New regulations on the registration of contractors

Introduction
New rules on the social security and tax liability of contractors have finally entered into force in Belgium. The former system, better known as the "registration of contractors," was found to be in breach of the freedom to provide services by the European Court of Justice in a judgment dated 9 November 2006 (EU Commission v. Kingdom of Belgium). The former system was abolished by the law of 27 April 2007 (the "Law") and the Royal Decree of 27 December 2007 setting out the new applicable rules.

The scope of the new regulations is very broad and concerns all real estate works (as defined for VAT purposes) carried out in Belgium by a Belgian or foreign entrepreneur or subcontractor. Payments made by individuals in respect of works ordered by them for purely private purposes are not subject to the new rules.

Contractors are no longer obliged to register. Therefore withholding obligations (and sanctions if no withholding is applied) no longer depend on whether the contractor is registered. Instead, a withholding obligation applies in respect of each payment made to a contractor that has outstanding tax and social security liabilities.

It is important to note that the obligation to make withholdings in respect of social security liability is totally dissociated from the obligation to make withholdings in respect of tax liability: a principal may be required to (only) withhold for tax purposes or (only) for social security purposes or he may be obliged to make withholdings under both regimes. In any event, the combined withholding obligations (tax and social security) are limited to 50% of the amount to be paid to the contractor.

Optional registration
Although registration is no longer mandatory, the Law introduces a new optional registration procedure. This optional procedure may be attractive to contractors who wish to execute governmental contracts and principals who want to obtain the benefit of the reduced VAT rate applicable for renovation works in respect of "old" houses or who want to benefit from certain tax reductions (for example in respect of energy-saving investments). The new registration procedure is applicable only in specific circumstances, which we will not detail for the purposes of this briefing.

Key Issues
- Withholding obligation if contractor or subcontractor has tax or social liabilities
- Optional registration may still be relevant in some cases
- Entry into force of tax rules on 1 January 2009
- Several liability for tax and social liabilities
- Tax and social security position can now easily be checked

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Entry into force
The Law entered into force with regard to social security liability on 1 January 2008. However, the entry into force of the new rules in respect of tax liability was postponed until 1 January 2009 because the database that would allow principals to check the tax liability of contractors, as contemplated in the regulations, was not yet operational.

Social security
Social security liability is defined in the Law as any sum due to the National Office of Social Security (ONSS/RSZ) and any unpaid liability of a subcontractor for which a contractor is jointly liable.

Withholding obligation
As of 1 January 2008, each principal that makes a payment in respect of real estate works to a contractor that has outstanding social security liability (regardless of whether the contractor is registered) is obliged to withhold 35% of the total amount of the invoice (VAT excluded).

For invoices of more than EUR 7,143, the withholding obligation is capped at the amount of the effective outstanding social liability at the time of payment of the invoice. In order to be able to apply this cap, the principal should request the contractor to obtain a certificate confirming the amount of his social security liability. The certificate that confirms the amount of the outstanding liability remains valid for 20 days. If no certificate is obtained or if the amount of the tax liability exceeds 35% of the invoice, then the withholding must be equal to 35%. For invoices of less than EUR 7,413, the principal must always withhold 35% of the invoice (provided of course that the contractor has social security liability).

The amount to be withheld shall be paid to the bank account of the social security authorities: IBAN BE76 6790 0001 9295 - BIC PCHQBEBB of the National Office of Social Security - Place Victor Horta 11 - 1160 Brussels, with the following reference: registration number of the contractor (or sub-contractor), the amount and the date of the invoice in respect of which a withholding has been made, and the name of the contractor.

If the withholdings are not executed properly, then the principal will be liable for the payment of all amounts that should have been withheld plus an increase equal to 100% of the withholdings.

Several liability
In addition to the withholding obligation, the principal may also be held severally liable for the social liabilities of his contractor. This will be the case if the contractor already had social security liabilities at the time the agreement was concluded. This several liability is limited to 100% of the price paid in respect of the works and is further limited to 65% of the price paid if the principal is also liable for tax purposes.

Existence of social security liabilities
A contractor's social security liability (if any) may be checked on the website of the National Office of Social Security (www.socialsecurity.be) under the heading "Enterprise" using the contractor's enterprise number (the first nine digits of the VAT number) or social security registration number. If the contractor has no outstanding social security liability, a certificate confirming that no withholdings are to be applied can be printed directly from the website, and remains valid until the end of the month in which it is requested. The database is updated at the end of each month. Therefore, in order to ensure that no withholding obligation exists, the database should be checked each time a payment is made and at least once per month. In order to avoid several liability, the principal should, in any case, check whether a contractor has social liability before entering an agreement with a contractor.

Subcontractors
A contractor will be treated as principal in respect of his own sub-contractors. This means that the contractor may have withholding obligations in respect of his subcontractors and may be severally liable for their tax and social security liability.

A principal does not have any obligations, as such, in respect of the social security liability of the sub-contractors. The principal's obligations lie only with regard to the contractors with whom he has a direct contractual relationship.
Tax
For the purposes of the Law, the outstanding tax liability is defined as any liability in respect of direct income tax and taxes assimilated to income tax, any liability related to the different types of withholding taxes, any liability resulting from joint and several liability for the liability of a subcontractor and any liability relating to foreign taxes for which the foreign tax authorities have requested the assistance of the Belgian authorities to collect.

Withholding obligation
As of 1 January 2009, each person making a payment in respect of real estate works to a contractor that has outstanding tax liability (regardless of whether the contractor is registered) is obliged to withhold 15% on the total amount of the invoice (VAT excluded). This withholding obligation is dissociated from any withholding obligation that may exist in respect of social security liability.

As discussed above, for social security purposes, the amount to be withheld regarding tax liability depends on the amount of the invoice. For invoices of more then EUR 7,143, the withholding obligation is capped at the amount of the effective outstanding tax liability at the time of payment of the invoice (subject to the receipt of a certificate to be provided by the contractor). For invoices of less than EUR 7,413, the principal must always withhold 15% of the invoice.

The amount to be withheld should be paid to the tax authorities on the following bank account: IBAN BE33 6792 0023 2046 - BIC PCHQBEBB of the "Bureau de Recettes de Bruxelles 3 - Recettes Spéciales - Boulevard du Jardin Botanique 50, bte 3110 - 1000 Brussels", with the following indications: registration number of the contractor or sub-contractor, the amount and the date of the invoice in respect of which a withholding has been made, and the name of the contractor.

Several liability
The regime of joint liability in respect of social security liability applies in the same way for outstanding tax liability. However, the liability is capped at 35% of the total price paid for the works (VAT excluded).

Existence of tax liabilities
A contractor’s tax liability (if any) can be checked easily on the website of the Ministry of Finance (www.myminfin.be) using the contractor's enterprise number (the first nine digits of the VAT number). The link to the database can be found under the heading "Services". The database is updated constantly and it is advisable to check the position each time a payment is made and in any event before concluding an agreement with a contractor.

Unlike for social security, the certificate available on the website does not remain valid for a certain period, therefore if a payment is not made on the day the database is checked, a new check should be carried out at the time the invoice is effectively paid.