

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 3

Special relations (cooperation, affiliated undertakings and joint ventures)

Article 28

Contracts between contracting authorities

1 A contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- a the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- b more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority;
- c there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2 Paragraph 1 also applies where a controlled person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled

by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3 A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a contract to that legal person without applying this Directive, where all of the following conditions are fulfilled:

- a the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- b more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and
- c there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities shall be deemed to exercise joint control over a legal person where all of the following conditions are fulfilled:

- (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;
- (ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4 A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive, where all of the following conditions are met:

- a the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- b the implementation of that cooperation is governed solely by considerations relating to the public interest; and
- c the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

5 For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity based measure such as costs incurred by the relevant legal person with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding

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three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

Article 29

Contracts awarded to an affiliated undertaking

1 For the purposes of this Article, ‘affiliated undertaking’ means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Directive 2013/34/EU.

2 In the case of entities, which are not subject to Directive 2013/34/EU, ‘affiliated undertaking’ shall mean any undertaking that:

- a may be, directly or indirectly, subject to a dominant influence by the contracting entity;
- b may exercise a dominant influence over the contracting entity; or
- c in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

For the purposes of this paragraph, ‘dominant influence’ shall have the same meaning as in the second subparagraph of Article 4(2).

3 Notwithstanding Article 28 and provided that the conditions in paragraph 4 of this Article are met, this Directive shall not apply to contracts awarded:

- a by a contracting entity to an affiliated undertaking, or
- b by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities described in Articles 8 to 14, to an undertaking which is affiliated with one of those contracting entities.

4 Paragraph 3 shall apply to:

- a service contracts provided that at least 80 % of the average total turnover of the affiliated undertaking over the preceding three years, taking into account all services provided by that undertaking, derives from the provision of services to the contracting entity or other undertakings with which it is affiliated;
- b supply contracts provided that at least 80 % of the average total turnover of the affiliated undertaking, taking into account all supplies provided by that undertaking, over the preceding three years derives from the provision of supplies to the contracting entity or other undertakings with which it is affiliated;
- c to works contracts provided that at least 80 % of the average total turnover of the affiliated undertaking, taking into account all works provided by that undertaking, over the preceding three years derives from the provision of works to the contracting entity or other undertakings with which it is affiliated.

5 Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it shall be sufficient for that undertaking to show that the turnover referred to in points (a), (b) or (c) of paragraph 4 is credible, in particular by means of business projections.

6 Where more than one undertaking affiliated with the contracting entity with which they form an economic group provides the same or similar services, supplies or works, the percentages shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

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Article 30

Contracts awarded to a joint venture or to a contracting entity forming part of a joint venture

Notwithstanding Article 28 and provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period, this Directive shall not apply to contracts awarded by any of the following:

- (a) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 8 to 14, to one of those contracting entities; or
- (b) by a contracting entity to such a joint venture of which it forms part.

Article 31

Notification of information

Contracting entities shall notify to the Commission, if so requested, the following information regarding the application of Article 29(2) and (3) and Article 30:

- (a) the names of the undertakings or joint ventures concerned,
- (b) the nature and value of the contracts involved,
- (c) proof deemed necessary by the Commission that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of Articles 29 or 30.