

Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (repealed)

PART ONE

COMMON PROVISIONS

TITLE V

PUBLIC PROCUREMENT

CHAPTER 1

General provisions

Section 1

Scope and award principles

Article 101

Definition of public contracts

1 Public contracts are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 117 and 190, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services.

Such contracts comprise:

- a building contracts;
- b supply contracts;
- c works contracts;
- d service contracts.

2 Framework contracts are contracts concluded between one or more economic operators and one or more contracting authorities, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. They shall be governed by the provisions of this Title concerning the award procedure, including advertising.

3 Except for Articles 106 to 109, this Title shall not apply to grants, or to contracts for technical assistance concluded with the EIB or the European Investment Fund.

4 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the definition and scope of procurement contracts, including framework contracts and specific contracts.

Article 102

Principles applicable to public contracts

1 All public contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination.

2 All public procurement contracts shall be put out to tender on the broadest possible basis, except when use is made of the negotiated procedure referred to in point (d) of Article 104(1).

Contracting authorities shall not use framework contracts improperly or in such a way that their purpose or effect is to prevent, restrict or distort competition.

Section 2

Publication

Article 103

Publication of public contracts

1 All contracts exceeding the thresholds provided for in Article 118 or Article 190 shall be published in the *Official Journal of the European Union* by the contracting authorities.

Contract notices shall be published in advance except in the cases referred to in Article 104(2), and for the service contracts covered by Annex II B to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁽¹⁾.

Publication of certain information after the contract has been awarded may be dispensed with where it would hinder application of the law, would be contrary to the public interest, would harm the legitimate business interests of public or private undertakings or would distort fair competition between them.

2 Contracts with a value below the thresholds provided for in Article 118 or Article 190 and the service contracts referred to in Annex II B to Directive 2004/18/EC shall be advertised by appropriate means.

3 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the requirements for the advertising of contracts and publication of notices.

Section 3

Procurement procedures

Article 104

Procurement procedures

- 1 Procurement procedures shall take one of the following forms:
 - a the open procedure;
 - b the restricted procedure;
 - c contests;
 - d the negotiated procedure;
 - e the competitive dialogue.

Where a public contract or a framework contract is of interest to two or more institutions, executive agencies or bodies referred to in Article 208 and 209, and whenever there is a possibility for realising efficiency gains, the contracting authorities concerned shall seek to carry out the procurement procedure on an interinstitutional basis.

Where a public contract or framework contract is necessary for the implementation of a joint action between an institution and one or more contracting authorities from Member States, the procurement procedure may be carried out jointly by the institution and the contracting authorities, in certain situations, which are to be specified in the delegated acts adopted pursuant to this Regulation.

Joint procurement may be conducted with EFTA states, and Union candidate countries, if this possibility has been specifically provided for in a bilateral or multilateral treaty.

2 For contracts where the value exceeds the thresholds provided for in Articles 118 or 190, use of the negotiated procedure shall be authorised only in cases provided for in the delegated acts adopted pursuant to this Regulation.

3 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the types of procurement procedure, joint procurement, low value contracts and payment against invoices.

Article 105

Content of tender documents

Tender documents shall give a full, clear and precise description of the subject of the contract and specify the exclusion, selection and award criteria applicable to the contract.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the content of tender documents, including the possibility of, and the conditions for, revision of the price and the technical specifications.

Article 106

Exclusion criteria applicable for participation in procurement procedures

1 Candidates or tenderers shall be excluded from participation in procurement procedures if:

- a they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- b they or persons having powers of representation, decision making or control over them have been convicted of an offence concerning their professional conduct by a judgment of a competent authority of a Member State which has the force of *res judicata*;
- c they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify including by decisions of the EIB and international organisations;
- d they are not in compliance with their obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed;
- e they or persons having powers of representation, decision making or control over them have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation, money laundering or any other illegal activity, where such illegal activity is detrimental to the Union's financial interests;
- f they are subject to an administrative penalty referred to in Article 109(1).

Points (a) to (d) of the first subparagraph shall not apply in the case of the purchase of supplies on particularly advantageous terms from a supplier which is definitively winding up its business activities or from the receivers or liquidators of a bankruptcy, through an arrangement with creditors, or through a similar procedure under national law.

Points (b) and (e) of the first subparagraph shall not apply where the candidates or tenderers can demonstrate that adequate measures have been adopted against the persons having powers of representation, decision making or control over them, who are subject to a judgement as referred to in points (b) or (e) of the first subparagraph.

2 In the case of a negotiated procedure where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract can be awarded only to a particular economic operator, the institution may decide not to exclude the economic operator concerned on the grounds referred to in points (a), (c) and (d) of the first subparagraph of paragraph 1, if it is indispensable to do so in order to ensure the continuity of service of the institution. In such cases, the institution shall duly justify its decision.

3 Candidates or tenderers shall certify that they are not in one of the situations listed in paragraph 1. However, the contracting authority may refrain from requiring such certification for very low value contracts.

For the purpose of the correct application of paragraph 1, the candidate or tenderer, whenever requested by the contracting authority, shall:

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- a where the candidate or tenderer is a legal person, provide information on the ownership or on the management, control and power of representation of the legal person and certify that they are not in one of the situations referred to in paragraph 1;
- b where subcontracting is envisaged, certify that the subcontractor is not in one of the situations referred to in paragraph 1.

4 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on:

- a the exclusion criteria applicable for participation in calls for tenders, including rules on illegal activities giving rise to exclusion;
- b what evidence may be satisfactory to show that an exclusion situation does not exist;
- c the duration of an exclusion. Such exclusion shall not exceed 10 years.

Article 107

Exclusion criteria applicable to awards

1 A contract shall not be awarded to candidates or tenderers who, during the procurement procedure for that contract:

- a are subject to a conflict of interests;
- b are guilty of misrepresenting the information required by the contracting authority as a condition of participation in the procurement procedure or fail to supply that information;
- c find themselves in one of the situations of exclusion, referred to in Article 106(1), for the procurement procedure.

2 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the exclusion criteria applicable during the procurement procedure, and the establishment of what evidence may be considered satisfactory to show that an exclusion situation does not exist. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the duration of an exclusion.

Article 108

Central exclusion database

1 The central exclusion database set up and operated by the Commission, shall contain details of candidates and tenderers which are in one of the situations referred to in Article 106, point (b) of the first subparagraph of Article 109(1) and point (a) of Article 109(2). That database shall be common to the institutions, executive agencies and the bodies referred to in Article 208. The European Parliament and the Council shall be annually informed of the number of new cases and of the total number of cases entered into the database.

2 The authorities of the Member States and third countries as well as the bodies, other than those referred to in paragraph 1, participating in the implementation of the budget in accordance with Articles 58 and 61, shall communicate to the authorising officer responsible information on candidates and tenderers that are in one of the situations referred to in point (e) of the first subparagraph of Article 106(1), where the conduct of the operator concerned was detrimental to the Union's financial interests. That authorising officer shall receive this information and request the accounting officer to enter it into the database.

The authorities and bodies referred to in the first subparagraph shall have access to the information contained in the database and may take it into account, as appropriate and on their own responsibility, when awarding contracts associated with the implementation of the budget.

3 The ECB, the EIB and the European Investment Fund shall have access to the information contained in the database for the purpose of protecting their own funds and may take it into account, as appropriate and on their own responsibility, when awarding contracts in accordance with their procurement rules.

They shall communicate to the Commission information on candidates and tenderers that are in one of the situations referred to in point (e) of the first subparagraph of Article 106(1), where the conduct of the operators concerned was detrimental to the Union's financial interests.

4 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the central exclusion database, including the definition of standardised procedures and technical specifications for the operation of the database.

5 Access may be granted to authorities of third countries only when the rules laid down in Article 9 of Regulation (EC) No 45/2001 are fulfilled and after an evaluation on a case-by-case basis.

Article 109

Administrative and financial penalties

1 The contracting authority may impose administrative and/or financial penalties on the following:

- a contractors, candidates or tenderers in the cases referred to in point (b) of Article 107(1);
- b contractors who have been declared to be in serious breach of their obligations under contracts covered by the budget.

In all cases, however, the contracting authority shall first give the person concerned an opportunity to present his or her observations.

2 The penalties referred to in paragraph 1 shall be proportionate to the importance of the contract and the seriousness of the misconduct, and may consist of:

- a the exclusion of the candidate or tenderer or contractor concerned from the contracts and grants financed by the budget, for a maximum period of ten years; and/or
- b the payment of financial penalties by the candidate or tenderer or contractor up to the value of that contract.

3 In order to reinforce the protection of the Union's financial interests, institutions may decide, in compliance with the principle of proportionality, to publish their decisions imposing administrative or financial penalties referred to in paragraph 1 after the procedure set out in paragraph 1 has been fully complied with.

The decision to publish a decision imposing administrative or financial penalties referred to in the first subparagraph shall take into account, in particular, the seriousness of the misconduct, including its impact on the Union's financial interests and image, the time which has elapsed since the misconduct took place, the duration and recurrence of the misconduct, the intention or degree of negligence of the entity concerned and the measures taken by the entity concerned to remedy the situation.

The decision on the publication shall be included in the decision imposing administrative or financial penalties and shall expressly provide for publication of the decision imposing penalties, or of a summary thereof, on the internet site of the institution.

In order to ensure a deterrent effect, the summary published shall include the name of the person responsible for the misconduct, a short description of that misconduct, the programme concerned and the duration of the exclusion and/or the amount of the financial penalties.

The decision shall be published after the legal remedies against the decision have been exhausted or after the expiry of the deadlines for redress and the publication shall remain on the internet site until the end of the exclusion period or until 6 months after the payment of the financial penalties where these penalties constitute the sole measure decided.

Where natural persons are concerned, the decision to publish shall be taken with due consideration of the right to privacy and with due observance of the rights provided for in Regulation (EC) No 45/2001.

4 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on different administrative and financial penalties for tenderers or candidates who have made false declarations, have made substantial errors, have committed irregularities or fraud or have been found in serious breach of their contractual obligations.

Article 110

Award criteria for contracts

1 Contracts shall be awarded on the basis of award criteria applicable to the content of the tender after the capability of economic operators not excluded under Articles 106, 107 and point (a) of Article 109(2) has been checked in accordance with the selection criteria contained in the documents relating to the call for tenders.

2 Contracts shall be awarded by the automatic award procedure or by the best-value-for-money procedure.

3 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the specification of the selection criteria and the award criteria. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the documents that give proof of economic and financial capacity and the evidence of technical and professional capacity and detailed rules on electronic auctions and abnormally low tenders.

Article 111

Submission of tenders

1 The arrangements for submitting tenders shall be such as to ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.

2 The Commission shall ensure by appropriate means and in application of Article 95 that tenderers may enter the contents of the tenders and any supporting evidence in an electronic format ("e-procurement").

The Commission shall report to the European Parliament and the Council on the progress of the implementation of this provision by 28 October 2014 and regularly afterwards.

3 If deemed appropriate and proportionate, the contracting authority may require tenderers to lodge a security in advance as a guarantee that the bids made will not be withdrawn.

4 With the exception of low value contracts, referred to in Article 104(3), applications and tenders shall be opened by an opening board appointed for this purpose. Any tender or application declared by the board not to satisfy the conditions laid down shall be rejected.

5 All requests to participate or tenders declared by the opening board as satisfying the conditions laid down shall be evaluated, on the basis of the criteria provided in the documents relating to the call for tenders, in order to propose to the contracting authority the award of the contract or to proceed with an electronic auction.

6 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the submission of tenders and the establishment of the time limits for receipt of tenders and requests to participate, the time allowed for access to invitation to tender documents and the time limits in urgent cases. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the different methods of communication and detailed rules on the possibility of a tender guarantee, the opening of tenders, the requests to participate and the Committee for the evaluation of tenders and requests to participate.

Article 112

Principles of equal treatment and transparency

1 While the procurement procedure is under way, all contacts between the contracting authority and candidates or tenderers shall satisfy conditions ensuring transparency and equal treatment. They shall not lead to amendment of the conditions of the contract or the terms of the original tender.

2 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the principles of equal treatment and transparency. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the contact that is allowed between contracting authorities and tenderers during the contract award procedure, the minimum requirements of the written record of an evaluation and the minimum details of the decision taken by the contracting authority.

Article 113

The award decision

1 The authorising officer shall decide to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

2 The contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, as well as the duration of the standstill period referred to in Article 118(2). The contracting authority shall notify all tenderers who meet the exclusion and selection criteria, and who make a request in writing, of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded.

However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between those undertakings.

3 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the award decision and the signature and implementation of the contract.

Article 114

Cancellation of the procurement procedure

The contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation.

The decision shall be justified and be brought to the attention of the candidates or tenderers.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the cancellation of the procurement procedure.

Section 4

Guarantees and corrective action

Article 115

Guarantees

Other than in the case of low value contracts, the contracting authority may, if it deems it appropriate and proportionate on a case-by-case basis and subject to a risk-analysis, require contractors to lodge a guarantee in order to:

- (a) ensure full performance of the contract, or
- (b) limit the financial risks connected with payment of pre-financing.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules, including criteria for risk analysis, on the guarantees that are required from contractors.

Article 116

Errors, irregularities and fraud in the procedure

1 Where the award procedure proves to have been subject to substantial errors, irregularities or fraud, the contracting authority shall suspend the procedure and may take whatever measures are necessary, including the cancellation of the procedure.

Where, after the award of the contract, the award procedure or the performance of the contract prove to have been subject to substantial errors, irregularities or fraud, the contracting authority may, depending on the stage reached in the procedure, refrain from concluding the contract, suspend its performance or, where appropriate, terminate it.

Where those errors, irregularities or fraud are attributable to the contractor, the contracting authority may, in addition, refuse to make payments, recover amounts already paid or terminate all the contracts concluded with that contractor, in proportion to the seriousness of the errors, irregularities or fraud.

2 The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the suspension of a contract in the event of errors, irregularities and fraud.

(1) OJ L 134, 30.4.2004, p. 114.