



Public Procurement

Selecting Economic Operators

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General context

It is important for a contracting authority to ensure that it will enter into a contract with an economic operator that has the ability to perform and complete the contract. Thus a contracting authority may want to check, for example, the suitability of economic operators in terms of compliance with basic legal requirements as well as their financial resources, experience, skills and technical resources. The contracting authority will then exclude from the procurement process those economic operators that do not satisfy such checks. This process is referred to as the selection or qualification process.

The selection of economic operators generally involves two distinct phases. First, the contracting authority will establish whether there are grounds for excluding economic operators from participating. The contracting authority will then consider whether the economic operators that have not been excluded meet the relevant requirements to be selected as tenderers. The economic operators that have been selected will then be invited to submit tenders, negotiate or participate in dialogue. In the case of the open procedure, the tenders that they have already submitted will be evaluated.

The selection of economic operators means the process of assessing and deciding which economic operators are qualified to perform the contract. This process must be carried out by applying objective, non-discriminatory and transparent selection criteria, which the contracting authority sets in advance and discloses to economic operators.

The Public Sector Directive (the Directive)¹ significantly limits the contracting authority's discretion in this area as it (1) lists the selection criteria that a contracting authority may choose to use, (2) lays down the evidence or references that a contracting authority may require from economic operators to verify that the set selection criteria are satisfied, and (3) also lays down general rules concerning the process of selection.

The Directive seeks to ensure that the selection process does not provide opportunities for contracting authorities to conceal discrimination and that it gives to economic operators fair opportunities for participation. The main objective is to ensure that intra-Community trade is not restricted and that the Treaty² principles on freedom to provide services and freedom of establishment are respected.

The contracting authority may use only the following selection criteria to establish whether an economic operator is qualified to perform a specific contract:

- personal situation of the economic operator
 - mandatory grounds for exclusion
 - optional grounds for exclusion
- suitability to pursue the professional activity
- economic and financial standing
- technical and/or professional ability.

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

² Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012. Referred to in the Procurement Brief as “TFEU” or “Treaty”.

Personal situation of economic operators

Mandatory grounds for exclusion: A contracting authority is obliged to exclude from participation in a contract award procedure those economic operators that are known to have been convicted by final judgment for one or more of the following criminal activities:

- participation in a criminal organisation
- corruption
- fraud
- terrorist offences or offences linked to terrorist activities
- money laundering or terrorist financing
- child labour and other forms of trafficking in human beings.

The grounds for exclusion with regard to non-conformity with obligations to pay taxes and social contributions distinguish between mandatory and optional grounds for exclusion.

First, a contracting authority is obliged to exclude from participation in a procurement procedure an economic operator involved in a case in which an administrative or judicial decision having final and binding effect has established that a breach of obligations relating to the payment of taxes or social contributions has occurred (mandatory grounds for exclusion).

Second, a contracting authority may exclude or may be obliged by a Member State to exclude an economic operator if the contracting authority can demonstrate by appropriate means that the economic operator concerned is in breach of its obligations relating to the payment of taxes and social security contributions (optional grounds for exclusion, which may be rendered obligatory by a Member State). Nevertheless, the exclusion no longer applies when the economic operator has paid its obligations or has entered into a binding arrangement with a view to paying the obligations due. All interest accrued and all fines must also have been paid.

Optional grounds for exclusion: A contracting authority is permitted to exclude an economic operator from participation in the procurement process in the following circumstances:

1. The contracting authority can demonstrate by any appropriate means a violation of applicable obligations related to environmental, social and labour law established by EU law, national law, collective agreements or by international environmental, social and labour law.
2. The economic operator is bankrupt or is subject to insolvency or winding-up proceedings; its assets are being administered by a liquidator or by the court; or it is under any analogous situation in accordance with national laws or regulations.
3. The contracting authority may demonstrate by any appropriate means that the economic operator concerned is guilty of grave professional misconduct that renders its integrity questionable.
4. The contracting authority has plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.
5. A conflict of interest cannot be effectively remedied by less intrusive measures than the exclusion of the economic operator.
6. A distortion of competition caused by the prior involvement of the economic operator in the preparation of the procurement procedure cannot be effectively remedied by other, less intrusive, measures.

7. The economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or concession contract that led to early termination of that prior contract, damages or other comparable situations.
8. The economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information, or is not able to submit supporting documents required by the contracting authority.
9. The economic operator has undertaken to unduly influence the decision-making process of the contracting authority or to obtain confidential information that may confer upon it undue advantages in the procurement procedures.

National legislation may make some or all of the above grounds mandatory grounds for exclusion.

What is “self-cleaning”? The Directive introduces “self-cleaning” measures. Economic operators finding themselves in a situation where they are subject to exclusion from a procurement procedure can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of misbehaviour.

Accordingly, the economic operator may provide evidence to the effect that the measures it has taken are sufficient to demonstrate its reliability, despite the existence of relevant grounds for exclusion. For example, the economic operator should prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence, that it has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and that it has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences.

If the contracting authority considers those self-cleaning measures insufficient to prove the reliability of the concerned economic operator, that operator should receive from the contracting authority a statement of the reasons for not having considered the measures sufficient to not exclude the economic operator.

Self-cleaning is not available to those economic operators that have been excluded from participating in procurement or concession award procedures by way of a final judgement during the period of exclusion resulting from the judgement (in some Member States exclusion from participation in procurement procedures can be an additional sanction in criminal court decisions). This restriction only applies, however, in the respective Member States where the judgement is effective.

What is the European Single Procurement Document? For the purposes of simplification and limitation of administrative burdens, the Directive introduces the European Single Procurement Document (ESPD). The ESPD is an updated self-declaration by economic operators providing preliminary evidence, in replacement of certificates issued by public authorities and third parties, that the economic operator:

- is not in any of the situations in which an economic operator should or may be excluded (mandatory and optional grounds for exclusion); in the event that the economic operator has undertaken self-cleaning measures, it should provide information about those measures;
- meets the relevant selection criteria that have been set by the contracting authority;
- where applicable, fulfils the objective rules and criteria that have been set for the purposes of shortlisting.

Accordingly, the ESPD should consist of a formal statement by the economic operator that the relevant grounds for exclusion do not apply and/or that the relevant selection criteria have been fulfilled. The ESPD should (1) provide the relevant information as required by the contracting authority; (2) identify the public authority or third party responsible for establishing the supporting documents; (3) contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide these supporting documents and (4) contain the information, such as the internet address of the database, any identification data, and where applicable, the necessary declaration of consent, where the contracting authority can obtain the supporting documents directly by accessing a database.

Where the economic operator relies on resources of other entities, the ESPD should contain the information with respect to those entities.

The European Commission has published the standard form of the ESPD. It should be used in all procurement covered by the Directive. For procedures below the financial thresholds of the Directives, Member States may also require the use of the ESPD or may establish their own types of declarations that are required from economic operators. The ESPD may be re-used if the information it provides remains valid and accurate. As from April 2018, the ESPD must be drawn up and submitted exclusively in electronic form.

What evidence may be requested from economic operators to prove that they do not fall under the mandatory or optional grounds for exclusion? In compliance with the principle of transparency, a contracting authority must indicate in the contract notice the grounds for mandatory or optional exclusion that will be applied and the information required from economic operators proving that they do not fall under the cases justifying exclusion.

A contracting authority is obliged to accept, at the time of submission of requests for participation or of tenders, the ESPD as preliminary evidence, in replacement of certificates issued by public authorities or third parties, confirming that an economic operator does not fall under any of the mandatory or optional grounds for exclusion and fulfils relevant selection criteria.

Before awarding the contract, the contracting authority should require that the tenderer to which it has decided to award the contract submit up-to-date supporting documents confirming the lack of grounds for exclusion and the fulfilment of selection criteria.

Nevertheless, the contracting authority may ask tenderers and candidates at any moment during the procurement procedure to submit all or part of the supporting documents where it is necessary to ensure the proper conduct of the procedure. This requirement may be necessary, for example, in the restricted procedure or in other procedures with a separate stage of qualification and selection of candidates, where only a limited number of candidates will be invited to submit tenders (referred to as “shortlisting”).

On the other hand, the contracting authority is not allowed to require the submission of supporting documents or other documents where it has the possibility of obtaining those documents directly from a national database in any Member State that is available free of charge. Examples of such databases are national procurement registers, virtual company dossiers or pre-qualification systems. Economic operators do not have to submit documents in cases where the contracting authority already has those documents in its possession, having previously awarded the contract or concluded a framework agreement.

What kinds of supporting documents are required? In relation to the mandatory grounds, in general terms, this evidence must take the form of an extract from the judicial record or its equivalent or, where a country does not issue such documents, a declaration on oath or solemn declaration. Where appropriate, the contracting authority is to ask the economic operator to supply evidence that it does not fall under any of the mandatory grounds for exclusion.

In relation to the optional grounds, the types of evidence vary depending on the optional grounds for exclusion concerned. With regard to grave professional misconduct and serious misrepresentation of information, it is for the contracting authority to determine the acceptable types of evidence.

Economic operators based in other Member States: It may be difficult in practice for a contracting authority to establish the types of documents/evidence that economic operators based in other Member States are able to submit in order to prove that they do not fall under any of the mandatory or optional grounds for exclusion and to identify the authorities that are authorised to issue these documents/evidence under their national laws.

To facilitate access to this information in the various Member States, the European Commission Services established an online repository of certificates (e-Certis), which contains information concerning certificates and other forms of documentary evidence used in various Member States. Member States are required to keep this information constantly up-to-date. E-Certis may be accessed on their website³.

Selection stage criteria – general requirements

In compliance with the principle of transparency, a contracting authority must indicate in the contract notice the selection stage criteria to be applied and the relevant information to be provided.

A contracting authority is permitted but is not obliged to consider the suitability, economic and financial standing, and technical/professional ability of economic operators. A contracting authority can therefore decide what it does and does not ask, within the limits of the permitted selection criteria.

Criteria must be related and proportionate to the subject matter of the contract. Setting criteria that are not necessary or are inappropriate may attract economic operators that are not qualified or deter efficient economic operators from participation.

It is left to the discretion of the contracting authority to fix the minimum capacity levels that economic operators must meet. However, if a contracting authority decides to fix minimum capacity levels, these levels must also be related and proportionate to the *subject matter* of the contract and set out in the contract notice.

Under no circumstances may the set selection criteria be changed or waived during the process of selection of economic operators. At this stage, the set selection criteria are to be applied as they stand.

Application of selection stage criteria

Suitability to pursue the professional activity: A contracting authority may check if economic operators are generally suitable and fit to carry out the professional activity by asking them to prove that they are enrolled on trade or professional registers in their Member State of establishment. Where no relevant register exists in these states, economic operators may produce a declaration on oath or a certificate, in accordance with the provisions of their national laws. The registers and corresponding declarations or certificates for each Member State are listed in the relevant annexes of the Directive.

Can a contracting authority require from foreign tenderers to be registered in the Member State in which the contracting authority is based? The Court of Justice of the European Union (CJEU) considered such a requirement permissible, although subject to meeting specific conditions linked to equal treatment. The CJEU concluded that a contracting authority could

³ <http://ec.europa.eu/markt/ecertis/login.do>

exclude a tenderer that has not met the obligations (for example, concerning payment of taxes or social security contributions) in the Member State where the contracting authority is based. A separate check as to whether those obligations have been met is also allowed. The requirement of registration is lawful, provided that the registration requirement does not complicate or delay the participation of the foreign tenderer or give rise to excessive administrative charges.

On the other hand, a contracting authority may not require an economic operator established in another Member State to be enrolled on a trade or professional register in the country of the contracting authority. This requirement would be in breach of both the Directive and the principle of the freedom to provide services.

Economic and financial standing: A contracting authority may consider the economic and financial standing of economic operators. The specific economic and financial standing criteria must be aimed at assessing whether economic operators have adequate financial resources (throughout the contract period), such as cash, a credit line or any other source, to handle and complete the contract to be awarded. Contracting authorities may require, for example, that economic operators have a certain, minimum yearly turnover, including a certain, minimum turnover in the area covered by the contract.

In order to facilitate participation of small and medium-sized enterprises, as a rule the Directive prohibits contracting authorities from demanding a minimum yearly turnover higher than twice the estimated contract value. The contracting authority may demand, however, a larger turnover, but only in justified cases, such as circumstances related to the special risks attached to the nature of the works, services or supplies. The main reasons for such a requirement should also be indicated.

Evidence that may be requested from economic operators as proof of their economic and financial standing: The Directive provides in one of its annexes a list of the types of evidence that, as a general rule, a contracting authority may request from economic operators as proof of their economic and financial standing. However, this list is only indicative and is not exhaustive. Therefore, a contracting authority may also require other evidence than that listed in the Directive, subject to compliance with basic public procurement principles. The Directive explicitly requires the evidence/information sought from economic operators to be related and proportionate to the subject matter of the contract.

Technical and/or professional ability: A contracting authority may consider the technical and/or professional ability of economic operators. The specific technical and/or professional ability requirements aim to ensure that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate standard.

Evidence that may be requested from economic operators as proof of their technical and/or professional ability: The Directive provides in one of its annexes an exhaustive list of evidence that a contracting authority may request from economic operators as proof of their technical and/or professional ability. As the list is exhaustive, a contracting authority may not request any other evidence than that listed. However, a contracting authority is not obliged to request all of the listed evidence but only the evidence that is necessary to assess the technical and/or professional ability of economic operators in relation to the contract to be awarded. This list of evidence is divided according to the subject matter of the contract (i.e. supplies, works or services).

Can an economic operator rely on the resources of other entities to prove its economic and financial standing or technical and/or professional ability? Where appropriate and with regard to a specific contract, an economic operator may rely on the capacities of other entities, regardless of the legal nature of the links it has with them. It must in this case prove that it will have at its disposal the resources necessary, for example by producing an undertaking by those entities to that effect. This possibility allows an economic operator to rely not only on the

economic and financial resources of affiliated entities but also of sub-contractors or of any other entity that has actually made its resources available to the economic operator.

A group of economic operators may also, under the same conditions, rely on the capacities of participants in the group or of other entities. In the case of criteria related to educational and professional qualifications or to professional experience, economic operators may rely on the capacities of other entities only if those entities will perform works or services for which these capacities are required. The contracting authority may not insist on a specific form of document confirming that those resources are available to the economic operator. For example, the contracting authority is not allowed to require a co-operation agreement or the establishment by the economic operator of a partnership with those entities.

Missing or incomplete evidence

The Directive explicitly states that a contracting authority is allowed to invite economic operators to *supplement* or *clarify* the evidence submitted. The Directive does not indicate what is meant by “supplementary” evidence or “clarification”.

Rejecting an advantageous application because an economic operator fails to submit a specific piece of evidence requested by the contracting authority may go against the principle of effective procurement. On the other hand, the search for missing evidence may be very time-consuming and prolong the time allotted to the assessment of expressions of interest/applications or to the evaluation of tenders by making it necessary to wait until all of the evidence requested has been submitted.

A sensible approach is to permit contracting authorities to request additional evidence provided that it relates to the evidence already submitted and to the corresponding pre-set selection criteria. It is also advisable to allow contracting authorities to clarify evidence already provided when the evidence submitted contains inconsistent or contradictory information, is unclear, or contains omissions.

In practice, and in order to reduce the burden on economic operators but also the burden on contracting authorities, it may be appropriate to limit the verification of the evidence submitted. The Directive is silent on this issue. In some EU Member States, however, national legislation specifically establishes how contracting authorities should deal with this issue.

Shortlisting

It is permitted to draw up a shortlist of economic operators from among those operators that are qualified, and the economic operators on the shortlist are then invited to tender/negotiate/conduct a dialogue. When doing so, a contracting authority must keep in mind the following issues:

- The contracting authority must apply objective and non-discriminatory criteria (or methodologies).
- Only the objective and non-discriminatory criteria that are allowed by the Directive may be applied for the selection of economic operators. Therefore, any criteria that extend beyond the criteria allowed by the Directive itself are not permitted.
- The contracting authority must take into account the relative financial or technical capacity of the economic operators. This analysis would result in a relative ranking of the qualified economic operators, thereby enabling the contracting authority to identify those economic operators that are best qualified to perform the contract to be awarded.
- In order to identify the relative ranking of the qualified economic operators and to **determine which economic operators to invite to tender/negotiate/conduct**

a dialogue from among the qualified operators, the contracting authority may also develop methodologies based on a weighting/scoring system.

- The contracting authority is required to indicate in the contract notice the objective and non-discriminatory criteria and methodologies that it intends to apply for shortlisting. This requirement is aimed at safeguarding the principles of equal treatment and transparency and at limiting the possibilities of abuse and discretion by contracting authorities.

Official lists

The Directive allows Member States to set up and use official lists of approved economic operators. In very general terms, these registration systems must be set up and operate in compliance with the rules on the permissible selection criteria laid down in the Directive. Economic operators registered on an official list are not to be treated more favourably than those that are not registered, and the registration system must allow economic operators to ask to be registered at any time. Economic operators on such lists in their Member State of establishment may claim such registration, within certain limits, as alternative evidence that they fulfil the selection criteria on the basis of which the registration took place.

Strategy for selection of economic operators

Checklist of the main points that should be addressed: The overall strategy for the selection of economic operators should be determined before the tender is launched. This strategy must be established in a manner that respects general law principles, including the relevant Treaty principles, as well as national laws.

The following checklist covers the main points that, in general terms, a contracting authority should address when defining its overall strategy for the selection of economic operators (* does not apply to the open procedure):

1. Have you identified the category of selection criteria that you will apply?
2. Have you defined the specific criteria that you will apply within each category of selection criteria chosen?
3. Do you consider it appropriate to fix minimum-capacity levels with regard to any economic and financial standing criteria or to any technical and/or professional capacity criteria to be applied? If so, have you defined these minimum-capacity levels?
4. Have you identified the evidence/references to be required from economic operators to prove that they satisfy the set selection criteria?
5. *In the case of restricted procedures, competitive procedures with negotiation, and competitive dialogue procedures, the contracting authority should address the following issues:
 - a) Have you set the minimum number of economic operators to be invited to tender/negotiate/conduct a dialogue?
 - b) Do you consider it appropriate to fix the maximum number of economic operators to be invited to tender/negotiate/conduct a dialogue? If so, then:
 - Have you fixed this maximum number?
 - Have you determined the criteria or methodologies to be applied in order to choose the economic operators that are to be invited to

- tender/negotiate/conduct a dialogue from among the economic operators that are qualified?
 - o Have you established whether there are mandatory pre-qualification questionnaire (PQQ) templates that you are required to use?
1. Have you identified, in accordance with the requirements of the applicable law, when, where and how you should disclose:
- a) the selection criteria that you will apply?
 - b) any minimum capacity level that you will apply?
 - c) the evidence/references that you will request?
 - d) the minimum number of economic operators that you intend to invite to tender/negotiate/conduct a dialogue?*
 - e) any maximum number of economic operators that you will invite to tender/negotiate/conduct a dialogue?*
 - f) any criteria or methodologies that you will apply in order to choose the economic operators to be invited to tender/negotiate/conduct a dialogue from among the economic operators that are qualified?*

Utilities

Under the Utilities Directive , contracting entities have slightly more flexibility in terms of the choice of the selection criteria that may be applied and the evidence that may be requested from economic operators.

As a general rule, contracting entities that establish selection criteria in open, restricted, negotiated procedures with calls for competition and in innovation partnerships must do so in accordance with objective rules and criteria. When for utilities they include in those rules and criteria the selection criteria defined in the Directive, they should apply those criteria in accordance with the requirements of the Directive. This means, for example, the obligation to apply limitations concerning criteria related to financial and economic standing (maximum yearly turnovers), the ESPD, and documents and certificates that may be required.

Utilities can also set up and operate qualification systems. These systems must be operated on the basis of objective criteria, and the rules for qualification are to be established by the contracting entity. The qualification systems are similar to the official lists of economic operators under the Directive, except for the fact that they are set up by contracting entities for their own use.

Further information

Publications

SIGMA (2015), *Public Procurement Training Manual – Module E3*, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

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>

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

SIGMA (2016), *Use of Official Automatic Exclusion Lists in Public Procurement*, Brief 24, OECD Publishing, Paris

Other sources

Selected case law of the Court of Justice of the European Union: C-31/87 “Beentjes”, C-357/06 “Frigerio Luigi & C.”, C-305/08 “CoNISMa”, C-213/07 “Michaniki”, C-538/07 “Assitur”, C-376/08 “Serrantoni and Consorzio stabile edili”, C-74/09 “Bâtiments and Ponts Construction and WISAG Produktionservice”, C-465/11 “Forposta and ABC Direct Contact”, C-234/14 “Ostas celtnieks”, http://curia.europa.eu/jcms/jcms/j_6/