Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union

REGULATION (EU, EURATOM) 2015/1929 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 28 October 2015

amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 322 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the Court of Auditors[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council[(3)] lays down the rules for the establishment and the implementation of the general budget of the European Union. In particular, it also contains rules on public procurement. Directives 2014/23/EU[(4)] and 2014/24/EU[(5)] of the European Parliament and of the Council were adopted on 26 February 2014 and it is therefore necessary to amend Regulation (EU, Euratom) No 966/2012 in order to take them into account for contracts awarded by the Union institutions on their own account.

(2) Some definitions should be added and certain technical clarifications should be made to ensure that the terminology of Regulation (EU, Euratom) No 966/2012 is in line with that of Directives 2014/23/EU and 2014/24/EU.

(3) The ex ante and ex post publicity measures necessary to launch a procurement procedure should be clarified in the case of contracts above and below the thresholds set out in Directive 2014/24/EU.

(4) Regulation (EU, Euratom) No 966/2012 should include an exhaustive list of all the procurement procedures available to the Union institutions regardless of the thresholds.

(5) As is the case in Directive 2014/24/EU, Regulation (EU, Euratom) No 966/2012 should allow for market consultation prior to the launch of a procurement procedure.

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(6) In addition, it should be clarified how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, while ensuring that they can obtain the best value for money for their contracts, in particular through requiring specific labels and/or through the use of appropriate award methods.

(7) In order to ensure that, when executing contracts, economic operators comply with the applicable environmental, social and labour law obligations established by Union law, national legislation, collective agreements or the applicable international social and environmental conventions listed in Annex X to Directive 2014/24/EU, such obligations should be part of the minimum requirements defined by the contracting authority and should be integrated in the contracts signed by the contracting authority.

(8) In order to protect the Union's financial interests, a single early detection and exclusion system should be set up by the Commission, and the rules for exclusion from participation in procurement procedures should be improved in order to strengthen the protection of those interests.

(9) The decision of exclusion of an economic operator from participation in procurement procedures or the imposition of a financial penalty and the decision to publish the related information should be taken by the relevant contracting authority, in view of its autonomy in administrative matters. In the absence of a final judgment or final administrative decision and in cases related to a serious breach of contract, the contracting authority should take its decision having regard to the recommendation of a panel on the basis of a preliminary classification in law of the conduct of the economic operator concerned. The panel should also assess the duration of an exclusion in cases where the duration has not been set by the final judgment or the final administrative decision.

(10) The role of the panel should be to ensure the coherent operation of the exclusion system. The panel should be composed of a standing chair, representatives of the Commission and a representative of the relevant contracting authority.

(11) The preliminary classification in law does not prejudge the final assessment of the conduct of the economic operator by the competent authorities of Member States under national law. The recommendation of the panel, as well as the decision of the contracting authority, should therefore be reviewed following the notification of such a final assessment.

(12) Regulation (EU, Euratom) No 966/2012 should specify the situations giving rise to exclusion.

(13) An economic operator should be excluded by the contracting authority when a final judgment or a final administrative decision has been taken in the case of grave professional misconduct, non-compliance, whether intentional or not, with the obligations related to the payment of social security contributions or the payment of taxes, fraud affecting the general budget of the Union (‘the budget’), corruption, participation in a criminal organisation, money laundering, terrorist financing, terrorist related offences, child labour or other forms of trafficking in human beings or

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irregularity. It should also be excluded in the case of a serious breach of contract or bankruptcy.

(14) When deciding on the exclusion or the imposition of a financial penalty and on the publication thereof or on the rejection of an economic operator, the contracting authority should ensure compliance with the principle of proportionality by taking into account in particular the seriousness of the situation, its budgetary impact, the time which has elapsed since the relevant conduct, its duration and its recurrence, the intention or degree of negligence and the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation.

(15) The contracting authority should also be able to exclude an economic operator where a natural or legal person assuming unlimited liability for the debts of that economic operator is bankrupt or in a similar situation of insolvency or where that natural or legal person fails to comply with its obligations to pay social security contributions or taxes, where such situations impact the financial situation of the economic operator.

(16) An economic operator should not be subject to a decision of exclusion when it has taken remedial measures, thus demonstrating its reliability. This possibility should not apply in case of the most severe criminal activities.

(17) In the light of the principle of proportionality, it is necessary to distinguish between the cases where a financial penalty may be imposed as an alternative to the exclusion and the cases where the gravity of the conduct of the economic operator concerned in respect of attempting to unduly obtain Union funds justifies the imposition of a financial penalty in addition to the exclusion so as to ensure a deterrent effect. It is also necessary to define the minimum and maximum financial penalty which can be imposed by the contracting authority.

(18) It is important to underline that the possibility to apply administrative and/or financial penalties on a regulatory basis is independent from the possibility to apply contractual penalties, such as liquidated damages.

(19) The duration of exclusion should be limited in time, as is the case in Directive 2014/24/EU and in accordance with the principle of proportionality.

(20) It is necessary to determine the commencement date and the duration of the limitation period for imposing administrative sanctions.

(21) It is important to be able to reinforce the deterrent effect achieved by the exclusion and the financial penalty. In that regard, the deterrent effect should be reinforced by the possibility to publish the information related to the exclusion and/or to the financial penalty, with full respect for the data protection requirements set out in Regulation (EC) No 45/2001 of the European Parliament and of the Council[(6)] and in Directive 95/46/EC of the European Parliament and of the Council[(7)]. This should contribute to ensuring that the conduct concerned is not repeated. For reasons of legal certainty and in accordance with the principle of proportionality it should be specified in which situations a publication should not take place. In its assessment, the contracting authority should have regard to any recommendation of the panel. As far as natural

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persons are concerned, personal data should only be published in exceptional cases justified by the seriousness of the conduct or its impact on the Union's financial interests.

(22) The information related to an exclusion or a financial penalty should only be published in the case of grave professional misconduct, fraud, a significant deficiency in complying with the main obligations of a contract financed by the budget or an irregularity.

(23) The criteria for exclusion should be clearly separated from the criteria leading to a possible rejection from a given procedure.

(24) It is appropriate that different cases usually referred to as situations of conflict of interest are identified and treated distinctly. The notion of a 'conflict of interest' should be solely used for cases where an official or an agent of a Union institution is in such a situation. In cases where an economic operator attempts to unduly influence a procedure or obtain confidential information, this should be treated as grave professional misconduct. In addition, economic operators may be in a situation where they should not be selected to implement a contract because of a professional conflicting interest. For instance, a company should not evaluate a project in which it has participated or an auditor should not be in a position to audit accounts it has previously certified.

(25) The information on the early detection of risks and on the imposition of administrative sanctions on economic operators should be centralised. For that purpose, related information should be stored in a database set up and operated by the Commission as the owner of the centralised system. That system should operate in full compliance with the right to privacy and the protection of personal data.

(26) While the setting up and the operation of the early detection and exclusion system should be the responsibility of the Commission, other institutions and bodies, as well as all entities implementing the budget in accordance with Articles 59 and 60 of Regulation (EU, Euratom) No 966/2012 should participate in that system by transmitting relevant information to the Commission to ensure an early detection of risks.

(27) The contracting authority and the panel should guarantee the right of defence of economic operators. The same right should be given to economic operators, in the context of an early detection, where an act envisaged by an authorising officer could adversely affect the rights of the economic operator concerned. In cases of fraud, corruption or any other illegal activity affecting the Union's financial interests which are not yet subject to a final judgment, the contracting authority and the panel should be given the possibility to defer the opportunity given to the economic operator to submit its observations. Such deferral should only be justified where there are compelling legitimate grounds to preserve the confidentiality of the investigation.

(28) This Regulation respects the fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union, in particular the need to ensure the legality and proportionality of sanctions, the right to an effective remedy and to a fair trial, the right of defence and the right to privacy and the protection of personal data.

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(29) The Court of Justice of the European Union should be given unlimited jurisdiction with regard to penalties imposed pursuant to this Regulation, in accordance with Article 261 of the Treaty on the Functioning of the European Union (TFEU).

(30) In order to facilitate the protection of the Union's financial interests across all management modes, the entities involved in the implementation of the budget in shared and indirect management should take into account, as appropriate, exclusions decided upon by the contracting authorities at Union level.

(31) In accordance with Directive 2014/24/EU, it should be possible to verify whether an economic operator is excluded, to apply selection and award criteria, as well as to verify compliance with the procurement documents in any order. As a result, it should be possible to reject tenders on the basis of award criteria without a prior check on exclusion or selection criteria of the corresponding tenderer.

(32) Contracts should be awarded on the basis of the most economically advantageous tender in line with Article 67 of Directive 2014/24/EU. It should be clarified that selection criteria are strictly linked to the evaluation of candidates or tenderers and award criteria are strictly linked to the evaluation of the tenders.

(33) Union public procurement should ensure that Union funds are used in an effective, transparent, and appropriate way. In that regard, electronic procurement should contribute to a better use of Union funds and enhance access to contracts for all economic operators.

(34) It should be clarified that there should be an opening phase and an evaluation for any procedure. An award decision should always be the outcome of an evaluation.

(35) Given that criteria are applied in no particular order, it is necessary to provide for the possibility for the rejected tenderers who submitted compliant tenders to receive the characteristics and relative advantages of the successful tender if they so request.

(36) For framework contracts with reopening of competition, it is appropriate to waive the obligation to provide the characteristics and relative advantages of the successful tender to an unsuccessful contractor, on the basis that the receipt of such information by parties to the same framework contract each time a competition is reopened might prejudice fair competition between them.

(37) A contracting authority should be able to cancel a procurement procedure before the contract is signed, without the candidates or tenderers being entitled to claim compensation. This should be without prejudice to situations where the contracting authority has acted in such a way that it may be held liable for damages in accordance with general principles of Union law.

(38) As is the case in Directive 2014/24/EU, it is necessary to clarify the conditions under which a contract may be modified during its performance without a new procurement procedure. In particular, cases such as administrative changes, universal succession and application of clear and unequivocal revision clauses or options do not alter the minimum requirements of the initial procedure. A new procurement procedure should be required in the case of material modifications to the initial contract, in particular to