Evaluation of public procurement directives: Directives 2014/23/EU (the Concessions Directive), 2014/24/EU (the Public Procurement Directive), and 2014/25/EU (the Utilities Directive)

Business & Science Poland position

Business & Science Poland (BSP) expresses its gratitude to the European Commission for the opportunity to provide its opinion as part of the evaluation process of the Public Procurement Directives (2014/23/EU, 2014/24/EU, and 2014/25/EU). BSP members are active participants in the public procurement market, with extensive experience in the execution of contracts at both the national and international level, and appreciate the initiative to analyse the effectiveness and adequacy of the existing regulations. We believe that this is a key step towards improving and modernising the public procurement system in the European Union.

Public procurement is an important element in promoting innovation, competitiveness and sustainable development in Europe. However, the experience of our members shows that, despite numerous reforms, the current regulations still need improvements in transparency of procedures, fair competition, and access to contracts for a wide range of economic operators, including SMEs. In particular, we highlight several key areas that should be addressed in potential legislative changes:

1. Extend the possibility of verifying subcontractors- The current regulations allow sectoral procurers to define their additional grounds for excluding contractors, but they do not cover subcontractors. Introducing the possibility of applying the same rules to subcontractors will increase the transparency and security of the contracts performed.

2. Mechanism for verifying excessive prices - Existing regulations allow for the analysis of bids for abnormally low prices, but there is no parallel mechanism for verifying abnormally high bids. The introduction of such a tool would allow contracting authorities to eliminate unjustified costs and ensure greater efficiency in the spending of public funds.

3. Uniform grounds for invalidation- Currently, the rules on invalidation vary from one Member State to another, leading to a lack of legal consistency across the EU. Regulating this issue at directive level would increase legal certainty for economic operators and contracting authorities.

4. Flexibility in the criteria for evaluation of bids in framework agreements - Explicit confirmation in the Directives' provisions regarding the possibility of not using the price criterion in procedures for the conclusion of so-called incomplete framework agreements (those that do not specify all the terms and conditions of the contract) would introduce more certainty in the application of such a flexible and market-specific approach to the evaluation of bids.

5. Early Contractor Involvement (ECI), alliance - In some EU Member States (in particular Finland), infrastructure investment delivery models involving early involvement of the works contractor in the design process are already being used successfully. The use of these models makes the investment process more efficient and innovative and reduces the number of disputes. Explicitly prejudging the acceptability of the use of these models and designating them as an accepted EU course of action for

contracting authorities would help to increase the popularity of these models and, consequently, increase the efficiency and innovation of public works procurement in the EU.

6. Designated subcontracting- We propose to explicitly allow the possibility for a contracting authority to designate a contractor selected in a procedure conducted in accordance with the provisions of the Directives as a key subcontractor for an investment, which the separately selected general contractor for the investment would have to include in the execution of the contract. This solution is commonly used in international infrastructure contracts and would contribute to increasing the efficiency of large, complex projects. Based on the current regulations, the application of this model may raise certain doubts, and therefore, the explicit confirmation of this admissibility will increase the legal security of investment implementation.

7. Clarification of access to contracts for contractors from third countries- Existing regulations on the participation of non-EU entities need to be clarified, especially in light of recent case law of the Court of Justice of the EU. Clear rules on international consortia and the sharing of resources and subcontracting would increase the transparency of procedures.

8. Clarification of the rules on concession contracts with related parties- Existing ambiguities in the interpretation of in-house (so-called 'in-house') contracts need to be clarified to ensure uniform application of the rules across the EU.

9. Amendments to the sanctions legislation in connection with Russia's aggression against Ukraine- In connection with the sanctions in place, it is necessary to clarify the rules for excluding entities linked to Russia and to eliminate the possibility of circumventing the regulation through subcontracting.

Below, we submit the details of our analysis:

1. Extension of the possibility to verify subcontractors- Directive 2014/25/EU

The provisions of Directive 2014/25/EU provide in Article 78(1) (in conjunction with Article 80(1)) for sectoral contracting authorities the possibility of specifying grounds for exclusion of the economic operator other than those indicated in Article 57 of the so-called Classical Directive (Directive 2014/24/EU). At the same time, both Directives provide for the possibility to examine for exclusion grounds also subcontractors, but limiting this examination to the mandatory and optional exclusion grounds set out in the Classical Directive, omitting such a possibility for objective exclusion grounds formulated by sectoral procurers based on Article 78(1) of the Utilities Directive. This leads to a situation where, in one procedure, the contracting authority verifies the economic operator both against the exclusion grounds set out in the Classical Directive and also against an additional exclusion ground formulated on the basis of the Utilities Directive, and the subcontractor only against the exclusion grounds from the Classical Directive.

2. Abnormally high price review mechanism- Directives 2014/24/EU and 2014/25/EU

A practice that is unfavourable from the point of view of public procurement and the principle of obtaining the best value for money is not only the unjustified underpricing by contractors in their bids but also the offering of services, supplies or works at inflated prices. At the same time, contracting authorities with regard to prices that appear to be abnormally high, as opposed to abnormally low, have neither the possibility to demand explanations nor to counteract such practices in other ways. It is therefore proposed that the existing

mechanisms in the Directives relating to the examination of an abnormally low price can also be applied by contracting authorities to bids containing prices which appear to be abnormally high.

3. **Unified grounds for cancellation of proceedings**- Directives 2014/24/EU and 2014/25/EU

One of the circumstances in which the possibility of cancelling proceedings should be allowed is a change of circumstances affecting the legitimacy of continuing the proceedings, e.g. a significant change in the conception of the implementation of the project or investment programme within the framework of which the contract is to be awarded, or a significant change in the conception of the implementation of the contract itself, or the failure of the contracting authority to allocate funds for the implementation of the contract.

4. **Flexibility in the criteria for the evaluation of bids in framework agreements-** Directives 2014/24/EU and 2014/25/EU

By definition, the purpose of a framework agreement is to establish the framework conditions for future contracts to be awarded to the contractors with whom the framework agreement is signed. Framework agreements are often concluded at a point in time when the detailed terms of the contracts to be granted under them are not yet known and are detailed at the stage of procedures for the award of the implementing contract, i.e. after such contract has been put back into competition. It is advisable to approach framework contracts more flexibly by allowing contracting authorities to conclude such contracts following a procedure in which tenders were selected based on criteria other than price. This would not apply to cases where contracts under a given framework agreement are awarded under the terms and conditions of that framework agreement without re-exposing them to competition, i.e. the cases referred to in Article 33(4)(a) of Directive 2014/24/EU.

This possibility arises from the EC explanatory document (EXPLANATORY NOTE- FRAMEWORK AGREEMENTS-CLASSIC DIRECTIVE) available on the EC public procurement website:

https://ec.europa.eu/docsroom/documents/15474

However, the explicit introduction of such a possibility in the Directives will provide greater legal certainty for its use in practice, which may contribute to the popularity of this method among contracting authorities. Currently, framework contracts are hardly used in the EU.

5. **Early contractor involvement (ECI), Alliance**

The execution of complex projects presents numerous challenges. Executing them under standard formulas very often leads to schedule and budget exceedances and numerous disputes, not infrequently to contractors walking off the site. One of the key risks is the likelihood of suboptimal preparation of the description of the subject of the contract.

This risk can be partially mitigated by the design-and-build formula, but this formula also has numerous disadvantages, as it usually leads to a deterioration in the quality of construction works and functionality of the object of investment- in order to maximise the contractor's profit.

The experience of the few contracting authorities in the EU up to now, especially in Finland and, until recently, also in the UK, shows that these risks can be better managed in so-called collaborative early contractor involvement (ECI) models. These have various names - including early contractor involvement, alliance, integrated project delivery, team project delivery (Bouwteam).

For instance, in one such model, the contracting authority entrusts the preparation (planning, design) of the investment to contractors it selects (designers, experts), who, however, in the process cooperate, with the

participation of the contracting authority, with the future general contractor of the investment selected already at the preparation stage in a specially prepared procurement procedure. On the basis of the current directives, this is a non-obvious solution in terms of procurement, due to the fact that such a general contractor must be selected without knowing the exact scope of the investment. However, as the practical examples show, it is possible, but requires the use of open-book remuneration (based on the reimbursement of the eligible investment costs plus a margin specified in the tender, potentially using a target cost mechanism and an incentive system (pain share / gain share)) and innovative bid evaluation criteria focusing on the contractor's competence.

However, such a model can be applied in full compliance with the rules of transparency, equal treatment and fair competition. Due to its radical difference from traditional models, however, it raises doubts among contracting authorities, who discourage its use.

At the same time, these models, as the examples of investments in Finland, among others, demonstrate, make it possible to reduce the risks of exceeding deadlines and budgets of numerous disputes, while at the same time increasing the quality and innovation of the investment and ensuring its efficiency.

For this reason, explicitly stipulating in the Directive the permissibility of such solutions will allow investments to be better implemented, especially in large, complex projects, which is particularly important in the context of the challenges facing infrastructure in the European Union in the coming decades.

6. Appointed subcontracting

In the international practice of complex execution of infrastructure investments and other complex projects, the model of subcontracting, also known as nominated subcontracting, has been successfully used for years. This solution is provided for, among other things, in the FIDIC contract conditions commonly used in such investments.

These complex projects are most often executed by entrusting their execution entirely to a single general contractor. However, it is not uncommon for such projects to involve highly specialised supplies, works, or services, the functionality, quality, and durability of which are of key importance to the contracting authority. When there are only a handful of contractors for such specialised contracts, the range of general contractors who can undertake the remaining scope of work may also be limited. To influence the selection of the specialist contractor and its terms and conditions, the contracting authority may, admittedly, issue such a contract separately and execute two contracts in parallel with two contractors: a specialist contractor (specialist works) and a general contractor (remaining scope of works). In this situation, however, the duty of coordination and the risk of integration rests with the contracting authority. The use of the nominated subcontracting model, on the other hand, allows the contracting authority to retain control of the procurement of the key specialised supplies, works or services for the entire project, while transferring the duty of coordination and the risk of integration to the general contractor of the project, who is better able to manage them. Importantly, at the heart of the proposed change is the assumption that each appointed subcontractor as well as the general contractor will be selected in public procurement procedures, thus there is no risk to fair competition or equal treatment of contractors.

At present, the public procurement coordination directives only provide for the possibility of providing that key parts of the contract should be performed by the contractor itself or by one of the members of the consortium, thus introducing an exception to the general rule of wide acceptance of subcontracting in public procurement

and reliance on third parties' resources. For the reasons indicated above, it is justified to introduce the possibility of instructing the general investment contractor to treat a specialised contractor, separately selected by the contracting authority, as its subcontractor (appointed by the contracting authority), not so much limiting the possibility of using subcontracting, but leaving the contracting authority to decide how, in certain circumstances, the contractor should use subcontracting.

Although this model should also be considered acceptable under the current Directives, its admissibility under the Directives may be questionable, and therefore the explicit confirmation of this possibility in the Directives will provide greater legal certainty for its application in practice, which may contribute to the popularity of this method among contracting authorities. Ultimately, this will increase competition in the market and reduce the number of disputes over complex investments.

7. Clarification of access to contracts for third-country economic operators - Directives 2014/24/EU, 2014/25/EU, 2014/23/EU

The rules on access of economic operators from third countries that do not have a public procurement market access agreement with the EU should be more clearly defined in the Directives, including taking into account the CJEU judgment of 22 October 2024 in Kolin Inşaat Turizm Sanayi ve Ticaret (Case C-652/22). Until the Directives are amended, it is advisable to update the EC guidelines on access to the EU[1] public procurement market by third-country economic operators and clarify in particular issues such as the possibility to limit the participation of such economic operators in public procurement procedures also as a member of a consortium, resource provider or subcontractor.

8. Clarification of provisions on contracts awarded to related entities - Directive 2014/23/EU

The Concessions Directive uses the term 'services/works provided to the contracting authority' in this context. This wording raises questions of interpretation under the Concessions Directive, where, in the case of concessions, the recipients of the services or the users of the built infrastructure are external users and it is usually they who pay for these services or the possibility to use the infrastructure, even though the concession contract is signed with the contracting authority. The proposed amendment is intended to clarify that the required percentage of revenue may include revenue from contracts performed directly for the contracting authority and from concession contracts concluded with the contracting authority, even though the payments come from external users of the infrastructure or service.

9. Amendments to the sanctions legislation in light of Russia's aggression against Ukraine - Council Regulation (EU) NR 833/2014

It is necessary to clarify the wording of Article 5k(1) of Council Regulation (EU) NR 833/2014 of 31 July 2014 concerning restrictive measures given Russia's actions destabilising the situation in Ukraine accordingly. According to the aforementioned provision, it is prohibited to award or continue to award any public contract or concession falling within the scope of the Public Procurement Directives to or with the participation of:

a. Russian nationals, individuals residing in Russia or legal persons, entities or bodies established in Russia;
b. legal persons, entities or bodies in which more than 50 per cent of the ownership rights are directly or indirectly held by an entity referred to in point (a) of this paragraph; or

[1] COMMISSION COMMUNICATION Guidelines on the participation of third-country bidders in the EU public procurement market and the introduction of goods from third countries into that market (2019/C 271/02)

c. individuals or legal persons, entities or bodies acting on behalf of or at the direction of an entity referred to in points (a) or (b) of this paragraph, including subcontractors, suppliers or entities whose capacities are relied on within the meaning of the Public Procurement Directives, where they account for more than 10% of the value of the contract.

The present formulation of the provisions of the Regulation raises doubts as to their interpretation and thus affects the practice of awarding public contracts covered by the Directives, leading to situations where the aforementioned provisions are interpreted in a way that allows them to be circumvented in practice. For instance, the EC document 'Consolidated FAQs on the implementation of Council Regulation No 833/2014, Council Regulation No 269/2014, Council Regulation (EU) No 692/2014 and Council Regulation (EU) 2022/263' indicates that the limit of 10 per cent of sanctioned subcontractors applies to each subcontractor individually and not jointly.

By interpreting and applying these provisions in this manner, it is possible to execute the contract entirely with sanctioned subcontractors (ten sanctioned subcontractors at 10% of the contract value each) and, therefore circumvent the entire regulation.

Pending amendments to the content of the regulation, if any, it is advisable to update the EC guidelines contained in the aforementioned document as soon as possible, in a spirit which takes into account not only the literal wording of the relevant provisions but also the purpose of the regulation.

Business & Science fully supports efforts to modernise public procurement regulations in the European Union. We believe that the introduction of the above changes will contribute to greater efficiency, transparency, and fairness in public procurement while at the same time enhancing the competitiveness and innovation of the European market.

About BSP

Business and Science Poland (BSP) is a multi-sectoral business federation based in Brussels representing 180.000 jobs from industrial, chemical, transport, agricultural and digital sectors, dedicated to connecting leading Polish enterprises and the R&D community with the European Union's agenda. BSP is committed to upholding the EU's core values while actively contributing to its transformation in a responsible and effective way.