

DESIGNING: WAYS TO INVOLVE THE CONTRACTOR

Abstract

The contract models 'design and build' and 'turnkey imply' that the one party (usually, but not necessarily the contractor) is responsible for the design and building activities. There are more contract models known to involve the contractor in design activities: the Dutch model of the 'building team' and the internationally known and used model 'alliances'. In the Dutch construction world all these models are being used. The motivation is the wish to build more efficiently, cheaper and with less legal problems.

The Dutch building team gives the contractor influence during design. After completing the design work the contractor is the first one to be invited to make an offer on the construction of the design. There is therefore a break between the design and the construction phase and in this way this model could be called traditional. Nevertheless the use of construction expertise during the design phase makes this model attractive, and being used in the both the utilities field and infrastructure. In this paper it will be argued that the way alliances are legally shaped they show remarkable resemblance to the building team model. However parties might not want to go all the way and form alliances. Is the building team a real alternative?

Keywords: contract models, general conditions, building team model, design and build, contracts, alliance

INTRODUCTION

The contract models 'design and build' and 'turnkey' imply that one party is responsible for both design and build. Usually, but not necessarily, this is a contractor. There are more contract models known to involve the contractor in design activities: the Dutch model of the 'building team' and the internationally known model 'alliances'. In the Dutch construction world all these models are used. The motivation is the wish to build more efficiently, more cheaply and with less legal problems.

This paper is devoted to the Dutch 'building team'. The background and legal form will be discussed and how does it work in practice.

BACKGROUND

The origins of the building team model lie in the fifties of the last century. When WW II was over Holland, as many other European countries, was confronted with a baby boom. This led to a tremendous increase in demand for (affordable) houses. In order to meet this demand it was necessary to shorten construction time and to lower the costs of construction. In the city of Rotterdam the idea of early contractor involvement as the key to make this possible was first devised. For each building project a building team was formed consisting of representatives of the city as employer, the architect, several consulting engineers and a contractor. The task of the building team was to come to an optimal balance between design and build activities. The contractor's task was to test if the designs could be executed as efficiently as possible and to see if any cost reduction could be made. To prevent the undoing of the reduction by the introduction of a high contract sum the contractor was not contracted

to execute the design, but was only entitled to be the first and for the time being the only one to make a bid. Would the bid be too high, the employer would in principle be free to approach other contractors. (Van den Berg, M.A.M.C., Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, Bijzondere Overeenkomsten, Deel IIIC, Aanneming van Werk*, Kluwer, Deventer, 2007, p. 323).

The success of the model is revealed by the formation of general conditions. In 1992 the Model Building Team Agreement came into being. The initiative was taken by the Dutch organisation of contractors, but to safeguard a proper balance between the interests of the contractors and the employers a committee was formed in which the Institute for Construction Law and the University of Tilburg (at that time Catholic University of Brabant) participated.

The use of this model, on the basis of the general conditions just mentioned, continues to the present day. Research by the Dutch Economical Institute for Construction (*Bouworganisatievormen in beweging*, 2005, p. 41-42) shows that 58% of businesses interviewed on the use of contract models said they regularly worked with this model. The integrated models were used by a far smaller group: only 22% said they used this model on a regular basis.

THE CONTENT OF THE MODEL BUILDING TEAM AGREEMENT

The 1992 Model Building Team Agreement is the instrument most often employed in practice to define the relationship between the employer and the building team contractor. The model contains provisions in respect of the object of the building team (Article 1), the task of the building team and the employer's and contractor's duties as participants (Articles 4-6), decision-making and documentation (Articles 7-10), the contractor's liability (Articles 11-13), price-making (Articles 15-17), price negotiations and awarding of the contract (Articles 18-21), termination of the contract (Articles 22 and 23) and regulations on disputes (Article 24). The following discussion is based on E.M. Bruggeman, M.A.B. Chao-Duivis, A.Z.R. Koning, ed. *A Practical Guide to Dutch Building Contracts*, Instituut voor Bouwrecht, Den Haag, 2008).

The role of the employer

The employer has a leading role within the building team. Article 5, paragraph 1 of the 1992 Model Building Team Agreement lists the employer's main duties:

Article 5, paragraph 1 of the Model Building Team Agreement

The employer shall manage the building team, which is understood to encompass the following duties:

- to express any wishes and requirements in respect of the project in due time;
- to chair building team meetings;
- to monitor and co-ordinate the activities performed by the separate participants;
- to assess any plans, budgets and bids proposed within the building team;
- to promptly make any and all decisions necessary to expedite the project.

The role of the building team contractor

The building team contractor's main duties are listed in Article 6, paragraph 1 of the 1992 Model Building Team Agreement:

Article 6, paragraph 1 of the 1992 Model Building Team Agreement

The contractor shall contribute to the building team his specific experience and expertise in the execution of works and the costs involved, insofar as such is reasonable and expeditious within the scope of project preparation to develop a design acceptable to the employer.

This is understood to comprise the following duties:

- to assess any and all plans and bids proposed in the context of the building team in terms of cost-related and construction-related aspects, as well as to suggest any worthwhile alternatives to the plans and bids proposed within the building team;
- to perform such work as may be specified in the programme of activities attached to this agreement as Appendix 1.

The activities specified in Appendix 1 are:

- to provide advice on the cost-specific optimisation of the construction project;
- to provide advice on the technical feasibility of both the project as a whole and the (draft) design for it;
- to draw up a (draft) design for any alternatives he may have suggested;
- to provide advice on the financial feasibility of the project (does the budget suffice for the planning idea?);
- to draw up a time schedule for the preparation and execution of the project;
- to perform any other activities, to wit ... (to be filled in by the parties).

The parties may agree that the building team contractor will also perform other work later in the project preparation stage (Article 6, paragraph 2 of the 1992 Model Building Team Agreement). In addition to providing advice, for example, the contractor may be asked to assume responsibility for a part of the design.

Article 11 of the 1992 Model Building Team Agreement stipulates that the contractor is required to perform his duties within the scope of the building team to the best of his ability. It is furthermore determined in Article 16 of the model that the contractor must submit his tender in the form of an open budget.

Obligation to warn

The obligation to warn merits special attention. The parties collaborating in the building team have first-hand knowledge of the activities of the other team members. It goes for all the team members, as professional experts who look upon one another's contributions to the team meetings with due care and consideration, that the proper performance of their duties requires them to issue a warning whenever a particular recommendation or (partial) design should entail certain risks or contain errors (Architectural Arbitration Institute, 23 June 1972, *Bouwrecht* 1973, p. 393).

Liability on the part of building team members

An important aspect of the building team is the liability of its participants for any loss incurred by the employer due to occurrences within the building team. The characteristic feature of working in a building team is that the concerted effort by designer(s), consultant(s) and contractor culminates in the production of the design. Seeing as how collaboration in a building team involves a great deal of consultation, partial designs being fit into the overall design, recommendations being given back and forth and alternative proposals being presented, it is possible for liabilities to shift or become confused and for obscurities with regard to the cause of any damage or loss to arise.

Within the building team, all the participant have their own specific duties. The architect, for example, is responsible for the design and the structural engineer for the structural calculations and the overall construction. In principle, responsibilities within the building team are thus clearly distinguishable and there is no joint responsibility for the design (Van den Berg, M.A.M.C., Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, Bijzondere Overeenkomsten, Deel IIIC, Aanneming van Werk*, Kluwer, Deventer, 2007, p.329/330). Whenever a building team member causes any damage in the performance of his duties, he is liable for such damage.

Yet building team members are constantly presenting advice to one another, which is precisely the added value of collaborating in a building team. In point of fact, giving advice related to other members' specific duties is the principal task of the building team contractor within the team. A building team participant may also take over another member's duties, such as in the case where the building team contractor assumes responsibility for a partial design.

Who is liable for the advice provided or the partial design created in this way?

Article 12 of the 1992 Model Building Team Agreement almost literally incorporates a ruling by the Court of Arbitration of 6 July 1982 (as described in *Bouwrecht* 1982, p. 715).

Article 12 of the 1992 Model Building Team Agreement

The responsibility for recommendations and designs resides with the party to whose specific field of expertise such recommendations or designs relate, provided that the said party accepted and embraced the same.

Therefore, there is no joint liability under the model agreement either. In other words, if a recommendation to alter a proposed design of a construction/or any other recommendation originates, for example, with the contractor, then the contractor is not responsible for such a recommendation as long as the following conditions are met:

- it is possible to identify another team member as the party to whose specific field of expertise the recommendation relates;
- the latter accepts and embraces the recommendation.

Limitation of liability

In common with the contract between the employer and designers and consultants, the 1992 Model Building Team Agreement, too, contains provisions limiting the building team contractor's liability. Article 13 of the 1992 Model Building Team Agreement therefore stipulates that the building team contractor's liability is subject to the RVOI 1987 regulations

governing the relationship between the client and the consulting engineers. Article 13 reads as follows:

Article 13 of the 1992 Model Building Team Agreement

If insofar as the contractor should be responsible for recommendations and designs pursuant to the provisions set out in the preceding article, his liability for the same shall be governed by the RVOI 1987 regulations governing the relationship between the client and the consulting engineers, with the provision that in lieu of the consultancy fee mentioned in Article 16, paragraph 4 of the said RVOI 1987 regulations, a fixed amount of(to be filled in by the parties) shall apply.

Tender, price negotiations and building contract formation

Although the design and actual construction phases are, to a certain extent, integrated into the building team method, the two are nevertheless separated by the price-making stage. The 1992 Model Building Team Agreement contains a considerable array of provisions to regulate price negotiations, which constitute a dominant aspect of the agreement for the employer and the building team contractor. It is important for the two of them to reach an agreement on the price and eventually conclude a building contract, because this enables them to make the most of collaborating in a building team (see paragraph 1 of this chapter).

If the employer is a department inviting tenders (a public service or another regulatory organisation such as the police or a school board), the contract will have to be put to tender to the building team contractor and perhaps to other building team members as well. In addition to a special contractual relationship, a special procedure for inviting tenders applies in that case. In the literature, this special procedure is also referred to as ‘a variation on the single private invitation to tender methodology’ ((Van den Berg, M.A.M.C., Mr. C. Asser’s *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, Bijzondere Overeenkomsten, Deel IIIC, Aanneming van Werk*, Kluwer, Deventer, 2007, p. 338).

In the 1992 Model Building Team Agreement, the question of whether the contract for the execution of the design co-developed by the building team contractor is actually awarded to the same is made dependent on the successful outcome of price negotiations. Article 15 of the 1992 Model Building Team Agreement stipulates that the building team contractor is presented with the prospect of being the first and – initially – sole tenderer for the project. The procedure is laid down in Article 16 of the 1992 Model Building Team Agreement.

Article 16 of the 1992 Model Building Team Agreement

The contractor shall submit his tender in the form of an open budget, which must be treated confidentially by the employer and returned to the contractor forthwith in the event that no building contract is concluded between the parties.

The safeguards in place for both parties during the price negotiations and contract awarding stage are set out in Article 18 to 21 of the 1992 Model Building Team Agreement.

Article 18 of the 1992 Model Building Team Agreement stipulates that the parties must conduct the negotiations with due regard for the other party’s legitimate interests.

Article 18, paragraph 2 of the 1992 Model Building Team Agreement

For the duration of this contract, the employer shall refrain from contacting other contractors in respect of the works to be commissioned.

Should the parties fail to reach an agreement on the contract sum during the price negotiations, it will be necessary to seek the opinion of a quantity surveyor in accordance with the procedure indicated in Article 19, paragraphs 2 to 5. The parties must designate a quantity surveyor in mutual consultation (Article 19, paragraph 2). Failure to do so will cause the opinion to be issued by a panel of three experts, two of whom are designated by the parties. The two experts thus appointed must jointly designate a quantity surveyor to complete their panel (Article 19, paragraph 3).

The opinion presented by the expert(s) is not always free of obligation, seeing that paragraph 5 stipulates that the parties may be required to act on it:

Article 19, paragraph 5 of the 1992 Model Building Team Agreement

If an opinion leads to a contract sum totalling more than% (percentage to be filled in) of the price specified in the contractor's tender without exceeding the said tender price, the parties undertake to abide by the opinion.

The idea underlying Article 19, paragraph 5 of the 1992 Model Building Team Agreement is that it provides a certain range within which the parties are prepared to bind themselves in advance. The range is formed by the tender price percentage entered by the parties in Article 19, paragraph 5 and the price stated in the building team contractor's tender. According to paragraph 5, the parties are bound to the opinion if it results in a contract sum totalling more than the percentage filled in without exceeding the price specified in the contractor's tender. In case a percentage of 95 has been entered, for example, then the parties are bound to the opinion if it gives rise to a contract sum between 95% and 100% of the tender price. The percentage entered in Article 19, paragraph 5 will therefore always be lower than 100% (which equals the price specified in the building team contractor's tender). The contractor's tender price (which is subject to disagreement) is the maximum amount that may be binding upon the employer. The percentage entered in Article 19, paragraph 5 is important for the building team contractor, as it represents the minimum amount that may be binding upon the employer.

If the opinion provided by the expert(s) is within the agreed range, the contractor will execute the works for the price ensuing from the expert(s)' opinion, since in this case the parties are obliged to act on the opinion (as stipulated in Article 19, paragraph 5).

In the event that the parties fail to reach an agreement on the price despite having sought the opinion referred to in Article 19 of the 1992 Model Building Team Agreement, then the agreement is terminated under Article 22, paragraph 1, subparagraph a of the model. Article 20 of the 1992 Model Building Team Agreement stipulates that if the parties do not succeed within reason to agree on a contract sum, the employer is free to award the contract to a third party. For the protection of the employer, the last sentence of Article 20 also stipulates that in such a case the contractor is not permitted to impede the employer in any way whatsoever in his endeavours to negotiate a contract with a third party in respect of the execution of the works.

If the contractor is not to blame for the abortive attempt to conclude a building contract, the employer will be required to compensate the contractor for his efforts by paying an amount or

a tender price percentage to be decided between the parties (Article 23, paragraph 1 of the 1992 Model Building Team Agreement).

The model does not contain any provisions in respect of payment in the event that the parties do reach an agreement on the price. It is assumed that the contractor will incorporate the consultancy fees into his budget for the execution of the works.

The consultations on the price taking place after completion of the design and before the employer and the building team contractor enter into the building contract can be termed 'negotiations'. It is not possible for building team members to break off negotiations without any reason?

If an agreement was made on the basis of the 1992 Model Building Team Agreement, the extensive price-making procedure discussed above applies. Yet even if the employer and the contractor have not entered into a building team agreement or have concluded a building team agreement containing a price-making clause, the negotiations (price consultations) cannot be broken off for no reason. According to Dutch case law parties are no longer free to discontinue the negotiations once they have reached a stage where breaking them off would be unacceptable in view of the other party's justifiable confidence in the eventual conclusion of the contract or on account of other circumstances. The case of justifiable confidence will not be quick to present itself, as such a situation is not likely to emerge until the final stages of the negotiations. But there may also be other circumstances in which discontinuing the negotiations is unacceptable, e.g. in the event that a building team relationship exists between the parties. In the latter case, breaking off the negotiations should already be considered unacceptable as soon as the price-making stage has commenced, before justifiable confidence has even had a chance to arise. Within the context of the building team, this stage is initiated once the design has been finished; the building team contractor and the employer must reach an agreement on the price prior to proceeding to the conclusion of the building contract.

Price agreement

When the parties have reached agreement on the price, the building contract is concluded, as stipulated in Article 21 of the 1992 Model Building Team Agreement.

Article 21 of the 1992 Model Building Team Agreement

The building contract shall be considered concluded once the parties have reached agreement on the contract sum or the contract sum has become final in pursuance of the procedure referred to in Article 19. The building contract shall be specified in writing by the parties.

As stipulated in Article 14 of the 1992 Model Building Team Agreement, this contract will be subject to the UAC 1989 conditions (the general conditions for the traditional model).

The parties may also fail to reach an agreement on the price, in which case Article 20 of the 1992 Model Building Team Agreement becomes applicable.

Article 20 of the 1992 Model Building Team Agreement

If the parties do not succeed within reason to reach an agreement on the contract sum and the procedure set forth in Article 19 fails to provide a solution, the employer shall be free to invite third parties to submit tenders for the project, to enter into negotiations with those having submitted tenders and to award the contract for the

execution of the works to one or more of these third parties. In this case, the contractor shall forbear from impeding the employer in any way whatsoever in his endeavours to negotiate a contract with a third party in respect of the execution of the works.

Whenever the employer and the building team contractor fail to reach an agreement on the price, and the negotiations must therefore be considered to have broken down (the binding opinion of the expert(s) has not resulted in price agreement either), the employer is entitled under the model to enter into negotiations with a different contractor (for the sake of clarity: a contractor from outside the building team). The final sentence of Article 20 of the 1992 Model Building Team Agreement subsequently stipulates that the contractor must refrain from hindering the employer in any way whatsoever in his endeavours to negotiate a contract with a third party in respect of the execution of the works (known as the waiver). This obligation already arises from the standard Dutch law of obligations, however (Section 2, subsection 1 and Section 248, subsection 1 of Book 6 of the Netherlands Civil Code). The inclusion of this stipulation must be perceived in light of the fact that the building team contractor was formerly assumed to be more or less entitled to the building contract and, if it was not awarded to him, had the possibility of impeding the employer to open negotiations with a different contractor (until 1992, a code of practice existed which stipulated that the employer required permission from the contractor with whom negotiations had failed to enter into negotiations with the next contractor).

The concept of the waiver is still encountered today, but the problems it is projected to overcome are rather different now. The idea is that the building team contractor has a certain claim under the 1992 Model Building Team Agreement to secure the building contract. If, however, no agreement is reached on the price despite fair negotiations, the building team contractor no longer has such a claim, so there is nothing left to waive.

Termination of the agreement

The inception of the building contract between the employer and the building team contractor signifies the termination of the building team agreement between these parties. This is not explicitly set forth in the 1992 Model Building Team Agreement, but can be derived from it (Article 22, paragraph 2 of the model).

The building team agreement may also be terminated prematurely, though. The 1992 Model Building Team Agreement specifies a number of cases of such premature termination and sets out the legal consequences thereof.

If the employer and the building team contractor fail to reach an agreement on the price, the agreement is terminated without judicial or arbitral intervention, as stipulated in Article 22, paragraph 1, subparagraph a of the 1992 Model Building Team Agreement. The agreement also ends if the employer does not succeed in obtaining the required permits, etc., or if an agreed resolutive condition becomes effective, see Article 22, paragraph 1, subparagraph b, of the 1992 Model Building Team Agreement.

If the contractor is not to blame for the failure to conclude a building contract, the employer will be required to compensate the contractor for his efforts by paying an amount or a tender price percentage to be decided between the parties (Article 23, paragraph 1 of the 1992 Model Building Team Agreement). The amount or percentage in question can be entered by the employer in Article 23, paragraph 1.

Effecting this payment will also entitle the employer to freely use, at his own risk and discretion, any drawings, calculations and other know-how developed and contributed to the building team by the contractor, as stipulated in Article 23, paragraph 2 of the model.

THE BUILDING TEAM IN PRACTICE

In 2008 the Dutch Institute for Construction Law conducted a quickscan of the use of the building team model in practice. This quickscan led to the following conclusions.

The reasons for using the model

The model is used especially in situations in which time is of the essence. The contractor's advice to make the design easier to execute is one reason mentioned. The second reason: when the contractor is involved during the design phase he can make time by actually starting with the execution earlier. This implies that the contract is awarded before the design is completed. This practice may raise questions in procurement law which are not considered in this paper.

Another reason for using this model is when the project is complicated.

It has been said more than once that the contractor was able to duly restrain the architect.

The use of the model was also recommended when a contractor worked on the original building in the past which now has to be transformed.

When should the contractor be involved?

The model agreement is silent on the moment when the contractor should be involved. The interviewed persons all agreed that the ideal situation is to involve the contractor as early as possible. This turned out not to be practice. In most cases the contractor was only involved in the last phase of the design.

Role of the contractor in the design phase

In contrast to the model and the ideal situation the contractor's role was in most cases limited to calculations. The employers were – once again: in general – not impressed by the innovative insights of the contractors, but some were impressed with certain special knowledge displayed by some contractors.

The cost reduction

Although no empirical proof is available the interviewed persons (all of them employers) estimated that the involvement of the contractor in the design phase led to considerable cost savings even though they said that the contract sum was higher compared to the sums that would have been reached after a traditional way of working (separation of design and work). The cost reduction was achieved not so much thanks to a more efficient design but rather to the time saved by the early start of the execution of the construction work.

The relationships in the building team

The interviewed persons mentioned that the role and attitude of the architect in the building team is one that requires special attention. It was said that architects are unwilling to work in this fashion with contractors. Special attention should also be paid to communication in the building team.

COMPARISON TO THE ALLIANCE MODEL

In the alliance model employer and contractor work together on both design and execution in such a way that they are each other's equal. The interests of both parties are aligned in such a way that there is no contradiction between them. This requires a complete change of hearts and organisation of both parties. The building team is limited to a close cooperation between employer and contractor during the design phase. The relationship between employer and contractor is characterised in the literature as one of equality (Van den Berg, M.A.M.C., Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands Burgerlijk recht, Bijzondere Overeenkomsten, Deel IIIC, Aanneming van Werk*, Kluwer, Deventer, 2007, p. 324) and also requires close cooperation. This makes the building team to a certain extent comparable to the alliance model. At the same time it is an alternative for the alliance model requiring a simpler legal organisation.

CONCLUSION

The building team model is one of the modern contract forms in the Netherlands. It has proven its use, even though the use of it might not be exactly according to the general conditions. This model is aimed at working cheaply and fast and by giving the contractor a role in design it can be very useful in improving the relationships between the parties who have to work together in order to realise a project. Regarding employers who do not want to go all the way with either a design and construct contract or an alliance the building team model is an alternative worth considering.

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