

The new rules on supplier selection and exclusion and the introduction of a new debarment regime under the [Procurement Act 2023](#) will have a significant impact on both contracting authorities and suppliers.

How Can Suppliers Be Excluded From Tenders, and Under Which Grounds?

The exclusions regime enables, and where appropriate requires, the exclusion of suppliers where they pose particular risks to public procurement.

In assessing tenders, a contracting authority:

- Must disregard any tender from an excluded supplier
- May disregard any tender from an excludable supplier

Excluded Suppliers

Suppliers must be excluded if:

- The contracting authority considers that:
 - A mandatory exclusion ground applies to the supplier or an associated person, and
 - The circumstances giving rise to the application of the exclusion ground are continuing or likely to occur again, or
- The supplier or an associated person is on the debarment list by virtue of a mandatory exclusion ground.

Mandatory Grounds (Excluded)

Grounds	Exclusion Period
<ol style="list-style-type: none"> 1. Corporate manslaughter or corporate homicide 2. Terrorism 3. Theft, fraud and bribery 4. Labour market, slavery and human trafficking offences 5. Organised crime 6. Tax offences 7. Cartel offence 8. Ancillary offences 9. Equivalent offences in other jurisdictions 10. National security (only in relation to certain contracts where approved by central government) 11. Misconduct in relation to tax 12. Competition law infringements 13. Equivalentents outside of the UK 14. Failure to cooperate with a debarment investigation 	<p>Generally, a five-year period is the standard exclusion period for all grounds.</p> <p>However, this could be shorter depending on the offence – e.g. (i) for exclusion grounds that are new, events that occurred before the Procurement Act 2023 came into effect cannot be considered and (ii) for exclusion grounds that are the same as, or substantially similar to, a discretionary exclusion ground under the previous legislation, events that occurred more than three years before the relevant provisions in the Procurement Act 2023 came into force cannot be considered.</p>
<ol style="list-style-type: none"> 15. Improper behaviour in relation to the award of a public contract 	<p>Only excluded from competing for the contract in question</p>

Excludable Suppliers

Suppliers are excludable if:

- The contracting authority considers that:
 - A discretionary exclusion ground applies to the supplier or an associated person, and
 - The circumstances giving rise to the application of the exclusion ground are continuing or likely to occur again, or
- The supplier or an associated person is on the debarment list by virtue of a discretionary exclusion ground.

Discretionary Grounds (Excludable)

Grounds	Exclusion Period
<ol style="list-style-type: none">1. Labour market misconduct2. Environmental misconduct3. Insolvency, bankruptcy etc.4. Potential competition infringements (in view of the contracting authority)5. Professional misconduct that brings into question the supplier's integrity6. Breach of contract or past poor performance7. Acting improperly in procurement8. National security	<p>Generally, a five-year period is the standard exclusion period for all grounds.</p> <p>However, this could be shorter depending on the offence – e.g. (i) for exclusion grounds that are new, events that occurred before the Procurement Act 2023 came into effect cannot be considered and (ii) for exclusion grounds that are the same as, or substantially similar to, a discretionary exclusion ground under the previous legislation, events that occurred more than three years before the relevant provisions in the Procurement Act 2023 came into force cannot be considered.</p>

Although the mandatory and discretionary grounds for exclusion are largely based upon grounds under the existing regime, there are notable additions. For example, poor performance, a new discretionary ground for exclusion, can be met either where a contracting authority considers the supplier has not performed to the contracting authority's satisfaction, and has been given an opportunity to improve but has failed to do so (note: this ground applies if any contracting authority has come to that conclusion on any contract, not just the contracting authority running the specific procurement in question), or where the supplier has breached a relevant contract, and the breach results in termination, damages or settlement. Further, underperformance can be a ground for exclusion even if it was on a below-threshold contract. This leaves significant discretion for the contracting authority to determine a satisfactory level of performance, and suppliers should therefore, when bidding for a contract, assess the risk of breaching any onerous terms and the potential exclusion implications if there were a finding of breach of contract.

Rules on Associated Persons, Connected Persons and Subcontractors

Contracting authorities should consider whether the exclusion grounds apply not only to the supplier that has submitted a tender, but also to other individuals or entities (i) with significant influence or control over the supplier, (ii) that the supplier has significant influence or control over and (iii) that have certain associations with the supplier.

Associated Persons

A supplier may be an excluded supplier or an excludable supplier if any exclusion ground applies to either the supplier or an associated person, and if the circumstances giving rise to the exclusion ground are continuing or likely to occur again. An "associated person" is defined as a person that the supplier is relying on to satisfy the conditions of participation (other than a guarantor).

Associated persons are likely to be within the first tier of subcontractors, but may be further down the supply chain – for example, in procurements of contracts with highly technical elements.

Connected Persons

A supplier may be an excluded supplier or an excludable supplier if certain exclusion grounds apply to a connected person, and if the circumstances giving rise to the exclusion ground are continuing or likely to occur again. Connected persons are defined as:

- a. Persons with significant influence or control over the supplier or persons over which the supplier has significant influence or control, such as majority shareholders.
- b. Directors and shadow directors of the supplier.
- c. Parent and subsidiary companies. (Sister companies of the supplier, i.e. companies with the same parent, are not connected persons unless they fall within one of the other categories of associated or connected persons.)
- d. Predecessor companies (i.e. companies that have become insolvent and ceased to trade and the business has effectively been transferred to the supplier).
- e. Other persons who can reasonably be considered to stand in an equivalent position to the above categories.

Subcontractors

Contracting authorities must ask for details of all subcontractors that a supplier intends to use as part of the procurement. This is not restricted to subcontractors that the supplier is relying on to meet conditions of participation (who will in any event be associated persons), but applies to all subcontractors (of all tiers) that the supplier intends to subcontract the performance of all or part of the contract to.

A supplier can also be considered an excluded or excludable supplier by virtue of a connected person of a subcontractor.

New Central Debarment List

If a contracting authority decides a supplier is excluded or excludable, it must report this to the Minister of state, who will make an investigation and decide whether the supplier should also go on the central debarment list. The central debarment list will be available to all contracting authorities, which must exclude a supplier that is listed as excluded, and may exclude a supplier that is listed as excludable.

If the Minister, following investigation, determines that the grounds for exclusion are met, the Minister will publish a report setting out whether the supplier will be entered on the debarment list and, if so, for how long.

The supplier will then be given notice, and there will be an eight-day standstill period during which the supplier can apply for interim relief, i.e. to suspend a debarment decision pending an appeal. Appeals must be brought within 30 days of when the supplier was or ought to have been aware of the Minister's decision. The Minister may not enter the supplier's name onto the debarment list until a subsequent appeal has concluded or the time allowed to bring an appeal has elapsed. The court can also only make an order setting aside the debarment decision if it is satisfied that the Minister has made a material mistake of law. In the absence of submissions or an appeal, the supplier will be added to the debarment list.

Suppliers can apply to be removed from the debarment list (as distinct from appealing to the court); however, the Minister is only required to consider such an application if there has been significant new information or a material change of circumstances, e.g. the supplier can show evidence of self-cleaning.

Exclusions Post-contract Award

If a supplier (or a subcontractor in respect of which the contracting authority requested information during the procurement procedure) is found to be an excluded supplier or an excludable supplier during the term of a public contract (including a framework), the contracting authority can decide whether to terminate the contract with that supplier. The Procurement Act 2023 implies a right to terminate in these circumstances into each public contract and provides for the same in relation to each framework.

The right to terminate is discretionary, even where the supplier is an excluded supplier (i.e. subject to a mandatory exclusion ground). When contracting authorities exercise their discretion on whether to terminate contracts in these situations, contracting authorities should consider factors including:

- a. Time elapsed on the contract
- b. Time remaining in the contract
- c. The nature and relevance of the misconduct to the contract
- d. The impact of termination on public services
- e. The cost of termination and reprocurement

Conclusion

The new exclusion and debarment rules will understandably lead to unease among suppliers, given the extensive grounds for exclusion from tenders and the severity of the implications of debarment.

It is also significant that suppliers can be excluded from tenders based on the conduct of associated persons, connected persons and subcontractors, and that suppliers can be excluded based on offences or conduct committed overseas that would be grounds for exclusion if they had occurred in the UK. These aspects of the new rules will be of particular relevance to larger corporate groups and multinationals.

If a supplier is notified of exclusion from any procurement, the supplier should do the following:

- Immediately prepare to contest a debarment decision and begin rehabilitation ("self-cleaning") if necessary.
- Take proactive steps to evidence a material change of circumstances. If placed on the debarment list, it is possible to be removed if this is evidenced.

If you would like to discuss any aspect of this alert or if you have any other public procurement-related queries, including how the Procurement Act 2023 may impact your organisation, please reach out to one of our contacts.

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