

Managing robust public procurement exercises

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The guidance is contained in [Procurement Policy Note 01/19](#) which is accompanied by [A Guide for Commercial and Procurement Professionals](#) and [Frequently Asked Questions](#).

The Procurement Policy Note helpfully confirms the government's intention that the public procurement regime should continue broadly unchanged after Brexit. If the UK leaves the EU with a deal then the current arrangements will be preserved under the European Union (Withdrawal) Act 2018. In the event that the UK leaves without a deal then the Government has committed to amending existing legislation to ensure that the current arrangements can continue to operate after 'exit day'.

The government has published guidance on [public sector procurement after a no deal Brexit](#). Further help and advice on the likely impact of Brexit is also available from [our Brexit Hub](#).

Scope

The guidance contained in the Procurement Policy Note applies to all central government departments, their executive agencies and non-departmental public bodies. It is also relevant to the wider public sector including the NHS and local authorities when they are carrying out procurements under the public procurement regime laid down in the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2015 and the Concession Contracts Regulations 2016.

Exclusions

Mandatory exclusions

Contracting authorities must exclude bidders where the bidder has been convicted of certain offences including corruption, fraud, terrorism, money laundering, human trafficking and modern slavery. An exhaustive list of specific offences that should trigger mandatory exclusion is provided in Regulation 57(1)(a)-(m) of the Public Contracts Regulations 2015.

A bidding entity will also be excluded if:

1. the person convicted is a member of the bidder's administrative, management or supervisory body or has power of decision, representation or control in the bidding entity, or
2. the entity convicted has powers of decision, representation or control in the bidding entity (for example where the bidding entity is a subsidiary of a convicted parent company).

Bidders should also be excluded if a final and binding judicial or administrative decision has been issued confirming that they are in breach of their tax and social security obligations. Bidders may avoid mandatory exclusion in certain circumstances by paying, or entering into a binding obligation to pay the relevant obligations and any associated fines or interest.

If a contracting authority becomes aware that a bidder should have been excluded after a contract is awarded then it may terminate the contract under Regulation 73(1)(b). A contractual term permitting termination on this basis is implied into all contracts awarded under the public procurement regime. However, contracting authorities should consider whether this implied term provides them with them sufficient protection in the event that they need to terminate on this basis. Consideration should be given to the inclusion of an express terms dealing with the process of termination under Regulation 73(1)(b) and any payment obligations arising in those circumstances. This will be particularly important where the costs of re-running a procurement exercise would be high or where the authority would incur significant liabilities if the contract came to an abrupt or premature end.

Discretionary exclusions

Contracting authorities may exercise their discretion to exclude bidders on a number of other grounds including where:

1. the bidder is in breach of environmental, social or labour law obligations
2. the bidder is bankrupt, the subject of insolvency or winding-up proceedings, is in administration or where it has entered into an arrangement with its creditors
3. the bidder is guilty of grave professional misconduct which renders its integrity questionable
4. the bidder has entered into agreements with competitors aimed at distorting competition
5. a conflict of interest exists which cannot be remedied by other means
6. the bidder has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract
7. the bidder has failed to satisfy the contracting authority that none of the mandatory exclusion grounds apply or is guilty of serious misrepresentation in that regard, or
8. the bidder has attempted to unduly influence the decision-making or to obtain confidential information that would give it a competitive advantage in the procurement process.

Breach of obligations relating to the payment of taxes or social security contributions may also be a discretionary ground for exclusion.

Contracting authorities considering excluding a bidder on a discretionary ground should ensure that they have obtained robust evidence that the ground(s) are met and that they have carefully considered all material factors before taking the decision to exclude the bidder.

Verification

All bidders will generally be required to self-declare their status against the exclusion grounds unless they are bidding for a call-off contract under an existing framework agreement. Where a number of organisations come together to submit one bid (for example as a joint venture or a partnership established for the purpose of the contract) then each organisation will need to self-declare its own status against the exclusion grounds. Where a bidder relies on another company within its group to meet a particular selection criterion then both the bidder and the company upon which it relies will need to self-declare their respective statuses.

Contracting authorities must ensure that the mechanism for assessing declarations is clearly laid out in the procurement documents. There are various methods by which verification may be undertaken, although European Single Procurement Documents must be accepted if offered with a bid.

Verification is usually only required from the successful bidder prior to contract award, but evidence may be sought from all bidders where this is necessary to ensure the proper conduct of the procurement process.

Failure to verify a successful bidder could result in a procurement challenge if that bidder would have failed to meet the necessary criteria (and therefore should not have been awarded the contract) at the time of contract award.

Self-cleaning

Bidders will usually be excluded for a period of five years from the date of conviction on mandatory grounds, or three years on discretionary grounds. However, a bidder may bid for public contracts before the end of the relevant exclusion period if it has taken appropriate measures to demonstrate its reliability, despite the relevant ground for exclusion – this is known as ‘self-cleaning’. This may include paying compensation, collaborating with the authorities and taking measures to prevent further criminal offences or conduct.

It is for the bidder to provide sufficient proof to satisfy the contracting authority that its bid should be considered. Contracting authorities will need to assess that evidence and consider the nature of the offence and the particular circumstances of the bidder before deciding

whether to accept the bid.

Conflicts of interest

Contracting authorities must take care to ensure that they have systems in place to prevent, identify and remedy conflicts of interest in procurement procedures.

Where potential bidders have acted in an advisory capacity during pre-market engagement or in preparing the procurement process then measures must be put in place to ensure that this does not distort any subsequent competition. Contracting authorities must share any information exchanged during pre-competition dialogue with all other potential bidders and ensure that any advantage is eliminated.

Bidders may be excluded where it is impossible to ensure equal treatment of all bidders by any other means, however they must be given an opportunity to prove that any potential conflict would not distort the competition.

Where a conflict does arise the contracting authority must document in its procurement report:

1. the precise nature of the conflict of interest
2. the action taken by the contracting authority to ensure equal treatment of all potential bidders, and
3. how the authority has satisfied itself that the competition was not distorted by the conflict.

If you have any queries about the issues raised in the new guidance, or require advice on a procurement exercise that you're running then our [public procurement team](#) are always available to offer help, advice and practical solutions to your problems.

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