



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 27 January 2012**

**5736/12**

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**Interinstitutional File:  
2011/0438 (COD)**

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**MAP 4  
MI 48**

**NOTE**

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from:	General Secretariat
to:	Working Party on Public Procurement
on:	1 February 2012
No Cion prop.:	18966/11 MAP 10 MI 686
Subject:	Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 3: Reducing documentation requirements

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In view of the Working Party on Public Procurement on 1 February 2012, delegations will find in the Annex a non-paper prepared by the Commission services (DG Internal Market) on Cluster 3 of the above proposal

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### Cluster 3

#### Reducing documentation requirements

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Changes to the substance are highlighted in **bold**; minor modifications or purely linguistic adaptations are not highlighted.

#### **1. Selection and exclusion criteria**

*Article 54*

*General principles*

*[Directive 2004/18/EC: Art. 44(1)]*

1. Contracts shall be awarded on the basis of the criteria laid down in Articles 66 to 69, provided that the following cumulative conditions are fulfilled:
  - (a) **the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account Article 43;**
  - (b) the tender comes from a tenderer that is not excluded in accordance with Articles 21 and 55 and that meets the selection criteria set out by the contracting authority in accordance with Article 56 and, where appropriate, the non-discriminatory rules and criteria referred to in Article 64.

Paragraph 1 contains a short summary of the basic conditions that have to be met for awarding the contract: the tender must be admissible, fulfilling all requirements (as to its content and presentation) set by the contracting authority, and the tenderer must have passed qualitative selection.

The provision completes the list provided in Article 44(1) of Directive 2004/18/EC; its wording follows Article XV:4 of the GPA.

2. ....[Cluster 2]

3. **In open procedures, contracting authorities may decide to examine tenders before verifying the fulfilment of the selection criteria, provided that the relevant provisions of this section are observed, including the rule that the contract shall not be awarded to a tenderer that should have been excluded pursuant to Article 55 or that does not meet the selection criteria set out by the contracting authority, in accordance with subsection 1 of this section.**

Paragraph 3 clarifies that in one-phase procedures contracting authorities are in principle free to decide about the order in which they examine selection and award criteria. Examining the award criteria first may improve the efficiency of the procedure if their assessment is relatively easy and straightforward, such as awards on the basis of cost only. In such a case, contracting authorities must, of course, ensure full and proper application of the rules on qualitative selection by subsequently excluding the tenderer having submitted the best tender if it turns out that there is a ground for exclusion or that the selection criteria are not fulfilled.

4. **The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to amend the list in Annex XI, where necessary due to the conclusion of new international agreements or modification of existing international agreements.**

Paragraph 4 empowers the commission to update, by way of delegated acts, the list of international social and environmental conventions that is relevant for the application of paragraph 2 (see cluster 2).

*Article 55*

*Exclusion grounds*

*[Directive 2004/18/EC: Art. 45(1),(2),(4)]*

1. Any candidate or tenderer that has been the subject of a conviction by final judgment for one of the following reasons shall be excluded from participation in a public contract:
  - (a) participation in a criminal organisation, as defined in **Article 2(1) of Council Framework Decision 2008/841/JHA**<sup>1</sup>;
  - (b) corruption, as defined in **Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union**<sup>2</sup> and **Article 2 of Council Framework Decision 2003/568/JHA**<sup>3</sup> as well as corruption as defined in the national law of the contracting authority or the economic operator;
  - (c) fraud within the meaning of Article 1 of the Convention on the protection of the financial interests of the European Communities<sup>4</sup>;
  - (d) **terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA**<sup>5</sup> respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;

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<sup>1</sup> OJ L 300, 11.11.2008, p. 42.

<sup>2</sup> OJ C 195, 25.6.1997, p. 1.

<sup>3</sup> OJ L 192, 31.7.2003, p. 54.

<sup>4</sup> OJ C 316, 27.11.1995, p. 48.

<sup>5</sup> OJ L 164, 22.6.2002, p.3.

- (e) money laundering, as defined in Article 1 of Council Directive 91/308/EEC<sup>6</sup> .
- The obligation to exclude a candidate or tenderer from participation in a public contract shall also apply where the conviction by final judgment has condemned company directors or any other any persons having powers of representation, decision or control in respect of the candidate or tenderer.

The list of mandatory grounds for exclusion has been updated and adapted to new developments in the EU's political orientations, in particular with regard to the fight against corruption and terrorism. Point (b) includes now, besides the relevant EU legal acts, also convictions for corruption offences under national law. The new point (d) on terrorist offences and offences linked to terrorist activities follows the corresponding provision in Directive 2009/81/EC.

2. Any economic operator **shall be excluded from participation in a contract where the contracting authority is aware of a decision having the force of res judicata** establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

The failure to pay taxes and social security contributions figures in Directive 2004/18/EC among the non-mandatory grounds for exclusion (Article 45(2)(e) and (f)). In view of the importance of such payments for European public finances and social systems, in particular in times of economic and fiscal crisis, the proposal provides a mandatory ground for exclusion subject to the condition of the existence of a (judicial or administrative) decision having force of res judicata.

3. A contracting authority may exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:

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<sup>6</sup> OJ L 166, 28.6.1991, p. 77.

(a) ... [Cluster 2]

(b) where the economic operator is the subject of **insolvency** or winding-up proceedings, where **its assets** are being administered **by a liquidator** or by the court, where it has entered into an arrangement with creditors, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

Terminology adapted to Council Regulation No 1346/2000 on insolvency proceedings.

(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct;

Point (c) on grave professional misconduct demonstrated by any means remains essentially unchanged. However, the current Article 45(2)(c) of Directive 2004/18/EC which provides an additional ground for exclusion in case of a conviction for an offence concerning the professional conduct has not been taken over since it largely overlaps with point (c).

(d) **where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature with the same contracting authority.**

**In order to apply the ground for exclusion referred to in point (d) of the first subparagraph, contracting authorities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment shall be communicated to the contractor in question, which shall be given the opportunity to object to the findings and to obtain judicial protection.**

1. Point (d) makes it clear that a contracting authority can exclude an economic operator in case of prior bad performance. The provision which follows the wording of Article VIII:4(c) of the GPA sets however clear conditions for such an exclusion so as to ensure a fair and objective application without discrimination.

2. In line with the GPA, the exclusion ground is limited to cases of qualified bad performance (“significant or persistent deficiencies”) of a substantive requirement. It is further restricted to contracts of a similar nature with the same contracting authority. In view of the far-reaching legal consequence – exclusion from the procedure – these conditions have to be interpreted restrictively. Contracting authorities must in particular ensure that the breaches of contractual obligation have a seriousness that makes them comparable to the other grounds for exclusion listed in Article 55.

3. In order to make use of point (d), contracting authorities (and Member States) must further ensure appropriate procedural guarantees: Contractual performance has to be assessed by a fair and objective system. Assessments must be communicated to the economic operators which have a right of objection and appropriate judicial protection. These safeguards are necessary to avoid arbitrary exclusions and surprise decisions.

**4. Any candidate or tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 may provide the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.**

**For this purpose, the candidate or tenderer shall prove that it has compensated any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct. Contracting authorities shall evaluate the measures taken by the candidates and tenderers taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the contracting authority considers the measures to be insufficient, it shall state the reasons for its decision.**

1. The provision on “self cleaning” is one of the major innovations of the proposal. It follows the assignment made under Article 73(3) of Directive 2009/81/EC according to which the Commission shall investigate “the feasibility of harmonising the conditions for the reinstatement of candidates or tenderers with prior convictions excluding them from participation in public procurements, and shall, if appropriate, bring forward a legislative proposal to that effect”. The proposed solution is inspired by legislation and case-law from various Member States, in particular Germany and Austria.

2. Under the proposed system, candidates or tenderers who are about to be excluded on the basis of one of the grounds for exclusion have the right to submit to the contracting authority evidence demonstrating that they have taken appropriate measures to remedy the consequences of past misconduct and to effectively prevent future occurrences. To this effect, they have to prove, the following three elements:

- 1) Compensation of any damage caused by the criminal offence or misconduct;
- 2) active collaboration with the investigating authorities to clarify the facts and circumstances of the case in a comprehensive manner; and
- 3) concrete technical, organisational and personal measures appropriate to prevent further criminal offences or misconduct.



As results from recital 35, the measures to be taken include, in particular, staff reorganisation (including the dismissal of all officers, directors and employees involved in the misconduct, redeployment and/or disciplinary measures regarding persons having participated to a lesser degree or simply tolerated the misconduct) and appropriate compliance measures to prevent future misconduct (including, for instance, establishing binding company guidelines, staff training and information, separation of administrative and operative department, installation of a compliance officer, double-checking of important decisions).

3. The contracting authority is obliged to examine and evaluate the measures taken by the candidate or tenderer in question with a view to a possible admission to the procurement procedure. If it considers the measures insufficient, it has to provide an explanation.

4. The proposed system ensures that the decision on acceptance of “self-cleaning” measures is taken by the contracting authority on the basis of harmonised criteria in a case-by-case approach, taking into account not only the nature of the misconduct and the measures taken by the economic operator but also the concrete circumstances of the contract award at hand. This allows for a flexible and realistic practice.

**5. Member States shall ensure that contracting authorities and economic operators can easily obtain information and assistance with regard to the application of this Article through the liaison point provided for in Article 88.**

**6. Member States shall make available to other Member States, upon request, any information related to the exclusion grounds listed in this Article. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 88.**

The proposed rules on assistance and administrative cooperation are intended to facilitate the application of the grounds for exclusion in cross-border situations where the difficulties of obtaining reliable and comprehensive information can become an obstacle to the exercise of the Internal Market freedoms.

*Article 56*

*Selection criteria*

*[Directive 2004/18/EC: Art. 44(1),(2), 46, 47, 48]*

1. Contracting authorities may establish conditions for participation relating to:
  - (a) suitability to pursue the professional activity;
  - (b) economic and financial standing;
  - (c) technical and professional ability.

**They are not obliged to impose all the conditions listed in paragraphs 2, 3 and 4, but they shall not provide requirements other than those listed.**

**Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the contract to be awarded.** All requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.

Paragraph 1 states clearly that contracting authorities have a limited choice among the selection criteria exhaustively defined in the following paragraphs. It also reinforces the restrictions following from the principle of proportionality: conditions for participation in procurement procedures must be limited to what is strictly necessary to ensure that a candidate or tenderer is able to perform the contract fully and satisfactorily. Reactions to the Green Paper consultations have shown that a considerable number of stakeholders complain about excessive requirements in that respect. Effective compliance with the proportionality principle is important not only to ensure access to public procurement but also to avoid excessive administrative burdens and unjustified risks of exclusion for participants.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled on one of the professional or trade registers kept in their Member State of establishment, as described in Annex XII.

In procedures for the award of public service contracts, insofar as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

3. **With regard to sufficient economic and financial standing, contracting authorities may require economic operators to have adequate financial and economic capacity.** For that purpose, they may require that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract and an **adequate professional risk indemnity insurance.**

... [Cluster 5]

**Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover by reference to groups of lots for the event that the successful tenderer is awarded several lots to be executed at the same time.**

**Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement.**

The rules regarding requirements of economic and financial standing have been streamlined and clarified. Subparagraphs 3 and 4 clarify practically relevant situations that are not addressed in Directive 2004/18/EC.

4. **With regard to technical and professional ability, contracting authorities may require that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. Contracting authorities may conclude that economic operators will not perform the contract to an appropriate quality standard where the contracting authority established that they have conflicting interests which may negatively affect the performance of the contract.**

In procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

Paragraph 4 clarifies the conditions for the use of criteria relating to technical and professional ability. It specifies also that a lack of professional ability may result from a conflict of interests affecting contract performance (for example, in the case of a contract for the testing and auditing of research and development work, the company having executed the work in question would present a clear conflict of interests affecting the correct performing of the audit contract).

5. Contracting authorities shall indicate the required conditions of participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

## ANNEX XII

### REGISTERS<sup>7</sup>

The list of professional and trade registers in Annex XII has been reorganised and clarified.

The relevant professional and trade registers and corresponding declarations and certificates for each Member State are:

- in Belgium the "Registre du Commerce"/"Handelsregister", and, *in the case of service contracts*, the "Ordres professionnels/Beroepsorden";
- in Bulgaria, the "Търговски регистър";
- in the Czech Republic, the "obchodní rejstřík";
- in Denmark, the "Erhvervs- og Selskabsstyrelsen";
- in Germany, the "Handelsregister", the "Handwerksrolle", and, *in the case of service contracts*, the "Vereinsregister", the "Partnerschaftsregister" and the "Mitgliedsverzeichnisse der Berufskammern der Länder";
- in Estonia, the "Registrite ja Infosüsteemide Keskus";

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<sup>7</sup> For the purposes of Article 56(2), "professional or trade registers" means those listed in this Annex and, where changes have been made at national level, the registers which have replaced them.

- in Ireland, the economic operator may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name;
- in Greece, the "Μητρώο Εργοληπτικών Επιχειρήσεων — ΜΕΕΠ" of the Ministry for Environment, Town and Country Planning and Public Works (Υ.ΠΕ.ΧΩ.Δ.Ε) *in respect of works contracts*; the "Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο" and the "Μητρώο Κατασκευαστών Αμυντικού Υλικού" *in the case of supplies contracts; in the case of service contracts*, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services as referred to in Annex I, the professional register "Μητρώο Μελετητών" and the "Μητρώο Γραφείων Μελετών";
- in Spain, the "Registro Oficial de Licitadores y Empresas Clasificadas del Estado" *in respect of works and services contracts*, and, *in the case of supplies contracts*, the "Registro Mercantil" or, in the case of non-registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question;
- in France, the "Registre du commerce et des sociétés" and the "Répertoire des métiers";
- in Italy, the "Registro della Camera di commercio, industria, agricoltura e artigianato"; *in the case of supplies and services contracts* also the "Registro delle commissioni provinciali per l'artigianato" or, in addition to the already mentioned registers, the "Consiglio nazionale degli ordini professionali" *in respect of services contracts*;

- in Cyprus, the contractor may be requested to provide a certificate from the "Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων)" in accordance with the Registration and Audit of Civil Engineering and Building Contractors Law *in respect of works contracts; in the case of supplies and services contracts* the supplier or service provider may be requested to provide a certificate from the "Registrar of Companies and Official Receiver" (Εφορος Εταιρειών και Επίσημος Παραλήπτης) or, where this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name;
- in Latvia, the "Uzņēmumu reģistrs";
- in Lithuania, the "Juridinių asmenų registras";
- in Luxembourg, the "Registre aux firmes" and the "Rôle de la Chambre des métiers";
- in Hungary, the "Cégnyilvántartás", the "egyéni vállalkozók jegyzői nyilvántartása" and, *in the case of service contracts*, some "szakmai kamarák nyilvántartása" or, in the case of some activities, a certificate stating that the person concerned is authorised to be engaged in the commercial activity or profession in question;
- in Malta, the economic operator obtains his "numru ta' registrazzjoni tat-Taxxa tal-Valur Miżjud (VAT) u n-numru tal-licenzja ta' kummerc", and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority;
- in the Netherlands, the "Handelsregister";
- in Austria, the "Firmenbuch", the "Gewerberegister", the "Mitgliederverzeichnisse der Landeskammern";

- in Poland, the "Krajowy Rejestr Sądowy";
- in Portugal, the "Instituto da Construção e do Imobiliário" (INCI) *in respect of works contracts*; the "Registo Nacional das Pessoas Colectivas" in the case of *supplies and services contracts*;
- in Romania, the "Registrul Comerțului";
- in Slovenia, the "Sodni register" and the "obrtni register";
- in Slovakia, the "Obchodný register";
- in Finland, the "Kaupparekisteri"/"Handelsregistret";
- in Sweden, the "aktiebolags-, handels- eller föreningsregistren";
- in the United Kingdom, the economic operator may be requested to provide a certificate from the Registrar of Companies stating that he is certified as incorporated or registered or, where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in a specific place under a given business name.



## **2. Reliance on capacities of others**

### *Article 62*

#### *Reliance on the capacities of other entities*

[Directive 2004/18/EC: Art. 47.2, 47.3, 48.3, 48.4]

1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 56(3), and to criteria relating to technical and professional ability as set out pursuant to Article 56(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. **In the case of economic and financial standing, contracting authorities may require that the economic operator and those entities are jointly liable for the execution of the contract.** Under the same conditions, a group of economic operators as referred to in Article 16 may rely on the capacities of participants in the group or of other entities.

In substance unchanged compared to Directive 2004/18/EC, except for the clarification that contracting authorities may require joint liability in case of reliance on third parties for economic and financial standing. This clarification aims at allowing contracting authorities to effectively protect themselves against a deficiency of the prime contractor (e.g. insolvency) during contract execution, arising from financial unsoundness.

2. **In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a group of economic operators as referred to in Article 6, a participant in the group.**

Under the current rules, seen in the light of the case-law of the Court (in particular, Case C-176/98, *Holst Italia*), there is considerable uncertainty on whether contracting authorities are allowed to require performance of a contract by the main contractor "in person" (e.g., prohibit subcontracting). Especially in contracts involving continued cooperation with the economic operator over a certain time (works, services and supplies involving installation), there can be a legitimate interest to have the chosen contractor itself perform the essential tasks.

The proposal hence explicitly allows contracting authorities to prohibit subcontracting to a certain extent, but limits this prohibition to the "critical tasks" to avoid a too strong interference in economic operators' freedom to organise their business.

### **3. Means of proof, notably self-declarations and European Procurement Passport**

#### *Article 57*

#### *Self-declarations and other means of proof*

*[new]*

1. **Contracting authorities shall accept self-declarations as preliminary evidence that candidates and tenderers fulfil any of the following conditions:**
  - (a) **they are not in one of the situations referred to in Article 55 in which economic operators shall or may be excluded;**

- (b) they meet the selection criteria that have been set out pursuant to Article 56;**
- (c) where applicable, they meet the objective rules and criteria that have been set out pursuant to Article 64;**
- (d) they will be able, upon request and without delay, to provide the supporting documentation that contracting authorities have required in accordance with Articles 59, 60 and, where appropriate, Articles 61 and 63.**

The self-declaration principle is one of the major innovations of the proposal. In requests to participate or tenders, candidates and tenderers may submit self-declarations instead of certificates and other official documents as means of proof that they are not subject to one of the grounds for exclusion and that they fulfil the selection criteria and, where applicable, meet the objective rules and criteria used to reduce the number of participants (Article 64). Candidates or tenderers who make use of this option must, however, be prepared to submit the actual official documents “upon request and without delay”.

- 2. A contracting authority may ask a candidate or tenderer at any moment during the procedure to submit all or parts of the required documentation where this appears necessary to ensure the proper conduct of the procedure.**

**Before awarding the contract, the contracting authority shall require the tenderer to which it has decided to award the contract to submit the documentation in accordance with Articles 59 and 60 and, where appropriate, Article 61. The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 59, 60 and 61.**

Paragraph 2 marks the limits of the self-declaration principle: The contracting authority is obliged to require and verify the actual official documents before it awards the contract to the successful tenderer. In addition, it may ask for all or part of the documents at an earlier stage of the procedure if this is considered necessary. This is intended to ensure fairness and objectivity of the procedure and to prevent abuses.

- 3. Contracting authorities shall not require certificates other than those referred to in Articles 60 and 61; in respect of Article 62, economic operators may rely on any appropriate means to prove to the contracting authority that they will have at their disposal the resources necessary.**

**Candidates and tenderers shall not be required to re-submit a certificate or other documentary evidence that has already been submitted to the same contracting authority within the past four years in an earlier procedure and is still valid.**

Paragraph 3 protects the legitimate interests of candidates and tenderers by setting clear limits with regard to the documentation to be submitted in case of a request under paragraph 2. It has to be noted that, in any event, candidates and tenderers are entitled to submit the European Procurement Passport as means of proof for the particulars set out in Annex XIII (see Article 59).

Subparagraph 2 follows widespread complaints expressed in the Green Paper consultations that candidates and bidders are frequently excluded for failure to submit documents that are already (sometimes even in multiple copies) in the possession of the contracting authority.

- 4. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information related to the exclusion grounds listed in Article 55, to the suitability, financial and technical capacities of tenderers described in Article 56 and to the content or nature of the means of proof indicated in this Article.**

Here again, the proposed provision on administrative cooperation is intended to facilitate the practical application of the selection criteria in cross-border situations where the difficulties of obtaining reliable and comprehensive information can become an obstacle to the exercise of the Internal Market freedoms.

*Article 58*  
*Online repository of certificates (e-Certis)*  
*[new]*

- 1. With a view to facilitating cross-border tendering, Member States shall ensure that the information concerning certificates and other forms of documentary evidence introduced in e-Certis is constantly kept up to date.**
  
- 2. Recourse to e-Certis shall become obligatory and contracting authorities shall be obliged to require only such of types of certificates or forms of documentary evidence that are available in e-Certis at the latest 2 years after the date provided for in Article 92(1).**

As set out in Recital 33, "the Commission provides and manages an electronic system — e-Certis, which is updated and verified on a voluntary basis by national authorities. The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities. Experience acquired so far indicates that voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of small and medium-sized enterprises in particular. Maintenance should therefore be rendered obligatory in a first step; recourse to e-Certis will be made mandatory at a later stage", more precisely 2 years after the latest date for implementation of the Directive, which coincides with the date proposed for the generalised obligation to use electronic means of communications (see Art. 19(7)).

*Article 59*  
*European Procurement Passport*  
*[new]*

- 1. National authorities shall issue, at the request of an economic operator established in the relevant Member State and fulfilling the necessary conditions, a European Procurement Passport. The European Procurement Passport shall contain the particulars set out in Annex XIII and shall be drawn up on the basis of a standard form.**

**The Commission shall be empowered to adopt delegated acts in accordance with Article 89 in order to modify Annex XIII due to technical progress or for administrative reasons. It shall also establish the standard form for the European Procurement Passport. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.**

1. The European Procurement Passport is intended as a standardised document (needing no translation) greatly facilitating proof of the elements listed in Annex XIII (see below), in particular the basic identification data of the economic operator that are typically provided in a certificate of registration) and that the operator is not subject to mandatory grounds for exclusion or insolvency proceedings. Tenderers can use the passport for instance in situations where they have submitted self-declarations and are requested by the contracting authority under Article 57(2) to provide official documents. They may, of course, also opt for submitting the passport right from the beginning with the tender to avoid any last-minute requests.

2. The passport is issued by the competent national authority of the Member State of establishment of the economic operator and has a minimum validity of 6 months. It is for Member States to determine issues of administrative organisation and procedure such as the level and central or de-central structure of competent authorities and the details of the procedure for the request and a possible renewal procedure.

2. **At the latest 2 years after the date provided for in Article 92(1), the passport shall be provided exclusively in electronic form.**

The mandatory switch-over to electronic procurement passport has to be seen in the context of the mandatory generalised use of electronic means of communication, in particular e-submission as from 30 June 2016 (two years after the expiry of the transposition period), provided under Article 19(7). From that date on, the passport will also have to be provided in electronic form so that it can be submitted electronically to the contracting authority.

3. **The authority issuing the passport shall seek the relevant information directly from the competent authorities, except where prohibited by national rules on the protection of personal data.**

Paragraph 3 establishes the “one stop shop” rule: In principle, it is for the authority delivering the passport – and not for the economic operator requesting it – to collect the underlying information from the competent authorities (such as the trade register and the authority responsible for keeping the judicial records). An exception may only be made where national data protection rules are preventing the authority delivering the passport from obtaining the required information.

4. **The European Procurement Passport shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification. Such justification may be related to the fact that the passport was issued more than six months earlier.**

The passport provides full proof for the fulfilment of the different conditions for participation covered by it. Contracting authorities are therefore, in principle, not entitled to ask for other or additional documents as means of proof. They may however, in exceptional cases question the passport and require additional evidence, if they can provide an appropriate justification. The fact that the minimum period validity of the passport (six months, see point (f) of Annex XIII) has expired may be a factor of the justification; it should, however, be complemented by additional elements

- 5. Member States shall make available to other Member States, upon request, any information relating to the authenticity and content of the European Procurement Passport. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 88.**

The proposed provision on administrative cooperation is intended to facilitate the practical application of rules on the European Procurement Passport, in particular in situations where the contracting authority has doubts as to the authenticity and pertinence of the passport.

**ANNEX XIII**  
**CONTENT OF EUROPEAN PROCUREMENT PASSPORT**

**The European Procurement Passport contains the following particulars:**

- (a) Identification of the economic operator;**
- (b) Certification that the economic operator has not been the subject of a conviction by final judgment for one of the reasons listed in Article 55(1);**
- (c) Certification that the economic operator is not the subject of insolvency or winding-up proceedings as referred to in Article 55(3)(b) ;**
- (d) Where applicable, certification of enrolment in a professional or trade register prescribed in the Member State of establishment, as referred to in Article 56(2);**



- (e) **Where applicable, certification that the economic operator possesses a particular authorisation or is member of a particular organisation within the meaning of Article 56(2);**
- (f) **Indication of the period of validity of the Passport, which shall be not less than 6 months.**

*Article 60*

*Certificates*

*[Directive 2004/18/EC: Art. 45.3, 47, 48]*

Article 60 (in connection with Annex XIV) lists the certificates that economic operators can submit as proof for the different conditions for participation in the procedure (absence of grounds for exclusion, fulfilment of the selection criteria). One has to bear in mind that economic operators have always the possibility to first submit self-declarations (Article 57). For the items covered by the European Procurement Passport (see above, Article 59 and Annex XIII), economic operators can choose between submitting certificates as described in Article 60 or presenting the European Procurement Passport which provides full proof for the fulfilment of the conditions covered by it. It should also be noted that information about the national certificates should be made available through e-Certis as described in Article 58.

- 1 Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in Article 55 apply to the economic operator:
  - (a) as regards paragraph 1 of that Article, the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country where the economic operator is established showing that those requirements have been met;
  - (b) as regards paragraph 2 and point (b) of paragraph 3 of that Article, a certificate issued by the competent authority in the Member State concerned;

- (c) where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1, 2 and point (b) of paragraph 3 of that Article, they may be replaced **by an official declaration to that effect by the national liaison point designated in accordance with Article 88.**

Point (c) replaces the submission of "declarations on oath" as foreseen in Article 45.3, 2<sup>nd</sup> subparagraph of Directive 2004/18/EC for cases where the required documents are not issued in the country of origin/establishment becomes redundant by the submission of a statement of the national liaison point in the country of origin/establishment, confirming that the required documents are not issued .

2. Proof of the economic operator's economic and financial standing may, as a general rule, be provided by one or more of the references **listed in Annex XIV, part 1.**

Where, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

The list of possible means of proof enumerated in Article 47 of Directive 2004/18/EC has been shifted to an Annex, without changes on substance.

3. Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XIV, part 2, according to the nature, quantity or importance, and use of the works, supplies or services.

The list of possible means of proof enumerated in Article 48 of Directive 2004/18/EC has been shifted to an Annex, without major changes on substance (for changes, see below).

4. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the evidence on exclusion grounds, the documents attesting the suitability to pursue the professional activity, and financial and technical capacities of tenderers, as well as any other means of proof referred to in paragraphs 1, 2 and 3 of this Article.

Obligation for mutual cooperation and information exchange with regard to the certificates, through the Internal Market Information system (referred to in Article 88), to facilitate handling and assessment of evidence in a cross-border context.

#### **ANNEX XIV**

#### **MEANS OF PROOF OF SELECTION CRITERIA**

##### *Part I: Economic and financial standing*

Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

List of possible means of proof for economic and financial standing, previously in Article 47 of Directive 2004/18/EC (no changes).

- (b) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;
- (c) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

- (d) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

*Part II: Technical ability*

Means providing evidence of the economic operators' technical abilities, as referred to in Article 56:

List of possible means of proof for technical capacity, previously in Article 48 of Directive 2004/18/EC.

- (a) the following lists:
- (i) a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution for the most important works; **where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than five years before will be taken into account;**
  - (ii) a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. **Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account;**

The possibility to take into account experience dating back more than five/three years has been inserted to respond to a concern voiced by contracting authorities and economic operators: especially in times of economic crisis and for large-scale projects, undertakings might not have carried out enough reference projects in the last 5 years but be able to show relevant experience through reference projects dating back longer.

The precisions of the exact form and content of the references in former Article 48(2)(a) have been deleted for the pure purpose of simplifying the text.

- (b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;
- (c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;

Extension from "supplier or service provider" to "economic operator" to encompass works.

- (d) where the 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, where 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 or those of the undertaking's managerial staff;
- (f) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

Generalisation of the possibility to require such proof through the deletion of the current limitation to “public works and public service contracts, and only in appropriate cases”.

- (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 economic operator intends possibly to subcontract;
- (j) with regard to the products to be supplied:
  - (i) samples, descriptions or photographs, the authenticity of which must be certified where 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.

*Article 61*

*Quality assurance standards and environmental management standards*

*[Directive 2004/18/EC: Art. 49, 50]*

1. Where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, **including on accessibility for disabled persons**, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators **that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.**

The substance of this provision has remained unaltered, except for the explicit clarification that quality assurance standards may also concern accessibility. This clarification is all the more useful in view of the strengthened provisions in respect of accessibility in the context of technical specifications, cf. Art. 40(1) 4<sup>th</sup> subparagraph and the notes on cluster 2.

The last sentence has been changed to be consistent with the new provisions of Art. 42 (see notes on that Article under cluster 2).

2. Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management schemes or standards, they shall refer to the European Union Eco-Management and Audit Scheme (EMAS) **or to other environmental management schemes as recognized in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council**<sup>8</sup> or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators **that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.**

This provision has been changed in three respects:

1. by generalising its scope to **all** contracts (currently, it is limited to "public works contracts and public services contracts, and only in appropriate cases ...");
2. the references to EMAS has been completed and updated through the references to Regulation 1221/2009, and
3. the last sentence has been changed to be consistent with the new provisions of Art. 42 (see notes on that Article under cluster 2).

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<sup>8</sup> OJ L 342, 22.12.2009, p. 1.

**Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the documents produced as evidence of compliance with quality and environmental standards referred to in paragraphs 1 and 2 of this Article.**

Obligation for mutual cooperation and information exchange with regard to the certificates, through the Internal Market Information system (referred to in Article 88), to facilitate handling and assessment of evidence in a cross-border context.

#### **4. Lists of approved economic operators**

##### *Article 63*

*Official lists of approved economic operators and certification by bodies established under public or private law*

*[Directive 2004/18/EC: Art. 52]*

Generally, this Article has been restructured with the aim of simplifying its content and to adapt it to the changes of the other provisions of this sub-section.

1. Member States may establish or maintain either official lists of approved contractors, suppliers or service providers or provide for a certification by certification bodies complying with European certification standards within the meaning of Annex VIII.

They shall inform the Commission and the other Member States of the address of the certification body or the body responsible for the official lists, to which applications shall be sent.

Paragraph 1 combines the provisions of the current Article 52, paragraphs 1, 7 and 8 without altering the substance.



2. Member States shall adapt the conditions for registration on the lists referred to in paragraph 1 and for the issue of certificates by certification bodies to the provisions of **this subsection**.

<p>This provision has been adapted and simplified to ensure coherence in view of the changes introduced to Articles 55 to 62.</p>
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Member States shall also adapt those conditions to Article 62 as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such cases, those operators shall prove to the authority establishing the official list that they will have those resources at their disposal throughout the period of validity of the certificate attesting to their registration in the official list and that throughout the same period those companies continue to fulfil the qualitative selection requirements encompassed by the official list or certificate on which operators rely for their registration.

3. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. Those certificates shall state the references which enabled those economic operators to be registered in the list or to obtain certification and the classification given in that list.
4. Certified registration on official lists by the competent bodies or a certificate issued by the certification body shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the list or certificate.
5. Information that can be deduced from registration on official lists or certification shall not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is to be awarded.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the Member State holding the official list.

6. The requirements of proof for the criteria for qualitative selection encompassed by the list or certificate shall comply with Articles 59, 60 and, where appropriate, Article 61. For any registration of economic operators of other Member States in an official list or for their certification, no further proof or statements shall be required other than those requested of national economic operators.

Economic operators may request at any time their registration in an official list or for the issuance of a certificate. They shall be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

- 7.. Economic operators from other Member States shall not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.
8. **Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the documents produced as evidence that the economic operators fulfil the requirements to be registered in the list of approved economic operators or as evidence that economic operators from another Member State possess an equivalent certification.**

Obligation for mutual cooperation and information exchange with regard to the certificates, through the Internal Market Information system (referred to in Article 88), to facilitate handling and assessment of evidence in a cross-border context.

## **5. Reduction of numbers of candidates, tenderers and solutions**

The rules for reducing the number of candidates, tenderers and solutions in two phase procedures remain virtually unchanged. The wording has only been slightly streamlined and adapted to the new catalogue of procedures.

### *Article 64*

*Reduction of the number of otherwise qualified candidates to be invited to participate  
[Directive 2004/18/EC: Art. 44(3)]*

1. In restricted procedures, **competitive procedures with negotiation**, competitive dialogue procedures and **innovation partnerships**, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue, provided a sufficient number of qualified candidates is available.
2. The contracting authorities shall indicate, in the contract notice **or in the invitation to confirm interest**, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number.

In the restricted procedure the minimum number of candidates shall be five. In the competitive procedure with negotiation, in the competitive dialogue procedure and in the innovation partnership the minimum shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.

The contracting authorities shall invite a number of candidates at least equal to the minimum number. Where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in Article 56(5) is below the minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities. In the context of the same procedure, the contracting authority shall not include other economic operators that did not request to participate, or candidates that do not have the required capabilities.

*Article 65*

*Reduction of the number of tenders and solutions*

*[Directive 2004/18/EC: Art. 44(4)]*

Where contracting authorities exercise the option of reducing the number of tenders to be negotiated as provided for in Article 27(5) or of solutions to be discussed as provided for in Article 28(4), they shall do so by applying the award criteria stated in the contract notice, in the specifications or in the descriptive document. In the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or qualified candidates.

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