

Updated Dutch DBFM(O) models published: what is included and what is still missing

The 5.0 versions of the Dutch DBFM/DBFMO models have been published – an update

On 5 July 2018 the Dutch government published new versions of the DBFM and DBFMO models: the 5.0 versions (DBFMO¹ and DBFM²). These documents include both the changes already incorporated in current projects and new amendments. This article highlights some of the most important changes compared to the previous (4.3) versions and discusses selected items which did not make the cut and will need to stay top-of-mind of market parties.

Three important changes from a legal point of view

Three changes are highlighted below from a legal point of view. These have already been incorporated in one or more recent infrastructure and/or accommodation projects. A full overview of the changes can be found through these links: DBFMO³ and DBFM⁴.

- **Calculation of financial advantages of refinancing further detailed / decrease of percentage payable to the contracting authority**

The method to determine the financial advantages of refinancing has been further detailed. The method now includes parties discussing and agreeing upon an amendment of the financial model. Based on this updated financial model the financial advantages will be determined by comparing the distributions before and after refinancing (rather than merely the payments expected to be done to the shareholders, as was the case in the 4.3 versions). The definition of distributions (after taxes) is now fairly wide and includes, in short, every form of dividend or payment on shares, of equity reductions, payments under shareholder loans, payments of cash or in kind other than in the ordinary course of business, release of freely distributable funds to shareholders and early release of conditional funding obligations.

The contractor must pay the contracting authority an amount of 50% of such financial advantages (after tax), where initially it had to pay a percentage of 50% (in some cases even up to 70%) before tax.⁵

- **Early FC no longer limits the effective preparation time for the commencement certificate**

The models have introduced the concept that if the contractor reaches financial close before the relevant deadline, it can use the remaining time (being the amount of time left until the relevant deadline for financial close) to obtain the commencement certificate. This could remove the incentive for contractors to reach financial close later rather than sooner for the sole reason of needing the additional time to prepare for the commencement certificate.⁶

¹ <https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/04/01/rijksbrede-modelovereenkomst-dbfmo-huisvesting-rijksvastgoedbedrijf>

² <https://www.rijksoverheid.nl/documenten/richtlijnen/2016/06/01/dfbm-overeenkomst-rijkswaterstaat>

³ <https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/06/01/overzicht-van-aanpassingen-van-het-model-dbfm-o-contract>

⁴ <https://www.rijksoverheid.nl/documenten/richtlijnen/2016/04/04/overzicht-van-de-aanpassingen-van-het-model-dbfm-contract>

⁵ For more details, please refer to art. 3.5 (g) - (j) and schedule 18 DBFMO and art. 3.4 (g) – (j) and schedule 10 part 5 DBFM.

⁶ For more details, please refer to art. 4.2 (a) DBFMO and art. 4.1 (a) DBFM.

■ Protection for the contracting authority regarding Labour Market Fraud (Bogus Schemes) Act included

The Labour Market Fraud (Bogus Schemes) Act (*Wet aanpak schijnconstructies*) has been in place for several years. This act protects employees against underpayment and protects contractors who act in good faith against contractors who do not observe relevant laws and agreements. As result of this act, the contracting authority (as in principle every employer higher in the chain) could be liable towards employees of sub-contractors, if the employees have not been paid in full. However, liability may be limited or avoided by appropriate protective clauses, which have now been included in the form of information obligations, auditing rights, rights of recourse and a perpetual clause (*kettingbeding*) regarding contractors lower in the chain (subcontractors etc).⁷ Labour related topics such as this need to be reflected in subcontracts, and contractors need to ensure that their subsubcontractors etc. also comply to such contractual requirements.

Three missing items that will need to stay top of mind

The market expected several other changes which have not made the cut. Such changes can be split in three categories: unnecessary differences between the DBFM and DBFMO model, recurring requests submitted by bidders during tenders and fundamental changes to adapt the contracts given negative experiences. Below we have included an example of a change, per category, which would have been helpful to market parties.

■ No protection against not reaching FC due to lenders

The DBFMO model includes in art. 3.1 (c) protection for the contractor should financial close not be reached as initially envisaged lenders are no longer willing to finance on lending conditions as applicable at BAFO. This protection is not included in the DBFM model.

■ No protection against differences in information provided

The DBFM model still does not include a compensation event for differences in project information provided by the contracting authority during the tender and the actual existing situation. This model also does not provide for such a compensation event for facts or circumstances that exist but are not apparent from project information. Such protection has been requested in recent infrastructure projects. It has been provided in recent infra projects, but for concrete types of information only. A more generous projection is provided in both the old and the current DBFMO model as a compensation event.

■ More room for collaboration, influence and intermediate alignment/verification

In September 2017 a market consultation was organised by the Dutch Ministry of Finance, the Dutch Central Government Real Estate Agency (*Rijksvastgoedbedrijf*) and the Dutch Central Government Infrastructure Agency (*Rijkswaterstaat*) to discuss the model DBFM(O) agreements. One of the items flagged and discussed was the need, or rather necessity, to have more room for collaboration between parties, more influence for the contracting authority during the construction period (on construction methods and output) including intermediate alignment/verification possibilities. It has been argued that such interventions would improve the overall success of DBFM(O) contracts by ensuring that the contracting authority receives the output it was expecting to receive (or more). To ensure this, contact moments need to be introduced to provide the contracting authority with more influence during the construction project (while maintaining the starting position that design and construction obligations are allocated to the contractor). No arrangements have been introduced to the model agreements to cater to this need.

Concluding remarks

As the new models have been published, they should be the basis for new projects that will be put up for tender since the date of publication. Their publication may also help ongoing negotiations in existing projects.

⁷ For more details, please refer to art. 18.11 DBFMO and art. 18.15 DBFM.

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