

Technical support to the implementation  
and management of ENI CBC programmes

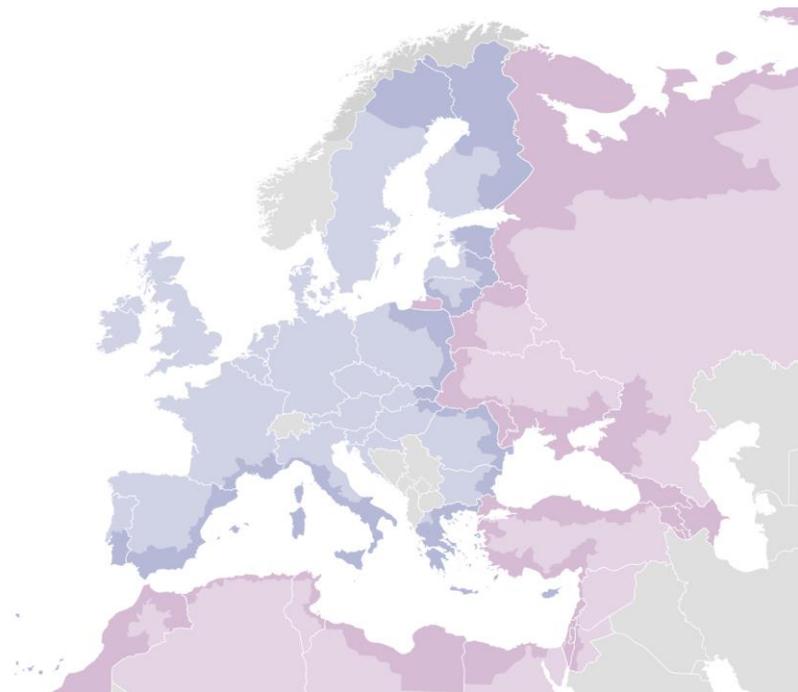
# Factsheet on procurement by Palestinian public beneficiaries

Applicable rules, tips and recommendations  
Update December 2019

## **DISCLAIMER**

This **non-binding document** has been developed by the TESIM project. It does not necessarily reflect the views of the European Commission on the topic, and is presented to programme and project practitioners **for illustrative purposes only**.

In case the document is endorsed by an ENI CBC programme and renders it compulsory for use by project beneficiaries, **neither TESIM experts nor the TESIM consortium members shall be held liable for its contents**, in particular as far as audit findings on the eligibility of expenditure are concerned.



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## 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 Palestinian beneficiaries with use of public budgetary funding, deriving from the applicable legislation, but also from the programme' specific rules and the Financing Agreement.



## 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 Palestinian beneficiaries are as follows:

Article	Content
<b>52.2</b>	General principles
<b>52.3</b>	Rules of nationality and origin
<b>53</b>	Procedures and thresholds for service contracts
<b>54</b>	Procedures and thresholds for supply contracts
<b>55</b>	Procedures and thresholds for work contracts
<b>56</b>	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 article 106(1) of Regulation 966/2012 [...] (bankruptcy, etc.).*

The Palestinian public beneficiaries, in accordance with the provisions of the Financing Agreement **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.

## Rules of nationality and origin

Article 52.3 stipulates that “*In all cases, the rules of nationality and origin set forth in articles 8 and 9 of Regulation 236/2014 shall apply.*” This rule is also included in article 5 of the General Conditions of the Financing Agreements signed between the European Union and Palestine for the ENI CBC programmes.

### **What does it mean in practice?**

The **rule of nationality**, that is, the eligibility conditions for the participation of tenderers in procurement procedures, is the same as the one applied in the Member States. Therefore, there is **no restriction on nationality of tenderers**.

The Common Implementing Rules (EC Regulation 236/2014) provides that in the case of actions implemented under shared management with a Member State, as it is the case in the ENI CBC Programmes, **the supplies originated from the countries that are eligible under the rules of that Member State are also eligible**. According to the programme rules, there is **no restriction on the origin of supplies of a value lower than 100.000€**.

## 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, 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.

### Conversion of thresholds from Euro to US Dollars (USD)<sup>1</sup>

The amounts indicated in the ENI CBC IR and in the programme rules are all in EUR, while in the actual procurement procedures USD may be used, as it is the currency mentioned in the legislation. **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) for the month of the launch of the procedure.”

The exchange rate shall be the “monthly accounting rate of the Commission”, which can be found in the [Infoeuro website](#).

Additional fluctuations may take place during the project implementation, once the procurement contracts are awarded.

<sup>1</sup> The rule is the same, whatever the currency used

Please take into account that the **actual rate used to check the compliance with the thresholds for the type of procedure will NOT be the same as the one to be applied for reporting of the expenditure:**

*“Expenditure incurred in a currency other than Euro shall be converted into Euro by the Beneficiaries using the monthly accounting exchange rate of the EC in the month during which expenditure was submitted for examination to the auditors for its verification at each payment claim”.*

For more details, please refer to grant contract templates.

### 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 Article 266 of Delegated Regulation (EU) No 1268/2012.”* This article provides a list of reasons for justified use of the negotiated procedure and need to be complemented with the instructions and thresholds stipulated in articles 265, 267 and 269 of the above-mentioned 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,
- Extension of contracts already started (with respect of certain conditions),
- 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 28 of the **Implementing Regulation no. (5) of 2014** on direct (single-source) procurement to assess the convenience of using this procedure.

## 2.2. Overview on applicable Palestinian legislation

The list of applicable legal acts is as follows:

Legal reference	Content
<b>Euro Mediterranean Agreement</b> between Palestine and the Commission of the European Communities of 24 February 1997	
<b>Public Procurement Law no. (8)</b> of 2014	Establish a mandatory <b>legal framework for procurement</b> of supplies and services by public bodies in Palestine
<b>Financing Agreement</b> on CBC 2014-2020 Special Conditions and its Annex I-General Conditions	<b>Requirement for Beneficiaries in CBC countries to follow</b> procurement procedures and rules of nationality and origin as per Articles 52-56 of the <b>Implementing Regulation (EU) No 897/2014</b> (Articles 4 and 5 of the Annex I)

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

### **3. Requirements on procurement for Palestinian public bodies**

#### **3.1. General principles**

The laws referred to in the previous section of this document shall apply to the beneficiaries concerned by the law, that is, any ministry, department, authority or official public institution, as identified in the Procurement Law no. (8) of 2014.

The general procurement principles are in line with the ENI CBC IR: fair competition, economy and efficiency, transparency, non-discrimination, objectivity and fight against corruption and fraud.

The use of **electronic platform** is compulsory.

#### **3.2. Language requirements**

The procurement announcements and documents have to be published in **Arabic and preferably in English**, according to article 65 of the Implementing Regulation (5) of 2014. In the case of international bidding, the use of English is compulsory.

## 4. Compliance with ENI CBC Implementing Rules

Even though the Public Procurement Law of Palestine is mostly 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 17 of the Law stipulates that Evaluation Committees for tenders shall be constituted by 3 to 5 members.

The beneficiaries must consider the requirement of the ENI CBC IR of an **odd number of members**, which is **compatible** with the provision in the Palestinian legislation. Please ensure that there are 3 or 5 members, but **never 4**.

### 4.2. Exclusion criteria for tenderers

Even though the Law stipulates exclusion criteria for tenderers, they 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. Tender documents in accordance with best international practices

Even though the Palestinian legislation on procurement is compliant with the requirements of articles 52.2 to 56 of the ENI CBC IR, there are some few points of attention in the **tender documents**, which might imply ineligibility of expenditure if not taken into account.

There are specific templates under the Palestinian legislation, but not all of the analog documents in PRAG exist or the content is not fully in line. The following check-list compares the main documents in PRAG with the ones indicated in the Palestinian legislation.

Document	Is the document (or analog) mentioned in the legislation?	Is the content in line with PRAG template?
Contract notice	Yes	Yes
Declaration of honour on exclusion and selection criteria	No	-
Instructions to tenderers	Yes	Partially
Terms of reference	Yes	Yes
Draft contract	Yes	Yes
Administrative compliance grid	No	-
Evaluation grid	No	-
Tender submission form	Yes	Partially
Tender opening checklist	Yes	Partially
Tender opening report	Yes	Yes
Evaluators grid	No	-
Evaluation report	Yes	Yes
Contract award notice	Yes	Yes

#### 4.3.1. Complementary documents or additional content

We recommend to add the following content in your usual documents linked to the tender documents:

- Source of financing, that is, EU through ENI CBC Mediterranean Sea Basin;
- Eligibility of tenderers, origin of goods and no application of preferential regime;
- Acceptance of verifications and checks by EU and programme bodies.

**We strongly recommend:**

- to adapt and translate the [PRAG templates](#) identified below and
- to ensure that the content of existing document is in line with equivalent PRAG templates,

in case your **procurement documents ARE NOT FULLY compliant** with these instructions, it may result in the full or partial **ineligibility of the expenditure**.

You may find **use and adapt** if necessary, **your own templates** or **translate** the [PRAG ones](#):



The **additional templates** to use are:

Document	PRAG reference
Declaration of honour on exclusion and selection criteria	Adapted version in Annex A of this document

Please check the content of your usual templates with the following PRAG ones, to ensure they are in line:

Document	PRAG reference
Contract notice	b8o3_contractnotice_simp_en.doc (services); c2_contractnotice_en.doc (supplies); d2_contractnotice_en.doc (works)

Tender submission form	b8_tenderform_en.doc (services); c4l_tenderform_en.doc (supplies); d4n_tenderform_en.doc (works)
Tender opening check-list	b9_openchecklist_en.doc (services); c5_openchecklist_en.doc (supplies); d5_openchecklist_en.doc (works)

**“Tender documents must be drafted according to best international practice”** This is an essential requirement for the eligibility of expenditure. Some new standard documents in line with SPD<sup>2</sup> from the World Bank will be approved soon. **Be attentive to these new documents once approved!!**

Despite the alignment of Palestinian legislation with best international standards, we recommend a thorough verification of the compliance of your usual templates.

**DO NOT PROCURE AS USUAL!!**

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

<sup>2</sup> Standard Procurement Documents (SPD) <https://projects.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework#SPD>

## ANNEX A: 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’)

#### I – Situation of exclusion concerning the person

<b>(1) declares that the above-mentioned person is in one of the following situations:</b>	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 law of the country in which it is established, with those of the country in which the contracting authority is located or those of the country of the performance of the contract;	<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 selection criteria or in the performance of a contract;	<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 the following:		
(i) fraud, within the meaning of 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 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of EU Member States, drawn up by the Council Act of 26 May 1997, and in Article 2(1) of Council Framework Decision 2003/568/JHA, as well as defined in Article 14 of the General Conditions of the Financing Agreement for ENI CBC between Palestine and the European Commission in the legal provisions of Palestine;	<input type="checkbox"/>	<input type="checkbox"/>
(iii) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA;	<input type="checkbox"/>	<input type="checkbox"/>
(iv) money laundering or other financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council;	<input type="checkbox"/>	<input type="checkbox"/>
(v) 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 forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council;	<input type="checkbox"/>	<input type="checkbox"/>
(e) the person has shown significant deficiencies in complying with the main obligations in the performance of a contract financed by the Union's budget or by the Palestinian public budget, which has led to its early termination or to the application of liquidated damages or other contractual penalties, or which has been discovered following checks, audits or investigations by the Palestinian competent authorities, the Delegation of the European Union in Palestine, any Managing Authority of ENPI CBC or ENI CBC, Audit Authorities of ENI CBC, the European Commission, OLAF or the European Court of Auditors;	<input type="checkbox"/>	<input type="checkbox"/>
(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) for the situations of grave professional misconduct, fraud, corruption, other criminal offences, significant deficiencies in the performance of the contract or irregularity, the applicant accepts to be subject to: i. facts established in the context of audits or investigations carried out by the European Court of Auditors, OLAF, or any other check, audit or control	<input type="checkbox"/>	<input type="checkbox"/>

<p>performed under the responsibility of an authorising officer of the European Commission, Managing Authority or Audit Authority, the competent Palestinian authorities or any other competent body;</p> <p>ii. 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;</p> <p>iii. decisions of the Managing Authority, the Palestinian National Authority (identified in the Financing Agreement for ENI CBC programmes between the European Commission and Palestine) or the European Commission relating to the infringement of the competition rules stipulated in the Framework Agreement between the European Union and Palestine or of a national competent authority relating to the infringement of national competition law; or</p> <p>iv. decisions of exclusion by an authorising officer of the Contracting Authority.</p>		
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**II – Situations of exclusion concerning natural persons with power of representation, decision-making or control over the legal person**

<b>(2) declares that a natural 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 company directors, members of management or supervisory bodies, and cases where one natural person holds a majority of shares) is in one of the following situations:</b>	YES	NO
Situation (c) above (grave professional misconduct)	<input type="checkbox"/>	<input type="checkbox"/>
Situation (d) above (fraud, corruption or other criminal offence)	<input type="checkbox"/>	<input type="checkbox"/>
Situation (e) above (significant deficiencies in performance of a contract )	<input type="checkbox"/>	<input type="checkbox"/>
Situation (f) above (irregularity)	<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**

<b>(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:</b>	YES	NO
Situation (a) above (bankruptcy)	<input type="checkbox"/>	<input type="checkbox"/>
Situation (b) above (breach in payment of taxes or social security contributions)	<input type="checkbox"/>	<input type="checkbox"/>

#### IV – Grounds for rejection from this procedure

<b>(4) declares that the above-mentioned person:</b>	YES	NO
(h) has distorted competition by being previously involved in the preparation of procurement documents for this procurement procedure.	<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. 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 the persons that are members of the administrative, management or supervisory body. It must also provide the following evidence concerning the person itself and concerning the natural or legal persons which assume unlimited liability for the debt of the person:

For situations described in (a), (c), (d) or (f), 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 (a) or (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 procurement procedure. 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

<b>(5) declares that the above-mentioned person complies with the selection criteria applicable to it individually as provided in the tender specifications:</b>	YES	NO
(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 tender specifications;	<input type="checkbox"/>	<input type="checkbox"/>
(b) It fulfills the applicable economic and financial criteria indicated in section [insert] of the tender specifications;	<input type="checkbox"/>	<input type="checkbox"/>
(c) It fulfills the applicable technical and professional criteria indicated in section [insert] of the tender specifications.	<input type="checkbox"/>	<input type="checkbox"/>

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

<b>(6) if the above-mentioned person is the sole tenderer or the leader in case of joint tender, declares that:</b>	YES	NO
(d) the tenderer, including all members of the group in case of joint tender and including subcontractors if applicable, complies with all the selection criteria for which a consolidated assessment will be made as provided in the tender specifications.	<input type="checkbox"/>	<input type="checkbox"/>

## 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 specifications 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. 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 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