EUROPEAN COURT OF AUDITORS

Opinion No 1/2015

(pursuant to Articles 322 and 325 TFEU)

concerning the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union

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THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 322 and 325 thereof, together with the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof;

Having regard to the proposal for a Regulation[1] of the European Parliament and of the Council amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union[2] ("the Financial Regulation");

Having regard to the request for an opinion on the abovementioned proposal, sent by the Parliament to the Court of Auditors on 23 July 2014;

Having regard to the request for an opinion on the abovementioned proposal, sent by the Council to the Court of Auditors on 18 July 2014;

Having regard to the adoption of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC[3] (hereinafter "Directive 2014/24/EU"), and the adoption of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts[4];

HAS ADOPTED THE FOLLOWING OPINION:

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[1] COM(2014) 358 final of 18 June 2014.

[2] 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, OJ L 298, 26.10.2012, p. 1.

[3] OJ L 94, 28.3.2014, p. 65.

[4] OJ L 94, 28.3.2014, p. 1.

I. GENERAL REMARKS ON THE CONTENT AND AIMS OF THE PROPOSAL

Purpose of the proposal for a Regulation

1. The proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union was drafted with a view to bringing those rules into line with the public procurement rules in Directive 2014/24/EU and in Directive 2014/23/EU on the award of concession contracts.

2. The Court of Auditors approves of this goal of alignment. This is because, firstly, the reason for improving the legal framework surrounding public procurement is to increase the efficiency of public spending and thus to contribute to the sound financial management and legal certainty for which the Member States[5] and the Union are required to strive. Secondly, in order to ensure consistency between its policies and activities[6], and in line with the principle of sincere cooperation[7], the Union must make sure that the aims of the financial rules applicable to its general budget (the Financial Regulation) are similar to those of the directives referred to above. Moreover, except where duly justified, it must at least accurately replicate the provisions of the directives where the way those provisions are to be implemented is not at the discretion of the Member States.

3. The alignment process would mean the legislator adopting rules amending the Financial Regulation, and the Commission adopting delegated acts. Since the provisions of the Financial Regulation and the rules of implementation are closely linked, the Court of Auditors considers that it should be informed about the

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[5] Recital 2 to Directive 2014/24/EU.

[6] Article 13 of the EU Treaty, Article 7 TFEU.

[7] Article 4(3) of the EU Treaty.

amendments which the Commission proposes to the rules of application before the legislator adopts the rules amending the Financial Regulation.

4. With regard to the legal basis of the proposal adopted by the Commission to amend the Financial Regulation, the Court of Auditors notes that this proposal also involves a considerable number of rules aimed at reinforcing the protection of the EU's financial interests by the implementation at the Commission of a system to rapidly detect risks to those financial interests. The proposal should therefore also have Article 325 of the TFEU as its legal basis. Reference to this article, however, is missing from the citations to the proposal for a regulation submitted for an opinion.

Infringement of the rules on decision-making; impediment to the objective of clarification

5. The Court of Auditors considers that dividing the topic of public procurement between, on the one hand, the Financial Regulation and, on the other, the rules of application infringes the rules on and procedures for decision-making as set out in the Treaties and clarified by the case-law of the Court of Justice. This is especially true of the use of certain key terms and concepts, which are neither defined nor explained in the proposal for a Regulation (see paragraphs 21, 23, 35, 39, 41 and 42), although, pursuant to Article 290 TFEU, only non-essential elements of the financial rules can be the subject of a delegated act. Rules which are essential in this area must be placed under the joint responsibility of the European Parliament and the Council[8].

6. The Court of Auditors therefore is of the opinion that the legislator cannot delegate to the Commission, under Article 290, the power to determine the essential elements relating to public procurement – as would be done through the current proposal for a Regulation.

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[8] Judgment of the Court of 17 December 1970 in Köster, paragraph 6 (Case 25/70, ECR p. 1162).

7. Moreover, given that the proposal would probably place most key notions and concepts of public procurement in the regulation containing the rules of application, the Court of Auditors is unable to appraise whether this revision would fully achieve the objective of clarifying the public procurement rules. We would note in this regard that the Public Procurement Directive sought to clarify certain basic notions and concepts so as to offer better guarantees of legal certainty and to incorporate the relevant case-law of the Court of Justice of the European Union[9].

8. Lastly, this division is detrimental to the objective of clarification which underlies the reform of the public procurement rules, and around which the text of Directive 2014/24/EU was designed and built. The fact of the matter is that understanding of the procurement rules applicable to the institutions is rendered more complex by envisaging the alignment process as the revision of two legal acts in parallel, and by importing provisions from the Directive without retaining the structure of the normative text[10].

9. The Court of Auditors recommends that priority be given to compliance with the decision-making process and to the objective of clarification. In the Court's view, that objective would be met by codifying all the public procurement rules applicable to the institutions in a separate regulation, which would make the rules easier to comprehend and consult[11].

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[9] Recital 2 to Directive 2014/24/EU.

[10] For example, the content of Article 57 of Directive 2014/24/EU is spread across several articles of the Financial Regulation.

[11] Like ECB Decision of 27 January 2009 amending Decision ECB/2007/5 laying down the Rules on Procurement (ECB/2009/2), OJ L 51, 24.2.2009, p. 10.

Financial rules not fully aligned with the objectives of the directives revising and modernising the public procurement rules

10. The reasons for revising and modernising the rules on public procurement through the adoption of procurement directives 2014/23/EU and 2014/24/EU are "to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals"[12].

11. The Court of Auditors recommends that there be a clear reminder of these objectives in the recitals to the proposed regulation. In the current proposal, they are only partially listed in the explanatory memorandum, which states that "[new] provisions are introduced, such as […] the introduction of compliance with environmental, social and labour law as a key requirement …". The objectives should also be established more firmly through the normative part of the regulation.

12. Firstly, therefore, the aim of making better use of public procurement in support of common societal goals should be clearly expressed, but with the proviso that using public procurement in this way cannot be allowed to detract from the sound financial management of the EU budget. Secondly, the obligation to comply with environmental, social and labour law should be reiterated among the general principles that are applicable to procurement (see paragraph 20) and accompanied by explicit sanctions against non-compliant tenderers or contractors (see paragraphs 34 and 40).

13. The Court of Auditors recalls its observation that the legal obligations imposed on EU institutions with regard to green procurement are currently less

[12] Recital 2 to Directive 2014/24/EU.

demanding than those imposed by EU legislation on Member State authorities[13]. By way of sector-specific directives Member State authorities are required to exploit the potential of public procurement to contribute to the Europe 2020 strategy for smart, sustainable and inclusive growth. These requirements[14] should be therefore made applicable also to public procurement by the EU institutions.

14. The objective of facilitating the participation of small and medium-sized enterprises in public procurement should also be expressly taken up in the proposal for a Regulation. The Court of Auditors considers that the following areas in particular should be covered in order to promote the participation of SMEs: the obligation to justify a decision not to subdivide a contract into lots (Article 46(1) of Directive 2014/24/EU), the compulsory use of e-Certis (Article 61), direct payments to subcontractors (Article 71(7)), monitoring of the application of public procurement rules (Article 83(3)) and the public availability of information and guidance on the interpretation and application of the public procurement legislation binding the institutions and bodies of the EU (Article 83(4)).

Unsuitability of the proposed mechanisms to protect the financial interests of the European Union

15. The Court of Auditors can only support stronger measures to protect the EU's financial interests by means of an effective risk detection system. The Court of Auditors considers that the Commission should continue to be the only institution entrusted with managing the central exclusion database, using timely information sent by the other institutions and bodies of the EU.

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[13] See paragraph 80 of ECA Special Report No 14/2014 "How do the EU institutions and bodies calculate, reduce and offset their greenhouse gas emissions?".

[14] Now also set out in recital 95 to Directive 2014/24/EU.

16. However, the provisions of Articles 106 and 108 of the proposal for a Regulation, which concern the establishment, through new ad hoc panels, of a centralised system of penalties for economic operators to be operated by the Commission, are mostly incompatible with autonomy for the other institutions and bodies in organisational matters. A system of this kind could remove those institutions' and bodies' control over their own procurement procedures and the management of their own contracts, despite the fact that they are granted that autonomy by the Treaty and the Financial Regulation and, in their capacity as authorising bodies, they are best placed to exercise such control. Another concern is that the proposed decision-making process would be long and complicated in a field where rapid action is paramount. The system would be likely to generate conflicting responsibilities among the authorities and panels charged with the protection of financial interests – and with OLAF in particular[15].

17. It is vital to bear in mind that the measures to exclude or reject economic operators from procurement procedures are similar to the exclusionary sanctions which national criminal jurisdictions may impose on legal persons. The Court of Auditors considers that the system envisaged by the proposal for a Regulation should be revised in the light of the principles that penalties must be defined by law and be proportionate and that the right of defence must be respected.

18. Finally, the reasons for amending the current exclusion system should be made clearer in the preamble. Although the objective of improving the rules in this

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[15] For example, pursuant to Article 7(6)(b) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, it is in principle for the institution concerned to take suitable precautionary administrative measures, such as decisions to exclude a party from a public procurement procedure. Under the proposed system, however, exclusion decisions would be the remit of an ad hoc panel to which the institutions would turn as and when necessary.

regard is given in a general way, it is not possible to identify which elements of the system were targeted for improvement.

II. SPECIFIC COMMENTS BY ARTICLE

19. This section contains the Court of Auditor's analysis of the proposal for a Regulation from the point of view of the objectives of revising and modernising the public procurement rules, which led to the adoption of the public procurement directives, and from that of the objective of protecting the Union's financial interests. The Court of Auditors has examined these objectives for each article in turn. Comments are made where the process of alignment with the directives appears to be incomplete or where improvements are needed to the proposed mechanisms for the protection of financial interests.

Article 102[16] – Principles applicable to procurement procedures and contracts

20. By reference to Article 18(2) of Directive 2014/24/EU, the Court of Auditors considers that a general principle should be added governing the execution of contracts in accordance with the law and reflecting the necessary societal goals to be achieved. We propose that the following paragraph be added to Article 102:

"When awarding and executing contracts, the contracting authorities shall implement suitable measures to ensure that smart, sustainable and inclusive growth be supported and that economic operators comply with the environmental, social and labour law obligations established by EU or national legislation, collective agreements or the international environmental, social and labour conventions listed in Annex X to Directive 2014/24/EU."

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[16] All of the articles to which these comments refer are addressed in Article 1(3) of the proposal for a Regulation.

Article 104 – Procurement procedures

21. Article 104(1) of the proposal for a Regulation contains a list of procurement procedures. The article should be expanded to include a definition of each procedure, together with the conditions in which procedures of an exceptional nature (competitive procedure with negotiation, competitive dialogue, negotiated procedure) may be used. This is all part of the key notions and concepts of public procurement which may not be delegated under Article 290 TFEU.

22. For the sake of clarity and completeness, Article 104(5) of the proposal should be expanded and amended as follows: "The Commission is empowered to adopt delegated acts, in accordance with Article 210, establishing detailed rules on the types of procurement procedure for the award of concession contracts or public contracts of a value above or below the thresholds set in Article 4(a) and (b) of Directive 2014/24/EU, and on ~~dynamic purchasing system~~ joint and interinstitutional procurement~~, low value contracts and payment against invoices~~.".

Articles 106 and 108 – Exclusion criteria and exclusion system

23. Given the nature of the penalty of exclusion from participation in procurement which can be imposed on economic operators, the situations and circumstances in which this penalty can be applied must be placed in a legal framework that is clear, precise and subject to restrictive interpretation. In this regard, the proposed text contains a good deal of uncertainty, in particular in the following areas:

– There is no definition concerning what is meant by "administrative decision" in Article 106(1)(b), (c) and (f). A decision of this kind would not be analogous to a final judgment unless it were stated, as in Article 57 of the Directive, that it is an *administrative decision* "having final and binding effect in accordance with the legal provisions of the administrative authority of the Member State or of the Union that took the decision".

– Regarding, in particular, the cases referred to in Article 106(1)(d), the proposal should be expanded to bring it into line with Article 57(1) of Directive 2014/24/EU. This is because the requirement for exclusion on this basis can only be justified here if the economic operator (or its representative) has been the subject of a conviction by final judgment for the offences in question. The ad hoc panel referred to in Article 108 would not be competent to establish evidence of this kind of offence. It can legitimately be asked how such a body would be capable of establishing evidence of fraud, corruption or child labour. It should be noted that if behaviour involving fraud or corruption has been observed in public procurement procedures or grant contracts financed by the European funds and no final legal judgment has been made on this, then those responsible may be excluded from participation in public procurement on the basis of Article 106(1)(b) and/or (f), since such behaviour can be defined as an irregularity[17] and/or may be considered as serious professional misconduct.

  Furthermore, it should be remembered that an economic operator would also be excluded from participation if it were the subject of a decision to freeze funds in the context of an international (UN or EU) or national financial penalty. The contracting authority would be bound by the effects of such a decision, irrespective of whether or not Article 106 of the Financial Regulation were applied. The following proposal is made:

  "An economic operator shall be excluded from participation in procurement procedures in cases of:

  […]

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[17] The term 'irregularity' is defined in Article 1(2) Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ L 312, 23.12.1995, p. 1) (in particular, see the sixth recital which states that "the aforementioned conduct includes fraudulent actions as defined in the Convention on the protection of the European Communities' financial interests").

(d) fraud, corruption, participation in a criminal organisation, money laundering, terrorist financing, terrorist-related offences, child labour or other forms of trafficking in human beings, ~~on the basis of evidence established by the panel referred to in Article 108 or as established by a final judgement~~ where it is established that the economic operator has been the subject, for one of these reasons, of a conviction by final judgment or of national or international sanctions to freeze its assets;

[…].”

– The proposal does not include definitions of the essential notions listed as constituting grounds for exclusion, namely, serious breach of obligations, serious professional misconduct, irregularity, etc.

– The proposal contains no provisions on the operation of these ad hoc panels or their investigative powers, which should actually be covered by the Financial Regulation.

– Article 108(2) gives no details of the nature of the “preventive temporary and conservatory measures in the implementation of the budget” which a responsible authorising officer might take if exclusion has not (yet) been agreed by the panel. Under Article 107 (see below), an economic operator could only be excluded – i.e. rejected – from a given procurement procedure if in one of the situations referred to in Article 107, and this would be impossible as a preventive temporary measure. Moreover, an operator cannot be rejected temporarily from a specified procedure. That being the case, the proposal should be expanded in order to indicate what other effective measures the responsible authorising officers could take.

– The text does not address the matter of double punishment. It should make it clear that any decision of exclusion already imposed is not to be repeated under

any such criminal penalties a Member State may impose when OLAF subsequently refers a case to a national judicial authority.

24. Under the proposal, the situations which might give rise to exclusion in the event of a serious breach in the performance of contractual obligations (Article 106(1)(e)) would be limited to cases where there are risks to the Union's financial interests, since the scope of action of the panel referred to in Article 108 would be similarly restricted. However, although a contractor may be in serious breach of its contractual obligations, that will not necessarily entail a risk to the Union's financial interests. Moreover, it should be possible to exclude an economic operator which has failed to meet the applicable obligations referred to in Article 18(2) of Directive 2014/24/EU (and taken up in Article 102 of the proposal – see above) by reference to Article 57(4)(a) of the Directive.

25. The question of the authority responsible for applying exclusion sanctions, and publishing them accordingly, must be clarified. On the one hand, the proposal does not deal with these questions regarding exclusion cases where panel intervention is not necessary because, for example, a final judgment has already been made on an economic operator or because of bankruptcy proceedings. On the other hand, when panel intervention is planned, according to the terms of Article 108, to make a ruling on an exclusion case, it would seem that decisions on exclusion and financial sanctions could only be taken by that panel, thus depriving the contracting authority of the autonomy to take decisions which it had in this case and which is necessary for it to carry out its administrative activities effectively. It is, therefore, the contracting authority which is best placed to know whether there can be considered to have been a serious breach in the performance of contractual obligations. There is no case for the intervention of an ad hoc panel, which would also infringe institutional autonomy.

26. Article 106(3) of the proposal would restore to the contracting authority a decision-making role in regard to penalties. This does not appear to square with the

reasoning behind Article 108, which states that decisions to impose an exclusion penalty would be for the Commission to take through a panel set up for that purpose. It would therefore be logical to move this clause to Article 107, which deals with the rejection of an economic operator from a given procedure, since it is in that context that the contracting authority should be allowed some discretion to assess whether to enforce or maintain exclusion in a specific procurement procedure which it has launched.

27. The question of the competent decision-making authority must also be clarified with regard to the requirement for transparency in relation to means of redress (Article 97 of the Financial Regulation). When sanction decisions (exclusion and financial) are taken by the panel, appeals against its decisions must be directed against the Commission, which set up the panel that acts on its behalf. This also means that appeals against decisions by contracting authorities to reject applications or tenders, motivated by an exclusion sanction taken by the panel, are inadmissible because the adversely affecting act is the sanction decision (see also paragraph 32).

28. On the basis of Article 261 of the TFEU, the text must allow for the Court of Justice to be given unlimited jurisdiction with regard to exclusion sanctions taken pursuant to these Articles.

29. The last subparagraph of Article 108(3) must be supplemented by allowing for an appeal to be made against the rejection of a request to revise the exclusion decision under Article 108(3)(g).

30. In its current form, Article 108(3) provides that, where there are compelling legitimate grounds to preserve the confidentiality of the investigation or of national judicial proceedings, exclusion could be imposed for fraud (Article 106(1)(d)) or irregularity (Article 106(1)(f)) without giving the economic operator a prior hearing. This exception to the basic rights of due process must be more closely managed. The Court of Auditors recommends that when the body is considering recourse to this

exception, it should obtain prior written authorisation from the future Controller of Procedural Guarantees[18].

Article 107 – Rejection from a given procedure

31. According to the explanatory memorandum and recital 15 to the proposal for a Regulation, the exclusion criteria would henceforth be clearly separate from the criteria leading to a possible rejection from a given procedure. However, this is accurate only for the situations described in Article 107(1)(b) and (c). This is because, whether an economic operator is to be excluded or rejected from participation in a given procedure, the situations referred to in Article 106(1) and (2) are identical, as is the procedure to be followed. Rejection would depend, not on an assessment by the contracting authority, but on a final judgment, an administrative decision or a decision taken by the panel referred to in Article 108. To mark this intention of separating the two situations in the interest of effectiveness and institutional autonomy, Article 107 should be completely aligned with Article 57(4) of Directive 2014/24/EU, while fully restoring to the contracting authority the power to decide whether to reject an economic operator from a given procedure.

32. In order to respect the right of defence, Article 107 should be supplemented by specifying that, prior to the decision to reject a given procedure, the contracting authority must give the tenderer or applicant the possibility of presenting its point of view on the rejection. Rejection decisions taken on the basis of false declarations[19] or because an economic operator previously participated in the preparation of the

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[18] As an analogy in relation to this, see the Court of Auditors' recommendation in paragraph 17(b) of Court of Auditors Opinion No 6/2014 concerning a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of Procedural Guarantees.

[19] Judgment of the General Court of 26 September 2014, Flying Holding NV & Consorts, T‑91/12 and T‑280/12, paragraphs 63-67.

tender documents shall be considered acts adversely affecting them. However, in cases where the rejection decision has been taken following a sanction decision adopted by the Commission, via the body acting in its name, the rejection decision must be considered to confirm the exclusion sanction decision, which constitutes the act adversely affecting them. The tenderer or applicant should no longer be heard. The following paragraph is proposed: "Before taking a decision to reject a given procedure, the contracting authority shall give the economic operator the opportunity to submit its observations, unless the rejection of the tender or application to participate in the tender has been justified by a sanction exclusion decision taken with regard to it, following a hearing of its observations".

33. Article 107 of the proposal no longer gives conflict of interest as a reason for rejecting an economic operator from a procurement procedure. However, this situation is the subject of Article 57(4)(e) of Directive 2014/24/EU. Article 107 of the proposal merely refers to the situation of conflict of interest in which a tenderer involved in preparing the procedure may be placed. This is a specific situation which differs from the conflict of interest referred to in Article 57(4) of the Directive. It is certain that for most conflict of interest cases, within the meaning of Article 57 of the Financial Regulation, between a member of staff of the contracting authority and an economic operator, the contracting authority must remove the staff member from the award procedure concerned, rather than the economic operator. However, these grounds for rejecting the economic operator must be added to cover cases, in particular, where the operator is economically linked to the company which is involved in the implementation or management of part of the budget allocated to the contract which is the subject of an award procedure. We propose adding a subparagraph to cover this cause for rejection: “(d) is in a situation of conflict of interest, within the meaning of Article 57, which cannot be remedied by other less intrusive measures”.

Article 110 – Award of contracts

34. To satisfy the stated objectives of this draft revision, Article 110(1) of the proposal for a Regulation should state, on the basis of Article 56 of Directive 2014/24/EU, that "contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable environmental, social and labour law obligations established by EU or national legislation, collective agreements or the international environmental, social and labour conventions listed in Annex X to Directive 2014/24/EU".

Without a provision of this kind, it would be impossible to reject such tenders unless non-compliance with the obligations resulted in a bid that was abnormally low or failed to satisfy the minimum requirements specified in the tender.

35. The award criteria must be defined in the regulation because they are essential elements of public procurement. The regulation must, therefore, define the meaning of the "most economically advantageous tender". In this respect, Article 67 of Directive 2014/24/EU should be referred to in its entirety, including paragraph 2(b) which mentions an award criterion which was established in case-law: "*[…]* qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract". This is a development in the case-law, which reflects a real need on the part of contracting authorities and helps to increase the efficiency of public spending. Contracting authorities must be able, in particular in relation to intellectual knowledge-based service contracts, to evaluate the technical value of a tender on the basis of the technical quality and professional experience of the team members

proposed by a tenderer to perform a contract or a framework contract[20]. Where the proposal for a regulation forms part of an alignment process in relation to the above objectives, this basic element of the award criteria cannot be omitted.

Article 112 – Contacts during the procedure

36. To ensure consistency and clarity of the Financial Regulation, Article 112 should refer across to Article 96. We propose the following wording: "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 and conform to the principles of good administration set out in Article 96. After the time limit for receipt of tenders, these contacts shall not lead to changes to the procurement documents or to substantial changes to the terms of the submitted tender, except where a procedure set out in Article 104(1) specifically allows for these possibilities."

Article 113 – Award decision

37. The proposed wording of Article 113(2)(2) and (3)(a) would not require the contracting authority, in the case of specific contracts awarded under a framework contract with reopening of competition, to notify the contractors whose tenders have been rejected of the reasons for their rejection, the relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded. This exception to the rules governing transparency and the obligation to state reasons cannot be justified.

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[20] Judgment of the General Court of 17 October 2012, Evropaïki Dynamiki/Court of Justice, T‑447/10, paragraph 53 and Judgment of the General Court of 25 November 2014, Alfastar Benelux SA/ Council of the European Union, T-394/12, paragraph 159.

Article 114a – Performance and modifications of the contract

38. Regarding the legal framework for modifications to a contract during execution, Directive 2014/24/EU contains new details which incorporate the case-law of the CJEU in this area. This states, as noted in recital 107 to the Directive, that, while contracts can be modified, "[a] new procurement procedure is required in case of material changes to the initial contract". In this regard, Article 114a(2) is worded as follows: "The contracting authority may modify a contract or framework contract substantially without a procurement procedure only in cases provided for in the delegated acts adopted pursuant to this Regulation and provided the substantial modification does not alter the subject matter of the contract or framework contract." To bring the financial rules into line with the Directive and EU case-law, the words "substantially" and "substantial" should be struck from this paragraph or replaced with an antonym.

39. The proposal for a Regulation does not explain what kinds of modification may be made to a contract during execution. However, these concepts are part of the essential elements of public procurement which must be defined in the Financial Regulation. Unless otherwise justified by virtue of the specific nature of contracts financed by the EU budget, the wording used should be that in Article 72 of Directive 2014/24/EU.

Article 116 – Substantial errors, irregularities or fraud

40. It is always for the contracting authority to activate the mechanisms of contractual penalties, which includes contract termination (see, in particular, Article 116 of the Financial Regulation). Serious and substantial infringement of contractual obligations which may result in a financial or exclusion sanction on the basis of serious breach of contract must be mentioned in Article 116 of the Financial Regulation as a reason for suspension and termination of the contract. These cases should be distinguished from cases of substantial errors. In addition, serious breaches of contractual obligations must be punishable with contractual sanctions even when the

breaches would not be prejudicial to the EU's financial interest. This would make it possible to cover, in particular, cases where breaches of contract or non-compliance with the applicable environmental, social and labour law obligations established by EU or national legislation, collective agreements or the international environmental, social and labour conventions listed in Annex X to Directive 2014/24/EU would not entail a loss to the EU budget.

Article 118 – Thresholds applicable and standstill period

41. The rules concerning the methods for estimating the value of the contract are considered essential to the subject of public procurement because they govern the choice of the award procedure. Consequently, these rules should be included in the Financial Regulation. In this context, it should be pointed out that, like the rules on estimating the value of framework contracts and contracts in dynamic purchasing systems, for the procedure following a call for expressions of interest, the value to be considered must be the maximum value of all the planned contracts throughout the entire duration of the list drawn up following the call for expressions of interest.

42. Given that the rules on penalties for non-observance of the standstill period are an essential element of public procurement, a clause should be added to Article 118 to the effect that “contracts signed before the end of the standstill period shall be void”. In the absence of any such dissuasive sanction, this obligation is in danger of being ignored. Compliance with the standstill period requirement, however, is an intrinsic part of an effective remedy system in the area of public procurement which both the EU and the Member States should guarantee.

This Opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 15 January 2015.

For the Court of Auditors

Vítor Manuel da SILVA CALDEIRA

President