

Practice Name:

## Exclusion and Blacklisting of Economic Operators

Country:

Malta

Practice category:

- Systems and tools
- Sanction mechanisms



Contact:

- Department of Contracts, Ministry of Finance
- <https://contracts.gov.mt/en/Pages/Home-DepartmentOfContracts.aspx>
- [info.contracts@gov.mt](mailto:info.contracts@gov.mt)

### Fraud risk(s) countered

- Avoidance or manipulation of public procurement procedures
- Collusion

### Context and objective(s)

In 2016, the Maltese Government introduced Public Procurement Regulations (PPR) that cover the exclusion, selection and shortlisting stage of public procurement processes undertaken by contracting authorities. This transposed the requirements of the EU Directive 2014/24/EU on public procurement into Maltese law. According to Part VI of the PPR, no economic operator or sub-contractor can be awarded a public contract if they are subject to any of the exclusion or blacklisting grounds.

Through the PPR, the Public Contracts Review Board and the Commercial sanctions tribunal were created to oversee the exclusion and blacklisting of economic operators.

Exclusion and blacklisting assists in the curbing of precarious work and also allows for the exclusion of companies or individuals convicted of corruption, fraud, money laundering, tax evasion, evasion of employees' social security contribution, organised crime, employment of minors, unprofessional behaviour and distortion of competition.

### Description of the practice

The PPR set out grounds for exclusion and blacklisting of economic operators from procurement procedures. No economic operator or sub-contractor shall be given a public contract if they are subject to any reason for exclusion or blacklisting. If a sub-contractor is excluded or blacklisted, the Director of the Department of Contracts or the authority responsible for the tendering process, shall request in writing that the economic operator replaces the sub-contractor within a timeframe, otherwise the economic operator shall be automatically excluded from the award.

The exclusion and blacklisting of economic operators represent two separate procedures.

The implementation of the procedure followed the outlines of the EU Directive 2014/24/EU and was based on meetings with stakeholders incl. ministries, the Public Contracts Review Board (PCRB) and the Attorney General Office.

### Exclusion of Economic Operators

The authority responsible for the tendering process must exclude an economic operator from a procurement procedure when they or a member of the administrative, management or supervisory body of the economic operator have been convicted by a final judgment relating to:

- participation in a criminal organisation
- corruption
- fraud
- terrorist offences / financing
- money laundering
- child labour and other forms of human trafficking
- failure to abide by obligations concerning taxes or social contributions

Concerning the last point, such an exclusion shall no longer apply if economic operators pay or enter into a binding arrangement to pay all their outstanding and future contributions.

The period of exclusion is five years starting from the date when the judgement became final.

A contract shall not be awarded to an economic operator who, during the procurement procedure:

- Is bankrupt or subject to insolvency or winding-up proceedings;
- Is subject to a conflict of interest;
- has been involved in the preparation of the procurement procedure.

The authorities responsible for the tendering process shall exclude economic operators at any time during the procedure if the economic operator is discovered to have committed, either before or during the procedure, one of the activities which are grounds for exclusion. Economic operators shall also be excluded if they omit to disclose their involvement in any of the above-mentioned activities.

Economic operators can be removed from exclusion if they provide evidence that they took sufficient measures that demonstrate their reliability, despite the existence of grounds for exclusion. If such evidence is considered sufficient by the authority responsible for the tendering process, they shall not be excluded. This shall not apply if the exclusion has been established by a final judgment.

Any economic operator who feels aggrieved by a decision may file an objection before the Public Contracts Review Board.

### **Blacklisting Economic Operators**

There are two types of blacklisting:

- 1) Blacklisting by the Director of Contracts

The Director of Contracts is empowered to blacklist an economic operator where the economic operator:

- has been declared guilty by any court or tribunal of an offence relating to labour law;
- has been convicted of an offence concerning professional conduct which renders his/her integrity questionable;
- has entered into agreements with other economic operators aimed at distorting competition;
- has shown significant or persistent deficiencies in the performance of a substantive requirement in a public contract, or a public concession contract, which led to early termination of that contract, damages or other comparable sanctions;
- has provided misleading information that may have a material influence on decisions concerning exclusion, selection or award;

- has unduly influenced the decision-making process of the contracting authority in order to obtain confidential information that may have undue advantages in the procurement procedure;
- is in violation of applicable obligations in the fields of environmental, social and labour law.

The economic operator is informed of the decision to be blacklisted through a registered letter detailing the appropriate grounds.

If they feel aggrieved by such a decision, they may file an objection before the Commercial Sanctions Tribunal. They must provide evidence that they took sufficient measures to demonstrate their reliability despite the existence of grounds for exclusion. If such evidence is considered sufficient, they shall not be blacklisted. This shall not apply if the exclusion has been established by a final judgment. The blacklisting shall be effective for two years from the date of decision. Once blacklisted, they can no longer argue for a removal from blacklisting.

## 2) Blacklisting by the Director of Employment and Industrial Relations

The Director of Employment and Industrial Relations may request the Commercial Sanctions Tribunal to blacklist an economic operator if they:

- failed to provide their employees with a written contract of service;
- failed to provide their employees with a detailed pay slip;
- failed to deposit wages or salaries by direct payment in the employee's bank account;
- failed to provide relevant bank statements of wages and salaries' deposit and copies of the detailed payslips, which are to be made available as and when required by the Department of Employment and Industrial Relations;
- subcontracted a public contract to another person who employs the same employees of the principal contractor to carry out the same or similar duties for the execution of the said public contract;

The economic operator is informed of the request by registered letter and has twenty days to file a reply.

After evaluating all the evidence and after considering all submissions put forward by the parties, the Commercial Sanctions Tribunal shall decide whether to accede to or reject the request made by the Director of Employment and Industrial Relations for the blacklisting of an economic operator. The period of blacklisting shall be between six months and one year. If the economic operator repeats the misconduct, the blacklisting period shall be between one and three years.

All existing contracts signed by the Central Government Authority, Contracting Authorities and bodies governed by public law with persons who have become blacklisted shall be terminated immediately without any compensation.

### **Information on exclusion and blacklisting**

Final judgements on grounds for exclusion are made public.

The Department of Contracts or the Department for Employment and Industrial Relations may be informed about offences that would constitute grounds for blacklisting. They assess the evidence, after which they may or may not initiate an investigation by the Compliance and Monitoring unit.

If the decision to exclude or blacklist an economic operator has been reached, public contracting authorities are informed by a Contracts circular which is also available on the website of the Department of Contracts. The exclusion or blacklisting expires after the duration defined in the circular.

In addition to this publicly available and shared information, contracting authorities may contact the Department of Contracts to assess whether an economic contractor was excluded or blacklisted.

Any person who enters into a contract with an excluded or blacklisted economic operator shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two thousand Euro (€2,000).

Awarded public contracts below the current national local threshold of €139,000 are published every six months in the Government Gazette and consequently assessed by the Department of Contracts. Contracts above this threshold are awarded with the assistance and under the supervision of the Department of Contracts, which also ensures the compliance with the PPR.

The economic operator may undergo self-cleaning measures throughout the whole exclusion procedure and term. No self-cleaning possibility is available for economic operators blacklisted through the DIER grounds.

### **Unique features**

- Exclusion and blacklisting of economic operators not only for economic offences but also labour law offences
- Centralised management of most public procurement awards through the Department of Contracts
- Dedicated tribunal (Commercial sanctions tribunal) for appeals in cases of blacklisting
- The Public Contracts Review Board, an independent body fully dedicated to Public Procurement remedies, including but not limited to, appeals on Exclusion grounds

### **Outcomes and results**

- One blacklisted company, two excluded individuals
- Increased transparency, social benefits due to decreased corruption and higher quality of public contracts
- Deterring economic crime through a concrete sanction mechanism and reputational damage through naming & shaming
- Impact on better working conditions and basis for further initiatives on minimum requirements for public contracts extending the social procurement role undertaken by the Department of Contracts in its function

### **Key success factors**

- Cooperation with different stakeholders
- Clear communication to authorities about the exclusion and blacklisting mechanism
- Role of the Department of Contracts as a centralised body

### **Challenges encountered & lessons learned**

- Initial resistance from economic operators
- Integration of exclusion and blacklisting mechanism into existing legal and institutional structures

### **Potential for the transferability**

- Malta is a comparatively small country with few stakeholders
- Public procurement is very centralised and standardised
- The involved parties are part of a small network and know each other well
- Other countries might face higher numbers of exclusion and blacklisting and require a different setup