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Selecting Economic Operators

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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, economic operators' suitability in terms of compliance with basic legal requirements as well as the financial resources, experience, skills and technical resources and exclude from the procurement process those economic operators that do not satisfy such checks. This is known as the selection or qualification process.

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

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 are set by the contracting authority in advance and disclosed to economic operators.

The Directive limits in a significant way a contracting authority's discretion in this area: it lists the selection criteria that a contracting authority may choose to use, it 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 it 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 fair opportunities of participation are given to economic operators. The main objective of is to ensure that intra-Community trade is not restricted and that the Treaty principles on freedom to provide services and freedom of establishment are respected.

What selection criteria can be used?

Only the following selection criteria may be used by a contracting authority 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

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
- Money-laundering

Personal situation of economic operators: Optional grounds for exclusion: A contracting authority is permitted but not obliged to exclude from participation in the procurement process those economic operators that:

- are bankrupt or are under any analogous situation in accordance with national laws or regulations
- are the subject of proceedings for a declaration of bankruptcy or similar proceedings under national laws and regulations
- have been convicted by a judgment that has the force of res judicata of an offence relating to their professional conduct, in accordance with the legal provisions of the country concerned;
- have been guilty of grave professional misconduct proven by any means that the contracting authority can demonstrate;
- have failed to fulfil obligations relating to the payment of social security contributions in their countries of establishment or that of the contracting authority in accordance with the legal provisions of the country concerned;
- have failed to fulfil obligations relating to the payment of taxes in their countries of establishment or that of the contracting authority, in accordance with the legal provisions of the country concerned;
- have been guilty of serious misrepresentation in supplying information required for the purpose of the selection of economic operators or have not supplied such information.

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

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 as sufficient evidence that an economic operator does not fall under any of the mandatory or optional grounds for exclusion the types of evidence listed in the Directive.

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 op-

erators 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 EU Member States, the Commission Services (DG-Internal Market) designed a questionnaire, which has been completed by a number of member states and which contains the relevant information. The completed questionnaires can be downloaded from the following website:

http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm

What general requirements apply to the use of selection stage criteria?

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 therefore has discretion as to 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 they 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.

How do we apply the specified selection 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 EU Member State are listed in the relevant annexes of the Directive.

A contracting authority may not require an economic operator established in another EU 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 in hand, as a credit line or in any other way, to handle and complete the contract to be awarded.

Can an economic operator rely on the resources of other entities to prove its economic and financial standing?: Yes, where appropriate and with regard to a specific contract, an economic operator may rely on the capacities of other entities. 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 on the economic and financial resources of affiliated entities but also of sub-contractors or 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

Evidence that may be requested from economic operators as proof of their economic and financial standing: The Directive provides 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 not exhaustive. Therefore a contracting authority may also require other evidence than that listed in the Directive, subject to compliance 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 criteria must be aimed at assessing whether economic operators have the relevant technical and/or professional ability (skills, equipment, tools, manpower, past experience, etc.) to perform the contract to be awarded.

Evidence that may be requested from economic operators as proof of their technical and/or professional ability: The Directive lays down 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).

What can a contracting authority do if evidence is missing or incomplete?

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 be 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 having to wait until all 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 not clear, 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.

Is shortlisting permitted?

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

- It 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.
- It must take into account their relative financial or technical capacity. This analysis would result in a relative ranking of the qualified economic operators, thereby enabling the contracting authority to identify those economic operators that were 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 qualified operators, a contracting authority may also develop methodologies based on a weighting/scoring system.
- A contracting authority is required to indicate in the contract notice the objective and non-discriminatory criteria and methodologies that it intends to apply for short listing. 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.

Can member states set up and use official lists of approved economic operators?

The Directive allows EU Member States to introduce official lists of approved economic operators. In very general terms, these registration systems must be set up and operated 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 at any time to be registered. Economic operators on such lists in their member state of establishment may claim, within certain limits, such registration as alternative evidence that they fulfil the selection criteria on the basis of which the registration took place.

Defining the overall strategy for the 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. It must be established in a manner that respects general law principles, including the relevant Treaty principles as well as national laws.

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

- Have you identified the category of selection criteria that you will apply?
- Have you defined the specific criteria that you will apply within each category of selection criteria chosen?
- 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?
- Have you identified the evidence/references to be required from economic operators to prove that they satisfy the set selection criteria?
- *In the case of restricted procedures, negotiated procedures with prior publication of a contract notice, and competitive dialogue procedures, the contracting authority should address the following issues:
 - Have you set the minimum number of economic operators to be invited to tender/negotiate/conduct a dialogue?
 - 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?
 - Have you established whether there are mandatory PQQ templates that you are required to use?
- Have you identified, in accordance with the requirements of the applicable law, when, where and how you should disclose:
 - the selection criteria that you will apply?
 - any minimum capacity level that you will apply?

- the evidence/references that you will request?
- the minimum number of economic operators that you intend to invite to tender/negotiate/conduct a dialogue?*
- any maximum number of economic operators that you will invite to tender/negotiate/conduct a dialogue?*
- 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

Utilities have more flexibility in terms of the choice of the selection criteria that may be applied and of the evidence that may be requested from economic operators. As a general rule, utilities that establish selection criteria in open, restricted or negotiated procedures must do so in accordance with objective rules and criteria.

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 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 reading:

[SIGMA Public Procurement Training Manual](#)