



## Public Procurement

# Subcontracting

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Authorised for publication by Karen Hill, Head of the SIGMA Programme

2 Rue André Pascal  
75775 Paris Cedex 16  
France

<mailto:sigmaweb@oecd.org>

Tel: +33 (0) 1 45 24 82 00

Fax: +33 (0) 1 45 24 13 05

[www.sigmaweb.org](http://www.sigmaweb.org)

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## Introduction

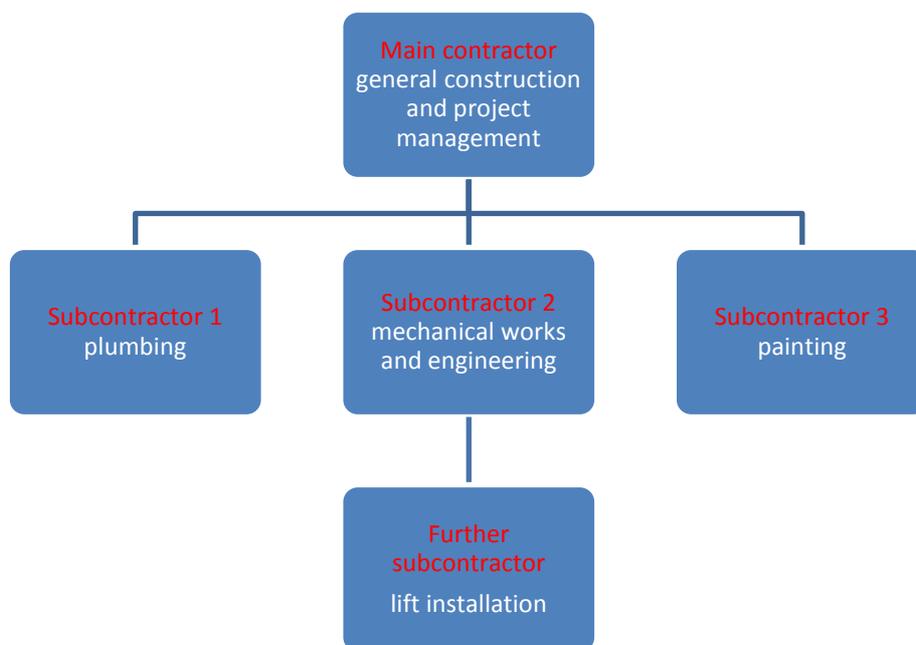
Subcontracting occurs when an economic operator that has been awarded a public contract (contractor) entrusts another entity with the performance of part of the works or services that are the subject matter of that contract. The second entity, entrusted with the performance of part of the works or services, is referred to as a “subcontractor”.

The contractor may use one or more subcontractors. Subcontractors may also subcontract some elements of the works or services that they are required to deliver in accordance with the subcontracting arrangements with the contractor (further subcontracting).

Even though the subcontractor is involved in the execution of part of the contract, it is the contractor that is ultimately responsible and liable to the contracting authority for the proper execution of a contract.

In many cases, subcontracting may be necessary or useful. For example, for construction works, the main contractor may decide to entrust other companies with a number of specialised activities, such as plumbing, mechanical and engineering works, and painting.

### Construction works contract for a new building – subcontracting arrangements



A similar situation applies to training services, where the service provider may need to subcontract to other economic operators the catering services, accommodation and transport for participants.

The Public Sector Directive (the Directive)<sup>1</sup> does not define the term “subcontracting”. This term is defined, however, in the national provisions of some Member States. For example, in Poland, a subcontract is defined as a written contract for pecuniary interest having as its subject matter the services, supplies or works that constitute part of the public contract concluded between an economic operator selected by the contracting authority and another entity (subcontractor). A subcontract for services, supplies or works may also be concluded between the subcontractor and a further subcontractor or subcontractors. Similarly, Italian provisions define subcontracting as a contract according to which a contractor entrusts third parties with the execution of a part of the services or works that are the object of the public contract.

National definitions, where used, have common characteristics, in that they either specify or imply that subcontracting may concern only a part or parts of a contract. Sometimes, national legislation specifies a maximum share of the contract that can be subcontracted to third parties, expressed as a percentage of the total value of the procurement contract.

### Reasons for subcontracting

Economic operators have various and good reasons to use subcontracting. It often makes good financial and business sense to do so. For example, an economic operator (contractor) may find that it is less expensive to use a specialist subcontractor for a specific element of a contract rather than executing that element of the contract itself. The reason for this is that a specialist subcontractor will have the necessary equipment and expertise, which the contractor does not have. In certain cases, a contractor may not be authorised to provide all of the services or works required by the contracting authority.

#### Example

A contractor executing a works contract may entrust the works to another company that holds the specific authorisations or licenses necessary for the disposal of hazardous waste from a construction site.

As an alternative approach to subcontracting, the contractor and the specialist waste disposal company could create a group and jointly sign a contract with the contracting authority. However, from the perspective of the waste disposal company, this approach may be unacceptable, as the contract may require it to assume liabilities that are not connected to the tasks that it will carry out. A subcontract arrangement with limited liability is likely to be a far more appealing solution for the waste disposal company.

Subcontracting may also be useful for an economic operator that does not meet all of the qualification criteria required by the contracting authority. The economic operator is able to rely on subcontractors to supplement the capacities or resources that are lacking in order to qualify to participate in the procurement process for the award of a public contract. See the discussions below and SIGMA Public Procurement Brief 7, *Selecting Economic Operators*, for more details.

Subcontracting may also facilitate the access of small and medium-sized enterprises (SMEs) to public procurement. An SME may not be able to perform an entire contract because of its size, specialisation, or limited resources, but it may be perfectly able to perform some of the services or works included in a larger project. For more information, see SIGMA Public Procurement Brief 33, *SMEs in Public Procurement*.

There may also be cases where subcontracting is used for the wrong reasons, for example as a way of facilitating collusion or bid rigging. An advance request for details concerning prospective

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<sup>1</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

subcontractors can assist in reducing the risk of collusion or bid rigging. For more information, see the *OECD Guidelines for Fighting Bid Rigging in Public Procurement*<sup>2</sup>.

## What the Directive says about subcontracting

### Reliance on subcontractors to satisfy selection stage requirements

Article 63 of the Directive permits an economic operator to rely on the economic and financial standing as well as the technical and professional ability of a third party in order to satisfy selection stage requirements. This reliance on the capacities of other entities is allowed, regardless of the legal nature of the arrangements between the economic operator wishing to participate in a procurement process and the third parties on which it relies<sup>3</sup>. Subcontracting is one of the ways in which the economic operator and its third parties may be linked.

Annex XII to the Directive sets out the means of proof that may be provided by economic operators to demonstrate that they meet the selection criteria. Among the means of proof for technical ability is “an indication of the proportion of the contract which the economic operator intends possibly to subcontract”. The Directive is therefore very clear that an economic operator may prove that it fulfils those requirements by providing information concerning its prospective subcontractors.

During the selection process, the economic operator must be able to demonstrate that, at the contract execution stage, it will be able to use the capacities of the third parties on which it relies to satisfy the selection stage criteria. It must prove that its links with the third parties are genuine and not merely an artificial means of satisfying the selection requirements. A general requirement obliges the economic operator to prove to the contracting authority that it will have the necessary resources at its disposal. It may do so, for example, “by producing a commitment by those entities to that effect”.

Where an economic operator proposes to rely on the capacities of third parties to satisfy educational and professional qualifications or relevant professional experience, it can only do so where those third parties will actually perform the works or services for which those capacities are required.

**Limitations on the reliance on third-party resources, including subcontracting:** Article 63(2) of the Directive includes a specific limitation on subcontracting. In the case of “works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators..... by a participant in that group”.

In this case, the contractor must perform those tasks directly. It is not allowed to subcontract them or to otherwise entrust the tasks to third parties.

### Information on proposed subcontracting arrangements and subcontractors

The ability of an economic operator to rely on third parties to satisfy selection stage criteria needs to be considered by the contracting authority at the planning stage of the procurement process.

According to Article 71(2) of the Directive, the contracting authority is permitted to ask an economic operator to indicate in its tender “any share of the contract it may intend to subcontract to third parties and any proposed subcontractors”. National provisions may oblige contracting authorities to request this information from economic operators.

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<sup>2</sup> OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, OECD Publishing, Paris.

<sup>3</sup> See, for example, the case of the Court of Justice of the European Union (CJEU) C-389/92 *Ballast Neddam Groep* concerning the reliance on third-party resources within a group company structure and CJEU case C-176/98 *Holst Italia* concerning the reliance on third-party resources in the context of joint venture arrangements.

This information on subcontracting arrangements is useful for the contracting authority to have in advance so that it knows which entity or entities will be executing the contract. The request for this information must be included in the procurement documents and consideration must therefore be given to this issue at the planning stage.

In addition, as has already been noted above, a contracting authority may ask for proof from an economic operator that is intending to rely on the resources of a third party, including a subcontractor, so as to ensure that it will have the necessary resources at its disposal. It is sensible to include a request for relevant information and proof in the procurement documents.

### Verification of subcontractors

**Verification of exclusion grounds:** Economic operators can be excluded from a procurement process where the grounds for mandatory, or discretionary, exclusion apply.

Article 63(1) of the Directive provides that where an economic operator proposes to use a subcontractor for the execution of part of the subject matter of the contract, contracting authorities should verify whether there are grounds for exclusion of the subcontractor.

Where a verification process shows that mandatory grounds exist for exclusion applying to a subcontractor, then the contracting authority should oblige the economic operator to replace the subcontractor to which those grounds apply.

In the case of optional grounds for exclusion, contracting authorities may require, or may be obliged by Member States to require, that the economic operator replaces a subcontractor to which those grounds apply.

Where necessary for the purposes of verification of the existence of grounds for exclusion of a subcontractor, the required information should be accompanied by the subcontractor's self-declaration in the European Single Procurement Document (ESPD). The implementing measures adopted by Member States may provide that a subcontractor that is presented after the award of the contract cannot use an ESPD self-declaration but must submit the certificates issued by public or third parties confirming that the subcontractor fulfils, where relevant, the conditions concerning the grounds for exclusion, the selection criteria and the reduction in the numbers of qualified candidates and other supporting documents. For more information on the ESPD, see SIGMA Public Procurement Brief 7, *Selecting Economic Operators*.

**Verification of selection criteria:** Economic operators must satisfy the selection criteria.

Article 63(1) provides that where an economic operator proposes to use a subcontractor for the execution of part of the subject matter of the contract, the contracting authority is to verify whether the proposed subcontractor fulfils the relevant selection criteria.

Where a verification process reveals that a subcontractor does not satisfy the relevant selection criteria, the contracting authority must oblige the economic operator to replace the subcontractor.

Where an economic operator relies on the capacities of a subcontractor, or subcontractors, for fulfilment of the criteria for economic and financial standing, the contracting authority may then oblige the economic operator and the subcontractor(s) to be jointly liable for the execution of the contract.

## Execution of the contract

Under the Directive, an economic operator that intends to use a subcontractor, or subcontractors, to deliver part of the works or services is not automatically required to inform the contracting authority of its intention to do so.

As explained above, an economic operator will need to provide the subcontractor's details at the selection stage where it seeks to rely on the capacities of that subcontractor to fulfil selection stage criteria.

At the tender stage the contracting authority is entitled to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract and any proposed subcontractors. In some Member States it may be obliged to do so.

It may still be possible for an economic operator to notify the contracting authority of the subcontracting arrangements after it has been awarded the contract.

National law may require that an economic operator obtains prior approval from the contracting authority for any subcontracting that had not been included in the tender.

**Specific requirements for information on subcontractors:** Specific provisions in Article 71(5) of the Directive relate to works contracts and certain services contracts that require information on subcontractors to be provided to the contracting authority.

In the case of works contracts and services to be provided at a facility under the direct supervision of the contracting authority, the main contractor is required to "indicate [in a tender] to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known".

The contracting authority must request this information "after the award of the contract and at the latest when the performance of the contract commences".

The contracting authority should oblige the main contractor to notify it of any changes to this information during the execution of the contract and to provide the required information on any new subcontractors that it might subsequently involve in the works or services.

This provision is not applicable with regard to suppliers. Member States may nevertheless extend this obligation to contracts for supplies or services at facilities that are not under the direct supervision of the contracting authority and to suppliers that are involved in contracts for works or services.

Member States may also directly impose the obligation to deliver the required information on the main contractor.

## Compliance of subcontractors and subcontracting with obligations concerning labour, social and environmental law

The Directive contains a mandatory provision requiring competent national authorities to ensure that subcontractors comply with the relevant obligations deriving from the mandatory EU law or from national law compatible with EU law in the fields of social, labour or environmental law or international labour law provisions. Subcontractors therefore have the same obligations as main contractors concerning compliance with these legal regulations.

To avoid any breaches of those obligations, the Directive provides examples of "appropriate measures" that may be taken by Member States or directly by contracting authorities: joint liability and verification.

**Joint liability:** The national law of a Member State may provide for the joint liability of the main contractor and subcontractors. The Member State should ensure that the relevant rules are applied in compliance with obligations in the Directives concerning labour, social and environmental law.

**Verification:** As explained in detail above, contracting authorities may verify, or may be obliged to verify by national provisions, whether there are grounds for exclusion of subcontractors, including exclusion on the grounds of failure to comply with obligations concerning labour, social and environmental law.

### Optional provisions concerning subcontracting

The Directive provides a number of optional solutions for Member States, some of which have already been discussed in this brief. Two specific provisions – direct payment to subcontractors and information on subcontractors – are discussed further below.

Member States that decide to regulate optional provisions concerning subcontracting in their national laws may limit their applicability, for instance with respect to some types of contracts, certain categories of contracting authorities or economic operators, or contracts for certain amounts.

**Direct payments:** Member States may provide that “... at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment should be set out in the procurement documents.”

Member States may provide for more stringent liability rules under national law, or for direct payments to subcontractors without requiring them to request such direct payments.

**Extension of obligation to provide information about subcontractors:** Member States are allowed to extend the obligations concerning the provision of information required from contractors on their subcontractors in the contract execution phase to include, for instance, subcontractors of the main contractor’s subcontractors or further down the subcontracting chain.

As already explained in detail above, Member States may also extend the information requirements to supplies contracts, services contracts other than those concerning services to be provided at facilities under the direct supervision of the contracting authority, or suppliers involved in works or services contracts.

### Example of national solutions

**France:** In France<sup>4</sup>, a contractor may subcontract specific parts of the contract to third parties provided that it obtains the approval of the contracting authority concerning each and every subcontractor, as well as the conditions of its payment, in advance.

A request concerning subcontracting may take place either (1) at the tendering stage, where the bidder provides in its tender the information on services covered by subcontracting, the names of the subcontractors, and the financial conditions defined in the draft subcontract; or (2) during the execution of the contract. In the first case, the notification of the award of the contract also means the approval of the subcontracting mentioned in the winning tender, including the relevant payment conditions. In the second case, the contractor is bound to submit to the contracting authority a separate request, in writing, containing the same type of information as indicated above.

Subcontracting is allowed if both parties to the main contract sign a special agreement. The contracting authority is deemed to have approved subcontracting if it does not reply to the request of the contractor within 21 days of receipt of the request.

All subcontractors that were approved by the contracting authority are entitled to direct payment by

<sup>4</sup> *Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics, JORF n°0074 du 27 mars 2016, Articles 133-137.*  
Consolidated version dated 14 July 2016 available at:  
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032295952&dateTexte=20160714>

the contracting authority for the parts of the contract that they performed, provided that the value of the subcontracting amounts to or exceeds EUR 600.

**Poland:** In Poland<sup>5</sup>, the Public Procurement Law includes a number of provisions that have the purpose of ensuring that contractors duly pay all subcontractors. These provisions specifically target subcontracting in the case of works contracts.

Economic operators and subcontractors intending to conclude a subcontract with works as the subject matter are obliged, during the execution of that contract, to submit to the contracting authority a draft subcontract. Subcontractors, on the other hand, that intend to further subcontract are obliged to obtain the consent of the economic operator for the conclusion of a subcontract.

The time limit for payment of remuneration to the subcontractor or to the further subcontractor provided in a subcontract may not exceed 30 days from the delivery of the invoice or receipt confirming the execution of the supplies, services or works assigned to the subcontractor or to the further subcontractors.

Direct payment of due remuneration by the contracting authority is made if the economic operator or subcontractor evades the payment of remuneration to its subcontractors or further subcontractors. This remuneration, however, applies only with regard to claims for payment arising after the acceptance by the contracting authority of the subcontract. The contracting authority deducts from the remuneration owed to the economic operator the amount that it had to pay directly to the subcontractor.

The evasion of payment by the main contractor to its subcontractors resulting in multiple direct payments by the contracting authority or direct payment for an amount representing more than 5% of the value of the whole contract may give rise to withdrawal from the contract by the contracting authority.

## Practical issues related to subcontracting – Questions and Answers

**Is a contracting authority permitted to oblige a contractor to subcontract part of the contract or to use a particular subcontractor?** The Directive does not allow contracting authorities to require subcontracting. Recourse to subcontracting is at the discretion of the economic operator<sup>6</sup>.

The contracting authority may not demand that the contractor engage a specific subcontractor. Such a requirement would be inconsistent with the fundamental principles of public procurement.

**Is an economic operator permitted to subcontract 100% of the contract (the whole contract)?** It is not explicitly forbidden in the Directive to subcontract an entire contract, but it could be argued that this prohibition is implied from the provisions in the Directive related to subcontracting, which refer to the “share” of the contract that the contractor intends to subcontract. In some Member States, national provisions explicitly prohibit subcontracting of the whole contract, treating it as equivalent to the cession of a contract, which in general is not allowed in public procurement.

**Is it possible for a contracting authority to limit recourse to subcontracting?** A limitation on subcontracting is possible in certain cases. Subcontracting may be excluded in all cases where the specific characteristics of the individual performing the services were a decisive factor in the conclusion of the contract with that person. This situation may concern cultural or artistic activities,

<sup>5</sup> Act of 29 January 2004 Public Procurement Law, as amended, Articles 143a-143c, available at: [https://www.uzp.gov.pl/\\_data/assets/pdf\\_file/0015/30336/Public\\_Procurement\\_Law\\_2015\\_consolidated.pdf](https://www.uzp.gov.pl/_data/assets/pdf_file/0015/30336/Public_Procurement_Law_2015_consolidated.pdf)

<sup>6</sup> Mandatory subcontracting provisions are included only in the Defence and Security Procurement Directive – Directive 2009/81/EC on the co-ordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, 13 July 2009.

intellectual services, and the field of science and research, and in similar situations where the qualities and characteristics of the service provider were decisive in his/her selection. Examples might include a famous singer or a Nobel prize-winner.

The Directive allows contracting authorities to require the performance of certain “critical tasks” directly by the bidder or, if the contract was awarded to a group of economic operators, by one of the members of the group. If direct performance is required, subcontracting of those critical tasks is implicitly excluded. The requirement concerning the direct execution of a contract is allowed for works contracts, services contracts, and siting or installation operations in the framework of supplies contracts. The CJEU has held that an economic operator may be prevented from subcontracting essential parts of the contract where the economic operator fails to demonstrate at the tender evaluation stage that the technical and economic capacities of the third party will be available<sup>7</sup>.

In the opinion of the CJEU, limitation of the use of subcontractors for a share of the contract that is fixed in abstract terms, such as a certain percentage of that contract, is incompatible with the 2004 Public Sector Directive<sup>8</sup>. The CJEU expressed this opinion in a case concerning a requirement, stipulated by the contracting authority in the procurement documents, that at least 25% of the works that were the object of the procurement should be performed by the contractor using its own resources<sup>9</sup>.

**Is it possible to change a subcontractor?** It is possible in some cases to change a subcontractor during the execution of the contract, even if the identity of the original subcontractor was included in the winning tender.

However, CJEU case law has confirmed that the change of a subcontractor will be a material change of the contract, triggering the need for a new contract award procedure if that particular subcontractor was a “decisive factor” in the decision of the public authority to award the main contract to the successful bidder<sup>10</sup>. The reasoning of the CJEU was the following: if Company A highlighted the skills and qualities of a particular prospective subcontractor (Subcontractor B) in its tender and if those factors played a decisive role in the decision to award the contract to Company A, then it would be unfair to other tenderers to allow the bidder to substitute another subcontractor for Subcontractor B. However, such a substitution is allowed if the new subcontractor has equally good qualifications and attributes.

The possibility of changing subcontractors is also implied by the provisions in Article 71 of the Directive, which oblige contracting authorities to require the contractor to notify any changes concerning subcontractors, including information on any new subcontractors that are subsequently involved in the execution of the works or services concerned.

## Utilities

Article 88 of the Utilities Directive<sup>11</sup> contains practically identical provisions to the subcontracting provisions in the Directive.

Article 79 of the Utilities Directive contains practically identical provisions concerning the reliance on third-party resources as those in the Directive.

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<sup>7</sup> CJEU Case C-314/01 *Siemens and ARGE*.

<sup>8</sup> Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 31 March 2004.

<sup>9</sup> CJEU Case C-406/14 *Wrocław – Miasto na prawach powiatu*.

<sup>10</sup> CJEU Case C-91/08 *Wall*.

<sup>11</sup> Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

The Utilities Directive does not contain any detailed provisions concerning the selection criteria that can be used by contracting entities. It does not provide a list of references that could be used as a means of proving technical capacity. The reason for these omissions is that the provisions of the Utilities Directive are generally more flexible with regard to those criteria than the provisions of the Directive.

## Further information

### **SIGMA Publications**

Public Procurement Training Manual – Module E3

<http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

Public Procurement Briefs

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2016), *Performance Measurement*, Brief 21, OECD Publishing, Paris

SIGMA (2016), *Selecting Economic Operators* Brief 7, OECD Publishing

SIGMA (2016) *SMEs in Public Procurement*, Brief 33, OECD Publishing, Paris

SIGMA (2016), *Contract Modifications*, Brief 38, OECD Publishing, Paris

SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris

<http://www.sigmaweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf>