Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (Text with EEA relevance)

COMMISSION IMPLEMENTING REGULATION (EU) 2016/7

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC[(1)], and in particular Article 59(2) thereof, and to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC of the European Parliament and of the Council[(2)], and in particular Article 80(3) thereof,

Whereas:

(1) One of the major objectives of Directives 2014/24/EU and 2014/25/EU is the lessening the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises. A key element of that effort is the European single procurement document (ESPD). The standard form for the ESPD should consequently be drafted in such a manner that the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria is obviated. With the same objective in mind, the standard form should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of that information can be carried out together with the verification in respect of the main economic operator and on the same conditions.

(2) The ESPD should also be available for use by contracting entities which are subject to Directive 2014/25/EU and which, when applying the exclusion and selection criteria provided for under Directive 2014/24/EU, must do so in the same way and under the same conditions as contracting authorities.

(3) To avoid administrative burdens for the contracting authorities and contracting entities and possible contradictory indications in the different procurement documents, the information which economic operators must provide in the ESPD should be clearly indicated by the contracting authorities and contracting entities in advance in the call for competition or through references therein to other parts of the procurement documents, which the economic operators must in any case examine carefully in view of their participation and possible submission of tenders.

Changes to legislation: *There are outstanding changes not yet made to Commission Implementing Regulation (EU) 2016/7. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(4) The ESPD should also contribute to further simplification for both economic operators and contracting authorities and entities by replacing various and diverging national self-declarations with one standard form established at the European level. This should also help to reduce problems linked to the precise drafting of formal statements and declarations of consent as well as language issues, since the standard form will be available in the official languages. The ESPD should thereby facilitate an increased cross-border participation in public procurement procedures.

(5) Any processing and exchange of data to be performed in connection with the ESPD should be performed in accordance with the national rules implementing Directive 95/46/EC of the European Parliament and of the Council[(3)], and in particular with national rules applicable to the processing of data relating to offences, criminal convictions or security measures under Article 8(5) of said Directive.

(6) It should be recalled that the Commission shall review the practical application of the ESPD taking into account the technical development of databases in the Member States and report thereon to the European Parliament and the Council by 18 April 2017. In so doing, the Commission may also take into consideration possible suggestions to improve its functionality in view of enhancing the possibilities of cross-border participation in public procurement, not least for SMEs, or potential simplifications within the framework set out by Directive 2014/24/EU; it may as well consider possible issues relating to practices of systematic requests of certificates or other forms of documentary evidence of all participants in a given procurement procedure or practices consisting in identifying in a discriminatory manner the economic operators to be requested such documentation.

(7) The measures provided for in this Regulation are in accordance with the opinion of the Advisory Committee on Public Procurement,

HAS ADOPTED THIS REGULATION:

Article 1

From the moment the national measures implementing Directive 2014/24/EU enter into force, and at the latest from 18 April 2016, the standard form set out in Annex 2 to this Regulation shall be used for the purposes of drawing up the European single procurement document referred to in Article 59 of Directive 2014/24/EU. Instructions for its use are set out in Annex 1 to this Regulation.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

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Done at Brussels, 5 January 2016.

For the Commission

The President

Jean-Claude JUNCKER

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ANNEX 1

Instructions

The ESPD is a self-declaration by economic operators providing preliminary evidence replacing the certificates issued by public authorities or third parties. As provided in Article 59 of Directive 2014/24/EU, it is a formal statement by the economic operator that it is not in one of the situations in which economic operators shall or may be excluded; that it meets the relevant selection criteria and that, where applicable, it fulfils the objective rules and criteria that have been set out for the purpose of limiting the number of otherwise qualified candidates to be invited to participate. Its objective is to reduce the administrative burden arising from the requirement to produce a substantial number of certificates or other documents related to exclusion and selection criteria.

To facilitate the task for economic operators when filling in an ESPD, Member States may issue guidance on the use of the ESPD, for instance to explain which provisions of national law are pertinent in relation to Part III, Section A[(4)], that official lists of approved economic operators or equivalent certificates might not be established or issued in a given Member State, or to specify which references and information must be given to enable contracting authorities or contracting entities to retrieve a given certificate electronically.

When preparing the procurement documents for a given procurement procedure, contracting authorities and contracting entities must indicate in the call for competition, in procurement documents referred to in the call for competition or in the invitations to confirm interest which information they will require from the economic operators, including an explicit statement as to whether the information set out under Parts II and III[(5)] should or should not be provided in respect of subcontractors on whose capacities the economic operator does **not** rely[(6)]. They may also make the task easier for economic operators by indicating this information directly in an electronic version of the ESPD, for instance by using the ESPD service https://webgate.acceptance.ec.europa.eu/growth/tools-databases/ecertis2/resources/espd/index.html[(7)] that Commission Services will make available, free of charge, for contracting authorities, contracting entities, economic operators, providers of electronic services and other interested parties.

Tenders in open procedures and requests for participation in restricted procedures, competitive procedures with negotiations, competitive dialogues or innovation partnerships, must be accompanied by the ESPD, which economic operators have completed in order to deliver the required information[(8)]. Except in relation to certain contracts based on framework agreements, the tenderer to whom it is intended to award the contract will have to provide up to date certificates and supporting documents.

Member States may regulate or leave it to contracting authorities and contracting entities to decide whether to use the ESPD also as part of procurement procedures not or not fully subject to the detailed procedural rules of Directives 2014/24/EU or 2014/25/EU, for instance for procurement below the relevant thresholds or procurements subject to the particular rules applicable to social and other specific services (the 'light regime')[(9)]. Similarly, Member States may regulate or leave it to contracting authorities and contracting entities to decide whether to use the ESPD also in connection with the award of concessions contracts, whether or not subject to the provisions of Directive 2014/23/EU[(10)].

The contracting authority or contracting entity may ask any tenderer at any moment during the procedure to submit all or part of the required certificates and supporting documents where this is necessary to ensure the proper conduct of the procedure.

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Economic operators may be excluded from the procurement procedure or be subject to prosecution under national law in cases of serious misrepresentation in filling in the ESPD or, generally, in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, or where such information is withheld or the economic operators are unable to submit the supporting documents.

Economic operators may reuse the information that has been provided in an ESPD which has already been used in a previous procurement procedure as long as the information remains correct and continues to be pertinent. The easiest way to do so is by inserting the information in the new ESPD through use of the appropriate functionalities that are provided to that effect in the above-mentioned electronic ESPD-service. Of course, reuse of information through other forms of copy-paste of information, for instance information stored in the economic operator's IT-equipment (PCs, tablets, servers …), will also be possible.

According to the second subparagraph of Article 59(2) of Directive 2014/24/EU, the ESPD shall be provided exclusively in electronic form; however, this may be postponed until 18 April 2018 at the latest[(11)]. This means that both fully electronic and paper-based versions of the ESPD may co-exist until 18 April 2018 at the latest. The just-mentioned ESPD-service will allow economic operators to fill in their ESPD electronically in **all cases**, thus enabling them to draw the full advantages of the facilities offered (not least of reusing information). For use in procurement procedures in which use of electronic means of communication has been postponed (also possible until 18 April 2018 at the latest), the ESPD service allows economic operators to print their electronically filled-in ESPD as a paper document which can then be transmitted to the contracting authority or contracting entity by other means of communication than electronic ones[(12)].

As mentioned earlier, the ESPD consists of a formal statement by the economic operator that the relevant grounds for exclusion do not apply, that the relevant selection criteria are fulfilled and that it will provide the relevant information as required by the contracting authority or contracting entity.

Where procurements are divided into lots **and** selection criteria[(13)] vary from lot to lot, an ESPD should be filled in for each lot (or group of lots with the same selection criteria).

The ESPD further identifies the public authority or third party responsible for establishing the supporting documents[(14)] and contains a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

Contracting authorities or contracting entities may choose or may be required[(15)] by Member States to limit the information required on selection criteria to a single question whether, yes or no, economic operators meet all the required selection criteria. While this may be followed up by requests for further information and/or documentation, care should be taken to avoid imposing excessive administrative burdens on economic operators through systematic requests of certificates or other forms of documentary evidence of all participants in a given procurement procedure or practices consisting in identifying in a discriminatory manner the economic operators to be requested such documentation.

The obligations for the contracting authorities and contracting entities to obtain the documentation concerned directly by accessing a national database in any Member State that is available free of charge also applies where the information initially requested on selection criteria has been limited to a yes or no answer. If such electronic documentation is requested, economic operators will therefore provide the contracting authority or contracting entity with the information needed to obtain the documentation concerned when the selection criteria are being checked rather than directly in the ESPD.