Exclusion Criteria

The exclusion process involves evaluating whether the bidder has committed any offences that would lead them to be excluded from the bidding process.
The exclusion questions you can ask are split into two types:

- **Mandatory exclusions**: you must ask questions regarding these exclusions and the bidder may be excluded from the procurement process if specified offences have been committed and the self-cleansing measures taken are in sufficient to demonstrate reliability. For example corruption, bribery, money laundering or certain types of frauds
- **Discretionary exclusions**: you may ask questions concerning discretionary exclusions where they are relevant and proportionate to the contract. You should determine whether a bidder should be excluded based on the bidder's response and any evidence provided of self-cleansing measures (if required) which are sufficient to demonstrate reliability. These should be considered on a case by case basis by you and your organisation.

It is considered best practice to ask bidders both types of questions in regulated procurement exercises.

The table below provides an overview of both types of exclusion criteria.

Exclusion Criteria in Route 2 Procurement Exercises	**Must ask**	**May ask**	**Self-Cleansing Applies**
Criminal Convictions	•		•
Blacklisting	•		•
Tax and Social Security Breach		•	

Environmental, Social and Labour Law		•	•
Bankruptcy and Insolvency		•	•
Grave Professional Misconduct		•	•
Conflict of Interest		•	•
Distortion of Competition		•	•
Contract Deficiencies		•	•
Misrepresentation		•	•
Unduly Influence		•	•

In the case of tax and social security breaches where self-cleansing does not apply, the bidder should not be excluded if they have fulfilled their obligations by paying or entered into a binding agreement with the view to paying monies due or the obligation to repay otherwise ceases.

What is Self-Cleansing?

Open or close

The bidder must be given the opportunity to provide evidence that they have taken sufficient and appropriate remedial action i.e. they have ‘self-cleansed’. If you are satisfied that the evidence provided is sufficient to demonstrate reliability, you must not exclude the bidder from the procurement procedure on those grounds

The bidder must satisfy that it has:

- paid, or undertaken to pay, compensation for any damage caused by the criminal offence or misconduct;
- provided detailed facts and circumstances by collaborating with the investigating authorities; and
- taken appropriate concrete technical, organisational and personnel measures to prevent further criminal offences or misconduct.

In the case of tax and social security breaches, the bidder should not be excluded if they have fulfilled their obligations by paying or entered into a binding agreement with the view to paying monies due or the obligation to repay otherwise ceases.

When considering any self-cleansing measures, organisations must consider all relevant factors. This includes the gravity and particular circumstances of the criminal offence or misconduct.

If you believe the bidder's remedial action is insufficient to demonstrate reliability, you must provide the bidder with a statement outlining the reasons for the decision. The statement of reasons must be provided in writing as soon as is reasonably practical to allow the bidder to understand why the self-cleansing measures taken are insufficient.

Exclusion Criteria in the SPD

Open or close

Questions relating to the above exclusion grounds are contained in the **SPD**. It is best practice, and will help promote consistency, to use the SPD document for all route 2 procurement exercises.

The standardised statement document has been developed to support you in explaining the exclusion criteria to bidders. Within the standardised statement document is a standard paragraph of text that can be added to your contract notice in section II.2.14 (Additional Information) to explain the exclusion criteria.

Please note that if you use the online SPD module on **PCS**, there is no need to add information on the Exclusion Grounds to the Contract Notice as they are automatically added to the module.

Mandatory Exclusion Grounds

The buyer must ask the bidder questions relating to criminal convictions and blacklisting in all Route 2 procurement exercises. If the bidder confirms they have taken part in these activities, they may be excluded from the process if they have not taken sufficient self-cleansing actions.

These are contained in the Procurement (Scotland) Regulations 2016 8(1) & 9(1).

Criminal Offences

Open or close

Buyers must ask if a bidder has been convicted by final judgement of one of the criminal offences contained in the relevant regulations

This includes:

- Participation in a criminal organisation
- Corruption
- Bribery and certain types of fraud
- Terrorist offences or offences linked to terrorist activities
- Money laundering or terrorist financing
- Child labour and other forms of trafficking in human beings

Blacklisting

Open or close

Buyers must ask if a bidder has taken part in blacklisting activities.

Blacklisting refers to the practice of systematically denying individuals employment, who would otherwise be able to be employed. Blacklisting is done on the basis of information, accurate or not, held in some type of database. The Scottish Government regards blacklisting or the compiling of a blacklist as totally unacceptable.

The **Employment Relations Act 1999 (Blacklists) Regulations 2010** provide rights for individuals if blacklisting results in refusal of employment, detriment, dismissal or redundancy.

The above are listed in regulations 8 and 9(1) of the **Procurement (Scotland) Regulations 2016**.

All exclusion, selection and award criteria must be relevant and proportionate to the subject matter of the contract. You should set out your specific requirements, the relevant exclusion grounds and the minimum standards that are relevant for your procurement exercise in the Contract Notice.

Statutory Guidance has been published on Selection of Tenderers and Award of Contracts to provide further guidance.

Derogation from Mandatory Exclusion Considerations

Open or close

In exceptional circumstances you may disregard the mandatory exclusion grounds when selecting a bidder. This can only be done where there are overriding reasons relating to the public interest. This provision is known as derogation from the mandatory exclusion considerations and ensures that organisations are able to respond to unforeseen emergency circumstances.

There is no definitive list of situations in which this derogation can be used and any decision should be made on a case by case basis. Organisations should be able to demonstrate that the actual or potential harm is so great, that the public interest in using the derogation outweighs the public interest in excluding a bidder.

An example may be where urgently needed vaccines or emergency equipment can only be purchased from a bidder to whom one of the mandatory exclusion grounds otherwise applies.

Each situation must be judged on its own merits, but the following situations are, on their own, unlikely to meet this test:

- when a bidder which should be excluded is offering a substantially better quality / more economical product or service;
- when there would otherwise be a lack of competition.

Discretionary Exclusion Grounds

Whilst the buyer may ask questions on the following areas within their procurement exercise, it is not mandatory to exclude the bidder if they have taken part in these activities. Each of these should be considered on a case by case basis by the buyer and any self-cleansing activities taken by the bidder should be taken into consideration.

When reviewing the activity, you should be proportionate in your decision, taking into account:

- the size of the contracts,
- the relevance of the breach
- its impact on the operational on the contract delivery and reputational risk

The discretionary exclusion grounds are:

Tax and Social Security Obligations

Open or close

Organisations may exclude a bidder where the bidder has breached its tax or social security obligations. These may take the forms of judicial or administrative decision or other “appropriate means”.

Buyers can request the following examples of evidence to understand a bidder’s breach in tax or social security obligations:

- credit references, i.e. details of any outstanding tax debt;
- company accounts, depending on the size of the tax debt the bidder may be obliged to include this in their accounts;
- an admission by a bidder to an Occasion of Non-Compliance (OONC); or,

- an admission by a bidder of the failure of an avoidance scheme which they were involved in and was, or should have been, notified under Disclosure of Tax Avoidance Scheme (DOTAS).

In the case of tax and social security breaches, the bidder should not be excluded if they have fufilled their obligations by paying or entered into a binding agreement with the view to paying monies due or the obligation to repay otherwise ceases.

Note – these examples relate to the UK tax regime, and there will be equivalents in other countries which should be considered, when relevant.

Environmental, Social and Labour Laws

Open or close

Bidders may be excluded if they have breached any the obligations in relation to environmental, social and labour law both in any relevant national and relevant collective agreements and specific international agreements.

Further information can be found in **9(5)(a) of The Procurement (Scotland) Regulations 2016**.

When determining whether to exclude a bidder on this basis, a contracting authority should be proportionate in its decision, taking into account the size of the contract, the relevance of the breach, and its impact on the operational risk to the delivery of the contract and reputational risk to the organisation.

Bankrupt or Insolvent Businesses

Open or close

Where a bidder is bankrupt or subject to insolvency proceedings, you can choose whether to exclude them from the procurement exercise.

Potential evidence could include:

- copies of accounts verifying they have sufficient liquidity to perform the contract

- its business plan outlining steps the potential supplier will take to address concerns
- references from other recent customers

When considering whether to exclude such a bidder you should consider contract delivery potential risks, such as:

- the impact this may have on the sub-contracting supply chain
- the size of the contract
- potential consequences of the contract failing

Additionally, organisations should take into account the potential benefits of awarding a contract to such a bidder. These can include:

- providing opportunities to contribute to increased employment in communities
- the wellbeing of local and regional communities
- helping unlock the innovation or economic potential with local businesses

Grave Professional Misconduct

Open or close

Bidders may be excluded if they are guilty of grave professional misconduct, which renders its integrity questionable.

Further information can be found in the **Procurement (Scotland) Regulations 2016 9(5)(c)**.

When determining whether to exclude a bidder on this basis, an organisation should be proportionate in its decision, taking into account the size of the contract, the relevance of the breach, and its impact on the operational risk to the delivery of the contract and reputational risk to the organisation.

Conflict of Interest

Open or close

Bidders may be excluded if a conflict of interest exists which cannot be effectively remedied by other less intrusive measures, and which may impact the procurement

process.

Further information can be found in **the Procurement (Scotland) Regulations 2016 9(5)(e)**.

When determining whether to exclude a bidder on this basis, an organisation should be proportionate in its decision, taking into account the size of the contract, the relevance of the breach, and its impact on the operational risk to the delivery of the contract and reputational risk to the organisation.

Distortion of Competition

Open or close

Bidders may be excluded if a distortion of competition arises from:

- the bidder entering into agreements with other bidders aimed at distorting competition
- the prior involvement of the bidder in the preparation of the tender which cannot be remedied by other, less intrusive measures.

Further information can be found in **the Procurement (Scotland) Regulations 2016 9(5)(d)(f)**

When determining whether to exclude a bidder on this basis, an organisation should be proportionate in its decision, taking into account the size of the contract, the relevance of the breach, and its impact on the operational risk to the delivery of the contract and reputational risk to the organisation.

Deficiency in Performance

Open or close

Bidders may be excluded if they have shown significant or persistent deficiencies in the performance of a substantive requirement (under a prior public contractor or a prior concession contract which led to early termination of that prior contract,

damages or other comparable sanctions).

Further information can be found in **The Procurement (Scotland) Regulations 2016 9(5)(g).**

When determining whether to exclude a bidder on this basis, an organisation should be proportionate in its decision, taking into account the size of the contract, the relevance of the breach, and its impact on the operational risk to the delivery of the contract and reputational risk to the organisation..

Misrepresentation or Unduly Influence

Open or close

Bidders may be excluded if they are found to have:

- seriously misrepresented the supply of information (when this information would be used to confirm there are no grounds for their exclusion from the procurement exercise, and therefore the bidder meets the selection criteria) or have withheld information; or

the bidder has:

- unduly influenced the decision making process
- obtained confidential information which may give them undue advantages in the procurement procedure
- negligently provided misleading information that may have a material influence on decisions

Further information can be found in **The Procurement (Scotland) Regulations 2016 5(h)(i)(j)**

Timescales for exclusions

Bidders must not be excluded indefinitely from participating in procurement activity.

A bidder must only be excluded:

- for a maximum of 5 years from the date of conviction by final judgment for one of the criminal offences listed in **Regulation 8 of the Procurement (Scotland) Regulations 2016**.
- until it has paid its outstanding tax or social security obligations. This includes: any applicable interest or fines; entering into a binding agreement to pay; or the obligation to make repayment ceases; or
- for a maximum of 3 years from the date of the relevant event for all other grounds for exclusion.

Applying Exclusion Grounds to Sub-Contractors

Open or close

You must consider how, in conducting your procurement, you can involve small and medium enterprises, third sector bodies and supported businesses. This can include the use of sub-contractors to support the delivery of the contract.

The Procurement (Scotland) Regulations 2016 do not include applying mandatory and discretionary exclusion grounds to sub-contractors for contracts below the GPA Procurement Threshold contract value. However you should consider the circumstances where this approach needs to be applied to safeguard effective contract delivery.

Who Do Exclusion Grounds Apply to Within the Company?

Open or close

Exclusions grounds apply to a person who is:

- a member of the administrative, management or supervisory body of the bidder or
- has powers of representation, decision or control in relation to such bidder.

Exclusion Criteria Statement in the Contract Notice

Open or close

Although the Single Procurement Document (SPD) is not mandatory for below GPA threshold procurements, it is good practice. In the Standardised Statement document, along with the selection statements, you can find two exclusion ground statements:

- one for the Contract Notice for below threshold procurements and
- one for the above threshold Contract Notice

In the case of a Route 2 procurement, please make sure that you copy over the statement for a below threshold Contract Notice exclusion statement to the textbox in the Contract Notice under II.2.14 Additional Information. This will make sure that you have informed the bidders that you will apply mandatory and discretionary exclusion grounds in the procurement exercise.

Please note that if you are using the online SPD module in PCS, there is no need to include this in the contract notice.

Care and Support Services

Open or close

In the case of Care and Support Services the mandatory exclusion grounds **Regulation 8(1) of the Procurement (Scotland) Regulations 2016** must be applied to all procurements, and you can also choose to apply the discretionary exclusion grounds.

Exclusion statements should be put under section II.2.14 Additional Information of the Social and other Specific Services Contract Notice, or detailed in the online SPD Module on PCS if it is being used.

Further information can be found in the **Statutory Guidance on Selection of Tenderers and Award of Contracts**.