

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Text with EEA relevance)

TITLE I

SUBJECT-MATTER, SCOPE, PRINCIPLES AND DEFINITIONS

CHAPTER I

Scope, general principles and definitions

Section III

General provisions

Article 18

Duration of the concession

1 The duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.

2 For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.

Article 19

Social and other specific services

Concessions for social and other specific services listed in Annex IV falling within the scope of this Directive shall be subject only to the obligations arising from Article 31(3) and Articles 32, 46 and 47.

Article 20

Mixed contracts

1 Concessions which have as their subject-matter both works and services shall be awarded in accordance with the provisions applicable to the type of concession that characterises the main subject-matter of the contract in question.

In the case of mixed concessions consisting partly of social and other specific services listed in Annex IV and partly of other services, the main subject-matter shall be

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determined according to which of the estimated values of the respective services is the higher.

2 Where the different parts of a given contract are objectively separable, paragraphs 3 and 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 5 shall apply.

Where part of a given contract is covered by Article 346 TFEU or Directive 2009/81/EC, Article 21 of this Directive shall apply.

In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to Directive 2014/25/EU, the applicable provisions shall be established in accordance with Article 22 of this Directive and Article 6 of Directive 2014/25/EU, respectively.

3 In the case of contracts which have as their subject-matter elements covered by this Directive as well as other elements, contracting authorities and contracting entities may choose to award separate contracts for the separate parts. Where contracting authorities or contracting entities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting authorities or contracting entities choose to award a single contract, this Directive shall, unless otherwise provided in paragraph 4 of this Article or in Article 21, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

4 In the case of mixed contracts containing elements of concessions as well as elements of public contracts covered by Directive 2014/24/EU or contracts covered by Directive 2014/25/EU, the mixed contract shall be awarded in accordance with Directive 2014/24/EU or Directive 2014/25/EU, respectively.

5 Where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject-matter of that contract.

In the event such contracts involve both elements of a services concession and of a supply contract, the main subject-matter shall be determined according to which of the estimated values of the respective services or supplies is the higher.

Article 21

Mixed procurement contracts involving defence or security aspects

1 In the case of mixed contracts which have as their subject-matter elements of a concession covered by this Directive and procurement or other elements covered by Article 346 TFEU or Directive 2009/81/EC this Article shall apply.

In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to Directive 2014/25/EU, and another being covered by Article 346 TFEU or Directive 2009/81/EC, the applicable provisions shall be established in accordance with, Article 23 of this Directive and Article 26 of 2014/25/EU, respectively.

2 Where the different parts of a given contract are objectively separable, contracting authorities or contracting entities may choose to award separate contracts for the separate parts or to award a single contract.

Where contracting authorities or contracting entities choose to award separate contracts for separate parts, the decision of the legal regime applicable to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting authorities or contracting entities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:

- a where part of a given contract is covered by Article 346 TFEU, or different parts are covered by Article 346 TFEU and Directive 2009/81/EC respectively, the contract may be awarded without applying this Directive, provided that the award of a single contract is justified for objective reasons;
- b where part of a given contract is covered by Directive 2009/81/EC, the contract may be awarded in accordance with this Directive or in accordance with Directive 2009/81/EC, provided that the award of a single contract is justified for objective reasons.

The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either this Directive or Directive 2009/81/EC.

3 Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Directive where it includes elements to which Article 346 TFEU applies. Otherwise the contracting authority or contracting entity may choose to award a contract in accordance with this Directive or in accordance with this Directive or in accordance with Directive 2009/81/EC.

Article 22

Contracts covering both activities referred to in Annex II and other activities

1 By way of derogation from Article 20, in the case of contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purposes of each separate activity or to award a single contract. Where contracting entities choose to award a separate contract, the decision of which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

Notwithstanding Article 20, where contracting entities choose to award a single contract, paragraphs 2 and 3 of this Article shall apply. However, where one of the activities concerned is covered by Article 346 TFEU or Directive 2009/81/EC, Article 23 of this Directive shall apply.

The choice between awarding a single contract or awarding a number of separate contracts shall not be made with the objective of excluding the contract or contracts from the scope of this Directive or, where applicable, from the scope of Directive 2014/24/EU or 2014/25/EU.

2 A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

3 In the case of contracts for which it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with the following:

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- a the concession shall be awarded in accordance with the provisions of this Directive applicable to concessions awarded by contracting authorities, if one of the activities for which the contract is intended is subject to the provisions of this Directive applicable to concessions awarded by contracting authorities and the other is subject to the provisions of this Directive applicable to concessions awarded by contracting entities;
- b the contract shall be awarded in accordance with Directive 2014/24/EU, if one of the activities for which the contract is intended is subject to this Directive and the other to Directive 2014/24/EU;
- c the contract shall be awarded in accordance with this Directive, if one of the activities for which the contract is intended is subject to this Directive and the other is not subject to either this Directive, Directive 2014/24/EU or Directive 2014/25/EU.

Article 23

Concessions covering both activities referred to in Annex II and activities involving defence or security aspects

1 In the case of contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purposes of each separate activity or to award a single contract. Where contracting entities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

Notwithstanding Article 21, where contracting entities choose to award a single contract, paragraph 2 of this Article shall apply.

The choice between awarding a single contract or awarding a number of separate contracts shall not, however, be made with the objective of excluding the contract or contracts from the scope of application either of this Directive or Directive 2009/81/EC.

2 In the case of contracts intended to cover an activity which is subject to this Directive and another which is:

- (a) covered by Article 346 TFEU; or
- (b) subject to Directive 2009/81/EC,

the contracting entity may:

- (i) award a contract without applying this Directive in the cases set out under point (a); or
- (ii) award a contract either in accordance with this Directive or in accordance with Directive 2009/81/EC, in the cases set out under point (b). The first subparagraph of this paragraph is without prejudice to the thresholds and exclusions provided for by Directive 2009/81/EC.

Contracts referred to in point (b), which also include procurement or other elements which are covered by Article 346 TFEU, may be awarded without applying this Directive.

However, it shall be a condition for the application of this paragraph that the award of a single contract is justified for objective reasons and the decision to award a single contract is not taken for the purpose of excluding contracts from the application of this Directive.