estate is transferred within 24 months after the date of first occupation or after the start date of the lease. This gives the seller of newly built property an opportunity to lease the property to a third party before a sale is concluded without the buyer losing the possibility to acquire the property exempt from any transfer tax.

5.5.4 RULINGS

In special cases it is possible to discuss the tax treatment of a transaction with the Dutch tax inspector prior to the entry into of the transaction. The inspector can grant a so-called "ruling" in which the tax treatment of the transaction is confirmed. Asking for such a ruling is common practice in the Netherlands.

6. ZONING, BUILDING AND ENVIRONMENTAL RULES FOR PROJECTS

6.1 INTRODUCTION

When realising a project in the Netherlands, multiple rules and regulations apply. These rules, promulgated by different governmental bodies, concern, amongst other things, the use of land and building thereon but also include rules relating to the protection of the environment.

Which of these rules apply to a specific project depends to a large extent on the type of project and its location. The redevelopment of land in a city is subject to different requirements to those of an off-shore wind farm. And the relevant rules for the exploitation of an oil refinery are different to those that apply to realising a large road tunnel.

In this chapter we will first focus on the impact of location on a project, i.e. the zoning laws that will apply to the project. After this we will describe certain regulatory requirements that are relevant for all types of projects. We will then examine some environmental rules which are more project specific. We will finish by giving some practical tips.

6.2 ZONING LAWS

CHOICE OF LOCATION: ZONING PLAN

When realising a project it is essential that the project and its activities are in line with the zoning plan that applies to the location of the project.

Every municipality in the Netherlands is obliged to determine zoning plans for its territory.[24] This zoning plan is determined by the council of the municipality.[25] It contains a description of the permitted use of each parcel of land covered by the plan and consists of a map, rules and an explanatory guideline. The zoning plan also contains certain building rules.

A first step when realising a project in the Netherlands is therefore to check the permitted use of the land in the applicable zoning plan. This can be done online at *www.ruimtelijkeplannen.nl.*

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[24] *Section 3.1 Spatial Planning Act (Wet Ruimtelijke Ordening).*

[25] *For projects of provincial or national interest, the provincial executive or government ministers can determine a zoning plan. These zoning plans have the same legal status as and are similar in content to a municipal zoning plan. For the realisation of large projects of provincial or national interest it can therefore be necessary to co-operate with governmental bodies.*

If the zoning plan permits the envisaged project, it will be relatively easy to obtain the required building permits (see Chapter 6.3 below). In many cases, however, the project does not fall (entirely) within the requirements of the zoning plan. In such cases a new or amended zoning plan needs to be put in place.[26] This can only be done by the council of the municipality where the envisaged project will be located.

ZONING PLANS: THE MUNICIPALITY'S FREEDOM OF POLICY

In principle the council of a municipality is free to determine its policy when drawing up a new zoning plan. The council is, however, bound by provincial zoning regulations. These regulations are often used as an instrument to limit or stimulate certain activities within the province.

Central government also has enacted certain rules which municipalities need to adhere to. In this respect we note that pursuant to a recent change of law[27] municipalities are required to apply a so-called "ladder for sustainable building".[28] These new rules contain limitations on certain large new developments, such as industrial estates, offices, retail and housing. For such new developments the municipality needs to demonstrate an existing regional need. If such a development is planned outside of the existing city infrastructure, two additional requirements apply. The municipality then also needs to demonstrate that i) the development cannot be realised within the existing locations and that ii) the proposed location is or can be reached by different modes of transport. These rules can have a far-reaching negative impact on the feasibility of certain projects and will need to be taken into consideration when planning a project in the Netherlands. The rules do not apply to projects like roads and railways or projects in the field of renewable energy.

ZONING PLAN AND TIMETABLE

Annex A contains an overview of the relevant time limits for the steps necessary to obtain a new zoning plan.

The timing of each of these steps is indicative: although the Spatial Planning Act contains set time limits, there are no consequences for the municipality if these time limits are not met. In practice it takes 6-12 months for a new zoning plan to be determined by the council of the municipality.

A developer who wants to speed up the zoning plan process can choose to prepare its own draft zoning plan and conduct all relevant related research. For larger projects this approach is not usual.

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[26] *There is an alternative possibility, namely to obtain a permit to deviate from the existing zoning plan. See paragraph 6.3.*
[27] *Section 3.1.6 sub 2 Spacial Planning Act.*
[28] *See footnote 27 ("Ladder van duurzame verstedelijking").*

Interested third parties can appeal against a zoning plan once it has been determined by the council of the municipality. If they do so, it can take 6-15 months before a decision on appeal has been obtained and for the zoning plan to become irrevocable.

Certain projects may fall within the scope of the Crisis and Repair Act.[29] Under this act procedures for zoning plans and permits are streamlined and faster. This primarily concerns the appeal phase where shorter time limits apply to decisions on appeal. See also Annex A. Relevant projects are, for instance, renewable energy projects, highways, national railways, airports and water protection works.

6.3 THE SURROUNDINGS PERMIT: AN ESSENTIAL PERMIT FOR ANY PROJECT

ONE PERMIT FOR SEVERAL ACTIVITIES

A project in the Netherlands will normally require a permit on the basis of the Environmental Licensing (General Provisions) Act[30] (**"**Wabo**"**). This is the so-called surroundings permit or "omgevingsvergunning". The surroundings permit is one integrated permit which can cover several different activities. It can include building works (building permit), developing, changing or operating an establishment (environmental permit) and demolishing or changing a monument (monument permit). The activities that require a surroundings permit are listed in the Wabo.

STRATEGIC DECISION

In many cases a project will cover several activities. For such a project, one surroundings permit will suffice. The Wabo offers flexibility. Separate permits can also be requested for each of the activities (partial permits). When the activities are very closely linked, this is not possible: in that case only one permit covering all activities can be requested. However, such a combined permit can be applied for in separate stages.[31]

The choice between one combined surroundings permit, partial permits or a permit in stages is for the sponsor of the project.
Cost savings and efficiency will be a factor in demining the best approach. It can be w ise to have clarity on the zoning aspects of a project before incurring costs on detailed building drawings. In some cases it is thought more practical to combine all permits in one surroundings permit so only one procedure needs to be followed for these permits. In our experience the best way forward depends on the type, scale and most of all the timing of the relevant project.

[29] *"Crisis- en herstelwet".*
[30] *Wet algemene bepalingen omgevingsrecht.*
[31] *It is also possible to request that certain permissions required under other regulations be added to the surroundings permit, e.g. those required under certain environmental regulations.*

PERMITS PROCEDURE: GENERAL REMARKS

There are two possible routes when obtaining a surroundings permit under the Wabo. These are the so-called regular procedure and the elaborate procedure. In principle the regular procedure will apply, unless the Wabo explicitly states that for the relevant activity the elaborate procedure must be followed. If one of the activities falls within this category, the entire surroundings permit will follow the elaborate procedure. Projects that will have an impact on the environment and require an environmental permit will always fall within the elaborate procedure (see also below: Environmental permit)

The Wabo contains a different set of rules and grounds for refusal for each of the listed activities. Below we will discuss two of the most relevant activities for projects: building (building permit) and developing and operating an establishment (environmental permit).

BUILDING PERMIT

When it comes to realising a project, all building works[32] will require a building permit. A building permit needs to be requested using a model form describing all planned activities. The form can be submitted online *(www.omgevingsloket.nl).*

A request for a building permit will need to comply with:

a. zoning plan and certain other rules for the municipality;[33]
b. central and local technical building regulations;[34] and
c. rules on building aesthetics.

If the requirements under b and c are not met, the permit will be refused.[35] If the request does not meet the requirements under a, then the request will be qualified as a request for a permit to deviate from the zoning plan. As mentioned above, the municipality is free to determine policy and there is no obligation on it to comply with this request. (See also paragraph 6.2 above.)

> *A building permit for a project on a certain location can therefore be obtained both through the route of a permit to deviate from the existing zoning plan and an amendment of the zoning plan. The duration of the process and the legal requirements thereof are very similar, but there are some differences. The permit to deviate is granted by local government[36] (the executive) whereas the zoning plan is determined by the council of the municipality (the elected representatives).*

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[32] *A road is not a building work, but any road with a bridge or tunnel will fall within the definition.*
[33] *E.g. the exploitation plan.*
[34] *The Buildings Act and the Municipal Building Code.*
[35] *Please note that if the applicants contravene the Public Administration (Probity Screening) Act ("Wet Bibob"), this will also lead to refusal of the building permit. This act aims to prevent criminal use of permits and concerns the integrity of the applicants.*
[36] *The municipal executive.*

PROCESS AND TIMETABLE OF BUILDING PERMIT

Annex B contains an overview of the process for obtaining a building permit and the timetable, including the timescales for objections and legal proceedings. As with the zoning plan, the Crisis and Repair Act may apply, shortening the time limits for decisions on appeal.

ENVIRONMENTAL PERMIT

Anybody who runs an establishment which has a certain impact on the environment is subject to environmental rules and regulations.

As regards permits, there are three categories of enterprises/establishments:

1. *Establishments which require a permit (Vergunningplichtige inrichtingen)*
   The Regulation on the Environment ("Bor") lists the categories of establishments which require an environmental permit. Examples include: hospitals and power plants. Companies will also require a permit if they fall under the IPPC Directive on industrial emissions.[37] The environmental permit will contain conditions. In addition, general environmental rules will apply to the permit. In terms of procedure the elaborate procedure of the Wabo will apply.
2. *Establishments requiring prior approval (Omgevingsvergunning beperkte milieutoets (OBM))*
   The Bor lists certain activities which require prior approval from the authorities. This prior approval is also called surroundings permit with limited environmental test ("OBM").
   This prior approval cannot be made subject to conditions or regulations. This approval or OBM is subject to the regular procedure under the Wabo.
3. *Establishments to which general rules apply (possibly with duty to notify)*
   Establishments which are listed in the so-called Activity Regulation (Activiteitenbesluit) do not need to obtain an environmental permit. Examples are schools and office buildings.
   The Activity Regulation contains rules for draining, air, energy saving, traffic and transport. Certain activities must also be notified to the competent authorities.

Please note that an establishment can sometimes be under an obligation to notify under the Activity Regulation but at the same time may also need to obtain an environmental permit or prior approval (OBM).

To determine whether a permit is required or whether the Activity Regulation applies, as well as the applicable notification requirements please see *http://aim.vrom.nl/* (Dutch only).

[37] *Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control).*

6.4 SPECIFIC ENVIRONMENTAL PERMITS

In this paragraph we will briefly describe some specific rules and permits which could be relevant to certain projects in the Netherlands.

WATER PERMIT

For activities in, on or near water a separate permit may be required. Examples are discharging cooling water by a factory in a canal or pumping up and draining away of ground water to keep a building site dry. These activities are not permitted without a permit pursuant to the Water Act[38] (water permit). This permit is separate from the surroundings permit under the Wabo.

Different governmental authorities can be involved. For larger ground water extractions the provincial executive will need to grant the permit. For smaller ground water extractions or drainage this will be granted by the local water board.

REQUEST AND PROCEEDINGS

A request for a water permit can be made on-line at *www.omgevingsloket.nl.* A request can also be submitted with the relevant local authorities.

NATURE RESERVE CONSERVATION PERMIT

Projects that are realised in or near a protected nature reserve and which will negatively impact or disturb protected nature values require a permit pursuant to the Nature Conservation Act 1998 ("Nbw"). In areas which have been labelled "Natura 2000 areas", projects which potentially have a significant negative impact require a permit. It is therefore not required for it to be certain that the project will have a negative impact: it is sufficient that such negative impact cannot be excluded.

REQUEST AND PROCEEDINGS

The request for a nature protection permit needs to be submitted to the provincial executive of the province where the nature reserve is located. If significant impact cannot be excluded a report needs to be prepared describing the consequences for the relevant area. The permit can only be granted if the provincial executive has ascertained that the environmental values of the area will not be affected. Without such certainty a permit can only be granted if research has shown that there are no alternatives for the project, there are imperative reasons of national interest for realising the project and compensation will be ensured for the environmental values which are lost as a result of the project.

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[38] *Waterwet.*

6.5 PRACTICAL TIPS WHEN REALISING A PROJECT IN THE NETHERLANDS

Please see below for a few practical tips when realising a projects in the Netherlands.

1. *Consult the relevant authorities at an early stage*
   It is unusual to realise a project in the Netherlands without any consultation of the relevant authorities. It is advisable to discuss plans for projects with the governmental authorities at an early stage. This will help in gauging how the authorities view the project and will also make it possible to agree on necessary steps, planning and the roles of each of the parties.
2. *Stay involved*
   It is highly advisable to remain intensely involved with the project and the steps that have to be taken throughout the permitting process. Remain alert to ensure that the authorities are following the rules so that third parties will not have any ammunition to object to the permit.
3. *Decision periods*
   Bear in mind that preparing a request for a permit takes a lot of time and that authorities often do not reach a decision within the time periods set in the relevant regulations. Not adhering to these time limits does usually not have any legal consequences for the authorities.
4. *Speed up the process*
   There are different ways to speed up the permitting process. It is, for instance, possible to co-ordinate the zoning plan procedure with the surroundings permit and certain other permits. This will lead to time savings in the case of appeal proceedings, as under such a co-ordinated process there is only appeal in one instance to theof the Council of State Administrative Law Division.

6.6 LOOKING AHEAD

There are far-reaching plans to implement a new Act on the Surroundings.

The aim of this act would be to integrate all existing legislation in the areas of spatial planning, environment, nature, water, building and monuments in one single act.

If and to what extent this major change will be realised is as yet uncertain, but if these plans were to be implemented, this would lead to important changes and likely improvements for projects.

ANNEX A ZONING PLAN

Steps	Time
Preparation time	At least 12 weeks
Administrative consultation	Statutory requirement *
Presentation for examination	6 weeks** draft zoning plan With coordination also: draft resolutions and if tying in also draft statement of no objection
(Statutory) decision making term	12 weeks^ following presentation for examination
Announcement	2 weeks^ after the decision has been taken
Date of decision becoming effective	The day following expiry of the appeal period **

PROTECTION OF RIGHTS

	Zoning plan
Opinions	Anyone
Application for review	Yes: stakeholder with Department (review period 6 weeks)
Term within which judgement can be expected	Judgement within six months following expiry of the review period^[2]
Appeal	No

* *These terms are estimates.*
** *This term is an imperative provision. In other words, this term cannot be shortened.*
*** *This term is suspended (if the person submitting the application is requested to correct a shortcoming) until the day on which the shortcoming is corrected, or the period set aside for that purpose has expired unused.*
^ *These are terms of order. These terms can be reduced. However any exceeding of this term will not have the legal consequence that a permit is ipso jure established or that the zoning plan can be considered to have been adopted.*
^^ *For the administrative body, these are deadlines. If these terms are exceeded, this has legal consequences; in that case – assuming the planological decision has already been reached – a permit will ipso jure have been established. This without prejudice to the fact that these terms can be shortened.*
[1] *The Municipal Council is required to take a decision, in which it is decided to designate the project as a case for which it is desirable in view of realising an element of municipal policy that the preparation and notification of the decisions to be taken are coordinated. In this decision, the decisions that must be coordinated need to be summarised. The decision on coordination cannot be delegated. There is no right of objection or appeal against this decision. The decision must be announced.*
[2] *As concerns the term within which a judgement must be issued, if Crisis and Amendment legislation applies, judgement must have been issued within six months following expiry of the period for application for judicial review. In the case of coordination, within six months following receipt of the statement of defence, a judgement must have been issued. On the basis of the Crisis and Amendment legislation, therefore, a judgement can in theory be expected earlier. It should however be noted that the Department has indicated that it is not always possible to issue a judgement within six months following the end of the term set aside for the application for review. It is therefore possible that the term of six months will be exceeded.*

ANNEX B SURROUNDINGS PERMIT

PROCEDURE – TERMS

No.	1 Surroundings permit subject to the extended preparation procedure	2 Surroundings permit subject to regular preparation procedure
Preparation time	(at least) 4 weeks*	(at least) 4 weeks*
Presentation of draft decision for examination	6 weeks** Draft surroundings permit	N/A
(Statutory) decision making term	26 weeks^ following receipt of request with the possibility of suspension for 6 weeks	8 weeks^^ following receipt of the request with the possibility of suspension for 6 weeks***
Announcement	After the decision has been taken	After the decision has been taken
Date of decision becoming effective	In principle the day following expiry of the term set aside for application for review	In principle the day following the announcement

PROTECTION OF RIGHTS

	Surroundings permit subject to the extended preparation procedure	Surroundings permit subject to regular preparation procedure
Opinions	Anyone	N/A
Objection	N/A	Stakeholder
Term within which a decision on the objection must be taken	N/A	6 weeks (or 12 weeks if committee is appointed) starting from the day on which the term for the submission of an objection has expired) *** possibility of suspending the decision by 6 weeks
Application for review	Yes: stakeholder at court (term for application 6 weeks)**	Yes: stakeholder at court (term for application 6 weeks)**
Temporary permit	In principle no suspensive effect, unless request is upheld	n principle no suspensive effect, unless request is upheld
Term within which judgement can be expected	6-12 months*1	6-12 months*1
Appeal	Yes: stakeholder at Department (term for appeal 6 weeks)**	Yes: stakeholder at Department (term for appeal 6 weeks)**
Term within which judgement can be expected	8-14 months*1	8-14 months*1

* *These terms are estimates.*
** *This term is an imperative provision. In other words, this term cannot be shortened.*
*** *This term is suspended (if the person submitting the application is requested to correct a shortcoming) until the day on which the shortcoming is corrected, or the period set aside for that purpose has expired unused.*
^ *These are terms of order. These terms can be reduced. However any exceeding of this term will not have the legal consequence that a permit is ipso jure established or that the zoning plan can be considered to have been adopted.*
^^ *For the administrative body, these are deadlines. If these terms are exceeded, this has legal consequences; in that case – assuming the planological decision has already been reached – a permit will ipso jure have been established. This without prejudice to the fact that these terms can be shortened.*
[1] *The Municipal Council is required to take a decision, in which it is decided to designate the project as a case for which it is desirable in view of realising an element of municipal policy that the preparation and notification of the decisions to be taken are coordinated. In this decision, the decisions that must be coordinated need to be summarised. The decision on coordination cannot be delegated. There is no right of objection or appeal against this decision. The decision must be announced.*
[2] *As concerns the term within which a judgement must be issued, if Crisis and Amendment legislation applies, judgement must have been issued within six months following expiry of the period for application for judicial review. In the case of coordination, within six months following receipt of the statement of defence, a judgement must have been issued. On the basis of the Crisis and Amendment legislation, therefore, a judgement can in theory be expected earlier. It should however be noted that the Department has indicated that it is not always possible to issue a judgement within six months following the end of the term set aside for the application for review. It is therefore possible that the term of six months will be exceeded.*

7. CONTRACTING PROJECTS IN THE NETHERLANDS: DESIGN, ENGINEERING & CONSTRUCTION

7.1 INTRODUCTION

In this chapter we will look at some standard forms of contracts which are used in the Netherlands for developing projects. The Netherlands has certain specific model form contracts which are commonly used for Dutch "local" projects. For larger projects, internationally accepted standards, such as FIDIC contracts, are mostly used.

7.2 CONTRACTUAL DELIVERY METHODS FOR PROJECTS IN THE NETHERLANDS

The transactional structure and the choice of contract for a project depend on various factors. These include the type of project, the parties involved and the way in which they want to allocate risk and responsibilities, the applicable procurement method, and the preferred costing and pricing mechanism. In this respect there is no difference between the Dutch and the international project practice.

In the Netherlands, the following contractual delivery methods are most commonly used:

(i) traditional (split) contracts in which the employer is responsible for the design and the contractor for the construction of the works;

(ii) design team contracts in which the contractor is involved in preparing the design so the employer can benefit from the contractors' construction knowledge in an early stage of the project. Please note that when participating in a design team, the contractor cannot be certain that it will win the contract for the construction of the project. In general contractors are willing, however, to join a design team as it increases their chances of getting the project awarded; and

(iii) integrated contracts (D&B, DBM, EPC(M), DBFM(O) and turnkey contracts) in which the contractor assumes responsibilities in addition to his traditional role; for example responsibility for the design, maintenance and/or operation of the Works.

Public-sector contracts are almost exclusively awarded through formal and competitive procurement procedures regulated by EU Directives 2004/17 and 2004/18.[39] Traditional (split) construction contracts and Design & Build ("D&B") contracts are historically the most commonly used delivery methods in the public sector. In the course of the last 10 years, however, Design, Build, Finance, Maintain and Operate ("DBFM(O)") contracts have been increasingly used in larger projects procured by the government.[40]

Private sector contracts are awarded through a mixture of formal tenders and one-to-one negotiations. Traditional construction contracts and D&B contracts (including turnkey agreements) are the most commonly used delivery methods for housing, retail, offices and distribution centres in the Netherlands. EPC(M) contracts are commonly used for industrial facilities and power plants.

CHARACTERISTICS OF CONTRACTS

Below we will give a brief overview of some of the main characteristics of contracts used for developing projects.

PRICING MECHANISMS; INCENTIVES AND PENALTIES

In traditional and integrated contracts all sorts of pricing mechanisms can be found, including lump sum payment, cost-plus pricing or open book and guaranteed maximum prices. In these types of contract a penalty scheme for late delivery is usually included and sometimes also an incentive scheme, according to which certain milestones are rewarded.

Alliance or partnering contracts, in which the employer and the contractor work together in an integrated team and where savings and losses are shared, are less commonly used in the Netherlands.

RISK ALLOCATION

In traditional (split) contracts and D&B agreements, the contractor typically bears the risk of price escalations and delays. Although under a traditional contract a contractor is not responsible for design and construction faults, based on the Dutch Civil Code a contractor has an obligation to warn its employer about any faults in the construction or design if and to the extent that the contractor knew or should have known about such faults.

Other types of contract can include any type of risk allocation as agreed between the parties. For complex projects a customised arrangement for risk allocation is normally put in place.

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[39] *See also Chapter 8 Procurement.*
[40] *See Chapter 9 PPP, for more information on PPP and DBFMO contracts.*

LIMITATION OF LIABILITY

Under Dutch law, limitations of liability are permitted except for liability based on gross negligence or wilful misconduct, which cannot be excluded contractually.

INTELLECTUAL PROPERTY RIGHTS

Under Dutch Law, the author of any work of literature, science or art (which includes any designs for construction or engineering and architectural drawings) becomes automatically the owner the intellectual property vested therein.

Intellectual property consists of i) exploitation rights and ii) moral rights. Exploitation rights include the right to publish and reproduce a work of intellectual property and can be transferred to another party. Moral rights include the rights of an author of a work of intellectual property, for instance an architect, to keep other parties from changing or deforming the work. Moral rights cannot be transferred to another party.

JOINT VENTURES AND USING SPECIAL PURPOSE VEHICLES

Joint ventures and special purpose vehicles (SPVs) are commonly used when developing a project in the Netherlands. However, there is no requirement for foreign parties to enter into a joint venture with a local Dutch party in order to operate on the Dutch market.

7.3 STANDARD FORMS OF CONTRACT

Although Dutch law contains almost no restrictions on contracting parties and customised contracts are often used in the Netherlands, there are several standard forms of contract that are widely used and accepted in the Netherlands. We will further describe these standard forms below. At the end of this chapter we will also look at the role of the FIDIC contract documentation.

(a) Standard forms for traditional contracts: UAV 2012

The Uniform Administrative Conditions for the Execution of Works[41] or "UAV" are the most frequently used form for traditional contracts. The UAV consist of a set of general terms and conditions. The most recent version dates from 2012 and is known as the UAV 2012.[42]

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[41] *"Uniforme Administratieve Voorwaarden voor de uitvoering van werken."*

[42] *Projects may also be contracted based on the UAV 1989, which are an earlier version of the UAV. The UAV have a long history in The Netherlands. The oldest version dates back to 1938.*

The UAV were established by several Dutch ministries after consulting industry organisations. The UAV are mostly used in contracts for the construction of buildings.

Some of the main characteristics of the UAV are:

i) Traditional contract form: employer responsible for design and contractor responsible for construction;
ii) Fixed price arrangements with the contractor bearing the risk of price increases.[43]
iii) Only used for projects in the Netherlands;
iv) Employer to provide all licenses and permits for the construction of the project;
v) Dispute resolution by an arbitral tribunal that only deals with cases related to construction projects (Raad van Arbitrage voor de Bouw).

Under the UAV 2012 a contractor will be able to claim payment for additional work if the design contains faults or is inadequate and the design needs to be adjusted.

(b) Standard forms for design team contracts

Although there are standard forms of contract available, design team contracts are usually tailor-made to the specifics of the project at hand. Important issues that need to be addressed in a design team contract are the design team members' liability for design errors and the rules for awarding the construction of the project to the contractor that is part of the design team.

(c) Standard forms for integrated contracts: UAV-GC 2005

The Uniform Administrative Conditions for Integrated Contracts 2005[44] or "UAV-GC 2005" are the standard form for design-and-build contracts in the Netherlands. The UAV-GC 2005 are intended for projects in which the responsibility for the design and construction rests with the contractor. This form of contract is used for infrastructure projects as well as commercial and industrial construction. Based on the UAV-GC 2005, the long-term maintenance of a project can also be assigned to the contractor.

The UAV-GC 2005 are output based, and the contractor has to prepare a design for the project based on a program of requirements. Compared to a traditional D&B agreement, this means greater freedom and greater responsibility for the contractor when preparing the design of the project.

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[43] *In the event of unforeseen circumstances the UAV provide a basis for claiming additional payment. In recent years claims for additional payment in relation to rising steel prices have been awarded.*
[44] *"Uniforme Administratieve Voorwaarden voor geïntegreerde contracten 2005".*

Some of the main characteristics of the UAV-GC 2005 are:

i) the contractor is responsible for the design, execution and delivery of the project in accordance with the employer's program of requirements by the agreed delivery date;
ii) the employer's program of requirements may also contain functional requirements;
iii) the employer can monitor the design process by means of a review and acceptance plan;
iv) in an annex to the program of requirements, the parties will decide which party is responsible for obtaining the necessary permits and licenses for the project;
v) the UAV-GC are mainly used for local projects in the Netherlands;
vi) the UAV-GC provide for dispute resolution by an arbitral tribunal that only deals with cases related to construction projects (Raad van Arbitrage voor de Bouw).

(d) Standard forms of contract for technical advisors: DNR 2011

For sake of completeness, we will also touch on the New Rules (in the Dutch: De Nieuwe Regeling), a set of general terms and conditions that regulates the relationship between the employer and its technical advisors, such as architects, construction engineers etc. The latest version of these rules dates from 2011 and is also known as the DNR 2011. The DNR 2011 is widely used and accepted in The Netherlands.

Some of the main characteristics of the DNR 2011 are:

i) any advice and documents produced by the consultant become the property of the client once they have been handed over and the client has met its financial obligations to the consultant;
ii) the client has the obligation to execute the project in accordance with the consultant's advice (design) and intentions. The client can only deviate from the consultant's advice after consulting him;
iii) the consultant has the right to reuse its advice (for another client) unless this would conflict with the client's reasonable interest. The client does not have the right to reuse the advice without express written consent of the consultant. If the consultant agrees to such reuse the advice, an additional fee (to be agreed upon by both parties) becomes payable;
iv) depending on who gave notice of termination (the client or the consultant) and on what grounds, early termination of the assignment may have consequences for the client's payment obligations and the consultants copyright; and
v) limits on the consultant's liability for damages to direct damages and to 1 or 3 times the amount of its fees with a maximum of €1m or €2.5m.

Increasing the liability cap under the DNR 2011 is usually negotiable if the risks can be insured by the consultant and any additional premiums are compensated.

(e) Standard forms for international contracts: FIDIC

For larger projects involving parties from various jurisdictions, FIDIC contracts are often used in the Netherlands.

FIDIC (Fédération Internationale Des Ingénieurs-Conseils) is an organisation that globally promotes the interests of the consulting engineering industry. It is best known for its range of standard conditions of contract. The FIDIC contracts are widely used and recognised as one of the standard forms of contract in the international engineering and construction industry.

The FIDIC library consists of different types of contract (each identified as a Book with a certain colour), such as:

- the Red Book: Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer;
- the Yellow Book: Conditions of Contract for Plant and Design-Build; etc.

FIDIC forms of contract are based on the principle of a fair allocation of risks between the parties and also on the principle that risks should be borne by the party best able to control them.

The Red Book is intended to be used where the employer is responsible for the design of the works. It is a re-measurement contract, meaning that the employer and the contractor agree in their contract the rates for different types of work and those rates will then be applied to the quantity of work carried out by the contractor.

The Yellow Book is intended for use where the works are designed by the contractor. It is a lump-sum contract in which the contractor promises to deliver the project for a fixed price.
The contractor therefore takes the risk for quantities. In the Netherlands, the Yellow Book is used for offshore wind farms.

All FIDIC Books define the role of the engineer essentially as the agent of the employer.
The engineer is therefore not considered to be impartial.

At the moment NEC3 contracts are not widely used in the Netherlands.

8. PUBLIC PROCUREMENT IN THE NETHERLANDS

8.1 INTRODUCTION

The internal market of the European Union (EU) represents a GDP of approximately €12.9 trillion (2012). One-fifth of this amount, i.e. roughly €2.58 trillion, was spent by public institutions on the procurement of services and goods.

This chapter of Doing Projects in the EU specifically aims to offer guidance to corporations outside the EU seeking to enter this vast EU public procurement market.

8.2 PUBLIC PROCUREMENT: THE EU REGULATORY FRAMEWORK

As regards procurement by non-EU based entities, two sets of rules are relevant. On the one hand these are the rules dealing with the entry into the EU market. And on the other hand, there are the EU and national procurement rules. Both sets of rules will be briefly described below.

RULES GOVERNING THE ENTRANCE TO THE EU MARKET

The WTO agreement that governs public procurement is the recently revised Government Procurement Agreement or "GPA". The GPA aims to liberalise trade in the field of public procurement. WTO member states are not obliged to ratify the GPA. The EU ratified the GPA; the People's Republic of China, for instance, decided not to. This means that the principles laid down in the GPA do not apply to Chinese corporations that want to participate in public procurements in the EU. EU member states are therefore not obliged to accept bids for a tender by Chinese corporations, nor to treat these bids in the same way as bids from states that have ratified the GPA.

There is no common policy yet amongst the EU member states on third countries and public procurement. For this reason, different member states will treat non-GPA country participants in their tenders in different ways. However, the fact that it is possible for EU member states to exclude competitors does not mean that they consistently do so. In many cases corporations from states outside the GPA are treated the same as their EU competitors.

EU PROCUREMENT RULES

In the EU a specific set of principles applies to government procurement. The most important of these principles are: non-discrimination, transparency, impartiality, proportionality and mutual recognition. These principles follow directly from the Treaty on the Functioning of the European Union[45], one of the two treaties in force which form the foundation of the European Union (the other being the Treaty on the European Union).

The procurement legislation of the EU aims to guarantee these principles. Governments in the EU are bound to them when procuring works, services or supplies with a value above certain thresholds.

The EU procurement legislation consists of two directives for the award of certain public contracts and one directive concerning the legal remedies for parties to a procurement process. The latter directive, the so-called Remedies Directive,[46] will be explained further in paragraph 8.7. The member states are obliged to implement all three directives in their national legislation. When doing so, they have the choice to issue different, i.e. stricter, rules than those prescribed by the directives. The national procurement rules for the Netherlands are further set out in paragraph 8.6 below.

The procurement of works, supply and services contracts is subject to Directive 2004/18 (the "Classic Directive"). The procurement of contracts for the sectors water and energy supply, transport and postal services is subject to Directive 2004/17 (the "Utilities Directive" and together with the Classic Directive hereafter also referred to as the "Directives". Below we will discuss the Classic Directive. The regime of the Utilities Directive is fairly similar to that of the Classic Directive. A few specific differences of the Utilities Directive are discussed in paragraph 8.4 below.

8.3 THE CLASSIC DIRECTIVE

The Classic Directive applies if (i) a contracting authority enters into (ii) a written agreement with a producer of (iii) supplies, works or services with an estimated value above (iv) the relevant European threshold value. It only applies (v) to contracts made for consideration or (in the words of the Classic Directive) "pecuniary interest". Below we will look at each of these requirements.

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[45] *C-326/47, Treaty on the Functioning of the European Union (consolidated version), dated 26 October 2012.*
[46] *Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts, dated 20 December 2007.*

CONTRACTING AUTHORITY

The term "contracting authority" applies to the central government, territorial bodies (such as the municipalities and provinces of the Netherlands), public institutions (which include academic hospitals), and associations formed by one or more of these bodies/public institutions.[47]

The concept of "public institution" is further defined in the Classic Directive. Appendix III to this Directive contains an extensive (but not exhaustive) overview of the public institutions in the various member states of the EU.

WRITTEN AGREEMENT FOR A PECUNIARY INTEREST

The agreement should be a legally binding written agreement between a contracting authority and a contractor for a pecuniary interest. A subsidy normally does not fall within the scope of such an agreement. The requirement of a pecuniary interest means that the contracting authority provides compensation for the execution of the contract. Typically, this is a payment, but more indirect forms of compensation, such as covering the cost of execution risks or the willingness to share in a potential loss, can also qualify as a pecuniary interest.

WORKS, SUPPLY AND SERVICES

European procurement rules relate to government contracts for works, supplies, and services. The term "works" refers to the execution, or the design and execution, of structures, such as buildings, roads and water works. "Supply" refers to products, such as office furniture or automobiles. "Services" refers to all conceivable forms of the provision of services, such as ICT services, accounting services, design by an architect, cleaning services, and waste collection services.[48]

THRESHOLD VALUES

The Classic Directive applies to contracts with a value above certain thresholds. The various threshold values for works, supplies and services are set every two years by the European Commission. At present (2014-2015) these thresholds are as follows:

Contract type	Threshold value (excluding VAT)
Works	€5,186,000
Supplies	€207,000 (for central government: €134,000)
Services	€207,000 (for central government: €134,000)

[47] *Other legal entities which are controlled by one of these institutions may also fall within the scope of the definition of contracting authorities and therefore be subject to the Classic Directive.*

[48] *In the Classic Directive, a difference is made between part A and part B services. The procurement rules are fully applicable to part A services, whereas part B services are exempt as they are considered to be of no interest to enterprises from other member states. It may be that this distinction will disappear following the adoption of the new draft directives on the award of public contracts.*

8.4 THE UTILITIES DIRECTIVE

The Utilities Directive applies to contracts in the water, energy, transport and postal services sectors. The threshold values that apply to the Utilities Directive differ somewhat from those of the Classic Directive and are as follows:

Contract type	Threshold value (excluding VAT)
Works	€5,186,000
Supplies	€414,000
Services	€414,000

The Utilities Directive applies to contracting authorities, government operations under significant influence of a contracting authority, and institutions that may not be contracting authorities but enjoy special or exclusive rights to engage in their activities in the special sectors. This last category means that the scope of the Utilities Directive is broader than the scope of the Classic Directive. The Utilities Directive only applies to contracting authorities if they engage in a "relevant activity", i.e. an activity defined in articles 2 through 7 of the Utilities Directive. Examples of these activities include the provision and exploitation of fixed networks for the distribution of gas/heat, electricity, or water and the supply thereof, for transport by train, tram, or bus, and postal services.

8.5 WHAT IF THE DIRECTIVES APPLY?

TENDER

If the Directives apply the contracting authority must put out a call for tender for supplies, services or works in advance, so that every interested enterprise may compete for the contract. The contracting authority must subsequently engage the interested parties in a fair, equal and transparent quoting process. The procurement rules require that, in principle, one of the following procedures be followed:

(i) open procedure (a procurement consisting of one phase); or
(ii) restricted procedure (a procurement in two phases, starting with a selection phase, followed by a bid submission phase).

Both the open and the restricted procedures are strictly regulated. The contracting authority has an obligation to treat all applicants equally and to be completely transparent. For this reason, the contracting authority must be open about all contact with parties that have submitted a tender in a public procurement procedure, and it may not be approached for one-to-one consultations concerning the public procurement procedure. During the process enterprises may also not exchange information regarding their submissions with other parties.

The deadlines in both public procurement procedures are final: if a submission is received too late, it will not be considered or reviewed.

In special cases, the contracting authority may make use of a negotiated procedure with or without publication of the contract notice in advance of a competitive dialogue. Both of these types of procedures are used less often. One sector where the competitive dialogue procedure is commonly used is in the procurement of DBFM(O) Agreements as part of a PPP project.[49]

OPEN PROCEDURE

An open procedure is a procurement consisting of one phase. After notice is given of the contract, all interested enterprises may make submissions immediately (in other words, present their offers). In this notice, the contracting authority informs the market of all demands which must be met by the applicants and their offer. The notice also contains any grounds for exclusion that may apply to the applicant. If exclusion grounds apply, applicants may or sometimes must be excluded. Finally, the notice will also include the award criteria.

After deciding on the grounds for exclusion, the contracting authority evaluates the offers of the remaining applicants on the basis of suitability requirements. These include the financial assets and the technical and professional capabilities (such as relevant experience) of the applicant. Suitability requirements may also cover sustainability or "Corporate Social Responsibility".

The contracting authority then evaluates the applications on the basis of the award criteria. Award criteria consider the price or the relationship between price and quality of the offers. The contracting authority may select the applicant with the lowest price or the most economically advantageous tender. In the latter case, besides price the contracting authority may base its choice, for instance, on quality, technical values, aesthetic values and sustainability. After evaluation of the entries, the contracting authority makes public to whom it intends to award the contract.

The open procedure takes relatively short (approximately two months) and is primarily suitable for straightforward contracts.

RESTRICTED PROCEDURE

A restricted procedure is conducted in two phases. First, at least five of the most suitable candidates for the contract are selected. In response to the information made public by the contracting authority, the interested parties are required to provide only a request to participate (but not an offer). After an evaluation of the requests to participate on the basis of further selection criteria, only the most suitable parties are invited to participate in an award phase during which they will submit their bids.

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[49] *See Chapter 9 for more information on PPP.*

The selection criteria create an extra step between the exclusion grounds, suitability requirements and the award criteria of the open procedure. Due to this extra step, the restricted procedure is suitable for more complex contracts in which the contracting authority finds it important to select the most suitable parties and to have only these parties compete for the contract. Also, if there is an excess of candidates on the market, a selection phase can be used to avoid the evaluation of hundreds of entries. If a contract demands great effort and therefore costs from the applicant, the restricted procedure is also most suitable. A restricted procedure takes approximately four to six months.

8.6 NATIONAL IMPLEMENTATION OF THE EU PUBLIC PROCUREMENT RULES IN THE NETHERLANDS

In the Netherlands, both Directives have been implemented in the Dutch Public Procurement Act 2012. The provisions of the Directives were implemented almost verbatim. The Public Procurement Act 2012 has a broader scope of application than the Directives. The Act covers contracts which fall outside the scope of the Directives.

If a contracting authority selects a form of public procurement when the Directives do not apply, a number of provisions of the Act will apply. The Public Procurement Act 2012 also contains certain specific requirements for contracting authorities and applicants:

(i) The contracting authority must explain the reasons for choosing a specific public procurement procedure, and enterprises can question this choice;

(ii) The contracting authorities must divide the contract into segments (to which applicants may submit separate entries), unless they find this inappropriate.[50] In that case, they must explain this decision;

(iii) All public procurements must be published at w*ww.tenderned.nl,* the free digital public procurement system of the Netherlands; and

(iv) Applicants are required to use the model Self-Declaration ("Eigen Verklaring"). In the Self-Declaration, candidates and applicants declare their intention to the contracting authority to fulfil all selection criteria and adhere to the specifications of the contract.

The terms stated above apply to all government contracts. For government contracts with a value above the European thresholds, the following provisions of the Dutch Procurement Act 2012, which deviate from the Directives, apply:

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[50] *In practice a contracting authority will be able to demonstrate rather easily that a larger contract cannot be divided if it can s how that there is a benefit in tendering the project as a whole.*

(i) Suitability requirements must not concern the turnover of the enterprise, unless there is a specific reason for this. If a turnover requirement is applied, the requirement may not be higher than triple the estimated contract value;
(ii) A contracting authority must observe an objection period of 20 calendar days from the day of making public its intent to award the contract before entering into an agreement with the winner (European rules prescribe a minimum period of 15 days only). This period is also known as the "Alcatel" period.

8.7 LEGAL REMEDIES

In practice, a procurement process does not always go smoothly. For applicants in a tender, it is therefore important to know the extent of their legal protection. The framework for judicial protection in European procurement procedures is set out in the Remedies Directive and in the national legislation of each member state.

LEGAL REMEDIES DIRECTIVE

Under the European Legal Remedies Directive, member states must ensure that entities that risk being harmed by the actions of a contracting authority in a tender have rapid and effective access to a review. The Legal Remedies Directive is only applicable to European tendering which falls within the scope of the Directives.

As long as the contract has not been definitively awarded and no contract has been entered into, the breach, if any, of the rules of the Directives can still be undone. An entity that is at risk of being harmed, e.g. because it has been wrongly not awarded the tender, may claim that the intention to award a contract must be withdrawn. If the claim is successful, the contracting entity may reconsider the award decision.

The Legal Remedies Directive provides, among other things, that the contracting entity must observe a minimum period (a standstill period) after notifying the intention to award a contract before it is allowed to enter into a contract with the intended winner of the tendering procedure. During this standstill period, other parties in the tender may express their objections. If a legal review is sought within the standstill period, this period will be extended until after the competent legal body has delivered its judgment.

Among other things, the Legal Remedies Directive also provides that such a competent review body is entitled to declare ineffective a direct award in breach of a European obligation to issue a call for tenders. Member states are free to determine the form of the ineffectiveness sanctions in accordance with their national procedural rules. In the Netherlands, it was decided to make it possible for a civil court to annul an illegal direct award of a contract.

PUBLIC PROCUREMENT DISPUTES IN THE NETHERLANDS

Disputes about the award of contracts in the Netherlands – apart from specific exceptions – are settled by the civil courts. There are two main procedures: preliminary relief proceedings and proceedings on the merits. Appeal to a court of appeal and to the Dutch Supreme Court is possible in both procedures.

Preliminary relief proceedings are intended for requests for provisional relief in urgent situations and are in principle used to obtain a remedy for any breach of the rules on the awarding of contracts in an ongoing tendering procedure. The requested relief may be, for example, a prohibition from awarding the contract to the intended winner, a reassessment of the tenders, or the invalidation of a tender that does not meet the requirements. Most disputes on the award of contracts are resolved in preliminary relief proceedings. Disputes in ongoing procurement procedures are by their nature considered urgent. Preliminary relief proceedings are summary in nature.

Proceedings on the merits can still be brought after the contract has been entered into with the party to whom the contract was awarded and are usually meant to either claim annulment of the contract or damages. The annulment of a contract once it has been entered into may be claimed in the Netherlands on the basis of a limited number of grounds, in accordance with the Legal Remedies Directive. The most important grounds are that the direct award is in conflict with the European rules on the awarding of contracts and that there has been a breach of the standstill period referred to above. If there are no grounds for annulment, in principle, an action for damages remains the only option in the event of a contract already entered into. In practice the possibility of successfully claiming damages for missing out on a contract is, however, limited.

In accordance with the Dutch Public Procurement Act, contracting entities must observe a standstill period of at least 20 calendar days after notifying the intention to award a contract. In tender documents this period often has the form of a time limit. This means that any objections must be expressed within the stipulated period for raising objections, at the risk of forfeiting legal rights.

9. PUBLIC PRIVATE PARTNERSHIPS (PPP) IN THE NETHERLANDS

9.1 INTRODUCTION

Large infrastructure projects (motorways and water works) and public housing projects (housing for government agencies, court and prison buildings) are increasingly being developed using public-private partnerships ("PPP"). In Dutch PPP projects the contracting authority tenders these PPP projects on the basis of a DBFM(O) agreement. The chosen tender procedure for these projects usually is the competitive dialogue.

9.2 DBFM(O) AGREEMENT

In a DBFM(O) agreement the contractor assumes the obligation to design, build, finance, maintain and possibly operate the relevant project for a period of 20 years or longer. Under the agreement, the contractor is responsible for making the project available to the contracting authority at a certain quality level, against payment by the Dutch government of an availability fee.

Project descriptions in DBFM(O) agreements are limited to functional requirements. As a result the contractor has considerable freedom in designing the project within the specified requirements. In doing so, the contracting authority can make use of the market's capacity to develop innovative and cost-efficient solutions.

9.3 MODEL FORM DBFM(O) AGREEMENTS OF THE DUTCH GOVERNMENT

The Dutch government has prepared standard forms of contract for DBFM(O) projects.

Currently two model DBFM(O) agreements are available:

i) Model DBFM(O) Agreement version 4.0 of the Directorate-General for Public Works and Water Management, which is used for infrastructure projects; and
ii) Model DBFM(O) Agreement version 4.0 of the Ministry of Defence and the Government Buildings Agency, which is used for housing projects.

Both model agreements, including further explanation and tender guidelines, can be found in Dutch and English language on the following website: *www.ppsbijhetrijk.nl/english*

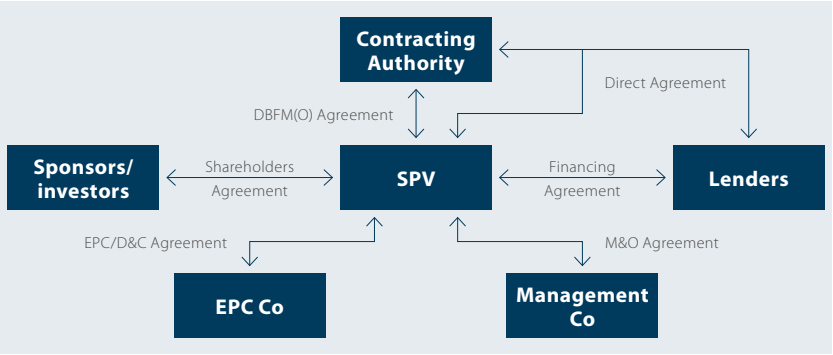
In the model DBFM(O) agreements, a system of risk-allocation is used in which certain risks (referred to as "listed risks") are priced (valued) during the tender phase. The contractor can choose to accept certain or all of these listed risks, in which case its tender price shall be reduced fictitiously based on the value of the listed risks as determined by the contracting authority.

The Dutch government has decided that projects should have a minimum investment volume of €25 million for housing projects and €60 million for infrastructure projects, in order to qualify for a DBFM(O) contract.

For all projects with an investment volume above these thresholds, the Dutch Government uses a so-called Public Private Comparator and Public Sector Comparator. These tools are designed to determine whether a project is suitable for a DBFM(O) contract. This is the case if the costs of following a DBFM(O) procedure do not outweigh the expected economic benefits thereof. For projects with a value below the above mentioned thresholds, this is assumed to be the case.

9.4 DBFM(O) CONTRACTUAL STRUCTURE

The contractual structure of a PPP project based on DBFM(O) is as follows:

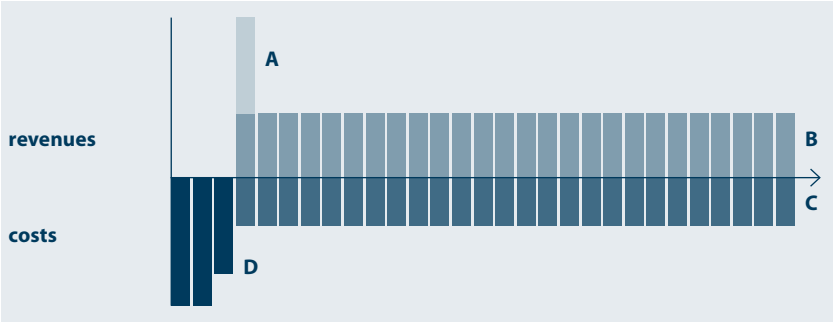


The main elements of this structure can be described as follows:

1. The contracting authority pays an availability payment to the contractor from the moment the project has been delivered and is ready for use (the "availability date") until the end of the contract period (usually between 20 – 30 years thereafter). Availability payments are adjusted in the case of non-availability or availability below certain performance levels. In certain cases the contracting authority also makes lump sum payments to the contractor when certain milestones are reached.
2. Because the Dutch government is the contracting authority, the cash-flow from a DBFM(O) contract (i.e. the availability payments and any milestone payments) is rated accordingly (currently AA+).
3. Financing is provided by i) equity provided by shareholders of the SPV (the sponsors) for approximately 15-25% of the capital requirements and ii) non-recourse loans from lenders for approximately 75-85% of the capital requirements. In larger projects part of these loans is often provided by government-owned banks, such as the European Investment Bank and the BNG Bank (Bank Nederlandse Gemeenten).
4. The lenders only have recourse on the assets of the SPV, of which the availability payments are the most important. The loans are fully secured by a standard security package. In addition the lenders will obtain step in-rights with respect to all major contracts of the SPV (this includes the DBFM(O) agreement).
5. All project risks are contracted back-to-back by the SPV to the EPC company and the O&M companies. These companies are usually owned by the sponsors or by a certain number of the sponsors. The obligations of the EPC and O&M companies are usually secured by performance bonds and parent-company guarantees.

9.5 CASH FLOW STRUCTURE DBFM(O) PROJECT

Please see below for an example of a cash flow diagram for a DBFM(O) project:



a. Costs incurred during the design and construction phase of a DBFM(O) project are financed by equity and debt (marked D).
b. When the project is delivered and becomes available for use ("availability date"), a bullet payment is made by the contracting authority (marked A in the figure above) and the periodic availability payments become payable (marked as B in the figure above').
c. From these payments interest is paid and repayments are made (marked as C in the figure above').

9.6 REASONS BEHIND THE RECENT SUCCESS OF PPP IN THE NETHERLANDS

The Netherlands identified DBFM(O) agreements as an important instrument to get more value for money when investing in large infrastructure or housing projects. During the last 10 years the Dutch Government has actively promoted the use of such agreements.

This has resulted in the Netherlands achieving a leading position in Europe with respect to PPP using DBFM(O) contracts. This has been accomplished by inter alia:

i) a focus on value for money, giving contractors the possibility to be innovative and develop cost-efficient solutions;
ii) the use of standard legal documentation that has proven to be bankable and which has led to lower transaction costs;
iii) a professional organisation within the government departments with considerable experience with DBFM(O) contracts; and
iv) willingness on the part of the contracting authorities to adjust to changing circumstances, such as the temporary measures that were taken during the first years of the financial crisis in 2008/2009 in order to secure funding for projects.[51]

9.7 PPP & DBFM(O): WHAT LIES AHEAD?

In the last 5-10 years a considerable number of projects has been procured by means of a DBFM(O) contract and there is still a large number of projects in the pipeline. The government's focus is on infrastructure projects (road works and water works). All this has resulted in a growing interest from international consortia to invest in Dutch DBFM(O) projects.

[51] *An example of a measure taken by the Dutch government to assist bidding consortia in obtaining funding was a one-off payment of 40% of the capital investments on completion of the project. This resulted in lower financing costs.*

The Dutch government has expressed its ambition to develop the use of DBFM(O) contracts in the Netherlands further, and it wants to maintain its leading position in Europe. In order to do so, the Dutch government has identified two areas of interest that will be given special attention in the near future:

- the financing of DBFM(O) projects; and
- the contract management of existing projects.

I. financing
   In addition to traditional bank financing, alternative financing solutions are considered and tested by the Dutch government, such as financing by institutional investors.
II. Contract management
   Another point of attention of the Dutch government is to organise a professional internal organisation to assist in managing projects during their operational phase.

10. FINANCING OF PROJECTS IN THE DUTCH MARKET

10.1 INTRODUCTION

The Dutch government plays an important role as originator of projects in the Dutch market. However, the role and involvement of the government differs by sector.

In the energy sector the government has developed policies and subsidies to stimulate renewable energy. Financing of such projects relies heavily on these government subsidies. Examples of these types of projects, which are realised by the private sector, include the Dutch offshore wind projects on the North Sea.

In the roads, government buildings and public transport sectors, the Dutch government has made intensive use of the public private partnership (PPP) model as a means to boost investments.[52] From a financial perspective these projects rely completely on the availability payments made by the government under the DBFM(O) agreement.

The role the government plays affects the structure of the financing of a project. However, the financing for both of the types of projects mentioned above consists of a combination of equity and debt. This chapter describes the different ways in which debt and equity can be provided. We will also examine the different types of players active in the Dutch project market. Where relevant, we will mention the differences between ''privately'' realised projects and PPP projects.

We will also pay attention to the contractual structure of the financing of projects, including a brief description of the funding mechanics, and a standard security package.

10.2 DEBT FINANCING

Until recently, project financing in the Dutch market was always provided by a group or a consortium of banks. However, in 2007/2008, as a consequence of the credit crunch, and also due to the stricter capital requirements under Basel III, the number of banks active in this market decreased significantly. This decrease in bank appetite for projects helped bring about the introduction of alternative forms of financing in the Dutch and European markets. We will look at two of these alternative forms of financing in paragraph 10.2.2. However, we will first look at the traditional project financing by a group of banks.

[52] *See Chapter 9.*

10.2.1 BANKS AND PROJECT FINANCING: PRIVATE MARKET & PPP

In the Netherlands, most projects are still financed by way of a bank financing. Very recently, the number of banks active in the Dutch and European market has increased again. The significance of bank financings for the realisation of projects is therefore not a point of discussion.

CHARACTERISTICS BANK PROJECT FINANCING

A traditional project financing provided by banks has several characteristics. We will set out some of these characteristics below.

SPV AS BORROWER

The borrower of the loan is the SPV which has been incorporated for the realisation of the project. The sponsors of the project are direct or indirect shareholders of the SPV.

NON-RECOURSE

The loan is granted on a "non-recourse" basis. As a consequence thereof, the lenders have in principle no recourse against the shareholders of the SPV. For these claims they only have recourse on the assets of the SPV. However, depending on the risk profile of a project, exceptions to this basic principle are often made to a greater or lesser extent. A common example is the requirement of the lenders that the sponsors issue guarantees for the SPV (limited recourse).

MATURITY

The term of the financing is relatively long. This applies to both private and PPP projects. In private project financings the term of the loan is linked to the depreciable life of the project, together with the duration of the off-take agreements and available subsidies. The maturity of the loan will always be shorter than the period during which the project can generate income. This provides the lenders with a so-called "tail" in case the project generates less income than expected or in case other difficulties occur. By way of illustration: in recent wind projects we see maturities of around 16-17 years.

In PPP projects the term of the loan is linked to the term of the underlying DBFM(O) agreement with the state. In recent PPP projects, this term is usually between 20 and 30 years. The maturity of the loans will again be shorter to create a tail for the lenders. By way of illustration: in the recent A1/A6 road project the maturity of the loans was 27 years.

FUTURE CASH FLOW BASIS FOR DEBT SERVICE

Loans and interest have to be repaid from the future income of the project. As a result, the future cash flow from the contracts and any subsidies of the SPV are the foundation for the financing. Although all project assets are pledged by the SPV in favour of the lenders, the value of these assets, without the contracts and the subsidies, is by no means sufficient to cover the costs of the loans.

RELATIVELY HIGH DEBT/EQUITY RATIO

The ratio between the amount of the loan and the equity provided by the sponsors depends on the type of project and the industry in which the project is realised. In Dutch infrastructure PPP projects, a debt/equity ratio of around 85:15 is not unusual. In recent offshore wind projects the debt/equity ratio is closer to 70:30.

PLAYERS IN BANK FINANCINGS IN THE DUTCH MARKET

COMMERCIAL LENDERS

Very recently, in the course of the last one or two years, the number of banks active in the Dutch project financing market has increased. Besides familiar lenders from Germany and Japan, we now see French, Spanish and commercial Dutch banks active again in the Dutch market.

In this respect it is worth mentioning that the Bank Nederlandse Gemeenten ("BNG") has been active in the Dutch market throughout the recent financial crisis. The BNG is partly owned by the Dutch state (50%) and partly in the hands of municipalities, provinces and waterboards. The BNG is very active in the Dutch PPP market and, because of its AAA rating, can often provide financing on favourable terms. To a lesser extent the Nederlandse Waterschapsbank ("NWB") is also active in the Dutch PPP market. The NWB is entirely owned by Dutch governmental authorities: 81% of the shares are held by waterboards, 17% by the state and 2% by provinces.

EUROPEAN INVESTMENT BANK ("EIB")

The EIB is an important player in the Dutch project financing market. The EIB was set up in 1958 by the Treaty of Rome, and the member states of the EU are its shareholders. It finances approximately 400 projects per year. 90% of these projects are within the EU. The EIB was established to provide long-term financings for "sound and sustainable investment" projects. These include projects for the development of underdeveloped areas, projects aimed at modernisation and projects to stimulate economic activity which cannot be financed by the member states themselves, or projects which are so large that several member states are involved and which cannot be financed by the member states themselves.

The EIB is the largest multilateral lender and borrower in the world. It finances itself in the international capital market, and because of its AAA rating it can do so on favourable terms. The EIB passes on these favourable terms to its borrowers.

In the Netherlands the EIB was involved as a lender in all major recent road PPP projects. Furthermore, the EIB plays an important role in the financing of offshore wind projects. The EIB's policy is to finance no more than 50% of the eligible project costs of a project. Only costs which directly relate to the underlying project are considered to be eligible project costs. Operational costs, insurance premiums and taxes do not fall within this definition. Besides the attractive cost of borrowing that the EIB offers, the major role of the EIB over the last years can partly be explained by the lack of liquidity in the commercial project financing market. It remains to be seen whether the role of the EIB in the Dutch and European market will decrease now that liquidity in the commercial banking sector has somewhat increased.

EXPORT CREDIT AGENCIES (ECA)

In offshore wind projects Export Credit Agencies or ECAs play an important role. They can provide loans or issue guarantees for products that are exported out of the ECA's country of origin by the contracting parties of the project. In offshore wind projects this includes guarantees for either loans provided by commercial lenders or by the EIB.

The conditions under which ECAs can provide loans or issue guarantees have most recently been set out in the OECD's Arrangement on Officially Supported Export Credit of 1 October 2013. These conditions contain specific rules for projects in the field of renewable energy. As a consequence thereof, the maturity of guarantees may not exceed 18 years, which is considerably longer than for other contracts. In principle, an ECA may only guarantee 85% of the relevant contract sum, and repayments of a guaranteed loan have to take place at least half-yearly in equal instalments.

10.2.2 ALTERNATIVE DEBT FINANCING

BACKGROUND

Until very recently, not a single project in the Dutch market had been financed by way of a bond issue . This is very different to other markets. In the UK, for instance, until the start of the credit crunch, so-called "wrapped" bonds were regularly used successfully. In the US financing by way of a bond issues for projects was and still is used more frequently.

However, because of the lack of liquidity in the bank financing market in the aftermath of the financial crisis, parties in the European and Dutch market started looking for alternatives to bank financing.

DEVELOPMENT OF ALTERNATIVE DEBT STRUCTURES

On the one hand, these alternatives included tapping into new categories of lenders/funders. In view of the long-term, stable and predictable cash flows of infrastructure projects, they are a highly suitable asset class for institutional investors, such as insurers and pension funds. On the other hand, project parties looked for new structures suitable for these new lenders.[53]

These alternative structures were supposed to meet certain specific requirements of institutional investors:

- for institutional investors, traditional investment in infrastructure projects is difficult because of the construction risk of projects and the relatively low rating thereof; and
- institutional investors require fixed-income streams with, if possible, an inflation component.

Therefore, the alternative structures that have been developed in recent years often contain:

- some form of credit enhancement to ensure that the institutional investor is not or only partly exposed to the construction risks of the project and to improve the risk profile of the financing; and
- a fixed interest compensation for the financing provided by the institutional investor.

Given the limited knowledge and experience of pension funds and insurers in projects and given the lack of manpower for the prolonged monitoring of projects, the alternative structures almost always consist of a combination of bank and bond financing. In this way, the institutional investor can profit from the knowledge and experience of the banks involved, who will also act as an agent under the financing documents.

TWO ALTERNATIVE TYPES OF DEBT FINANCINGS IN THE NETHERLANDS

As a result of the abovementioned developments, two projects with an alternative debt financing structure have now been successfully completed in the Netherlands. Below, we will briefly discuss both projects, namely the N33 secondary road and the Zaanstad prison. In this respect, it should be noted that the characteristics for project financing discussed in paragraph 8.2.1 above to a large extent equally apply to the projects below. We will only note a few particularities of both projects.

[53] *Parties have also looked for alternative structures for bank financings, e.g. mini-perms. Given the limited scope of this book we will not discuss this topic here.*

PROJECT 1: PILOT INDEX-LINKED FINANCING FOR THE N33

In November 2012 the Dutch state awarded a smaller PPP road project (N33) on the basis of so-called index-linked financing. This project was a pilot project in which the state offered bidders the opportunity to compensate debt providers for inflation. By doing so, the state wanted to examine whether providing such inflation-linked compensation would be an appropriate means to attract a broad range of institutional investors to invest in projects. In this pilot project, in which Houthoff Buruma was closely involved, the financing of the project was divided in two phases:

- three banks provided 100% of the loans during the construction phase of the project;
- after completion of the project 70% of the loans were refinanced by APG, a Dutch pension fund, while the banks held the remaining 30% of the loans. The term of the refinancing was 20 years, and the SPV pays a fixed interest rate ("coupon") to APG. APG committed itself to this fixed interest rate at financial close of the project, even though it only acceded to the project as a financier after completion of the project. In addition to the fixed coupon, APG receives an inflation-linked compensation on the principal of its loan, which is borne by the state. Changes in inflation will therefore not be at the SPV's risk. As the interest compensation is fixed, hedging of the APG facility was not required.

After evaluating this pilot project, the Dutch state decided that inflation-linked financing is a not the generic solution for making projects attractive to a broad range of institutional investors. According to the government there are no insurmountable obstacles for institutional investors to invest in infrastructure projects given the recent market developments, neither in equity, nor in debt. Consequently, the pilot project was not followed by further projects.[54]

PROJECT 2: PEBBLE/COMMUTE ZAANSTAD PRISON

In September 2013 financial close was reached for the Zaanstad prison project. The €195 million financing for this project was raised by a combination of ING's PEBBLE (pan-European bank to bond loan equitisation) and NIBC's Commute model. In the Netherlands and worldwide, this was the first time that a PPP project was financed by means of the PEBBLE-Commute structure.[55]

The PEBBLE-Commute structure is an initiative created by the banks in question, where project risk is reduced by way of a credit-enhancement tranche. This tranche makes it possible for the institutional investors to provide an investment-grade tranche of financing. The credit-enhancement tranche is provided by the banks and takes the form of a loan that is subordinated to the financing from the institutional investors. The subordinated tranche takes the first loss in the event of a default of the project. The documentation remains close to that for existing bank financing.

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[54] *See the letter of the Minister of Finance to the Second Chamber dated 7 June 2013.*
[55] *To date no project in the Netherlands has been financed using the PEBBLE or Commute structure separately.*

In the Zaanstad project ING Bank N.V. and NIBC provided 15% of the financing by way of a 7-year subordinated loan for the construction phase. This subordinated loan will only be repaid after the completion of the construction phase from the availability payments under the DBFM(O) contract. After repayment of the subordinated loan, the banks will stay involved in the financing of the project by providing services connected to the administration of the outstanding loans and the monitoring thereof. For important decisions the consent of the institutional investors will be required as well. The remaining 85% long-term financing of the project was placed with institutional investors, such as insurers and pension funds, who receive fixed-interest compensation. In this project, financiers and institutional investors from the Netherlands, Belgium, France and Germany were involved.

EUROPE 2020 PROJECT BOND INITIATIVE

In 2001 the European Commission launched the so-called Europe 2020 Project Bond Initiative. The objective of this initiative is to stimulate investment in infrastructure in the areas of transport, energy and IT, and to promote the creation of debt capital markets as a new source of financing for infrastructure in Europe.[56] This initiative is currently still in the pilot phase. In this pilot phase, there is capacity for up to ten projects. In July 2013 the Castor energy storage project was the first project to close using an EIB project bond. As far as we are aware, there are currently no Dutch projects among the projects in the pipeline of the Europe 2020 Project Bond Initiative.

The structure of the EIB project bond closely resembles the previously discussed PEBBLE/Commute structure. The financing consists of two parts: a tranche A as bond financing and a subordinated tranche B, which is provided by the EIB. Thus, the tranche provided by the EIB acts as credit-enhancement tranche for the remainder of the financing for the project. A requirement of the EIB Project Bond Initiative is that the remainder of the financing is provided by way of bonds/notes instead of loans. The support of the EIB can consist of a loan or a guarantee.

PRIVATE PLACEMENTS

Another type of bond which has been mentioned as an option for the financing of Dutch projects is the so-called project-related private placements: bond issues in the US market to institutional investors which do not require the preparation of a prospectus. Although private placements by Dutch corporates have soared in recent years, we are not aware of any project-based private placements in the Dutch market.

[56] *Regulation EU No. 670/2012 published in the Official Journal L 204/1 of 31/07/2012.*

COMMENTS ON ALTERNATIVE DEBT STRUCTURES

The new structures we described above have a number of disadvantages. These mainly concern the combination of bank and bond financing, which requires rather complicated intercreditor arrangements. The interests of the banks are not always aligned with those of the bondholders: this issue does not arise where financing is solely from a group of banks. Another disadvantage is the breakage costs associated with the early termination of a project bond. Because institutional investors are entitled to fixed-interest compensation, they will, depending on the interest rate at any given time, claim compensation for lost interest revenue from the SPV.

STATE OF AFFAIRS AND EXPECTATIONS FOR THE FUTURE

To date, other alternatively financed projects have failed to materialise in the Netherlands. Apart from the complications of bank-bond financing set out above, a relevant factor is that the liquidity in the banking market has recently increased. Views in the market range from "availability of funding is improving" to "liquidity is abundant". However, the world of institutional investors is showing considerable interest in the project finance market. Furthermore, the Energy Agreement[57] of September 2013 also aims to increase project financing by institutional investors. The Energy Agreement specifically provides for a facility whereby banks (or venture capital companies or funds) would supply project financing at the start-up of renewable energy projects, and whereby the cash flows from these projects would subsequently be sold to long-term investors. The Energy Agreement further states that these institutional investors will require that the risks of the financing partly remain on the balance sheet of the bank, so that the bank remains committed to good long-term performance of the projects.

In view of the above developments it is currently unclear to what extent the alternative financing/bond market will develop in the Dutch projects market.

What is clear is that several institutional investors are active in the Dutch project market. To date, this has not yet happen through new financing structures but in more traditional ways, for example as a lender or as an equity provider or a subordinated lender. It seems likely that one way or another, the involvement of institutional investors in the Dutch project market will increase in the near future.

[57] *See paragraph 3.1 and footnote 10 for more information on the Energy Agreement.*

10.3 EQUITY

GENERAL

At least part of the financing of each project will consist of a financial contribution from the sponsors of the project to the SPV. This contribution is usually provided under the generic term "equity" by way of a combination of equity (i.e. shares or "aandelenkapitaal") and subordinated loans ("achtergestelde leningen").

EQUITY

The legal entity most commonly used for the realisation of Dutch projects is the private company with limited liability (besloten vennootschap met beperkte aansprakelijkheid, in short, a "BV"). Due to a recent change in legislation, the BV no longer has a minimal capital requirement.[58] Sponsors therefore often only need supply a low and symbolic share capital amount, making a BV a very flexible legal entity.

Next to the BV, privately realised projects can also take the form of a limited partnership (commanditaire vennootschap, in short, a "CV"). A CV is not a legal entity, but it does have a separate pool of assets (afgescheiden vermogen). A CV has one general partner and one or more limited partners. The general partner of the CV is the legal owner of all the assets of the project. This general partner is an SPV, usually in the form of a BV. The sponsors of the project act as limited partners. CVs are popular for tax reasons. The CV is tax transparent, which has certain benefits for the sponsors.

SUBORDINATED LOANS

Usually the majority of the equity contribution of the sponsors will be provided by way of subordinated loans. These loans may not be repaid until the lenders are paid off. Interest on these shareholder loans may only be paid under strict conditions.

PLAYERS

Sponsors of projects in the PPP market usually consists of parties active in the Dutch construction market. Furthermore, internationally operating infrastructure funds, such as Macquarie and DIF, are playing an important role in the Dutch PPP market. These funds invest both in projects in the start-up phase and in existing projects, and therefore create an exit opportunity for the sponsor-construction companies. Finally, we also see institutional investors as a sponsor or subordinated lender for these projects. In privately realised projects like the offshore wind sector, utility companies are active as sponsors. In addition, construction companies, infrastructure funds and institutional investors are also active in this market.

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[58] *The so-called "Flex BV" Act.*

10.4 CONTRACT STRUCTURE

Because of the involvement of the EIB, the majority of larger Dutch projects are funded by two different types of lenders: the commercial lenders and the EIB. This has implications for the contract structure of the funding for these projects. In this paragraph we will we discuss some features of the finance documents.

COMMON TERMS AGREEMENT

Commercial lenders and the EIB will provide their funding pari passu. Often a Comment Terms Agreement (CTA) or Common Terms Facility Agreement (CTFA)[59] will be signed between the SPV, the commercial lenders and the EIB. The conditions for both categories of lenders and loans will be described in the CTA. The specific agreement for each loan will be included in a Commercial Facilities Agreement (CFA) with the commercial lenders and an EIB Facilities Agreement (EIB FA) with the EIB.

TRANCHES / FACILITIES

Depending on the costs and type of the project, several tranches or facilities will be included in the CTA, CFA and EIB FA.

Examples are:

- A fixed loan (term loan) with a long term (consisting of one or more tranches) and intended to finance the costs of the project;
- a revolving working capital facility for working capital;
- an equity bridge facility, a short-term facility which is used as a bridge loan for the equity contributions of the sponsors of the project. This facility will be repaid with the equity contributions. By bringing in the equity in a later stage, the sponsors can increase their return on the project.
- a milestone bridge facility, a facility with a shorter term which will be repaid with one or more milestone payments when the SPV reaches certain milestones in building the project (for certain PPP projects);
- one or more EIB term facilities; and
- ECA-guaranteed facilities, term facilities which are guaranteed by the relevant ECAs.[60]

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[59] *Until a few years ago, mezzanine facilities were also used but these have become less common.*
[60] *For more information about the role of ECAs, please see the last section of paragraph 10.2.1.*

OTHER FINANCE DOCUMENTS

In addition to the CTA, CFA and the EIB FA, the documentation of each project consists in any event of:

- an equity subscription agreement, setting out the contribution obligations of the sponsors;
- subordinated shareholder loans;
- a comprehensive security package;[61]
- direct agreements with the main contractual counterparties of the SPV; [62]
- an account bank agreement;
- hedging agreements;
- intercreditor agreement (or an equity subscription and subordination agreement); and
- where ECAs are involved: a guarantee and indemnity agreement.

PROJECT BANK ACCOUNTS & CASH FLOW

As mentioned above, the foundation for each project financing is the cash flow of the project. This cash flow will be included in the financial model for the project. This model is an important tool for monitoring the project. In addition, the cash flow of the project will be carefully monitored through a complex system of bank accounts of the project SPV. All payments to and by the SPV must flow through these bank accounts. For example, all payments from the banks under the loans are made available to the SPV in a so-called disbursement account. For the payment of project costs (including construction costs), the SPV may then, under certain conditions, transfer these funds to its operating account. In this operating account the SPV also receives its other income. Two further standard bank accounts in project financings are the debt service reserve account and the maintenance reserve account. Under the financing documents the SPV is required to maintain a minimum amount which functions as a financial "buffer" for any debt service and maintenance payments that become due. Income from insurance has to be paid into the insurance account. The last bank account we will mention here is the distribution account. This is the SPV's only bank account which is not pledged to the lenders. After all other outstanding bills have been paid, the SPV may transfer any surplus in the operating account to the distribution account to make a dividend distribution to its shareholders and/or a payment of interest on its shareholder loans. All payments by the project SPV from and to these accounts are strictly regulated in both the CTA and the account bank agreement.

[61] *Please see 10.5.*
[62] *Please see 10.5.*

10.5 COLLATERAL

Dutch law distinguishes between security rights which, on the one hand, qualify as a right in rem ("zakelijke zekerheden"), that is "collateral" or "real security", and those, on the other hand which qualify as quasi-security or personal security rights ("persoonlijke zekerheden"). Real security rights can be enforced against any party, regardless of any bankruptcy proceedings. Quasi-security only has the strength of a contractual agreement. Both forms of security will be discussed in more detail below.

COLLATERAL/REAL SECURITY ("ZAKELIJKE ZEKERHEDEN")

The Netherlands has a closed system of collateral rights. Collateral rights can be enforced against everyone, even against a trustee (curator) in the event of bankruptcy of the project SPV. These security rights therefore constitute an important safeguard for lenders.

Real security over moveable assets, receivables and shares is created by means of a deed of pledge. In certain circumstances, this deed needs to be registered with the relevant Dutch tax authorities. This is free of charge. In addition, it is common for the lenders to require that a notice of the pledge be given to certain key contractual counterparties of the project SPV. A pledge of shares requires a notarial deed. Most large Dutch law firms have in-house civil law notaries who will be able to draw up and execute deeds of share pledge.

Any immovable property ("onroerend goed") of the project SPV will have to be secured by way of a deed of mortgage ("hypotheek"). This is also takes the form of a notarial deed. This deed will subsequently be registered with the registers of the Land Registry office.[63]

PS Parallel debt

As an aside, we note that under Dutch law a lender can only hold security to secure his own claims. In a structure with many lenders, all claims of all lenders will obviously need to be secured. To prevent the need for all lenders to become parties to the Dutch security documents, a so-called "parallel debt" structure is included in the intercreditor agreement. In the parallel-debt provision, the project SPV undertakes to pay an amount equal to all claims of all lenders under the various loans to the security agent. All Dutch security will then be provided to the security agent and will secure this parallel debt claim of this security agent. The structure is such that the SPV will never have to pay twice: if a payment has been made under the parallel debt, this will reduce the outstanding amount under the loans, and vice versa.

[63] *Please note that it is not possible to create a mortgage for offshore wind projects outside Dutch territorial waters.*

QUASI-SECURITY ("ONEIGENLIJKE ZEKERHEDEN")

In addition to the collateral described above, Dutch projects normally also include a standard set of "quasi-security". These are rights which give the lenders certain contractual comfort, but which are not real security rights. Examples of quasi-security are contractual agreements such as (i) guarantees and (ii) direct agreements.

(i) Guarantees

In a standard project financing various kinds of guarantees will be in place.

Examples are:

- Cost-overrun guarantees and contingent equity: the shareholders/sponsors guarantee the provision of further funding in case the projects costs are higher than anticipated in the financial model;
- Parent guarantees: Usually separate joint ventures are established for the execution of the EPC contract and/or the maintenance contract. Parent guarantees are requested from the (final) shareholders of the joint ventures in relation to the obligations under the EPC and/or maintenance contract in which these underlying parties will be jointly and severally liable (hoofdelijk aansprakelijk) for the performance of these contracts;
- EPC performance guarantees: bank guarantees provided by the EPC contractor for a percentage of the EPC contract price as security for the fulfilment of its obligations under the EPC contract. Similarly, in the case of offshore wind projects, both the turbine supplier and the balance of plant contractor will have to provide LCs to the SPV.

The rights of the project SPV under the abovementioned guarantees and bank guarantees will be pledged to the lenders.

(ii) Direct agreements

Unlike many Anglo-Saxon legal systems, the Netherlands has no concept of a "floating charge". It is not possible to obtain a pledge or lien that covers the business of the SPV as a whole. Instead, each asset of the project SPV will need to be secured separately. In the case of an enforcement of such security, the security agent may sell the assets separately. This will need to be done to the highest bidder. A sale of the entire company by a lender as a going concern does not fit neatly within the Dutch collateral system.

In view of this, direct agreement with the major parties of the project SPV may be more important in Dutch transactions compared to certain other jurisdictions. The negotiations of these direct agreements have become standard practice in Dutch projects.

In short, the purpose of a direct agreement is to give the lenders the possibility to keep the project running if the project SPV is in financial difficulties. This is achieved by negotiating with counterparties that they will not terminate their contract during a certain period. This "standstill period" gives the lenders the possibility to decide whether they wish to continue with the project, for example, by transferring the contracts to a new SPV or that they want to pull the plug on the project instead.

The Dutch government has developed a standard form direct agreement for its DBFM(O) agreements for the PPP projects market. There is very little room to depart from this model.

With respect to the direct agreement with other parties in a PPP project and direct agreement in privately realised projects the form of direct agreement is less standardised. However, some points of discussion have become more crystallised, and a certain market standard is slowly developing around these points. This concerns for instance the length of the "standstill period" which the counterparty wishes to give to lenders and the obligations of the counterparty and the banks during this period.

Although the direct agreement has become a standard project documents, we note that this type of agreement has not yet been tested in a Dutch bankruptcy.

11. GOVERNMENT SUPPORT FOR PROJECTS

11.1 INTRODUCTION

The Dutch government has taken significant measures to support the realisation and exploitation of projects in the Netherlands. In this chapter we will limit ourselves to subsidies for renewable energy projects (paragraph 11.2) and certain tax incentives (paragraph 11.3).

In addition to renewable energy subsidies, a large number of sector-specific support measures are available. If a concrete plan for a project exists, it is advisable to look into these specific measures. An overview of government subsidies can be found at *http://www.rvo.nl/subsidies-regelingen*. In certain circumstances the Dutch government is also willing to grant specific financial support for special projects, where they fit in with its policy and/or is considered to be in the interest of the Dutch economy. In the past this has been the case with onshore and offshore wind, as the Dutch state is keen to stimulate innovation and reduce costs in this sector.

11.2 SUBSIDIES FOR RENEWABLE ENERGY PROJECTS

RENEWABLE ENERGY PRODUCTION INCENTIVE SCHEME ("SDE")[64]

The relevant subsidy for larger renewable projects is the Renewable Energy Production Incentive Scheme, in the Netherlands commonly known as "SDE". The Scheme covers the production of renewable electricity, heat and renewable gas. Currently the Scheme includes production methods using biomass, solar, wind (onshore and offshore), hydropower and geothermal heat.
The government decides on an annual basis which types of installation should be included in the Scheme. In this regard we note that as of 2015 biomass used to co-fuel coal-fired power plants can apply for SDE subsidy.

WHAT DOES AN SDE SUBSIDY COVER?

An SDE subsidy entitles the holder to receive the difference between the production costs of fossil-fuel energy and renewable energy. The SDE subsidy is a so-called operating subsidy. The award of subsidies is linked to the start of the production of renewable energy.
The maximum duration for an SDE subsidy is 15 years.

[64] *Stimuleringsregeling Duurzame Energieproductie*

HOW TO APPLY FOR SDE SUBSIDY: TIMING AND APPLICATION REQUIREMENTS

Under the Scheme an SDE subsidy should be applied for before construction of the project. To obtain the subsidy the applicant is required to hold certain relevant permits, including, for instance, an environmental permit, and to have a suitable location. When requesting the subsidy, the applicant needs to demonstrate the economic and technical feasibility of the project. One factor that needs to be taken into account in making this assessment is the availability of sufficient network capacity near the installation.

An applicant needs to apply for an SDE subsidy using a prescribed application form. There is a different form for each of the relevant production methods. The government decides annually from which date applications can be submitted. For 2014 this date is 1 April.

With each application the applicant needs to submit a feasibility study. This study should include an exploitation calculation, information regarding the equity of the applicant and any debt used for the financing of the project. Applicants for projects with an equity contribution of less than 20% of the investment cost will need to provide a letter of intent from a lender. For the production of heat the applicant needs to demonstrate that off-take is sufficiently ensured.

ASSESSMENT OF SDE APPLICATIONS

The Scheme favours cheaper renewable production methods over more expensive ones. The general idea underlying the Scheme is to generate as much renewable energy as possible with the available subsidy budget. In line with this principle, cheaper production methods are allowed to submit their applications first. As a result, relatively few applications for SDE subsidy for onshore wind were awarded in the period up until 2013, onshore wind being one of the more expensive renewable techniques. However, as of 2013, the possibilities for SDE subsidy for onshore wind have increased.[65]

HOW AN SDE SUBSIDY IS AWARDED

An SDE subsidy award takes the form of a subsidy grant.[66] This is an undertaking by the Dutch government to pay the subsidy if the holder complies with the subsidy conditions. One of these conditions is that the holder needs to have the relevant building contracts in place within one year of receiving the subsidy grant. This is to ensure that the project progresses in a good time.

The project needs to be operational within a maximum of 5 years after the subsidy is granted. If the holder does not comply with these conditions, the subsidy can be withdrawn.

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[65] *As of 2013 the Scheme allows "wind differentiation": locations with a lot of wind are granted more full load hours (vollasturen) compared to less windy locations.*

[66] *A "Subsidieverleningsbeschikking"*

Once the project is operational the government will make periodic payments based on the amount of electricity produced. These payments are made by way of advances. To receive payment the holder needs to submit certain certificates (so-called "guarantees of origin"[67]) to the government stating the amount of electricity produced. Guarantees of origin are issued by CertiQ, a subsidiary of Dutch grid operator TenneT. After the subsidy period has ended (usually after 15 years), the final subsidy will be determined.

BUDGET

Each year the government sets one combined budget for all production methods of renewable energy. In line with its ambitions for renewable energy, the SDE budget has seen a significant increase over the last few years. In 2012 the SDE budget was €1.7bn. For 2013 the budget was €3bn, and for 2014 the SDE budget is €3.5bn.

OFFSHORE WIND

Due to the fact that renewable production methods compete on price when obtaining an SDE subsidy, the Scheme has not subsidised any offshore wind projects. The wind farms which are currently being built have been subsidised under a special regulation[68] dating from 2009. The government has announced a new specific subsidy framework for offshore wind, which will come into force as of 2015. One of the guiding principles of this new regulation is that the offshore wind industry should be incentivised to achieve cost savings: each year a lower amount of subsidy per kWh energy will be made available.

Finally, we note that the Dutch government announced in the Energy Agreement that it will support the construction of an offshore demonstration wind farm in 2014. It is possible that the government will announce a specific subsidy for this project.

A FEW POINTS TO NOTE

An SDE subsidy grant is a solid basis for an investment in a renewable project. However, for the sake of completeness, we would like to point out three things to bear in mind in relation to this subsidy:

i) Interested parties can object to an SDE subsidy grant. In the worst case scenario, if these objections are sustained, the subsidy can be withdrawn;
ii) Subsidy grants for larger projects (>125 MW) need to obtain approval from the European Commission before the subsidy becomes effective.
iii) If the project also is awarded other subsidies, this can result in a reduction in the SDE subsidy.

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[67] *Garanties van oorsprong.*
[68] *Regeling Windenergie op zee 2009.*

11.3 TAX INCENTIVES

Dutch tax legislation contains several tax incentives to stimulate investments in energy-efficient and environmentally friendly assets. These facilities reduce the tax burden of entities[69] which invest in these types of assets. In order to be eligible for the facilities, entities must invest in new business assets.

RANDOM DEPRECIATION OF ENVIRONMENTAL INVESTMENTS SCHEME

The Random Depreciation of Environmental Investments Scheme ("VAMIL")[70] is a facility available for entities which invest in environmentally friendly business assets. The VAMIL provides an opportunity to depreciate 75% of an investment in qualifying business assets. As such, entities can achieve a liquidity or interest advantage. In order to be eligible for the VAMIL, entities must invest in a business asset that is on the Environmental List (Milieulijst) drawn up by the Ministry of Infrastructure and the Environment. Further, the total amount of qualifying investments must exceed €2,500.

ENERGY INVESTMENT ALLOWANCE

The Energy Investment Allowance ("EIA")[71] is designed for entities investing in energy-efficient assets and technologies. The EIA offers entities a direct financial advantage, because taxpayers can deduct 41.5% (in addition to regular depreciation) of the investment costs of these assets and technologies from their profits in the year the investment is made.

Entities can claim the allowance in respect of all assets included in the annual Energy List (Energielijst) of the Ministry of Economic Affairs. The maximum amount of investment for which EIA can be claimed per calendar year per taxpayer is €118m. The total amount of qualifying investments must exceed €2,500. Under certain conditions, advice on the investments in energy-efficient assets and technologies can be included in the deduction, as well as additional costs needed to make the investment operational.

SUBSIDY SCHEME FOR SUSTAINABLE ENERGY PRODUCTION

As mentioned under paragraph 11.2 above, entities that produce sustainable energy can apply for a subsidy for the production of sustainable electricity, sustainable heat or combined generation of sustainable heat and electricity or green gas. This is part of the Renewable Energy Production Incentive Scheme ("SDE").

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[69] *The rules also apply to individual enterpreneurs. In this chapter we will limit ourselves to qualifying entities.*
[70] *Section 3.31 and onwards of the Dutch Income Tax Act 2001 (Wet inkomstenbelasting 2001).*
[71] *Section 3.42 and onwards of the Dutch Income Tax Act 2001 (Wet inkomstenbelasting 2001).*

As from 2014, it is no longer possible to apply for the EIA and to receive a subsidy under the SDE. However, a transitional rule has been introduced by the Dutch Government. Under this transitional rule, an entity may apply for the EIA in 2014 if it has already received a subsidy under the SDE in 2013 or earlier, subject to the condition that it has not applied for the EIA previously.

ENVIRONMENTAL INVESTMENT ALLOWANCE

Entities which invest in environmentally friendly business assets may be eligible for the Environmental Investment Allowance ("MIA").[72] The MIA provides for an additional tax deduction (in addition to the regular depreciation) in respect of the investment costs in qualifying assets. Depending on the asset, the amount that can be deducted from the taxable profit is 13,5%, 27% or 36% of the investment costs. The maximum qualifying investment costs that are eligible amount to €25m per taxpayer per calendar year.

In order to be eligible for the MIA, the environmentally friendly business assets must be included on the Environmental List (Milieulijst). The total amount of qualifying investments must exceed €2,500 per calendar year. Under certain conditions, advice on the investments in the assets can be included in the deduction as well as additional costs needed to make the investment operational.

COMBINATION OF VAMIL, EIA AND MIA

It is not possible to apply for all these awards simultaneously. For instance, it is not possible to apply for the EIA and the MIA for the same investment. Therefore, a choice will have to be made between the EIA or the MIA. Needless to say, the amount that can be deducted under the two schemes will be decisive in this choice.

By contrast, entities can apply for the VAMIL in addition to the EIA or in addition to the MIA.

[72] *Section 3.42a and onwards of the Dutch Income Tax Act 2001 (Wet inkomstenbelasting 2001).*

USEFUL INFORMATION

CHAPTER 1:

The European Commission's list of some 250 key energy infrastructure projects in the EU:
Http://europa.eu/rapid/press-release_IP-13-392_en.htm

CHAPTER 2:

Visit *www.minbuza.nl* for further information (in various languages)
about how to contact Dutch embassies, consulates and permanent representations.

Detailed visa information is available (in English and Dutch) at *www.ind.nl*

More information on arbitration (including standard clauses) is provided
(in English and Dutch) at *www.nai-nl.org*.

CHAPTER 6

Zoning plans can be checked at *www.ruimtelijkeplannen.nl*.

A building permit needs to be requested using a model form describing all planned activities.
The form can be submitted online at *www.omgevingsloket.nl*.

CHAPTER 8

All public procurements in the EU are published at *www.ted.europa.eu*.

All public procurements in the Netherlands must also be published at *www.tenderned.nl*

CHAPTER 9

For more information on PPP projects in the Netherlands see *www.ppsbijhetrijk.nl*
and *www.ppsnetwerk.nl*.

CHAPTER 11

An overview of government subsidies can be found at *http://www.rvo.nl/subsidies-regelingen*.

PETER HABRAKEN, PARTNER, HOUTHOFF BURUMA

Peter Habraken specialises in public private partnerships (PPP) in the real estate, infrastructure, energy and transport/logistics sector. He advises private-sector parties as well as public-sector parties. He is a co-founder and member of the Dutch and German Lawyers Association. Peter Habraken teaches at the MSRE programme of the Amsterdam School of Real Estate and the postgraduate programme at Leiden University and Utrecht University. He is a member of the Association of Construction Law Lawyers, the Association of Real Estate Lawyers and the International Bar Association (Section on Energy, Environment Natural Resources and Infrastructure Law – SEERIL).

Recent Projects:

- Advised the SAAone Consortium in the SAA PPP, the largest PPP of its kind so far in The Netherlands (€4.4. billion) encompassing the motorway trajectory involving Amsterdam Airport Schiphol. The SAAone Consortium consists of VolkerWessels, Hochtief, Boskalis and Dutch Infrastructure Fund.
- Act as "consortium counsel" of the consortium "Hageraad", consisting of Wiel Arets Architects, Brink Group, FGB Facility Group and Hillen+Roosen, on its bid for the Surpreme Court ("Hoge Raad") PPP project.
- Acts for A.P. Moller Maersk on its investment in a new bunker terminal in Flushing harbour.
- Acts as "lenders counsel" (for the financiers) of the consortium of Facilicom, Hypsos, Macquarie and VolkerWessels on its bid for the Defense Museum PPP project, tendered by the Ministry of Defense.
- Advised VolkerWessels on the development, financing and maintenance of the new ZOO in Emmen. The ZOO will be the only of its kind in Europe and requires an investment of more than € 150 million.
- Advises VolkerWessels on its bid for the N33 Motorway PPP project. This PPP project also serves as a pilot to explore the possibilities of financing infrastructure by pensionfunds and other institutional investors, and will involve innovative "inflation-linked" finance structures.
- Advises HagaZiekenhuis, the second largest hospital of The Hague, on the procurement, zoning & planning and the PPP contracting for the (€ 100 m+) enlargement and renovation of its premises. The project forms part of the redevelopment of the Leyweg-area, also involving negotiations and contracting with the city of The Hague and (other) private parties.
- Advised AM (Royal BAM) in the restructuring of the Rotterdam Calypso project, involving approximately 500 apartments, commercial space and underground parking.

- Advises the consortium consisting of VolkerWessels, Facilicom and Sequoia in its bid for the DBFMO contract for a penitentiary institute in Zaanstad, near Amsterdam.
- Advised the Municipality of Zutphen and Proper Stok Groep (Heijman's) with regards to the project development of the PPS Noorderhaven – industrial area De Mars.
- Advises Waterschap Aa en Maas (District Water Board Aa and Maas), on the tendering and contracting of a new wastewater treatment plant in Den Bosch, capital of the Dutch Province of North Brabant. This concerns a technically broad and complex project, possibly a public-private partnership in a form of a DBFM(O) contract.
- Advised the municipality of Amsterdam, NS and ProRail on the cooperation agreement which is focused on a EUR 60 million investments in the modernisation of the Amsterdam Sloterdijk station. The modernisation will concern an improvement of Teleport and the office area around the station. They are planning to build a new entrance, shops and a parking place for 3000 bicycles. The project should be completed in 2015.
- Advised a consortium on the A2 Maastricht project, a project involving the reconstruction of a main road which will be upgraded to a motorway. Value: Euro 650 million.
- Advised Chinamex, Schipol Airport, and ING on the development of a big European trade centre in Schiphol. Value: EUR 180 million.

CHAMBERS EUROPE (2013 EDITION)

Peter Habraken is recommended in this year's edition; "He's easy to contact and always has the answers to our questions. A team worker."

LEGAL 500 (2013 EDITION)

Peter Habraken is recommended in this year's edition.

IFLR 2013 (2013 EDITION)

Peter Habraken is recommended in this year's edition.

JESSICA TERPSTRA, PARTNER, HOUTHOFF BURUMA

Jessica Terpstra works from both the London and Amsterdam offices and specialises in cross-border financial transactions, in particular project financing and property financing transactions. In addition, she advises clients in the area of banking and securities law, particularly with regard to financial supervision regulations. She is a member of the International Bar Association and the Dutch Securities Law Association.

Recent projects:

- Advised Deutsche Bank Securities Inc., as lead arranger and joint book running manager for Intergen N.V. US$ 1.8 billion bank/bond refinancing, consisting of an issue of US$ 750 million and £ 175 million senior secured notes and credit facilities over US$ 700 million.
- Acting as legal counsel to the SAAone Consortium in the largest PPP project of its kind in the Netherlands so far, the PPP A1-A6, encompassing the complete rebuild and doubling in capacity of the motorway trajectory involving Amsterdam Airport Schiphol.
- Advising housing corporation Vestia that reached agreement with a consortium of banks regarding the unwind of their derivative portfolio.
- Advising the lenders on the financing of the Rijnmond Power Plant.
- Advising the lenders of InterGen on the financial restructuring of the InterGen Group which portfolio contains also several Dutch power plants.
- Advising the BOP contractor as well as the mezzanine lender of the Belwind Project (wind energy).
- Advising VolkerWessels on an innovative "inflation-linked" finance structure regarding the N33 Motorway PPP project bid. This project served as a pilot to explore the possibilities of financing infrastructure by pension funds and other institutional investors.
- Advising the sponsors of the biomass power plant in Moerdijk and providing ongoing advice to BMC Moerdijk on the financing documentation for the operation of the plant.
- Advising the City of Rotterdam and the Province of Zuid-Holland with regard to Project Mainport Rotterdam relating to the extension of the port of Rotterdam.
- Advising the Municipality of Zutphen and Proper Stok Groep (Heijmans) with regard to the project development of the PPS Noorderhaven – industrial area De Mars.

- Advising Eneco regarding an underground gas storage facility in Epe, Germany (EPC contract and LTMOA).
- Acting for A.P. Moller Maersk on its investment in a new bunker terminal in Flushing harbour.
- Representing the Municipality of Bergen and several foundations and private parties concerning the planning and permitting issues related to the € 800 million project Bergermeer (underground) Gas Storage.
- Advising OCAP (a joint venture of Shell and VolkerWessels) on all regulatory aspects of the (underground) CO2 storage in Barendrecht.
- Involved in various other PPP projects in the Netherlands, such as the Montaigne project, The Ministry of Finance in the Hague and the 2nd Coentunnel.

CHAMBERS GLOBAL (2013 EDITION)

Jessica Terpstra is recommended.

IFLR1000 (2013 EDITION)

Jessica Terpstra is one of the highlight partners in Houthoff's finance team who lead an eight partner department with a clear focus on refinancing and restructuring.

ABOUT HOUTHOFF BURUMA

Houthoff Buruma is a long-established Netherlands-based law firm with well over 250 lawyers worldwide. The firm's lawyers serve a global client portfolio with a strong focus in areas of corporate/M&A, dispute resolution and finance. Houthoff Buruma has since long focused on China and the needs of Chinese businesses. As a result we are the law firm with the broadest Chinese client base in The Netherlands. We have a deep understanding of the Chinese way of doing business and have much experience with focusing on the business goals of our Chinese clients anywhere in the world. Houthoff Buruma has offices in London, Brussels, and New York, which gives us direct access to the world of international finance and all European institutions. We pride ourselves for often being the gateway to Europe for Chinese businesses via our contacts and experience on EU wide regulation, including procurement, distribution and tax structuring via the Netherlands.

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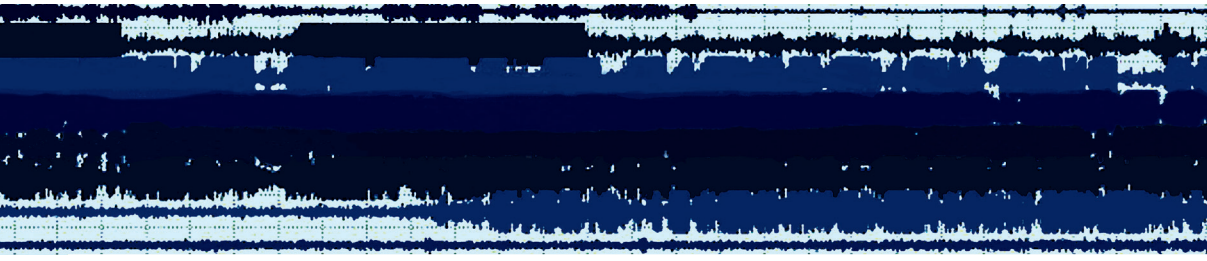

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