

Exclusion grounds under the new procurement regime

A range of questions were subject to consultation on the grounds for excluding bidders from a procurement process. We consider some of the key proposals which will be taken forward in the new regime.

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The **Government Response** to the public consultation on its Green Paper, Transforming Public Procurement (Green Paper) was published in December 2021 (Response). One of the key considerations of the Green Paper was the grounds for excluding bidders from a procurement process. In practice, this can be an area of difficulty for contracting authorities, who often struggle to interpret the rules with limited guidance or detail about how the exclusion grounds are to be applied, and what is sufficient to demonstrate that a ground is met, or conversely, that the bidder has self-cleaned.

A range of questions were subject to consultation, including whether the exclusion grounds should include fraud against the UK's financial interests and non-disclosure of beneficial ownership of the supplier; whether new exclusion grounds should be added to the list of exclusions within the procurement regime, and whether there should be a centrally managed debarment list. We consider below some of the key proposals which will be taken forward in the new regime.

Readers should note that the new procurement regime will not go live until 2023, and therefore some of the proposals set out in the Response and discussed in this article may be subject to change.

Exclusion for poor performance

We regularly advise contracting authority clients wishing to exclude a bidder on the basis of their previous poor performance, and often find that even in cases of very poor performance, the contracting authority is unable to meet the threshold to exclude the bidder. It is therefore no surprise that the response to the stakeholder consultation on this point was generally supportive of the Government proposal to make past performance easier to consider and commented on the need for a clear mechanism or guidance to ensure that past performance could be measured fairly and consistently. However, stakeholder responses also suggest a need to balance giving contracting authorities the power to exclude poorly performing suppliers with protections for suppliers to ensure that these tools are not used disproportionately, and do not discourage suppliers from taking on risky or complex contracts.

The Government intends to extend the current discretionary exclusion ground for poor performance (which currently allows a contracting authority to terminate a contract where the relevant bidder has shown "significant or persistent difficulties" under a prior public contract which led to early termination, damages or a similar sanction) which will apply in cases where a previous public contract has been terminated due to a breach of contract, where damages have been paid for a breach of contract, or a settlement has been entered into due to poor performance or breach of contract; or where the supplier has failed to remedy poor performance or breach in accordance with contractual measures put in place by a contracting authority.

This provides for a broader range of circumstances upon which a contracting authority may exclude a bidder from participating in a public procurement process on the basis of their prior poor performance. However, as with the current regime it will require contracting authorities to actively manage their contracts, as the ground will not apply where the contracting authority has not exercised its contractual

rights in relation to the relevant performance. In circumstances where a contracting authority has not taken action against a poorly performing contractor, and terminated their contract or required them to take specific action to remedy their poor performance, they will not be permitted to exclude them from future procurement opportunities on the basis of this exclusion ground. This highlights the need for good contract management throughout the term of a contract.

The Government also intends to introduce a Contract Performance Register (CPR). The CPR will hold information, for example about a supplier's performance against KPIs. The Government is exploring whether the CPR may highlight when a supplier may be eligible for exclusion from public procurements by indicating when a contract has been terminated for poor performance, or when a supplier has failed to implement measures imposed in response to poor performance. The information provided on the CPR in the Response is limited, but its success would clearly depend on effective contract management and a willingness to report to government on supplier performance.

Centrally Managed Debarment List

It was proposed in the green paper that a centrally managed list of barred suppliers would be created. The Response reveals that local authority respondents to the consultation were generally in favour of such a list, on the basis that it would promote consistent decision making about supplier misconduct, and avoid duplication of effort by contracting authorities making assessments about suppliers. As pointed out in the Response, the consequences of being on such a list would be very serious for a supplier. The Government proposal is that the Bill will provide a power for the Minister to add suppliers to a debarment list if they are assessed as meeting a ground for exclusion and there is insufficient evidence of self-cleaning. However, contracting authorities will still retain some discretion with respect to these suppliers, where they are subject to a discretionary exclusion.

The procedure around the list itself is still under consideration, however, it is anticipated that the new regime will require suppliers to be considered for debarment when they are excluded from a procurement and that certain types of contracting authority (likely to be central government initially) will also be able to refer suppliers for consideration. The new Procurement Review Unit (PRU) established under the Bill will be responsible for considering these cases and making recommendations about inclusion on the list to the Minister. There will be a process for appeals, and for requesting early removal from the list if self-cleaning can be demonstrated.

As pointed out in the stakeholder responses to consultation on the Green Paper, the efficacy of the debarment regime will depend on the resources put into maintaining it, and whether it could be linked to other regulatory and judicial databases that would allow automatic flagging of misconduct. However, the efficacy of the exclusions regime as a whole will of course feed into the debarment regime, because contracting authorities will need to be able to feel confident in applying the relevant exclusions before any suppliers can be considered for debarment by the PRU.

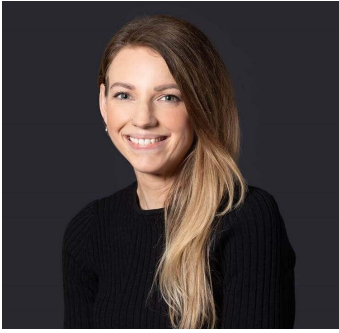
New grounds for exclusion

As noted above, the current regime of mandatory and discretionary exclusions can be difficult to interpret and apply, which hampers the ability of contracting authorities to exclude suppliers from competing for public contracts. Responses to the consultation reflected this, and the Response proposes to address these concerns by simplifying the exclusions regime. The concepts of mandatory and discretionary exclusions will be retained, but the focus will be on suppliers which pose an unacceptable risk to public confidence in procurement, effective competition or reliable delivery, as well as protecting the public, the environment, national security interests, public funds and employee rights. A list of the proposed exclusion grounds may be found in the Response. It is also proposed that the regime will be clarified, including by applying a five year time limit for the exclusion grounds, and clarifying the trigger point for that period, and further by confirming that the exclusion grounds will apply whether the relevant misconduct happened in the UK or overseas. In addition, the regime will clarify the way in which the actions of individuals and entities closely connected with a bidder may be taken account of by contracting authorities.

Helpfully, statutory guidance will be published which will address how to consider and apply the exclusion grounds, as well as how to manage self-declarations and assess information provided in relation to self-cleaning. Practical guidance of this nature is to be welcomed.

The Green Paper set out a number of significant proposals for changes to the way in which public procurement operates in England. Although the new regime is not expected to come into force until 2023, there will be many changes that all involved in public procurement need to understand. We will be producing a series of in-depth articles on the Response, explaining the key issues and areas of interest.

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