

Regulation (EU) No 377/2014 of the European Parliament and of the Council of 3 April 2014 establishing the Copernicus Programme and repealing Regulation (EU) No 911/2010 (Text with EEA relevance)

CHAPTER III

**PUBLIC PROCUREMENT**

SECTION I

**General provisions applicable to public procurement**

*Article 14*

**General principles**

Without prejudice to Article 8(7) and measures required to protect the essential interests of the security of the Union or public security or to comply with Union export control requirements, the Financial Regulation, and in particular the principles of open access and fair competition throughout the industrial supply chain, tendering on the basis of the provision of transparent and timely information, clear communication of the applicable procurement rules, selection and award criteria and any other relevant information allowing a level-playing field for all potential bidders, shall apply to Copernicus.

*Article 15*

**Specific objectives**

During the procurement procedure, the following objectives shall be pursued by the contracting authorities in their calls for tender:

- (a) to promote the widest and most open participation possible throughout the Union by all economic operators, in particular by new entrants and SMEs, including through encouraging the recourse to sub-contracting by the tenderers;
- (b) to avoid possible abuse of dominant position and reliance on a single supplier;
- (c) to take advantage of prior public sector investments and lessons learned as well as industrial experience and competences, while ensuring that competitive tendering rules are complied with;
- (d) to pursue multiple sourcing wherever appropriate in order to ensure better overall control of Copernicus, its costs and schedule;
- (e) to take into account wherever appropriate the total cost over the useful life-cycle of the product, service or work being tendered.

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## SECTION II

### Specific provisions applicable to public procurement

#### Article 16

#### Establishing fair competition conditions

The contracting authority shall take the appropriate measures to ensure fair competition conditions when previous involvement of an economic operator in activities associated with the subject of the call for tender:

- (a) may confer significant advantages on that economic operator in terms of privileged information and therefore may give rise to concerns as to compliance with equal treatment; or
- (b) affect normal competition conditions or the impartiality and objectivity of the award or performance of the contracts.

These measures shall not distort competition, or jeopardise equal treatment or the confidentiality of data collected about undertakings, their business relations and cost structure. In that context, those measures shall take into account the nature and particulars of the intended contract.

#### Article 17

#### Security of information

When contracts involve, require and/or contain classified information, the contracting authority shall specify in the tender documents the measures and requirements necessary to ensure the security of such information at the requisite level.

#### Article 18

#### Reliability of supply

The contracting authority shall specify in the tender documents its requirements in relation to the reliability of supplies and of the provision of services for the execution of the contract.

#### Article 19

#### Conditional stage-payment contract

1 The contracting authority may award a contract in the form of a conditional stage-payment contract.

2 A conditional stage-payment contract shall include a fixed stage which is accompanied by a budgetary commitment which results in a firm commitment to provide the works, supplies or services contracted for that stage and one or more stages which are conditional in terms of both budget and execution. The tender documents shall refer to the specific features of conditional stage-payment contracts. In particular, they shall specify the subject-matter of the contract, the

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price or the arrangements for determining the price and the arrangements for the provision of works, supplies and services at each stage.

3 The fixed stage obligations shall be part of a consistent whole; the same shall be true for the obligations under each conditional stage, taking into account the obligations under the previous stages.

4 Performance of each conditional stage shall be subject to a decision by the contracting authority, notified to the contractor in accordance with the contract. When a conditional stage is confirmed late or is not confirmed, the contractor may benefit, if the contract so provides and under the conditions laid down therein, from a tide-over allowance or a non-execution allowance.

5 Where, with regard to a particular stage, the contracting authority finds that works, supplies, or services agreed for that stage have not been completed, it may claim damages and terminate the contract, if the contract so provides and under the conditions laid down therein.

## Article 20

### Cost-reimbursement contracts

1 The contracting authority may opt for a full or partial cost-reimbursement contract up to a ceiling price, under the conditions laid down in paragraph 2.

The price to be paid for such contracts shall consist of reimbursement of all direct costs incurred by the contractor in performing the contract, such as expenditure on labour, materials, consumables, and use of the equipment and infrastructures necessary to perform the contract. These costs shall be increased by a fixed fee covering indirect costs and the profit, or a sum covering indirect costs and incentive fee compensation based on achieving objectives in respect of performance and delivery schedules.

2 The contracting authority may opt for a full or partial cost-reimbursement contract when it is objectively impossible to specify an accurate fixed price and if it can be reasonably shown that such a fixed price would be abnormally high due to the uncertainties inherent in performance of the contract because:

- a the contract has very complex features or features which require the use of a new technology and, therefore, includes a significant number of technical risks; or
- b the activities subject to the contract must, for operational reasons, start immediately even though it is not yet possible to determine a firm fixed price in full due to significant risks or because the performance of the contract depends in part on the performance of other contracts.

3 The ceiling price for a full or partial cost-reimbursement contract shall be the maximum price payable. It may only be exceeded in duly justified exceptional circumstances subject to prior agreement by the contracting authority.

4 The tender documents of a procurement procedure for a full or partial cost-reimbursement contract shall specify:

- a the type of contract, namely whether it is a full or partial cost-reimbursement contract up to a ceiling price;
- b for a partial cost-reimbursement contract, the elements of the contract subject to cost-reimbursement;
- c the total ceiling price;

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- d the award criteria, which must enable evaluation of the plausibility of the estimated overall budget, the reimbursable costs, the mechanisms for determining these costs, and the profit referred to in the tender to be evaluated;
  - e the mechanics of the increase referred to in paragraph 1 to be applied to direct costs;
  - f the rules and procedures which determine the eligibility of the costs planned by the tenderer for the performance of the contract, in accordance with the principles set out in paragraph 5;
  - g the accounting rules with which tenderers must comply;
  - h in the case of a partial cost-reimbursement contract to be converted into a firm fixed-price contract, the parameters for such conversion.
- 5 The costs declared by the contractor during the performance of a full or partial cost-reimbursement contract shall only be eligible if they:
- a are actually incurred in the course of the contract, with the exception of costs for equipment, infrastructures and intangible fixed assets necessary for performance of the contract which may be deemed eligible for the whole of their purchase value;
  - b are referred to in the estimated overall budget which may be revised by amendments to the initial contract;
  - c are necessary for the performance of the contract;
  - d result from and are attributable to the performance of the contract;
  - e are identifiable, verifiable, recorded in the contractor's accounting record and determined in accordance with the accounting standards referred to in the specifications and in the contract;
  - f comply with the requirements of applicable tax and social law;
  - g do not derogate from the terms of the contract;
  - h are reasonable, justified, and comply with the requirements of sound financial management, in particular regarding economy and efficiency.

The contractor shall be responsible for its own cost accounting, and for keeping sound accounting records or any other document required to show that the costs for which reimbursement is requested have been incurred and comply with the principles set out in this Article. Costs which cannot be substantiated by the contractor shall be deemed ineligible and their reimbursement shall be refused.

- 6 The contracting authority shall be responsible for the following tasks in order to ensure correct performance of cost-reimbursement contracts:
- a determining the most realistic possible ceiling price, while providing the necessary flexibility to account for technical difficulties;
  - b converting a partial cost-reimbursement contract into a full firm fixed-price contract as soon as it is possible to determine such a firm fixed-price during performance of the contract. For this reason, it shall determine the conversion parameters to convert a contract concluded on a cost-reimbursement basis to a firm fixed-price contract;
  - c implementing monitoring and control measures which provide, in particular, an estimated cost forecast system;
  - d determining suitable principles, tools and procedures for the implementation of contracts, in particular for identifying and checking the eligibility of costs declared by the contractor or its subcontractors during the performance of the contract, and for entering amendments to the contract;
  - e checking that the contractor and its subcontractors comply with the accounting standards stipulated in the contract and with the obligation to provide their accounting documents which should present a true and fair view of the accounts;

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- f throughout performance of the contract, continuously ensuring the effectiveness of the principles, tools and procedures referred to in point (d).

### *Article 21*

#### **Amendments**

The contracting authority and the contractors may change the contract by an amendment on condition that this amendment fulfills all of the following conditions:

- (a) it does not alter the subject-matter of the contract;
- (b) it does not disturb the economic balance of the contract;
- (c) it does not introduce conditions which, if they had appeared initially in the contract documents, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

### *Article 22*

#### **Subcontracting**

1 The contracting authority shall request the tenderer to subcontract a share of the contract by competitive tendering at the appropriate levels of sub-contracting to companies other than those that belong to the tenderer's group in particular to new entrants and SMEs.

2 The contracting authority shall express the requisite share of the contract to be subcontracted in the form of a range from a minimum to a maximum percentage. It shall ensure that such percentages are proportionate to the objective and value of the contract, taking into account the nature of the sector of activity concerned, and in particular, the competitive conditions and industrial potential observed.

3 If the tenderer indicates in its tender that it intends not to sub-contract any share of the contract or to subcontract a share inferior to the minimum of the range referred to in paragraph 2, it shall provide the reasons therefor to the contracting authority. The contracting authority shall submit that information to the Commission.

4 The contracting authority may reject subcontractors selected by the candidate at the stage of the main contract award procedure or by the tenderer selected for the performance of the contract. It shall justify this rejection in writing, which may be based only on the criteria used for selection of tenderers for the main contract.

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