



Nederlandse Vereniging van Ziekenhuizen



## Manual for General Purchase Conditions in Healthcare (AIVG) 2017

The following parties were consulted and involved:

Law firms:

- Cordemeyer & Slager
- Van Doorne

Trade associations:

- Actiz
- GGZ Nederland
- NVZ
- VGN

Other parties:

- Alcon
- Asito
- Bayer
- Boston Scientific
- BSN
- Comparex
- CWZ
- DiagneD
- FHI
- Gelderse Vallei
- Intrakoop
- JBZ
- Johnson & Johnson
- NefeMed
- Philips
- Randstad
- Siemens
- Stryker
- Tempo- team
- TMI
- Vosko
- Zorgdomein





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### The following order prevails in applying the AIVG:

- The General Purchase Conditions in Healthcare;
- An addendum to the General Purchase Conditions in Healthcare.

### The AIVG modules

#### 1. General part

The general part of the AIVG can be used for purchasing the majority of products and services procured by an Institution and which are not subject to special conditions. This general part shall act as a catch-all. When there are Products with special conditions, it would be preferable to document them in a (framework) agreement or appendix to the AIVG.

#### PNIL Module

This module aims at the deployment and hiring of (health) personnel from employment agencies. Elements can be applied for secondment. When it comes to using self-employed persons [ZZP], we work with the model agreements as approved by the Tax Authority.

#### ICT Module

The ICT module may be applied for the development of software, the purchase of ICT services or services/products that are predominantly of an ICT nature.

#### CSR (still to be formed)

The Institution has the option to use this module if it wants to engage in socially responsible purchasing.

#### 2. Changes

Changes can be divided into adjustments for convenience and changes to content. The AIVG is a breathing document that may be adjusted yearly. Suggestions are welcome via [zorg@nevi.nl](mailto:zorg@nevi.nl).





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### Convenience:

- **Readability:** the AIVG 2017 have been written in clear and plain language.
- **Modular build-up:** The AIVG2017 opted for a general part that applies to all performances. This general module is supplemented with different modules that apply to specific services, like ICT, PNIL [external employees] and CSR.

### Substantive points:

- **Reciprocal.** Where possible, parties shall be bound by reciprocal obligations.
- **Penalties have been removed:** penalty clauses that were part of the AIVG2014 were a topic of discussion between suppliers and purchasing institutions. To prevent this, no penalties have been included in the AIVG 2017.
- **Liability is limited:** The AIVG 2017 limits liability to €1,250,000 Euro per event, with a maximum of €2,500,000 per year.
- The AIVG are so far as possible in conformity with the Secure Application Covenant Medical Technology in specialist medical care. This is reflected in the quality demands for personnel, the Dutch manuals, NEN 7510 and in the disposal of medical devices.

### 3. Handling the AIVG 2017 correctly:

It is vital to use the AIVG correctly. Art. 6:232 of the Dutch Civil Code (hereinafter referred to as BW) dictates that a counterparty is bound to the general conditions if the user understood or should have understood that the counterparty was not familiar with the content of the provisions. It is irrelevant if the supplier has actually went over, read and understood the AIVG. The mere fact of the supplier not having read the conditions does not mean that the AIVG are inapplicable. However, under Art. 6:233 sub b BW, it does matter that the Institution provided to Supplier a reasonable opportunity to become familiar with the general conditions. If the Supplier is not given this opportunity, the (provisions in the) AIVG may be annulable. An annulable legal act may be annulled through an extrajudicial declaration, or through a court ruling (see art. 3:49 BW).





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Pursuant to art. 3:53 paragraph 1, the annulment will apply with retroactive effect to the time where this legal act was performed and already existing consequences of this annulled legal act must be undone. It is therefore imperative for the supplier to have a reasonable opportunity to make himself acquainted with the AIVG.

The Institution offers a reasonable opportunity to become familiar with the general conditions, if:

- 1) the Institution has presented the general conditions to the counterparty no later than or at the moment of closing the agreement; or if this is not reasonably possible:
- 2) it was made clear to the counterparty before establishment of the agreement that the conditions are available for inspection or have been deposited by him at a Chamber of Commerce or court registrar.
- 3) if the agreement is closed electronically, the general conditions were made available in such a way that supplier may store them and in that way made available for the purpose of being subsequently consulted.

**DO:** Explicitly declare the AIVG applicable in the request for a quotation.

**DO:** Send the AIVG to supplier before the closing of every agreement so that supplier is granted a reasonable, timely opportunity to become familiar with the AIVG.

**DO NOT:** Failing to send the AIVG.

### **Battle of forms**

Article 6:225 paragraph 3 of the Dutch Civil Code states that if the offer and the acceptance both point to different general conditions, the party who refers to his general conditions last shall have no legal force if this last party does not explicitly reject the other. By now, it turns out that case law does not accept an explicit rejection if:

- there is only a reference to the own general conditions;
- a clause was added to the general conditions that no other conditions are being accepted (Note: this means that the inclusion in art. 2.1 of the AIVG has no actual legal force, you will have to explicitly reject another party's conditions in the agreement or the order confirmation!);
- a standard line is included at the bottom of the paper stating that general conditions of the supplier are explicitly rejected.





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So in practice, it implies that an explicit rejection is required to dispose of the general conditions. A provision in the agreement or the order confirmation stating clearly that the general conditions of supplier are explicitly rejected should suffice. A mere reference to the AIVG, which also has this provision, does not suffice! A standard footnote at the bottom of the letter/order confirmation rejecting the AIVG also does not suffice. There has to be an explicit statement that the general conditions for the delivery are excluded.

**DO:** Pay attention to who last refers to his general conditions, if it is supplier, make sure you explicitly reject them in the agreement or order confirmation.

**DO NOT:** If supplier refers to his general conditions, do not agree with them!

### **Annulment, grounds for annulment**

The supplier, after being bound to the AIVG, can afterward try to annul the AIVG. The grounds for annulment are included in the Dutch Civil Code in articles 6:233 and 6:234. Grounds for annulment are well-founded if the provisions a) are unreasonably onerous and if (b) Institution has failed to give supplier a reasonable opportunity to become familiar with the general conditions. It would be impossible to list in this manual what provisions would be deemed unreasonably onerous and why.

The Dutch Civil Code lists a grey and black list of clauses that are deemed unreasonably onerous or that are suspected of being unreasonably onerous, but which are subject to rebuttal by institution if supplier attempts to have them annulled. What matters is the provision that supplier must be given a reasonable opportunity to become familiar with the general conditions of the institution.

Small business and professional organisations may appeal to grounds for annulment as stated above. Furthermore, consumers may also appeal to grounds for annulment, but this is not the target group the AIVG aims for. Large businesses cannot appeal to the grounds for annulment mentioned above.

A large business is defined as:

- 1) a business that at the time of closing the agreement has published its annual account based on article 360 book 2 BW;
- 2) if no annual account has been made public at the time of closing the agreement but the supplier has fifty or more persons employed.





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## International agreements

Finally, it is important to know what to look out for if the supplier is located abroad. In other words, in case of an international agreement. In making sure that disputes about agreed performances are actually settled under Dutch law at a Dutch court, one must avoid agreeing with the applicable law clause of the foreign supplier and also that disputes are settled at the court designated by the supplier. Furthermore, it is vital to always include the general conditions so that the supplier can become familiar with them on time, even if the party is an abovementioned large business.

**DO:** Explicitly declare the AIVG applicable in the request for a quotation.

**DO:** Send the AIVG to supplier before the closing of every agreement so that supplier is granted a reasonable, timely opportunity to become familiar with the AIVG.

**DO NOT:** Failing to send the AIVG, this is only possible if you know for sure that the supplier is a large business (see the definition of a large business below)





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## Explanatory Memorandum to the AIVG (general purchasing conditions for health care) – General Part

### Article 1 Definitions

**B. Consignation:** The choice was made to adhere to the definition of consignation that is accepted in legal transactions. A deviation thereof as a result of the transfer of storage risk will only cause confusion and the term consignation will no longer apply.

**G. Purchasing Association:** This is a new definition that fits with current practice. An evaluation of the concrete effects on current agreements will always be required. Any changes negotiated by the purchasing association must always be assessed against criteria of reasonableness and fairness.

**K. Medical Devices:** The definition is intended to fit with the Covenant regarding the safe application of medical technology in the hospital (medical covenant).

**N. Agreement:** This concerns an agreement in the widest possible sense, namely offer and acceptance (6:217 Civil Code).

**T. Associated Agreement:** this definition is intended to prevent the Institution from being forced to uphold maintenance agreements as well as other agreements.

**U. UDI:** This definition is important in relation to article 8.5 of the AIVG.

### Article 2 Applicability

2.2 The provisions in the conditions constitute the standard. Deviations are always possible, on condition they are formally recorded in writing.

2.4 The legal provisions of article 6:225 of the Civil Code apply. The conditions that were declared applicable first prevail, unless these conditions are explicitly rejected.

### Article 3 Establishing the Agreement.

3.1 No term of validity of the offer was included because it concerns general conditions where it is too complicated to make a distinction therein.

3.2 In many cases, the question was raised what is meant by ‘costs incurred’ when the agreement is yet to be implemented. The goal was set to avoid surprises for the Institution when the Agreement is initially accepted but later annulled, and the Institution is later confronted with costs related to research activities or preparatory costs.





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- 3.3 This provision comprises two elements. On the one hand the receipt theory applies, whereas on the other hand power of representation is concerned. The phrase “may be deemed to have been received” assumes the use of either regular mail or a digital medium, in which the digital medium will be predominant. The sentence regarding the power of representation pertains to the Supplier’s duty of investigation to check by means of the trade register or internal procuration whether a person has been authorized. They cannot argue that the person in question behaved in such a manner that this person could be expected to have held power of representation at the time that the Agreement was concluded. This mistake can be corrected through confirmation by the Institution.
- 3.4 This is about the case in which only Order is placed by the Institution. This can be seen as part of the Agreement, but under certain circumstances also as a separate agreement. In such a situation, the moment of acceptance must also be taken into consideration, which is why this regulation was included. The general conditions that were declared applicable first prevail, unless these general conditions are later rejected.
- 3.7 This concerns a best efforts obligation/duty of care on the part of the Supplier to make their Performance suit the goals and organisation of the Institution. When the Supplier fails to make an adequate effort, this can result in Supplier liability in case of incorrect advice or an unsuitable performance.

#### Article 4 Changes

- 4.2 In case such an article is not included, the Supplier will continue to invoice based on the old prices. The prices concerned are those that were initially included.

#### Article 5 Prices

- 5.2 Depending on the region and the Product, VAT percentages may vary. Hence this clarification.

#### Article 6 Purchasing Associations

The provision mainly deals with the existence of Purchasing Associations that are increasingly used by Institutions. The Institution wants to be in a position to benefit where current Agreements are concerned, however, the interests of both parties must be taken into consideration.







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### Article 7 Delivery

- 7.7 This provision is primarily concerned with redress during bankruptcies. The goal is to prevent Products that the Institution already paid for from being included in the bankrupt Supplier's assets.
- 7.8 Inspection and delivery do not always neatly coincide, which is why the choice was made to distinguish between the two.

### Article 8 Packaging and Shipment

- 8.5 The provision anticipates legislation that will develop over the coming years. The expectation is that this best efforts obligation will result in an obligation of result.

### Article 9 Property

An essential change is that the Product now only becomes the property of the Institution after payment is made in full.

### Article 11 Invoicing and Payment

- 11.6 This provision fits with current practice in which not only bank statements are utilised, but the option of a 403 declaration is now also available.
- 11.10 This provision was included to prevent Institutions from immediately defaulting when the term of payment is exceeded.

### Article 13 Documentation

- 13.1 Suppliers have often commented that the English language should be used exclusively, however, this would constitute a violation of the medical covenant; all users must be in a position to peruse a Dutch language manual.

### Article 14 Parts

- 14.2 The objective is to avoid that over time Institutions are confronted with unreasonable price increases.





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### Article 15 Products

15.3 This provision arises from the medical covenant.

### Article 16 Inspection, checking and testing

16.2 When a Supplier is unable to cooperate in the inspections, checks and tests as required by the Institution, the Supplier can appoint a party who will do this for multiple Institutions, to avoid an unnecessary burden on the Supplier.

### Article 19 Personal Data Protection

19.2 Institutions will increasingly face the issue of the protection of personal data. Despite it being a legal obligation, Suppliers are not always aware of it, or only grudgingly lend their cooperation.

### Article 20 Liability

20.4 This limitation of liability has made the provision proportional. The amount also fits current insurance practice. In addition, the distinction direct/indirect damage is now included.

### Article 21 Annulment

21 In a general sense, all possibilities for the annulment of the general part are now included in this article, whereas before these possibilities were spread across various articles. This has made the conditions substantially more transparent.

21.4 This is intended to prevent the Institution from being forced to uphold maintenance agreements and other agreements.

### Article 21 Annulment

Undeserved discounts are discounts that are undeserved because the actual purchase does not match the volume/term that the discount is based on.





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## **Explanatory Memorandum to the AIVG - PNIL Module**

### **Article 2 Labour relations**

This article is aimed at the distinction between the material employer (institution) and the formal employer. This distinction matters especially given how different obligations are tied to the different positions.

### **Article 3 Competence requirements**

The Institution is entitled to refuse a Worker if Institution feels that the Worker is not sufficiently competent.

### **Article 5 Working conditions**

The Institution must provide the right working conditions in which Worker performs his duties and will be held liable for this.

### **Article 6 Guarantees supplier and article 10 Taxes and social contributions**

Both articles limit the risk for institution of getting additional bills from the Tax Authority as regards taxes and social contributions.





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## Explanatory Memorandum to the AIVG - ICT Module

### Article 2 General provisions

- 2.1 Taking into account the entry into force of the General Data Protection Regulation on May 25, 2018, the institution must make sure that the Performance by Supplier has a fitting security level.

### Article 11 Back-up

This provision is a catch-all clause. It is advisable to make further agreements in the Agreement.

### Article 12 Exit clause

This provision is aimed at preventing vendor lock-in. Again, it would be wise to arrange for further agreements.

### Article 14 SaaS service

- 14.1 SaaS-based work comes with the disadvantage that the Institution depends on Supplier for access to Institution data. Please account for this as much as possible when entering into an Agreement.

