

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 I

**SCOPE, DEFINITIONS AND GENERAL PRINCIPLES**

*CHAPTER III*

***Material scope***

*Section 2*

***Excluded contracts and design contests; special provisions for procurement involving defence and security aspects***

*Subsection 2*

***Procurement involving defence and security aspects***

*Article 24*

**Defence and security**

1 In respect of contracts awarded and design contests organised in the fields of defence and security, this Directive shall not apply to:

- a contracts falling within the scope of Directive 2009/81/EC;
- b contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.

2 This Directive shall not apply to contracts and design contests not otherwise exempted under paragraph 1, to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting entity makes available in a contract award procedure as provided for in this Directive.

Furthermore, and in conformity with point (a) Article 346(1) TFEU, this Directive shall not apply to contracts and design contests not otherwise exempted under paragraph 1 of this Article to the extent that the application of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security.

3 Where the procurement and performance of the contract or design contest are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, this Directive shall not apply provided that the Member State has determined that the essential interests concerned cannot

be guaranteed by less intrusive measures, such as those referred to in the first subparagraph of paragraph 2.

### *Article 25*

#### **Mixed procurement covering the same activity and involving defence or security aspects**

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

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

Where 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, 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 that Directive, provided that the award of a single contract is justified for objective reasons. This point shall be without prejudice to the thresholds and exclusions for which that Directive provides.

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 Point (a) of the third subparagraph of paragraph 2 shall apply to mixed contracts to which both point (a) and point (b) of that subparagraph could otherwise apply.

4 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 it may be awarded in accordance with Directive 2009/81/EC.

### *Article 26*

#### **Procurement covering several activities and 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.

Where contracting entities choose to award a single contract, paragraph 2 of this Article shall apply. The choice between awarding a single contract and 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 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 subject to Directive 2009/81/EC, or
- b covered by Article 346 TFEU,

the contract may be awarded in accordance with Directive 2009/81/EC in the cases set out under point (a) and may be awarded without applying this Directive in the cases set out under point (b). This subparagraph is without prejudice to the thresholds and exclusions for which Directive 2009/81/EC provides.

Contracts as set out under point (a) of the first subparagraph, which in addition include procurement or other elements which are covered by Article 346 TFEU, may be awarded without applying this Directive.

However, it is a condition for the application of the first and second subparagraph 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.

#### *Article 27*

### **Contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules**

1 This Directive shall not apply to contracts or design contests involving defence or security aspects which the contracting entity is obliged to award or organise in accordance with procurement procedures different from those laid down in this Directive established by any of the following:

- a an international agreement or arrangement, concluded in accordance with the Treaties, between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- b an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- c an international organisation.

All agreements or arrangements referred to in point (a) of the first subparagraph of this paragraph shall be communicated to the Commission, which may consult the Advisory Committee on Public Procurement referred to in Article 105.

2 This Directive shall not apply to contracts and design contests involving defence or security aspects which the contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the contracts or design contests concerned are fully financed by this organisation or institution. In the case of contracts or design contests co-financed for the most part by an international organisation or international financing institution the parties shall agree on applicable procurement procedures.