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 insufficient to demonstrate reliability. For example, corruption, bribery, money laundering or certain types of fraud.
- **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 Route 3 procurement exercises.

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

Exclusion Criteria in Route 3 Procurement Exercises	Must ask	May ask	Self-Cleansing Applies
Criminal Convictions	•		•
Blacklisting	•		•
Tax and Social Security Breach (Binding decision - judicial or administrative)*	•		
Tax and Social Security (Decision by any other means)*		•	

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 met their obligations by paying or entered into a binding agreement with the view to paying monies due;
- have a clear disproportionate (i.e. minor) amount of taxes or social security contributions unpaid; 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 they have given is sufficient to demonstrate reliability, you should 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 have 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 them with a statement outlining the reasons for the decision. This must be provided in writing as soon as is reasonably practical to allow the bidder to understand why the self-cleansing measures they have taken are insufficient.

Exclusion Criteria and the SPD (Scotland)

Open or close

Questions relating to exclusion grounds are contained in the SPD. You must use the SPD for all Route 3 procurements. More information on the SPD and the Standardised Statements is contained in the **SPD station.**

A document containing a set of "standardised statements" has been developed to support you in explaining the exclusion criteria to bidders. Within the standardised statement document, is information that can be added to your contract notice in section II.2.14 (Additional Information) The Standardised Statements document can be found at the bottom of the page.

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 3 procurement exercises. If the bidder confirms they have taken part in these activities, they must be excluded from the process if they have not taken sufficient self-cleansing actions.

These are contained in **regulation 58(1) and (3) of the Public Contracts (Scotland) Regulations 2015.**

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 is 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.

Tax and Social Security Obligations - Binding Decision - Judicial or Administrative

Open or close

The Scottish Government treats tax and social security obligations seriously.

Organisations must exclude bidders where they have been subject to a binding decision (judicial or administrative) which found a breach of legal obligations to pay tax or social security contributions. A judicial decision is one which is made by a court or tribunal. An administrative decision is one which is made by the relevant tax authority in the UK or in the country where the bidder is established.

Derogation from Mandatory Exclusion Considerations

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. This allows buying organisations to respond to unforeseen emergency circumstances.

There is no definitive list of situations in which this derogation can be used, so any decision you make should be done carefully and 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 the 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 individually, 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

While you should ask questions on the following areas within the procurement exercise, it is not mandatory to exclude the bidder if they have taken part in these activities. Each of these grounds should be considered on a case by case basis by you 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 contract
- the relevance of the breach
- its impact on the operational and reputational risk to the contract delivery
- and the reputational risk to the organisation

The discretionary exclusion grounds are:

Tax and Social Security Obligations - Decision by other Means

Open or close

Organisations may exclude a bidder where the bidder has breached its tax or social security obligations and the decision has been reached by means other than a binding decision (judicial or administrative).

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)
- 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 fulfilled their obligations by paying or have entered into a binding agreement with the view to paying the money 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 Employment Law

Open or close

One of several discretionary grounds for exclusion relates to social, environmental and employment law obligations. These obligations include any relevant legislation, as well as relevant collective agreements and specific international agreements.

As these laws are wide ranging, you can focus on a specific area of law that bidders must take into account when making their self-declaration in respect of exclusion grounds. For example,

breaches of employment and equality legislation.

Bidders may be excluded where your organisation can demonstrate that the bidder has breached any of these obligations. This exclusion ground is discretionary and it is therefore for your organisation to decide if exclusion is appropriate.

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

Further information can be found in the Public Contact (Scotland) Regulations 2015 57 (2).

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 you could request to evaluate the situation include:

- copies of accounts verifying they have sufficient liquidity to perform the contract
- the bidder's business plan outlining steps they will take to address concerns, or
- 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 scale of the contract;
- the potential consequences of the contract failing.

Additionally, you 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 Public Contracts (Scotland) Regulations 2015, 58 (8) (c)

When determining whether to exclude a bidder on this basis, your 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 and reputational 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 that cannot be effectively remedied by other less intrusive measures, and that may impact the procurement process.

Further information can be found in **The Public Contracts (Scotland) Regulations 2015, 58 (8) (e)**

When determining whether to exclude a bidder on this basis, your 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 and reputational 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 to distort 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 Public Contracts (Scotland) Regulations 2015, 58 (8) (d) (f)**

When determining whether to exclude a bidder on this basis, your 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 and reputational risk to the delivery of the contract and reputational risk to the organisation.

Misrepresentation or Undue 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 withheld information;

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 Public Contracts (Scotland) Regulations 2015, 58 (8)(h)(i)

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 section 9 of **The Public Contracts (Scotland) Regulations 2015 58(8)(g)**

When determining whether to exclude a bidder on this basis your 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 and reputational risk

to the delivery of the contract and reputational risk to the organisation.

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 **58(1) of the Public Contracts (Scotland) Regulations 2015;**
- 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
- 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

Organisations must consider how, in conducting a procurement, they can facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in that process. This can include the use of sub-contractors to support the delivery of the contract.

Organisations can, at their discretion, require verification of whether there are any grounds for the exclusion of any sub-contractor involved in the delivery. Where this information is sought the SPD must be used.

Where this verification shows that there are mandatory grounds for the exclusion of a sub-contractor, the organisation must require that they are replaced.

You should keep in mind that this only applies to sub-contractors upon who the main bidder is not relying on to meet the selection criteria of the contract.

Where there are discretionary grounds for the exclusion of a sub-contractor, the organisation can choose whether it should be substituted. Organisations must decide whether to apply discretionary exclusion grounds to sub-contractors involved in the contract delivery on a case by case basis, taking into account the various circumstances of the contract.

Who do Exclusion Grounds Apply to within the Company?

Open or close

Exclusion 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 regarding such bidder

Exclusion Criteria Statement in the Contract Notice

Open or close

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 3 procurement, please make sure that you copy over the statement for an above **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

The mandatory exclusion grounds **(regulation 58(1) and (3) of the Public Contracts (Scotland) Regulations 2015)** must be applied to all procurements, and you can also choose to apply the discretionary exclusion grounds.

Exclusion statements should be put under 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.

Documents

SPD (Scotland) Standardised Statements

(file type: doc)