

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance)

## TITLE II

### RULES APPLICABLE TO CONTRACTS

#### CHAPTER IV

##### *Contract performance*

###### *Article 87*

#### **Conditions for performance of contracts**

Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 82(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

###### *Article 88*

#### **Subcontracting**

1 Observance of the obligations referred to in Article 36(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2 In the procurement documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

3 Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

4 Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor's liability.

5 In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting entity, after the award of the contract and at the latest when the performance of the contract commences, the contracting entity shall require the main contractor to indicate to the contracting entity the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at this point in time. The contracting entity shall require the main contractor to notify the contracting

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entity of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors' self-declarations as referred to in Article 80(3). The implementing measures pursuant to paragraph 8 of this Article may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

The first subparagraph shall not apply to suppliers.

Contracting entities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:

- a supply contracts, to services contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting entity or to suppliers involved in works or services contracts;
- b subcontractors of the main contractor's subcontractors or further down the subcontracting chain.

6 With the aim of avoiding breaches of the obligations referred to in Article 36(2), appropriate measures may be taken, such as:

- a Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 36(2).
- b Contracting authorities may, in accordance with Article 80(3) of this Directive, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57 of Directive 2014/24/EU. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

7 Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment.

8 Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contracting entities or economic operators or as of certain amounts.

## Article 89

### Modification of contracts during their term

1 Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

- a where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
- b for additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor:
  - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting entity;
- c where all of the following conditions are fulfilled:
  - (i) the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;
  - (ii) the modification does not alter the overall nature of the contract;
- d Where a new contractor replaces the one to which the contracting entity had initially awarded the contract as a consequence of either:
  - (i) an unequivocal review clause or option in conformity with point (a),
  - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or
  - (iii) in the event that the contracting entity itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 88;
- e where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting entities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex XVI and shall be published in accordance with Article 71.

2 Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new

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procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

- (i) the thresholds set out in Article 15; and
- (ii) 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

3 For the purpose of the calculation of the price referred to in paragraph 2, the updated price shall be the reference value when the contract includes an indexation clause.

4 A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

- a the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- b the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- c the modification extends the scope of the contract or framework agreement considerably;
- d where a new contractor replaces the one to which the contracting entity had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

5 A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a works, supply or service contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.

#### *Article 90*

#### **Termination of contracts**

Member States shall ensure that contracting entities have the possibility, at least under the following circumstances and under the conditions determined by the applicable national law, to terminate a works, supply or service contract during its term, where:

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure pursuant to Article 89;
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in Article 57(1) of Directive 2014/24/EU and should therefore have been excluded from the procurement procedure pursuant to the second subparagraph of Article 80(1) of this Directive;
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and this Directive that has been

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declared by the Court of Justice of the European Union in a procedure under Article 258 TFEU.