

New implementation rules for public procurement contracts – part 3: lead official, subcontractors and workers.

Below you will find the third instalment in our series concerning the introduction of the AUR 2013 for public procurement contracts published as of 1 July 2013. [AUR = algemene uitvoeringsregeling = general implementation regulation] In this contribution we discuss the provisions concerning the lead official, subcontractors and workers. V. Lead official (art. 11 AUR 2013) – (art. 1 AAV 1996) In accordance with article 11 AUR 2013, which largely corresponds to art. 1 AAV 1996 [AAV = algemene aannemingsvoorwaarden = general contracting terms], the lead official is designated by the contracting authority when concluding the contract, unless this information is already set forth in the contract documents. If the management of and control over the implementation are entrusted to an official of the contracting authority, any possible limitation of his powers is notified to the contractor, unless this was communicated in the contract documents. If the management of and control over the implementation are entrusted to a person outside the contracting authority, the scope of his possible mandate is notified to the contractor, unless this was communicated in the contract documents. Without this mention and until this notification takes place, one must proceed on the assumption that this person cannot bind the contracting authority. VI. Subcontractors (art. 12, 13, 14 and 15 AUR 2013) – (art. 10, §1, §2, 13, §5 AAV – art. 6, §1, §2, §3 AUR 1996) In principle, a contractor may always, for performing the works awarded to him, call upon a third party at his option, unless agreed to the contrary, or unless the works entrusted to the general contractor have an express *intuitu personae* character. Art. 10 §1 AAV 1996 already provided that the contractor is responsible vis-à-vis the contracting authority for all of the works performed by the subcontractors. The contracting authority deems itself not to be bound by any contractual relationship with these third parties. The contracting authority may however require that the subcontractors satisfy the law regulating the authorisation of contractors of works in proportion to the share of the contract they will perform. Art. 10 §2 AAV 1996 contains a number of prohibitory provisions for certain excluded natural persons and legal entities. The contractor is prohibited from entrusting all or a part of the contract: - to a contractor, supplier or service provider who finds himself in one of the cases referred to respectively in art. 17, 43 and 69 of the Royal Decree dated 8 January 1996, in art. 17, 39 and 60 of the Royal Decree dated 10 January 1996 as well as in art. 21, § 4 AAV 1996; - to a contractor who was excluded by application of the provisions of the law regulating the authorisation of contractors of works. Moreover, the contractor is prohibited from allowing these persons to participate in the management or supervision of all or a part of the

contract. Each violation of this prohibition can give rise to the application of the ex officio measures. This provision is expanded in the AUR 2013 to contracts for supplies and services. Art. 12 AUR 2013 adds a possibility for the management concerning the subcontractors. The contracting authority can require that the subcontractors of the contractor, in proportion to the share of the contract that they will perform, satisfy the minimum requirements concerning financial and economic capacity and technical and professional skill which are imposed by the contract documents. Art. 12 AUR 2013 adds a clause that establishes a link between the qualitative selection phase and the execution of the contract, more specifically when the capacity of a subcontractor was considered in the selection phase. In that event, the contractor is obliged to call on the subcontractor who was considered for the qualitative selection and he may not choose any other subcontractor unless subject to the prior approval of the contracting authority. This reasoning applies even when the subcontractor was identified in the bid in accordance with the requirements in the contract documents and when the contracting authority imposes the use of specific subcontractors. New is also the addition under which the contracting authority assumes responsibility for the financial and economic capacity and the technical and professional skill of subcontractors imposed on the contractor. Art. 13 AUR 2013 takes over art. 10 § 2 AAV 1996 and states that the contractor is prohibited from entrusting all or a part of the contract to undertakings that find themselves in certain exclusion cases (bankruptcy, social security or tax debts, criminal-law condemnations, etc.) or are excluded from recognition. Each violation of this prohibition can give rise to the application of the ex officio measures. The rules on the price revision were already regulated in art. 6 AUR 1996. Under art. 6 AUR 1996, the subcontractor is entitled to the application of price revision when the contract contains a price revision clause. Moreover an exception is provided for contracts with a low value or a short execution period. This regulation is retained with a somewhat different formulation in art. 14 AUR 2013. A new addition is that, after request with respect to this by the contracting authority, the contractor who did not obtain from his subcontractors a declaration in which they confirm that they enjoy a corresponding revision, can produce a relevant extract of the subcontracting agreement, from this it must appear that the obligations concerning price revision of the contracts given on a subcontracting basis are satisfied. The same obligation applies for the subcontractor of the subcontractor by virtue of the last paragraph of art. 15 AUR 2013. VII. Workers (art. 16 AUR 2013) - (art. 35 AAV 1996) This provision has remained largely unchanged and states that the contracting authority can demand from the contractor that he immediately replace all personnel members who compromise the proper execution of the contract due to their incompetence, their bad faith or their generally-known misconduct.

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