

## **Regulation 57 Grounds for Exclusion**

### **Exclusion grounds**

#### *Mandatory exclusions*

**57.**—(1) Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with regulations 59, 60 and 61, or are otherwise aware, that that economic operator has been convicted of any of the following offences:—

(a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977(a) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(b) where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime(c);

(b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(d) or section 1 of the Prevention of Corruption Act 1906(e);

(c) the common law offence of bribery;

(d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010(f), or section 113 of the Representation of the People Act 1983(g);

(e) where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities(h):—

(i) the common law offence of cheating the Revenue;

(ii) the common law offence of conspiracy to defraud;

(iii) fraud or theft within the meaning of the Theft Act 1968(i), the Theft Act (Northern Ireland) 1969(j), the Theft Act 1978(k) or the Theft (Northern Ireland) Order 1978(l);

(iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(m), article 451 of the Companies (Northern Ireland) Order 1986(n) or section 993 of the Companies Act 2006(o);

(v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(p) or section 72 of the Value Added Tax Act 1994(q);

(vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(r);

(vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(s) or section 19 of the Theft Act (Northern Ireland) 1969(t);

(viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(u); or

- (a) 1977 c.45; section 1 was amended by the Criminal Attempts Act 1981 (c.47), section 5(1), by the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40), Schedule 2, Part 2, and by the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52), Schedule 1; section 1A was inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5(1), and was amended by the Coroners and Justice Act 2009 (c.25), section 72(1)(a).
- (b) S.I. 1983/1120 (N.I.13); article 9 was amended by Part 2 of Schedules 1 and 2 to the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40), and article 9A was inserted by section 6(1) of that Act; there are other amendments but none is relevant.
- (c) OJ No L 300, 11.11.2008, p42.
- (d) 1889 c.69; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
- (e) 1906 c.34; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
- (f) 2010 c.23.
- (g) 1983 c.2; section 113 was amended by the Greater London Authority Act 1999 (c.29), Schedule 3, paragraph 30(2).
- (h) OJ No C 316, 27.11.1995, p48.
- (i) 1968 c.60.
- (j) 1969 c.16 (N.I.).
- (k) 1978 c.31.
- (l) S.I. 1978/1407 (N.I.23).
- (m) 1985 c.6; section 458 was modified by S.I. 2001/1090 and repealed by the Companies Act 2006 (c.46), Schedule 16.
- (n) S.I. 1986/1032 (N.I.6), amended by S.R. (NI) 2004/307 (and other instruments that were not relevant) and revoked by the

- Companies Act 2006 (c.46), Schedule 16.
- (o) 2006 c.46; section 993 is applied (with modifications) by S.I. 2009/1804, regulation 47, and by S.I. 2009/2436, regulation 3 and Schedule 1.
  - (p) 1979 c.2.
  - (q) 1994 c.23.
  - (r) 1993 c.36.
  - (s) 1968 c.60; section 20 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.
  - (t) 1969 c.16 (N.I.); section 19 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.
  - (u) 2006 c.35.

(ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act;

- (f) any offence listed—
  - (i) in section 41 of the Counter Terrorism Act 2008(a); or
  - (ii) in Schedule 2 to that Act where the court has determined that there is a terrorist connection;
- (g) any offence under sections 44 to 46 of the Serious Crime Act 2007(b) which relates to an offence covered by subparagraph (f);
- (h) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002(c);
- (i) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988(d) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(e);
- (j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004(f);
- (k) an offence under section 59A of the Sexual Offences Act 2003(g);
- (l) an offence under section 71 of the Coroners and Justice Act 2009(h);
- (m) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994(i); or
- (n) any other offence within the meaning of Article 57(1) of the Public Contracts Directive—
  - (i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland; or
  - (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland.

(2) The obligation to exclude an economic operator also applies where the person convicted is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control in the economic operator.

*Mandatory and discretionary exclusions for non-payment of taxes etc*

(3) An economic operator shall be excluded from participation in a procurement procedure where

- (a) the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and
- (b) the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of any of the jurisdictions of the United Kingdom.

- (a) 2008 c.28.
- (b) 2007 c.27.
- (c) 2002 c.29; sections 340(11) and 415 were modified by the Serious Crime Act 2007 (c.27), section 63(1) and Schedule 6, paragraph 44(a); section 415 was amended by the Serious Organised Crime and Police Act 2005 (c.15), section 107(4).
- (d) 1988 c.33; sections 93A, 93B and 93C were inserted by sections 29, 30 and 31 of the Criminal Justice Act 1993 (c.36) and repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 17(2).
- (e) S.I. 1996/1299 (N.I.9); articles 45, 46 and 47 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 31(2).
- (f) 2004 c.19; section 4 was amended by the Human Tissue Act 2004 (c.30), Schedule 6, paragraph 7, by the UK Borders Act 2007 (c.30), section 31(1), by the Borders, Citizenship and Immigration Act 2009 (c.11), section 54, by the Protection of Freedoms Act 2012 (c.9), section 110, and by the Criminal Justice Act (Northern Ireland) 2013 (c.7 (N.I.)), section 7(2) to

- (5) and Schedule 4, Part 2, and extended to the Isle of Man with modifications by S.I. 2008/680, article 18 and Schedule 8.
- (g) 2003 c.37; section 59A was inserted by the Protection of Freedoms Act 2012 (c.9), section 109(2).
- (h) 2009 c.25.
- (i) 1994 c.37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraphs 1 and 25(1) and (2)(a), and by Schedule 12.

(4) Contracting authorities may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(5) Paragraphs (3) and (4) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

*Exceptions to mandatory exclusion*

(6) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(7) A contracting authority may also disregard the prohibition imposed by paragraph (3) where an exclusion would be clearly disproportionate, in particular—

- (a) where only minor amounts of taxes or social security contributions are unpaid; or
- (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

*Discretionary exclusions*

(8) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:—

- (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in regulation 56(2);
  - (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under the laws and regulations of any State;
  - (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
  - (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
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- (e) where a conflict of interest within the meaning of regulation 24 cannot be effectively remedied by other, less intrusive, measures;
  - (f) where a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 41, cannot be remedied by other, less intrusive, measures;
  - (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;
  - (h) where the economic operator—
    - (i) 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; or
    - (ii) has withheld such information or is not able to submit supporting documents required under regulation 59; or

- (i) where the economic operator has—
  - (i) undertaken to—
    - (aa) unduly influence the decision-making process of the contracting authority, or
    - (bb) obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
  - (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

*Exclusion during procedure*

(9) Contracting authorities shall exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).

(10) Contracting authorities may exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4) or (8).

*Duration of exclusion*

(11) In the cases referred to in paragraphs (1) to (3), the period during which the economic operator shall (subject to paragraphs (6), (7) and (14)) be excluded is 5 years from the date of the conviction.

(12) In the cases referred to in paragraphs (4) and (8), the period during which the economic operator may (subject to paragraph (14)) be excluded is 3 years from the date of the relevant event.

*Self-cleaning*

(13) Any economic operator that is in one of the situations referred to in paragraph (1) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(14) If the contracting authority considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

(15) For that purpose, the economic operator shall prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(17) Where the contracting authority considers such measures to be insufficient, the contracting authority shall give the economic operator a statement of the reasons for that decision.