Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015 amending Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union

COMMISSION DELEGATED REGULATION (EU) 2015/2462

of 30 October 2015

amending Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[(1)], and in particular Articles 58, 60, 101, 103, 104, 104a, 105, 106, 107, 108, 110, 111, 112, 113, 115, 116, 117, 118, 119, 124, 131, 138, 139, 190, 191, 204 and 209 thereof,

Whereas:

(1) Regulation (EU, Euratom) No 966/2012 has been amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council[(2)] to align it to the amended Directive 2014/24/EU of the European Parliament and of the Council[(3)] on public procurement and Directive 2014/23/EU of the European Parliament and of the Council[(4)] on the award of concession contracts and to strengthen the system of protection of the Union budget. It is therefore necessary to update Commission Delegated Regulation (EU) No 1268/2012[(5)] on the rules of application of Regulation (EU, Euratom) No 966/2012.

(2) Article 290 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') provides that a legislative act may delegate to the Commission the power to adopt non-legislative acts only to supplement or amend certain non-essential elements of the legislative act.

(3) It is necessary to align the content of the delegation agreement with entities entrusted with budget implementation in indirect management with the extended obligations introduced by Regulation (EU, Euratom) No 966/2012 to notify and impose administrative sanctions on economic operators in the event of irregularities or fraud.

(4) The assimilation of non-profit organisations to international organisations permitting the application of the relevant specific rules on indirect management should be limited and subject to conditions. It is therefore appropriate to lay down the procedures to be followed and the criteria to be applied for any such assimilation.

Changes to legislation: *Commission Delegated Regulation (EU) 2015/2462 is up to date with all changes known to be in force on or before 02 February 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(5) In the interest of clarity and consistency, it is necessary to add new definitions and to make technical clarifications to ensure that the terminology of Delegated Regulation (EU) No 1268/2012 corresponds to that of Directives 2014/24/EU and 2014/23/EU as far as possible.

(6) It is appropriate for procurement procedures to be published in the *Official Journal of the European Union* to follow the information for notices provided in Directive 2014/24/EU and for those notices to be transmitted by electronic means. As these notices must be published in all EU languages, it is necessary to adjust the time limit for receipt of tenders by extending the time limit between dispatch and publication at Union level beyond that provided for in Directive 2014/24/EU.

(7) It is appropriate to simplify the publication of contract awards falling outside the scope of Directive 2014/24/EU and it is appropriate that such publication take place primarily on the internet site of the contracting authority rather than in the *Official Journal of the European Union*, as is the case for *ex ante* publicity.

(8) The competitive procedure with negotiation should be considered a standard procedure and should replace the former negotiated procedure with prior publication. It is therefore appropriate to limit annual reporting on exceptional procedures to the negotiated procedure without prior publication.

(9) It is necessary to ensure that the innovation partnership is used only when the desired product does not exist on the market. It is therefore appropriate to provide that it is necessary to carry out preliminary market analysis before using an innovation partnership.

(10) It is necessary to cater for all possible purchases including those falling outside the scope of Directive 2014/24/EU. The negotiated procedure should therefore be used without prior publication for these purchases, including certain legal services, certain categories of financial services, loans and public communication networks.

(11) International organisations may provide services as economic operators therefore it is appropriate to provide for their possible participation in procurement procedures. It is also necessary to provide for the possibility to use the negotiated procedure without prior publication for some international organisations that are prohibited from participating in competitive tendering by their statute. The resulting contract should be adapted with respect to the applicable law and jurisdiction.

(12) For harmonisation and simplification purposes, the standard procedures applicable for public procurement should also be applied to concession contracts, including the competitive procedure with negotiation. This meets the requirements of Directive 2014/23/EU on concessions which provides for *ex ante* and *ex post* publicity obligations. Therefore, the threshold for service concessions should be aligned with the threshold for service contracts.

(13) For harmonisation and simplification purposes, the standard procedures applicable for public procurement should also be applied to purchases provided for under the light regime in Directive 2014/24/EU, including the competitive procedure with negotiation.

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Therefore, the threshold for light regime purchases should be aligned with the threshold for service contracts.

(14) In the interests of clarity and simplification, the duration of a call for expressions of interest and the time limit within which to receive requests to participate should be aligned with those under the dynamic purchasing system, since both systems are very similar in all other respects.

(15) In the interests of administrative simplification and in order to encourage participation of small and medium-sized enterprises, it is appropriate to provide for negotiated procedures for middle-value contracts.

(16) Certain provisions should be adapted to facilitate the use of electronic procurement procedures including the electronic submission of tenders. In particular, the procurement documents including the full tender specifications should be made available by electronic means from the start of a procedure, including in the case of two-step procedures, except in justified cases. In addition, the outcome of a procedure should be notified by electronic means and tenderers and candidates should agree to be notified in this way when submitting their tenders or requests to participate and should provide a valid e-mail address for this purpose.

(17) Contractors should be required to comply with any applicable obligations in the fields of environmental, social and labour law.

(18) The contracting authority should accept the European Single Procurement Document (ESPD) as defined in Directive 2014/24/EU for exclusion and selection criteria as a standardised declaration whenever feasible, or, failing that, a declaration on honour. It should request supporting documents from the successful tenderers only or, in specific cases, from all tenderers or candidates.

(19) In order to ensure the proper functioning of the database for the early detection and exclusion system, it is necessary to lay down rules on accessing the information contained in the database and the transmission thereof.

(20) In the interests of simplification and with the aim of reducing the administrative burden, it is appropriate to use the existing automated information system established by the Commission for the reporting of irregularities and fraud in accordance with sector-specific rules for the purpose of the early detection and exclusion system.

(21) It is necessary to lay down detailed rules on the organisation and composition of the panel created to ensure that the system for imposing administrative sanctions is effective and consistent.

(22) It is necessary to determine the selection criteria for both a single economic operator and a group of economic operators in the procurement documents while ensuring proportionality and equality of treatment.

(23) In the interests of legal certainty, it is necessary to clarify that the selection criteria are strictly linked to the evaluation of candidates or tenderers and that the award criteria are strictly linked to the evaluation of the tenders. In particular, the qualifications and experience of staff assigned to perform the contract should only be used as a selection

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criterion and not as award criterion, as this would introduce a risk of overlap and double evaluation of the same element. Furthermore, any change in the staff assigned to perform the contract, even where justified through illness or a change in position, would call into question the conditions under which the contract was awarded and thereby create legal uncertainty.

(24) With a view to simplification, it is appropriate to link the requirements for opening and evaluation committees to the level of risk analysis by the authorising officer.

(25) It is appropriate that, when notified of the outcome of a procedure, candidates and tenderers are informed of the grounds on which the decision was taken and receive a detailed statement of reasons based on the content of the evaluation report.

(26) It is necessary to provide for the option of a performance guarantee in relation to works, supplies and complex services in order to guarantee compliance with substantial contractual obligations and to ensure proper performance throughout the duration of the contract. It is also necessary to provide for a retention money guarantee to cover the contract liability period, in line with customary practice in these sectors.

(27) It should be possible for certain administrative entities to act as central purchasing bodies for wholesale purchases or for centralised procurement.

(28) It is necessary to defer the application of the amendment on the time limit between dispatch and publication of a notice in the *Official Journal of the European Union* in order to adapt the system used for the translation of notices.

(29) It is necessary to defer the application of the provision on the availability, in the database for the early detection and exclusion system, of the information on fraud and irregularities contained in the automated information system of the Commission (the Irregularity Management System) until the database can receive this information.

(30) This Regulation should enter into force on the day following that of its publication in the *Official Journal of the European Union* in order to ensure that it can apply from the beginning of the financial year,

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) No 1268/2012 is amended as follows:

(1) in Article 32, the introductory sentence of the first subparagraph of paragraph 1 is replaced by the following:

> Acts likely to be affected by a conflict of interests within the meaning of Article 57(2) of the Financial Regulation may, inter alia, take one of the following forms without prejudice to their qualification as illegal activities under point (d) of Article 106(1) of the Financial Regulation:

(2) the title of Article 40 is replaced by the following:
Article 40

> Content of the agreement entrusting budget implementation tasks to entities and persons(Articles 60(3) and 61(3) of the Financial Regulation)

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(3) in Article 40, point (f) is replaced by the following:

(f) rules which allow the entity or person to exclude economic operators which are in a situation referred to in points (d) and (f) of Article 106(1) and in point (b) of Article 107 of the Financial Regulation from participating in procurement, grant or prize award procedures or from being awarded procurement contracts, grants or prizes and rules which allow the entity or person to impose a financial penalty to these economic operators;

(4) in Article 40, point (h) (i) is replaced by the following:

(h) arrangements providing for:

(i) an undertaking of the entrusted entity to inform the Commission without delay of fraud or irregularity as referred to in points (d) and (f) of Article 106(1) of the Financial Regulation occurring in the management of Union funds and the measures taken;

(5) in Article 40, the following paragraphs are added:

In the case of point (f) of the first paragraph, for the purpose of Article 106(5) of the Financial Regulation, a third country is considered in failure to act, inter alia, where its national legislation does not allow to exclude an economic operator from all EU financed award procedures within the meaning of Article 106 of the Financial Regulation. The delegation agreements specify where a third country is considered in failure to act.

For the purpose of point (h)(i) of the first paragraph, in the case of third countries and international organisations, these arrangements specify where the third country and the international organisation shall prevent, detect, correct and notify irregularities and fraud in accordance Article 60(3) of the Financial Regulation.

(6) Article 43 is replaced by the following:

Article 43

Specific provisions for indirect management with international organisations(Article 58(1)(c) (ii) and Article 188 of the Financial Regulation)

1 The international organisations referred to in point (ii) of Article 58(1)(c) of the Financial Regulation shall be international public-sector organisations set up by international agreements and specialised agencies set up by such organisations.

The agreements referred to in the first subparagraph shall be submitted to the authorising officer responsible for the *ex ante* assessment referred to in Article 39 before the Commission entrusts tasks of budget implementation.

2 The following organisations shall be assimilated to international organisations:

a the International Committee of the Red Cross;

b the International Federation of National Red Cross and Red Crescent Societies.