Conditions/evidence of suitability

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Qualifications

The procuring entity may wish to exclude certain providers from procurement with aim to ensure that any contract partner has the ability to complete the contract.

The award of public contracts takes place in two stages:
1. a selection of the contractors or suppliers who possess the qualifications necessary for taking part in the invitation to tender
2. an award of the contract
Suitability/ Award
The Difference Between Selection and Award

ECJ Beentjes (C-31/87) case:

– Selection and award are two different operations

– Selection takes place before award

– Selection and award are governed by different rules:
Personal Situation – Mandatory Grounds for Exclusion Conditions

Article 45 (1) Directive 2004/18
Conviction by final judgment for:
- Participation in a criminal organisation
- Corruption
- Fraud
- Money laundering
Personal Situation – Mandatory Grounds for Exclusion Conditions/Evidence:

- Extract from the judicial record or, failing that, an equivalent document issued by a competent judicial or administrative authority in the country of origin

- Declaration on oath (where a country does not issue the aforementioned documents)

- Solemn declaration (in those member states where there is no provision of declaration on oath)
Personal Situation / Optional Grounds for Exclusion Conditions

Article 45 (2) Directive 2004/18
- Bankrupt or analogous situation
- Subject of proceedings for a declaration of bankruptcy or similar
- Conviction by a judgment with the force of res judicata offence relating to professional conduct
- Grave professional misconduct
- Failure to fulfil the obligations relating to the payment of social security contributions
- Failure to fulfil the obligations relating to the payment of taxes
- Guilty of serious misrepresentation in supplying information or failure to supply it

- contains an exhaustive list of the grounds to do with a contractor’s personal situation on which he may be excluded from a procedure (C-226/04 and 228/04 La Cascina and Others, C-213/07 Michaniki AE, C-465/11 Forposta SA)
Personal Situation/ Optional Grounds for Exclusion Evidence

- Extract from the judicial record or, failing that, an equivalent document (to prove not bankrupt or similar, not subject of proceedings for bankruptcy or similar, not been convicted by a judgment – which has the force of res judicata – of an offence concerning professional conduct)

- Certificate issued by competent authority (to prove that have not failed to fulfill obligations to pay social security contributions and taxes)

- Declaration on oath (where a country does not issue such documents)

- Solemn declaration (in those member states where there is no provision of declaration on oath)

- Point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 allows the contracting authorities to prove professional misconduct by any demonstrable means
Suitability to Pursue the Professional Activity /Conditions

Article 46 Directive 2004/18
- Relates to whether economic operators are generally suitable and fit to carry out a professional activity
- Setting minimum requirements is permissible

Evidence
- Enrolment in trade or professional registers in the member states of establishment
- Declaration on oath or a certificate in accordance with what is provided by national law (in the case such registers do not exist in the states concerned)
Economic and Financial Standing - Conditions

Procuring entities are not required to consider economic and financial standing.

- Directive 2004/18/EC does not limit the criteria to be applied (ECJ in case C-29/86 CEI and Bellini)

- ECJ indicated that it is permitted to adopt a general rule fixing the maximum value of works that providers may carry out at one time
- Aimed at assessing the financial resources of economic operators to handle and complete the contract to be awarded

- Determined by taking into account the specific practical context of each case:
  Minimum capacity levels: Related and proportionate to the subject matter of the contract.
Economic and Financial Standing - Evidence

Non-exhaustive list of evidence

a) appropriate statements from banks or, where appropriate evidence of relevant professional risk indemnity insurance;

b) the presentation of balance-sheets or extracts from the balance-sheets,

c) a statement of the undertaking's overall turnover

Article 47(5) Directive 2004/18 - Economic operators may prove his standing by any other document the contracting authority deems appropriate
Technical and/or professional ability -Conditions

Contracting authorities are not obliged to consider the technical and/or professional ability of economic operators.

Refer to the capability of provider to perform the contract

Article 48 Directive 2004/18/EC indirectly limits the criteria to be applied

- Aimed at assessing that economic operators have the relevant technical and/or professional ability to perform the contract to be awarded

- Determined by taking into account the specific practical context of each case
Technical and/or professional ability /Evidence

Exhaustive list of evidence
- Evidence must be: related and proportionate to the subject matter of the contract *(C-31/87 Beentjes/to employ long-term unemployed persons)*.

- Entities may demand only the evidence listed in the Directive, and supplementary evidence.

- Entities may also consider other evidence that they have, although possibly only when this is of the type set out in the List.
(a) (i) list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed
(ii) a list of the principal deliveries effected or the main services provided in the past three years
(b) an indication of the technicians or technical bodies involved,
(c) a description of the technical facilities and measures used
(d) the where products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;
(e) the educational and professional qualifications of the service provider or contractor
f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(g) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(h) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(i) an indication of the proportion of the contract which the services provider intends possibly to subcontract;

(j) with regard to the products to be supplied:
   (i) samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests;
   (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards. (ECJ C-6/05 Medipac – Kazantzidis, C-489/06)
Award criteria

Article 53 Directive 2004/18
(a) most economically advantageous tender: when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or
(b) the lowest price
The choice is left to the discretion of the contracting authority (ECJ Sintesi (Case C-247/02)

Exception: MEAT must be used in the case of competitive dialogue and in the case where variants are authorised.
Practice of the National Review Commission

Personal Situation / Optional Grounds for Exclusion Conditions

Accordingly to the PPA the public authorities in a tender dossier specify substantive rules or measures regarding the representation of the grave professional misconduct

NRC 018-302/2012 Slovene Roads Agency
NRC 018-205/2011 The Municipality of Komen
NCR 018-185/2010 The Ministry of Finance
Economic and Financial Standing - Conditions

NRC 018-067/2011 DARS
NRC 018-043/2011 Ministry for health

Technical and/or professional ability – Conditions

NRC 018-067/2011 DARS (list of the works carried out)
NRC 018-29/2012 Hospital of the dr. Jožeta Potrča Ptuj (certificate ISO OHSAS 18001, employment)
NRC 018-293/2012 Hospital Valdoltra (employment, ISO 14001)
NRC 018-43/2013 University Medical Centre (CE marking)