

Gender-responsive Public Procurement

Exclusion grounds

The purpose of grounds for exclusion is to determine whether an operator is allowed to participate in the procurement procedure or to be awarded the contract.

Several of the exclusion grounds set out in Article 57 of Directive 2014/24/EU and Article 136 of the financial regulation are relevant to GRPP:

- mandatory exclusion for people trafficking / child labour;
- non-payment of tax or social security;
- non-compliance with applicable social or employment law obligations or collective agreements as set out in Article 18(2) of Directive 2014/24/EU ^[1].

Depending on the circumstances, other grounds such as corruption, misrepresentation or poor prior performance may be relevant.

Mentioning the possibility of exclusion is important from a preventive point of view: companies that do not comply with social legislation and do not, for example, make sure that they provide equal pay to women and men for equivalent work have an unfair competitive advantage over companies that do so.

Optional exclusion grounds related to social and labour obligations should be clearly mentioned in the tender documents, as they cannot be applied if not mentioned.

Article 18(2): Enforcing compliance with social and labour law

Article 18(2) of Directive 2014/24/EU requires Member States to ensure compliance with applicable environmental, social and labour law in the performance of public contracts. Article 18(2) refers to obligations established by EU law, national law, collective agreements and the eight core ILO conventions (including Convention 100 on equal remuneration and Convention 111 on discrimination). From a GRPP perspective, Article 18(2) may be used to enforce compliance with laws relating to equal pay and employment, non-discrimination and **work-life balance**. In addition to being a contract condition, Article 18(2) can serve as the basis for the rejection of a tender (Article 56(1)), for excluding a company from bidding (Article 57(4)(a)), for requiring a subcontractor to be replaced where they have violated any applicable obligation (Article 71(6)) or for rejecting an abnormally low tender (Article 69(3)). This means that a company with a history of breaches of **gender equality** legislation, for example, could be excluded from a tender.

Although Article 18(2) is far-reaching in its drafting, there is limited evidence of public bodies relying on this provision to enforce gender equality law in respect of contractors, at either the tender stage or the contract delivery stage. In some cases, this may be seen as outside the remit of the procurement or contract management officers, or such breaches may not be known to them. At the tender stage, compliance with Article 18(2) is most often a 'tick box exercise', with little incentive to actively investigate. A more robust approach is sometimes taken if competitors, NGOs or the media draw attention to a contractor's poor record.

Link between Article 18(2) and Article 56(4)(a)

A contracting authority could exclude a company when there is evidence of its failure to comply with applicable gender equality legislation within the previous 3 years – this is covered under Article 18(2), which is referenced in Article 56(4)(a). The company would have the right to 'self-clean', by demonstrating the concrete measures taken to correct the problems.

Examples of laws allowing exclusion of bidders non-compliant with gender discrimination law

In **Italy**, Article 41 of the code of equal opportunities between men and women sets out a clause that offers the possibility to exclude an economic operator from public contracts for up to 2 years if discrimination is discovered.

In **Spain**, Article 71(d) of Law 9/2017, of 8 November 2017, on public sector contracts sets out an exclusion criterion, namely exclusion for non-compliance with the obligation for companies with more than 250 employees to have an equality plan, in accordance with the provisions of Article 45 of Organic Law 3/2007, of 22 March 2007, on equality between women and men.

How to act

Clearly mention the grounds for exclusion in the contract announcement and tender documents. Remember that optional exclusion grounds related to social and labour obligations cannot be applied if not specifically mentioned in the tender documents.

Make reference to a (non-exhaustive) list of relevant social laws concerning equality between women and men, which can be added to the specifications as an annex. This means that tenderers or candidates who have violated national or EU laws relating to discrimination on the basis of sex or equality between women and men can be excluded from participation for a period of 3 years, subject to the possibility of 'self-cleaning'. This also applies to subcontractors under Article 71(6) of Directive 2014/24/EU.

To help you assess compliance with relevant social laws concerning equality between women and men, you may wish to involve gender equality bodies, gender experts, social partners and NGOs working in this field. In some countries, a national registry/database exists regarding compliance with exclusion grounds, which should incorporate compliance with applicable gender equality laws.

Mistake to avoid

As the grounds for exclusion are listed exhaustively in Article 57 of Directive 2014/24/EU and Article 136 of the financial regulation, you cannot exclude bidders based on other GRPP considerations (e.g. compliance with a gender equality code of practice that is not set out in legislation). However, these may form the basis of contract performance conditions if they are linked to the subject matter of the contract and set out in advance in the notice or tender documents.

Footnotes

[1] This is a discretionary ground for exclusion under the public sector directive. It is not mentioned as a ground for exclusion under the financial regulation; however, compliance with applicable social and employment law obligations and collective agreements in the performance of the contract is required under Article 166.