



TESIM

Technical support to the implementation and management of ENI CBC programmes

Factsheet on procurement by project public beneficiaries in Ukraine

Applicable rules, tips and recommendations

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DISCLAIMER

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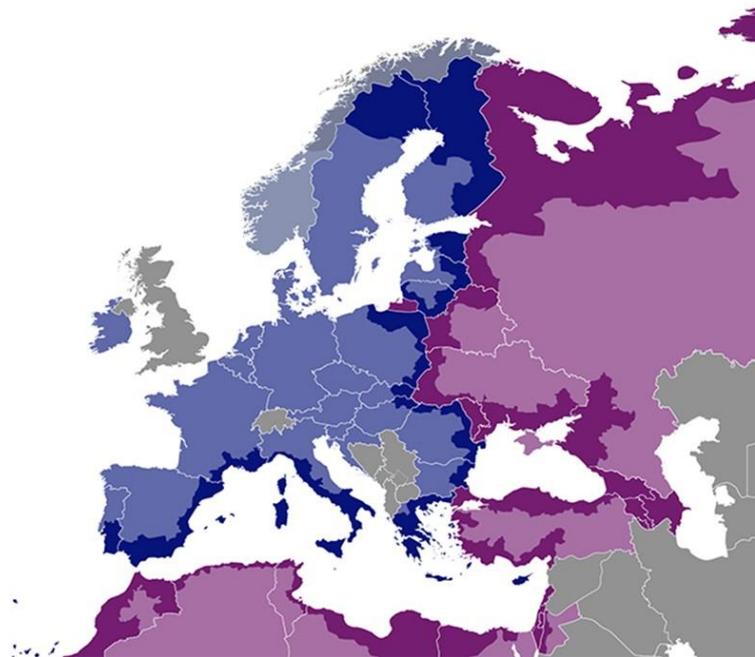


Table of contents

1. Introduction	3
2. Applicable legal provisions	4
2.1. Provisions in the ENI CBC Implementing Rules	4
General principles	4
Procurement procedures and thresholds	5
Conversion of thresholds from Euro to Ukrainian Hryvnia (UAH)	6
Use of negotiated procedure	6
2.2. Overview on applicable Ukrainian legislation	7
3. Requirements on procurement for Ukrainian public bodies	9
3.1. General principles.....	9
3.2. Definition of public bodies	9
3.3. Language requirements	10
3.4. Type of procurement procedures.....	10
3.5. Use of on-line system “Prozorro”	12
3.6. Applicable thresholds.....	13
4. Compliance with ENI CBC Implementing Rules	15
4.1. Composition of tender committee	15
4.2. Exclusion criteria for tenderers.....	15
4.3. Changes in procurement procedures.....	16
4.4. Tender documents in accordance with best international practices	17
4.4.1. Additional templates	24
ANNEX: Declaration of honour on exclusion and selection criteria	26

1. Introduction

The implementation of projects in the framework of ENI CBC requires the procurement of works, supplies and/or services by the beneficiaries in nearly all of them.

During the programming period 2007-2013 ENPI CBC projects were obliged to use the procedures of the Practical Guide to Contract procedures for EC external actions (PRAG). This obligation has not been included in the ENI CBC Implementing Rules (EC Regulation 897/2014), hereinafter ENI CBC IR.

The new regulatory framework allows therefore for the use of national legislation and procedures in CBC Partner Countries. However, national rules will be applied (1) under certain conditions and (2) only for certain types of beneficiaries. The present factsheet aims to describe the applicable rules of awarding contracts related to works, supplies and services for the public Ukrainian beneficiaries¹, deriving from the applicable legislation, but also from the programmes' specific rules and the Financing Agreement.

The initial factsheet was updated in April 2020, following the entry into force of a new Law of Ukraine "On Public Procurement". We keep track of these changes in the current version.

This new update additionally includes some minor adjustments to the latest version of PRAG, that is, the one for 2020. It also includes a reference to the relevant articles of the Financial Regulation (2018/1046) currently in force whenever the ENI CBC IR mentions the repealed one (Regulation 966/2012).

¹ For the purpose of this note, the notion of "non-public", that is, "private beneficiary" should be understood as private non-profit organization, as none of the programmes in which Ukraine is involved allows for the participation of profit-making bodies (e.g., businesses). A separate guide on procurement is available for them.



2. Applicable legal provisions

2.1. Provisions in the ENI CBC Implementing Rules

Section 1 of the chapter 4 of the ENI CBC IR regulates procurement. The articles relevant to Ukrainian beneficiaries are as follows:

Article	Content
52.2	General principles
52.3	Rules of nationality and origin
53	Procedures and thresholds for service contracts
54	Procedures and thresholds for supply contracts
55	Procedures and thresholds for work contracts
56	Use of negotiated procedure

General principles

Article 52.2 stipulates that:

- a) *The contract is awarded to the tender offering the best value for money, or as appropriate, to the tender offering the lowest price, while avoiding any conflict of interest;*
- b) *For contract with a value of more than 60.000€, the following rules shall apply:*
 - i. *An evaluation committee shall be set up to evaluate applications and/or tenders on the basis of the exclusion, selection and award criteria published by the beneficiary in advance in the tender documents. The committee must have an odd number of members with all the technical and administrative capacities necessary to give an informed opinion on the tenders/applications;*
 - ii. *Sufficient transparency, fair competition and adequate ex-ante publicity must be ensured;*
 - iii. *Equal treatment, proportionality and non-discrimination shall be ensured;*
 - iv. *Tender documents must be drafted according to the best international practice;*
 - v. *Deadlines for submitting applications or tenders must be long enough to give interested parties a reasonable period to prepare their tenders;*
 - vi. *Candidates or tenderers shall be excluded if they fall within one of the situations described in articles 136 and 141 of Regulation 2018/1046 [...]².*

In 2016, Ukraine joined the [World Trade Organisation Agreement on Public Procurement](#), therefore the law on procurement approved in December 2015 fulfils the conditions to be considered as "best international practice".

² The ENI CBC IR mentions articles 106 and 107 of Regulation 966/2012

Nevertheless, the Ukrainian beneficiaries, in accordance with the provisions of the Financing Agreement, also need to comply with the rules stipulated in the ENI CBC IR. A specific check-list for the verification of the compliance has been prepared. The identified potential incompliances are indicated in this guide.

Procurement procedures and thresholds

Articles 53 to 55 of the ENI CBC IR define the type of procedure and thresholds for services, supplies and works, as follows:

Article 53	Service contracts
> 60.000€ < 300.000€	Competitive negotiated procedure without publication
≥ 300.000€	International restricted tender

Article 54	Supply contracts
> 60.000€ < 100.000€	Competitive negotiated procedure without publication
≥ 100.000€ < 300.000€	Open tender procedure published in the programme area
≥ 300.000€	International open tender

Article 55	Work contracts
> 60.000€ < 300.000€	Competitive negotiated procedure without publication
≥ 300.000€ < 5.000.000€	Open tender procedure published in the programme area
≥ 5.000.000€	International open tender

In the cases where the tender needs to be published in the programme area, the beneficiary might need to go beyond the obligations of the national legislation, that is, whatever the threshold stipulated at national level, the publication should be in English. Moreover, it should be published by other means on top of the Ukrainian electronic platform, so that the potential suppliers from the other participating countries of the programme area are informed (e.g. web-site of the project or of the programme). The specific/additional requirements from the programmes' grant contracts should also be checked.

Nevertheless, the thresholds in the ENI CBC IR are not directly applicable to all Ukrainian beneficiaries, as indicated in the Financing Agreements:

Article 9 of the Special Conditions of the Financing Agreements stipulate that: “[...] For the avoidance of doubt, **lower thresholds** than those set out in

title VI Chapter 4 of Implementing Regulation (EU) no 897/2014 may be applied by beneficiaries or the CBC partner country”.

This clause applies to the public bodies, as the thresholds in the national legislation are lower and the national legislation is mandatory for these bodies.

Moreover, there is no specific reference in the ENI CBC IR on the procedures with a value **below 60.000€**. Also in these cases, beneficiaries need to refer to the **national legislation and, where allowed, to the internal rules of the organisation**.

Note that contracts must not be split artificially to circumvent the procurement thresholds.

Irrespective the amounts concerned, all procurements must respect the **general principles** of avoidance of conflict of interest, transparency, fair competition, equal treatment, proportionality and non-discrimination (unless regulated otherwise in the Guidelines for applicants or in the grant contract).

Conversion of thresholds from Euro to Ukrainian Hryvnia (UAH)

The amounts indicated in the ENI CBC IR and in the programme rules are all in EUR, while in the actual procurement procedures UAH will be used. **Which exchange rate should be used to verify if the procedure is above or below the threshold?**

Article 8 of the General Conditions of the Financing Agreements stipulates that “[...] in case of procedures in currencies other than Euro, the amount shall be converted to Euro using the exchange rate method mentioned in the Programme (Annex II).”

The exchange rate of the “monthly accounting rate of the Commission”, may be found in the [Inforeuro website](#).

Use of negotiated procedure

Article 56 of the ENI CBC IR stipulate that “*The beneficiary may decide to use negotiated procedure on the basis of a single tender in the cases referred to in points 11 of Chapter 1 and 39 of Chapter 3 of Annex I of the Regulation 2018/1046*”³.

³ The ENI CBC IR mention article 266 of the Delegated Regulation 1268/2012, which has been substituted by article 178 of Regulation 2018/1046. This article refers to the above-mentioned points in the annex of the Regulation.

“Negotiated procedures” **should not be confused** with the “Competitive negotiated procedure” mentioned in article 53 to 55. A non-exhaustive list of the cases referred in Article 56 of ENI CBC IR is:

- Extreme urgency,
- Additional delivery of original supplies as replacement of normal supplies,
- Contract following a contest,
- The tender procedure has been unsuccessful,
- Where for technical reasons, or for reasons connected with the protection of exclusive rights, the contract can be awarded only to a particular provider,
- Where a new contract has to be concluded after early termination of an existing contract.

The use of negotiated procedure is **exceptional** and there are specific provisions in national legislation. Please **check very carefully** article 40 of the **Law of Ukraine** on public procurement to assess the convenience of using this procedure.

2.2. Overview on applicable Ukrainian legislation

The list of applicable legal acts is as follows:

Legal reference	Content
<p>Framework Agreement between Ukraine and The Commission of the European Communities ratified by the Law of Ukraine as of 3.09.2008 (Рамкова угода між Урядом України і Комісією Європейських Співтовариств) http://zakon2.rada.gov.ua/laws/show/994_763</p>	<p>Activities and contracts, financed from the Community, are not subject to taxes (VAT), customs and other duties (Article 3 Taxes and customs)</p>
<p>Cabinet of Ministers of Ukraine Decree No 153 as of 15th February 2002 on unified system of the use and monitoring of international technical assistance (ПОСТАНОВА КМУ № 153 від 15 лютого 2002 Про створення єдиної системи залучення, використання та моніторингу міжнародної технічної допомоги) http://zakon3.rada.gov.ua/laws/show/153-2002-%D0%BF</p>	<p>Requires all international technical assistance projects (including CBC projects) to mandatory state registration at the Ministry of Economic Development. This registration entitles projects to receive tax, custom fee and other privileges, envisaged by the national law and international treaties of Ukraine</p>

<p>Decree of Cabinet of Ministers of Ukraine n° 544 of 11th July 2018 About creation of the national system of management and control of the programs of border cooperation of the European Neighborhood Instrument for 2014-2020 (Постанова КМУ № 544 від 11 липня 2018 Про запровадження національної системи управління та контролю за виконанням спільних операційних програм прикордонного співробітництва Європейського інструменту сусідства 2014—2020) https://zakon.rada.gov.ua/laws/show/554-2018-%D0%BF</p>	<p>Procurement of supplies, works and services under the grant funding is subject to the respective financing agreement (Article 15)</p>
<p>The Law of Ukraine on Public Procurement in version that is in force from April 19th 2020 (Закон України «Про публічні закупівлі», у редакції від 19.04.2020 р) https://zakon.rada.gov.ua/laws/show/922-19/ed20200419</p>	<p>Establishes a mandatory legal framework for procurement by public bodies and provides the types of the public bodies, covered by this Law</p>
<p>Financing Agreements on CBC 2014-2020 Special Conditions and its Annex I- General Conditions http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=29838a36-411d-4e4f-a13d-8bb2ef99ed6e&title=UgodMizhUriadomUkrainiTas-schodoDopomogis</p>	<p>Requirement for Beneficiaries in CBC countries to follow procurement procedures and rules of nationality and origin as per Articles 52-56 of the Implementing Regulation (EU) No 897/2014 (Articles 4 and 5 of the Annex I)</p>
<p>Order N° 680 on “Sample of tender documents” https://zakon.rada.gov.ua/rada/show/v0680731-16</p>	<p>Minimum content of tender documentation (no templates)</p>
<p>Order N° 10 on “Procedure below the established thresholds” https://infobox.prozorro.org/news-mert/nakaz-10-vid-19-03-2019</p>	<p>Description of the procedure to follow below the thresholds for compulsory use of Prozorro.</p>

The practical implications of this legislation are explained in the next chapter.

3. Requirements on procurement for Ukrainian public bodies

3.1. General principles

The “**Law of Ukraine on public procurement**” (see reference in the previous section of this document) shall apply to the beneficiaries considered as public bodies in the understanding of the law⁴. Article 6 of the law allows to use procurement provisions of the ratified international treaties of Ukraine, if different from the law.

The general procurement principles, as stated in article 5 of Chapter I and in Chapter III, are in line with the ENI CBC IR: fair competition, economy and efficiency, transparency, non-discrimination, objectivity and fight against corruption and fraud.

3.2. Definition of public bodies

Article 1.9 of the “*Law of Ukraine on public procurement*” includes the following types of “**contracting authorities**”:

- *public authorities and local governments (legislative, executive, judiciary, law enforcement agencies, the authorities of the Autonomous Republic of Crimea, local governments, associations of local communities);*
- *social insurance (Pension Fund of Ukraine, targeted insurance funds due to temporary disability, accident and occupational disease, medical insurance and unemployment insurance);*
- *legal entities that are enterprises, institutions, organisations and their associations which serve the needs of the State or a territorial community, if such activities are not carried out on an industrial or commercial basis, if one of the following characteristics is present:*
 - *the legal entity is the manager or recipient of government funds;*
 - *public authorities or local self-government bodies or other contracting authorities hold a majority of the votes in the highest governing body of a legal entity;*
 - *the government or community share of equities in the capital of legal entity exceeds 50 percent.*

Contracting authorities shall also include legal entities and/or economic operators operating in certain areas of economic activity and meeting at least one of the following criteria:

⁴ This is without prejudice to the application of a different notion of “public body” for the purposes of determining the financial liability of Ukraine in accordance with Article 74.5 of the ENI CBC IR and the Financing Agreement.

- *public authorities, authorities of the Autonomous Republic of Crimea, local self-governing authorities own a share of more than:*
 - *50 per cent in the authorized capital of the economic operator, or such authorities have the majority of votes in the supreme governing body of the economic operator or the right to appoint more than a half of the members of the economic operator's executive or supervisory board;*
 - *enjoying the existence of special or exclusive rights - rights granted by a public authority or local government authority under any legal act and/or act of individual action that limits the exercise of activities in the areas defined by this Law to one or more persons significantly affects the ability of other persons to exercise activities in those areas. Special or exclusive rights granted as a result of competitions (tenders, procurement procedures), the information on the conduct of which, together with the selection criteria, was previously made public and was available to the public, the possibility of participation in such competitions (tenders, procurement procedures) was not restricted and if the granting of such rights was based on objective criteria, shall not be considered special or exclusive.*

3.3. Language requirements

The procurement announcements have to be published in Ukrainian, even though other languages may be used regardless the amount, if decided by the contracting authorities.

For procedures related to services and supplies equal or more than 133.000€ and for procedures related to works equal or more than 5.150.000€, tender announcements should be also published in English.

3.4. Type of procurement procedures

The Article 13 of the law defines the following types of procedure, which are described in detail in chapters IV-VII:

- **Open tender** which is the main type of procurement procedure,
- **Restricted tender** is used when the pre-qualification of bidders is required through qualification selection and if the announcement of a restricted tender is published in English, since the estimated value of the procurement exceeds an amount equivalent to: for supply and services - EUR 133 000; for works – EUR 5 150 000.
- **Competitive dialogue** can be applied in case it is impossible to determine the required technical, qualitative characteristics (specifications) of the works or to determine the type of services, and a procurement decision requires negotiations with the participants in the procurement procedure,

- A **negotiated procurement procedure** shall be applied by the contracting authority as an exception in the case of:
 - 1) if an open tender procedure has been cancelled twice, including partially (by lot), due to the lack of sufficient tenders as defined by the law. In this case, the subject matter of the procurement, its technical and qualitative characteristics, as well as the requirements for the participant of the order placement shall not differ from the requirements that were defined by the customer in the tender documentation.
 - 2) if the work, goods or services can be performed, supplied or provided exclusively by a certain entity in one of the following cases:
 - the subject matter of the procurement is the creation or acquisition of a work of art or artistic performance.
 - the procurement contract is concluded with the winner of an architectural or artistic competition.
 - there is no competition for technical reasons, which must be documented by the purchaser.
 - there is a need to protect intellectual property rights.
 - conclusion of a contract with a "last hope" supplier for the supply of electricity or natural gas.
 - 3) when the buyer has an urgent need to carry out the procurement in the event of:
 - special economic or social circumstances arising from the immediate aftermath of an emergency situation make it impossible for the buyer to meet the deadline for tendering.
 - provision of humanitarian aid by Ukraine to other states in accordance with the established procedure.
 - termination of the procurement contract through the fault of the tenderer for a period of time not exceeding 20 per cent of the amount determined in the procurement contract. The application of a negotiated procurement procedure in such a case shall be subject to the decision of the tenderer for each tender.
 - appealing against decisions, actions or omissions of the tenderer in a continuing tender after examination/evaluation of tenderers' bids, up to an amount not exceeding 20 per cent of the expected value of the tender which is being appealed against.
 - the procurement of goods, works and services for the needs of defence during the legal regime of martial law in Ukraine or in certain areas thereof by the customers defined in the Law of Ukraine "On Defence Procurement".
 - 4) if after the conclusion of the contract on the purchase, the customer was required to purchase an additional amount of goods from the same supplier,

if in the case of a change of supplier, the customer would be forced to buy goods with different technical characteristics, which would lead to incompatibility associated with the operation and maintenance. The procurement of an additional item from the same supplier shall take place within three years of the conclusion of the procurement contract if the total value of such supplies does not exceed 50 per cent of the procurement contract price.

- 5) if after the conclusion of the procurement contract, the client needs to procure additional similar work or services from the same participant. The possibility and conditions of such additional works or services may be stipulated in the main procurement contract concluded as a result of the tender. Procurement of additional works or services from the same participant shall be made within three years after the award of the procurement contract, provided that the total value of such works or services does not exceed 50 per cent of the price of the main procurement contract made on the basis of the tender.
- 6) procurement of goods under the procedure for restoration of solvency of a debtor in accordance with the law.
- 7) procurement of legal services related to protection of rights and interests of Ukraine, including for the purpose of defending national security and defence, during settlement of disputes in foreign jurisdictions with participation of foreign entity and Ukraine, based on the decision of the Cabinet of Ministers of Ukraine or decisions of the National Security and Defence Council of Ukraine enacted in the manner prescribed by law, as well as procurement of goods, works and services in the event the customer participates in.

The restricted tender procedure requires a mandatory pre-qualification check of participants. It should be noted that this procedure can be applied by contracting authorities only from October 10, 2020.

The simplified procedure is applied to procurement, the cost of which is equal to or exceeds UAH 50 000 (EUR 1,620.97), but less than that specified in paragraphs 1, 2, h. 1, article 3 of the Law of Ukraine "On public procurement". This type of procedure must be performed in an electronic system. Also, the new law defines several cases where the contracting authorities may not apply the simplified procurement procedure.

3.5. Use of on-line system "Prozorro"

The "Law of Ukraine on public procurement" requests that all public bodies use an **e-procurement** on-line system via a dedicated web portal called "**Prozorro**". The use of

the system is governed by Decree of the Ministry of Economic Development, Trade and Agriculture of Ukraine No. 648 of 07.04.2020 " on the Authorised Body Web Portal on Procurement".

The new law provides the use of the electronic catalogue ProZorro Market for low-amount public procurement. The electronic catalogue works on the principle of an online shop. To receive an order from public contractors via the electronic catalogue, the supplier must be qualified. All qualified suppliers are entered in the Register of Qualified Suppliers.

ProZorro Market system generates and publishes the report on such procurements automatically.

Some useful links for the system are:

- Access to the web portal: <http://www.prozorro.gov.ua>
- Access to the ProZorro market: <https://prozorro.gov.ua/ProzorroMarket>
- FAQ section: <https://prozorro.gov.ua/faq>
- Where to start from: <http://infobox.prozorro.org/knowledge-base/view/668?q=>
- Online study practical courses: <http://infobox.prozorro.org/courses?page=1&count=10&sorting%5Bid%5D=desc>
- Six-week free online course on how to use Prozorro: https://courses.prometheus.org.ua/courses/course-v1:Prometheus+PP101+2017_T1/about

3.6. Applicable thresholds

The “**Law of Ukraine on public procurement**” stipulates the minimum thresholds for public bodies, but also allows the concerned institutions for the use of lower ones.

The thresholds in the Law are expressed in UAH. **This guide uses the [accounting exchange rate of the Commission of the month of June 2021](#)**, that is 33,44647 UAH/EUR.

The Law fixes the following thresholds for the use of Prozorro:

Type of contracts	Amount in UAH	Estimated amount in EUR (June 2021)
Supplies and services	≥200.000 UAH	≥5.979,66 €
Supplies and services for certain economic activities, as per part 1 of paragraph 2 of the article 3, such as energy or transportation	≥1.000.000 UAH	≥29.898,52 €

Works	≥1.500.000 UAH	≥44.847,78 €
Works for certain economic activities, as per part 1 of paragraph 2 of the article 3, such as energy or transportation	≥5.000.000 UAH	≥149.492,61€

When procuring services, supplies and works below the threshold indicated in the law for the use of Prozorro, the contracting authorities shall also comply with the public procurement principles and may also use the e-procurement system for the purpose of selecting the contractor.

In case Prozorro is not used for the procurement of services, supplies or works where the value is equal or exceeds 50.000 UAH (1.494,93€) and even if it is below the thresholds, the contracting authorities shall publish a report on awarded contracts within the e-procurement system, in accordance with article 10 of the Law.

However, the public bodies may decide to apply lower thresholds for the use of Prozorro.

4. Compliance with ENI CBC Implementing Rules

Even though the “Law of Ukraine on public procurement” is compliant with the requirements of articles 52.2 to 56 of the ENI CBC IR, there are some few points of attention, which might imply ineligibility of expenditure if not taken into account:

- Composition of the tender committee;
- Exclusion criteria for tenderers;
- Tender documents in accordance with best international practices.

4.1. Composition of tender committee

Article 11 of the Law stipulates:

The person responsible for the organization and conduct of the procurement / simplified procurement procedure is an authorized person, who is defined or appointed by the purchaser.

[...] By the decision of the purchaser, a working group consisting of the purchaser's employees may be created to consider the tender offers / proposals. In case of working group creation, the authorized person is the chairman and organizes its work. [...] The working group takes part in the consideration of tenders/proposals, in negotiations during the negotiation procedure, and the decision of the working group is advisory in nature.

Article 11 of the Law of Ukraine "On Public Procurement" stipulates instead of creating a tender committee to appoint an authorized person, which contradicts the rules of ENI CBC. Part 4 of Section X of the Law stipulates that until 1 January 2022 the contracting authority may either create a tender committee or appoint an authorized person.

The beneficiaries **must** consider the requirement of the ENI CBC IR of **designation of tender committee and an odd number of its members. The appointment of authorized person must be avoided.**

4.2. Exclusion criteria for tenderers

Article 17 of the Law stipulate exclusion criteria for tenderers. However, the eligibility criteria defined are not fully compliant with the requirements of the ENI CBC IR.

Not including specific provisions in the tenders, which fully comply with the eligibility criteria, may lead to the full or partial ineligibility of expenditure. Therefore, it is necessary to add **a declaration on honour** fully compliant with the ENI CBC IR. A template for such declaration is included as **annex A** of this document

4.3. Changes in procurement procedures

In the previous version of the Law of Ukraine "On Public Procurement" the term "abnormally low price" was not defined. Accordingly, many tender results were contested by suppliers due to dumping. Article 1 of the Law defines the abnormally low price:

Abnormally low tender offer price (hereinafter - abnormally low price) - price / adjusted price of the most economically advantageous offer according to the results of the auction, which is less by 40 or more percent of the average arithmetic value of the price / adjusted price of tender offers of other participants at the initial stage of the auction, and / or less by 30 or more percent of the next price / adjusted price of the tender offer according to the results of the conducted electronic auction.

According to the new version of the Law of Ukraine "On Public Procurement" the abnormal low price will be determined automatically by the electronic system. Thus, participants in the tender will be protected from dumping. This does not mean that a participant who set such a price will not be able to win the tender. If the participant provides a justification for the price, it will be able to continue participating in the tender. The abnormally low price is determined only in competitive tender procedures.

Another important point in the changes for contracting authorities is the possibility to include alternative qualification criteria in the tender documents. As part of the EU Association Lab project, an [electronic designer of non-price criteria](#) was created.

The Law returns to the qualification criterion of financial capacity, which is confirmed by financial statements. If this criterion is established, the contracting authority is not entitled to demand confirmation of the amount of annual income (revenue) exceeding the expected value of the object of procurement.

The new Law introduced changes in procurement complaint procedures. The changes concern deadlines for filing complaints and taking decisions.

Complaints shall be filed within 10 days from the day when the participant found out or should have found out about the violation of its rights due to the decision, action or inaction of the contracting authority, but by the day the procurement contract was concluded. Additional materials to the complaint can be submitted via the electronic system no later than three working days before the date of consideration. Novelties in the complaint procedure are: the time limit for execution of the decision of the appeal authority, complaint about lot procurement, refund of the fee for filing the complaint, and complaint about procurement in the case of automatic cancellation of a procedure.

4.4. Tender documents in accordance with best international practices

There are no specific templates under the Ukrainian legislation, but the minimum content of the compulsory documents is stipulated in the **Law on public procurement** and the **Order N° 680 of the Ministry of Economy of Ukraine** of 13 April 2016 on “**Sample tender documentation for open tender procedure**” (*Наказ N° 680: примірна тендера документація*). There is no reference to single tender or competitive negotiated procedure, which may be used only below the thresholds for the compulsory use of Prozorro.

In the following check-list we compare the compulsory documents in PRAG with the compulsory ones indicated in the Law on public procurement of Ukraine and the above-mentioned Order from the *Ministry of Economics*. As there are no templates, we analyse if the minimum information in the Law and the Order is in line with the equivalent documents in PRAG. When the **information is not fully in line with PRAG**, please refer to the comparative table below the check-list.

The information in PRAG is not always in the same document than the one mentioned in the Order N° 680, so we make a reference to them, whenever needed. The sections in the Order N° 680 are:

- General terms;
- Providing explanations relating to tender documents and changes therein;
- Submission and opening of tenders;
- Evaluation of the tenders;
- Results of the auction and award of the procurement contract.

Document	Is it compulsory? YES/NO	Legal reference	Is it in line with PRAG? YES/NO
Prior information notice	No	Not usual in Ukrainian practice	No
Contract notice	Yes	Article 10.1 of the Law	Not fully

		<p>Announcement of a procuring procedure and tender documents — not later than 15 or 30 (depend of the contract value) days prior to the tender opening procedure</p> <p>The contracting authority shall publish procurement information on the Authorized Agency's Web Portal in accordance with the procedure established by the Authorized Agency and Law "On public procurement", at its own discretion and on a free-of-charge basis via the authorized e-platforms.</p> <p>The contents are defined in the "general terms" in Order N° 680</p>	
Receipt for delivered tenders	Yes	the e-procurement system shall automatically generate a notice of receipt of the tender and send it to the tenderer specifying the date and the time of receipt	Yes
Declaration of honour on exclusion and selection criteria	No	There is no specific document, as it is filled-in on-line in Prozorro. However, as some exclusion criteria included in the ENI CBC IR are not included in Ukrainian legislation, it will be needed to require the template in annex for the tender to be fully compliant	Not fully
Instructions to tenderers	Yes	<p>Article 10, 22 of the Law</p> <p>It is published by the contracting authority on the web-site Prozorro. The contents are defined in the "instructions for preparing tenders" in Order N° 680</p>	Yes
Terms of reference	Yes	<p>Article 10, 23 of the Law</p> <p>It is published by the contracting authority on the web-site Prozorro. There is no standard template, but there are some examples in the Infobox of Prozorro:</p>	Yes

		http://infobox.prozorro.org/specifications?page=1&count=25&search_in_all=false	
Draft contract	Yes	Article 10.1 of the Law It is published by the contracting authority on the web-site Prozorro, but there is no standard template It is part of the tender document and it is compulsory to use it after award.	Yes
Administrative compliance grid	No	Not usual in Ukrainian practice, as the information is included in the report by the tender committee	Yes
Evaluation grid	Yes	There is no standard template in Ukrainian practice, but tenders shall be automatically evaluated by the e-procurement system based on the criteria and methods of evaluation specified by the Contracting Authority in the tender documents and by way of applying an e-auction. Article 16 of the Law indicates that the non-price criteria are given a value by the contracting authority, which is the equivalent to the evaluation grid.	Yes
Tender submission form	Yes	The tender shall be submitted electronically by means of completing an electronic form with separate boxes to be filled in with information about the price, other evaluation criteria (if established by the contracting authority), and uploading the required documents	Yes
Tender opening checklist	No	Not usual in Ukrainian practice as a separate check-list. The check is done by the tender committee and explained in the opening report	Yes
Tender opening report	Yes	Article 10 of the Law Minutes on tender opening are prepared by the Contracting Authority	No

Evaluators grid	No	Not usual in Ukrainian practice. The non-price criteria are automatically taken into account by the system through a formula. The evaluators take into account the result. If there is any non-compliant non-price criterion, the system rejects the bid.	Yes
Evaluation report	Yes	Article 10 of the Law Minutes on tender decision are prepared by the Contracting Authority	Yes
Notification letters to tenderers	Yes	Article 10 of the Law There is no template, as it is performed automatically by PROZORRO	Yes
Contract award notice	Yes	Article 10 of the Law There is no template, as it is performed automatically by PROZORRO	Yes

Comparison of content between PRAG and Ukrainian documents mentioned in Order N° 680

PRAG	Order N° 680 of Ministry of Economy	To be added
<u>Contract notice</u>	<u>“General terms” (article 21.2) of the Law</u>	
Publication reference	Not mentioned	Yes
Procedure (type of procedure)	Procurement procedure (open) (3)	-
Programme title and budget line (name of EU funding programme and item in the grant budget)	Not mentioned	Yes
Contracting Authority	Information about the Contracting Authority (2)	-
Description of the contract	Information about the procurement item (4)	-
Number and title of lots	Description of a particular part or parts [...] (4.2)	-

Eligibility (<i>nationality</i>) and rule of origin	Non-discrimination of tenderers (5) (<i>nationality</i>)	Rule of origin
Grounds for exclusion	Not mentioned	Yes
Number of tenders	Included in the “Instructions for preparing tenders”	-
Tender guarantee	Included in the “Instructions for preparing tenders”	-
Performance guarantee	Included in “Results of the auction and award of the procurement contract”	-
Information meeting and/or site visit	Not mentioned	Optional
Tender validity	Included in the “instructions for preparing tenders”	-
Period of implementation of tasks	Not mentioned	Yes
Selection criteria	Included in the “Instructions for preparing tenders”	-
Award criteria	Included in the “Evaluation of tenders”	-
How to obtain the tender dossier	Not applicable, as it is in Prozorro	-
Deadline for submission of tenders	Included in “Submission and opening of tenders”	-
Tender opening session	Included in “Submission and opening of tenders”	-
Language of the procedure	Information about the language (s) [...] (7)	-
Legal basis	Not mentioned	Yes
Other information	Information about the currency	-

PRAG	Order N° 680 of Ministry of Economy	To be added
<u>Instructions to tenderers</u>	<u>“Instructions for preparing tenders” (article 21.2) of the Law</u>	
Publication reference	Not mentioned	Yes
Services/Supplies/Works to be provided	Content and method of the tender submission (1)	-
Timetable	Not mentioned	Yes
Participation and subcontracting	Content and method of the tender submission (1)	-
Origin	Not mentioned	Yes
Content of tenders	Content and method of the tender submission (1)	-
Language of tenders	Included in “General terms”	Yes
Type of contract (<i>unit price, lumps sum or hybrid</i>)	Not mentioned	Yes
Currency	Not mentioned	Yes
Taxes and other charges (<i>exemption according to Financing Agreement</i>)	Not mentioned	Yes
Lots	Included in “General terms”	-
Tender validity	Period during which tenders are considered valid (4)	-
Additional information before the deadline for submitting tenders (meeting, etc.)	Included in “General terms”	Optional
Submission of tenders	Included in “submission and opening of the tender”	-
Amending or withdrawing tenders	Included in “Providing explanations relating to tender documents and changes therein”	-
Evaluation of tenders	Included in “Evaluation of tenders”	-

Ethic clauses	Not mentioned	Yes
Signature of contract	Content and method of the tender submission (1)	-
Cancellation of tender procedure	Included in "Evaluation of tenders"	-
Appeals	Not mentioned	Yes

4.4.1. Additional templates

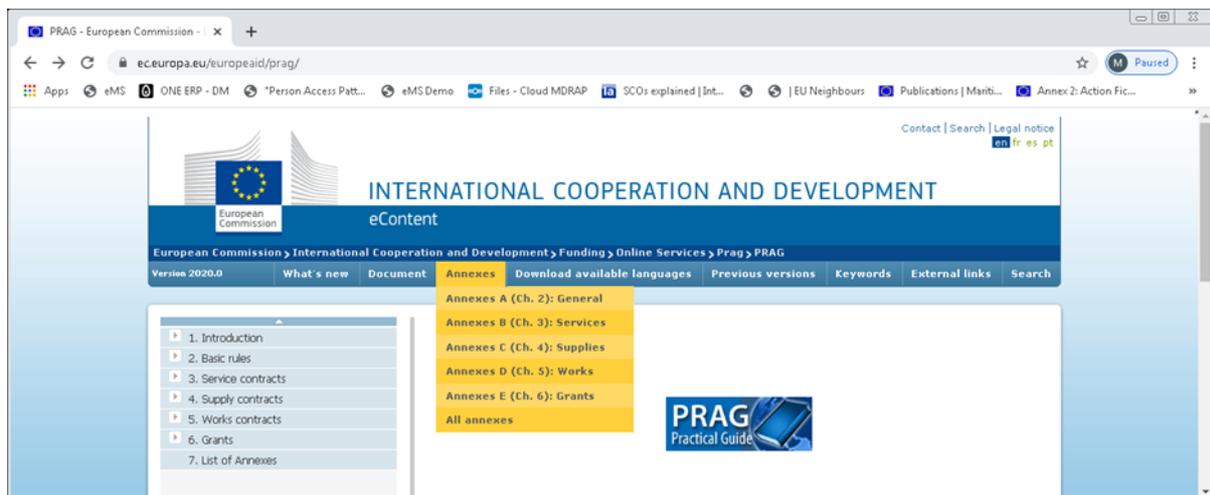
As indicated in the check-list above, some of the documents stipulated in PRAG are not usual in the Ukrainian procedure or there is no specific template.

We strongly recommend:

- to adapt (and translate) PRAG templates or
- to ensure that its content is included in your usual templates,

in case of **procurement documents NOT compliant** with EU's practices. The non-inclusion of this templates may result in the ineligibility of the expenditure.

You may find the templates in the annexes for services, supplies and works in the following URL: <https://goo.gl/Ungxi6>⁵



The **additional templates** to use are:

Document	PRAG reference
Prior notice	b1_priorinfo_en.doc (services); c1_priorinfo_en.doc (supplies); d1_priorinfo_en.doc (works)
Declaration of honour on exclusion and selection criteria	Adapted version in Annex A of this document
Draft contract (services)	b8c_contract_en.doc b8d_annexigc.pdf
Draft contract (supplies)	c4c_contract_en.doc

⁵ This is a shortened URL address

	c4d_specialconditions_en.doc c4e_annexigc.pdf
Draft contract (works)	d4n_contract_en.doc d4o_specialconditions_en.doc d4p_annexgc.pdf

“Tender documents must be drafted according to best international practice” This is an essential requirement for the eligibility of expenditure.

Despite the recent alignment of Ukrainian legislation with best international standards, the **absence of harmonized templates** obliges the Ukrainian public beneficiaries to a thorough verification of the compliance of its usual templates.

DO NOT PROCURE AS USUAL!!

**CHECK THE COMPLIANCE OF THE TENDER TEMPLATES BEFORE
LAUNCHING ANY PROCUREMENT PROCEDURE.**

ANNEX: Declaration of honour on exclusion and selection criteria

DECLARATION ON HONOUR ON EXCLUSION CRITERIA AND SELECTION CRITERIA

The undersigned [*insert name of the signatory of this form*], representing:

(<i>only for natural persons</i>) himself or herself	(<i>only for legal persons</i>) the following legal person:
ID or passport number: (‘the person’)	Full official name: Official legal form: Statutory registration number: Full official address: VAT registration number: (‘the person’)

The person is not required to submit the declaration on exclusion criteria if the same declaration has already been submitted for the purposes of another award procedure of the same contracting authority, provided the situation has not changed, and that the time that has elapsed since the issuing date of the declaration does not exceed one year.

In this case, the signatory declares that the person has already provided the same declaration on exclusion criteria for a previous procedure and confirms that there has been no change in its situation:

Date of the declaration	Full reference to previous procedure

I – SITUATION OF EXCLUSION CONCERNING THE PERSON

(1) declares that the above-mentioned person is in one of the following situations:	YES	NO
(a) it is bankrupt, subject to insolvency or winding up procedures, its assets are being administered by a liquidator or by a court, it is in an arrangement with creditors, its business activities are suspended or it is in any analogous situation arising from a similar procedure provided for under national legislation or regulations;	<input type="checkbox"/>	<input type="checkbox"/>
(b) it has been established by a final judgement or a final administrative decision that the person is in breach of its obligations relating to the payment of taxes or social security contributions in accordance with the applicable law;	<input type="checkbox"/>	<input type="checkbox"/>
(c) it has been established by a final judgement or a final administrative decision that the person is guilty of grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession to which the person belongs, or by having engaged in any wrongful conduct which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence, including, in particular, any of the following:		

(i) fraudulently or negligently misrepresenting information required for the verification of the absence of grounds for exclusion or the fulfilment of eligibility or selection criteria or in the performance of a contract or an agreement;	<input type="checkbox"/>	<input type="checkbox"/>
(ii) entering into agreement with other persons with the aim of distorting competition;	<input type="checkbox"/>	<input type="checkbox"/>
(iii) violating intellectual property rights;	<input type="checkbox"/>	<input type="checkbox"/>
(iv) attempting to influence the decision-making process of the contracting authority during the award procedure;	<input type="checkbox"/>	<input type="checkbox"/>
(v) attempting to obtain confidential information that may confer upon it undue advantages in the award procedure;	<input type="checkbox"/>	<input type="checkbox"/>
(d) it has been established by a final judgement that the person is guilty of any of the following:		
(i) fraud, within the meaning of Article 3 of Directive (EU) 2017/1371 and Article 1 of the Convention on the protection of the European Communities' financial interests, drawn up by the Council Act of 26 July 1995;	<input type="checkbox"/>	<input type="checkbox"/>
(ii) corruption, as defined in Article 4(2) of Directive (EU) 2017/1371 or active corruption within the meaning of 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, drawn up by the Council Act of 26 May 1997, or conduct referred to in Article 2(1) of Council Framework Decision 2003/568/JHA, as well as corruption as defined in other applicable laws, including as defined in Article 14 ⁶ of the General Conditions of the Financing Agreement for ENI CBC between the partner countries and the European Commission;	<input type="checkbox"/>	<input type="checkbox"/>
(iii) conduct related to a criminal organisation, as referred to in Article 2 of Council Framework Decision 2008/841/JHA;	<input type="checkbox"/>	<input type="checkbox"/>
(iv) money laundering or terrorist financing, within the meaning of Article 1(3), (4) and (5) of Directive (EU) 2015/849 of the European Parliament and of the Council;	<input type="checkbox"/>	<input type="checkbox"/>
(v) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA, respectively, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 4 of that Decision;	<input type="checkbox"/>	<input type="checkbox"/>
(vi) child labour or other offences concerning trafficking in human beings as referred to in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council;	<input type="checkbox"/>	<input type="checkbox"/>
(e) it has shown significant deficiencies in complying with the main obligations in the performance of a contract or an agreement financed by the Union's budget or by the national public budget, which has led to its early termination or to the	<input type="checkbox"/>	<input type="checkbox"/>

⁶ "Passive corruption" shall mean the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties, which has, or would have, the effect of harming the Union financial interests.

"Active corruption" shall mean the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official, for himself or for a third party, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties, which has, or would have, the effect of harming the Union financial interests.

application of liquidated damages or other contractual penalties, or which has been discovered following checks, audits or investigations by a contracting authority, the national competent authorities, the Delegation of the European Union in the partner countries, any Managing Authority of ENPI CBC or ENI CBC, Audit Authorities of ENI CBC, the European Commission, the European Anti-Fraud Office (OLAF) or the European Court of Auditors;		
(f) it has been established by a final judgment or final administrative decision that the person has committed an irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95;	<input type="checkbox"/>	<input type="checkbox"/>
(g) it has been established by a final judgment or final administrative decision that the person has created an entity under a different jurisdiction with the intent to circumvent fiscal, social or any other legal obligations in the jurisdiction of its registered office, central administration or principal place of business.	<input type="checkbox"/>	<input type="checkbox"/>
(h) (<i>only for legal persons</i>) it has been established by a final judgment or final administrative decision that the person has been created with the intent provided for in point (g).	<input type="checkbox"/>	<input type="checkbox"/>
(i) for the situations referred to in points (c) to (h) above the person is subject to: i. facts established in the context of audits or investigations carried out by the European Public Prosecutor's Office after its establishment, the European Court of Auditors, the European Anti-Fraud Office (OLAF) or the internal auditor, or any other check, audit or control performed under the responsibility of an authorising officer of an EU institution, of a European office or of an EU agency or body, Managing Authority or Audit Authority, the competent national authorities or any other competent body; ii. non-final judgments or non-final administrative decisions which may include disciplinary measures taken by the competent supervisory body responsible for the verification of the application of standards of professional ethics; iii. facts referred to in decisions of entities or persons being entrusted with EU budget implementation tasks; iv. information transmitted by Member States implementing Union funds; v. decisions of the Managing Authority, the National Authority appointed for the participating country, the European Commission or a national competent authority relating to the infringement of Union or national competition law; or vi. decisions of exclusion by an authorising officer of an EU institution, of a European office or of an EU agency or body or of the Contracting Authority.	<input type="checkbox"/>	<input type="checkbox"/>

II – SITUATIONS OF EXCLUSION CONCERNING NATURAL OR LEGAL PERSONS WITH POWER OF REPRESENTATION, DECISION-MAKING OR CONTROL OVER THE LEGAL PERSON AND BENEFICIAL OWNERS

Not applicable to natural persons, Member States and local authorities

(2) declares that a natural or legal person who is a member of the administrative, management or supervisory body of the above-mentioned legal person, or who has powers of representation, decision or control with regard to the above-mentioned legal person (this covers e.g. company directors, members of management or supervisory bodies, and cases where one natural or legal person holds a majority of shares), or a beneficial owner of the person (as	YES	NO	N/A
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referred to in point 6 of article 3 of Directive (EU) No 2015/849) is in one of the following situations:			
Situation (c) above (grave professional misconduct)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Situation (d) above (fraud, corruption or other criminal offence)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Situation (e) above (significant deficiencies in performance of a contract)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Situation (f) above (irregularity)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Situation (g) above (creation of an entity with the intent to circumvent legal obligations)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Situation (h) above (person created with the intent to circumvent legal obligations)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Situation (i) above	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

III – SITUATIONS OF EXCLUSION CONCERNING NATURAL OR LEGAL PERSONS ASSUMING UNLIMITED LIABILITY FOR THE DEBTS OF THE LEGAL PERSON

(3) declares that a natural or legal person that assumes unlimited liability for the debts of the above-mentioned legal person is in one of the following situations <i>[If yes, please indicate in annex to this declaration which situation and the name(s) of the concerned person(s) with a brief explanation]:</i>	YES	NO	N/A
Situation (a) above (bankruptcy)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Situation (b) above (breach in payment of taxes or social security contributions)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

IV – GROUNDS FOR REJECTION FROM THIS PROCEDURE

(4) declares that the above-mentioned person:	YES	NO
Was previously involved in the preparation of the procurement documents used in this award procedure, where this entailed a breach of the principle of equality of treatment including distortion of competition that cannot be remedied otherwise.	<input type="checkbox"/>	<input type="checkbox"/>

V – REMEDIAL MEASURES

If the person declares one of the situations of exclusion listed above, it must indicate measures it has taken to remedy the exclusion situation, thus demonstrating its reliability. This may include e.g., technical, organisational and personnel measures to prevent further occurrence, compensation of damage or payment of fines or of any taxes or social security contributions. The relevant documentary evidence which illustrates the remedial measures taken must be provided in annex to this declaration. This does not apply for situations referred in point (d) of this declaration.

VI – EVIDENCE UPON REQUEST

Upon request and within the time limit set by the Contracting Authority the person must provide information on natural or legal persons that are members of the administrative, management or supervisory body or that have powers of representation, decision or control, including legal and natural persons within the ownership and control structure and beneficial owners.

It must also provide the following evidence concerning the person itself and the natural or legal persons on whose capacity the person intends to rely, or a subcontractor and concerning the natural or legal persons which assume unlimited liability for the debts of the person:

For situations described in (a), (c), (d), (f), (g) and (h), production of a recent extract from the judicial record is required or, failing that, an equivalent document recently issued by a judicial or administrative authority in the country of establishment of the person showing that those requirements are satisfied.

For the situation described in point (b), production of recent certificates issued by the competent authorities of the State concerned are required. These documents must provide evidence covering all taxes and social security contributions for which the person is liable, including for example, VAT, income tax (natural persons only), company tax (legal persons only) and social security contributions. Where any document described above is not issued in the country concerned, it may be replaced by a sworn statement made before a judicial authority or notary or, failing that, a solemn statement made before an administrative authority or a qualified professional body in its country of establishment.

The person is not required to submit the evidence if it has already been submitted for another award procedure of the same contracting authority. The documents must have been issued no more than one year before the date of their request by the contracting authority and must still be valid at that date.

The signatory declares that the person has already provided the documentary evidence for a previous procedure and confirms that there has been no change in its situation:

Document	Full reference to previous procedure
<i>Insert as many lines as necessary.</i>	

VII – SELECTION CRITERIA

(1) declares that the above-mentioned person complies with the selection criteria applicable to it individually as provided in the tender specifications:	YES	NO	N/A
(a) It has the legal and regulatory capacity to pursue the professional activity needed for performing the contract as required in section [insert] of the contract notice/Instructions to tenderers;	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(b) It fulfills the applicable economic and financial criteria indicated in section [insert] of the contract notice/Instructions to tenderers;	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(c) It fulfills the applicable technical and professional criteria indicated in section [insert] of the contract notice/Instructions to tenderers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The contracting authority must adapt the table above to the criteria indicated in the tender documents (i.e. insert extra rows for each criterion or delete irrelevant rows).

(2) if the above-mentioned person is the sole tenderer or the leader in case of consortium , declares that:	YES	NO	N/A
(d) the tenderer, including all members of the group in case of consortium and including subcontractors if applicable, complies with all the selection criteria	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

for which a consolidated assessment will be made as provided in the tender specifications.			
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VIII – EVIDENCE FOR SELECTION

The signatory declares that the above-mentioned person is able to provide the necessary supporting documents listed in the relevant sections of the tender documents and which are not available electronically upon request and without delay.

The person is not required to submit the evidence if it has already been submitted for another procurement procedure of the same contracting authority. The documents must have been issued no more than one year before the date of their request by the contracting authority and must still be valid at that date.

The signatory declares that the person has already provided the documentary evidence for a previous procedure and confirms that there has been no change in its situation:

Document	Full reference to previous procedure
<i>Insert as many lines as necessary.</i>	

The above-mentioned person must immediately inform the contracting authority of any changes in the situations as declared.

The above-mentioned person may be subject to rejection from this procedure and to administrative sanctions (exclusion or financial penalty) if any of the declarations or information provided as a condition for participating in this procedure prove to be false.

Full name Date Signature