

Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance)

TITLE III

RULES APPLICABLE TO SUBCONTRACTING

CHAPTER I

Subcontracts awarded by successful tenderers which are not contracting authorities/entities

Article 50

Scope

1 Where, in accordance with Article 21(3) and (4), this Title applies, Member States shall take the necessary measures to ensure that successful tenderers which are not contracting authorities/entities apply the rules set out in Articles 51 to 53 when they award subcontracts to third parties.

2 For the purposes of paragraph 1, groups of undertakings which have been formed to obtain the contract, or undertakings related to them, shall not be considered third parties.

The tenderer shall include the exhaustive list of such undertakings in the tender. That list shall be updated following any change in the relationship between the undertakings.

Article 51

Principles

The successful tenderer shall act transparently and treat all potential subcontractors in an equal and non-discriminatory way.

Article 52

Thresholds and rules on advertising

1 When a successful tenderer which is not a contracting authority/entity awards a subcontract which has a value, excluding VAT, estimated not to be lower than the thresholds laid down in Article 8, it shall make known its intention by the way of a notice.

2 Subcontract notices shall contain the information referred to in Annex V and any other information deemed useful by the successful tenderer, if necessary with the approval of the contracting authority/entity.

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Subcontract notices shall be drawn up in accordance with the standard form adopted by the Commission in accordance with the advisory procedure referred to in Article 67(2).

3 Subcontract notices shall be published in accordance with Article 32(2) to (5).

4 A subcontract notice shall not be required when a subcontract meets the conditions of Article 28.

5 Successful tenderers may publish, in accordance with Article 32, subcontract notices for which advertising is not required.

6 Member States may also provide that the successful tenderer may fulfil the subcontracting requirement set out in Article 21(3) or (4) by awarding subcontracts on the basis of a framework agreement concluded in accordance with the rules set out in Articles 51 and 53 and in paragraphs 1 to 5 of this Article.

Subcontracts based on such a framework agreement shall be awarded within the limits of the terms laid down in the framework agreement. They may only be awarded to economic operators that were originally party to the framework agreement. When awarding contracts, the parties shall in all circumstances propose terms consistent with those of the framework agreement.

The term of a framework agreement may not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

Framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition.

7 For the award of subcontracts which have a value, excluding VAT, estimated to be less than the thresholds laid down in Article 8, successful tenderers apply the principles of the Treaty regarding transparency and competition.

8 Article 9 shall apply to the calculation of the estimated value of subcontracts.

Article 53

Criteria for qualitative selection of subcontractors

In the subcontract notice, the successful tenderer shall indicate the criteria for qualitative selection prescribed by the contracting authority/entity, as well as any other criteria it will apply for the qualitative selection of subcontractors. All these criteria shall be objective, non-discriminatory and consistent with the criteria applied by the contracting authority/entity for the selection of the tenderers for the main contract. The capabilities required must be directly related to the subject of the subcontract, and the levels of ability required must be commensurate with it.

The successful tenderer shall not be required to subcontract if it proves to the satisfaction of the contracting authority/entity that none of the subcontractors participating in the competition or their proposed bids meet the criteria indicated in the subcontract notice and thereby would prevent the successful tenderer from fulfilling the requirements set out in the main contract.