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UK Government Suppliers Need to Mind Their Ps and Qs Now That the New Procurement Act Is in Force

Client Alerts

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The Procurement Act 2023 looks set to reshape government (and other public) contracting in the UK. It came into force in the UK on 24 February, repealing and replacing the various EU-based procurement regimes for public contracts in the UK with a single unified set of rules and procedures(1). The superseded regulations will continue to apply to contracts whose procurement was commenced prior to 24 February 2025.

One of the most significant developments is the new "debarment regime" with its potentially far-reaching impacts on suppliers. The Act significantly expands the grounds on which suppliers can be excluded from participation in public tenders and contracts and establishes a centralised and public debarment list, managed by the Cabinet Office. The objective of the debarment regime is to ensure that risky or underperforming suppliers (and their supply chain partners) stay away from public projects, as well as to streamline and de-duplicate public sector efforts in screening suppliers. Cabinet Office ministers have the power to investigate and ultimately exclude suppliers who fail to meet minimum standards of integrity or pose particular risks (including threats to national security). A supplier which becomes subject to a debarment decision will be added to the debarment list, which will include not only the supplier's name, but also the exclusion ground to which the debarment relates. Debarment will last five years.

Beyond the reputational ramifications of publication on the debarment list, once a supplier's name appears on the debarment list, any contracting authority that falls within the Act's scope must treat that supplier as excluded. This effectively prohibits the supplier from participating in new competitive tendering procedures, from being awarded call-off contracts under framework agreements, or from remaining in dynamic markets for as long as it remains listed.

The UK Government has lost no time in using its new powers: only two days into the new regime it announced that seven companies in the construction industry are subject to investigation and may face a ban due to their connections to the tragic Grenfell fire in London in 2017.

The grounds for entering a supplier on the debarment list

The grounds for debarment are extensive. A supplier can find itself on the debarment list for being an ‘excluded’ or ‘excludable’ supplier. Debarment is **mandatory** where a supplier or ‘connected person’ has been convicted of a range of offences, is determined to be a threat to national security, or has failed to cooperate with an investigation into debarment. Debarment is **discretionary** in a number of situations, including where a supplier or connected person has been subject to a petition or application for winding up or has engaged in conduct which brings into question their integrity; where the supplier has committed a sufficiently serious breach of a public contract or has not performed a contract to a contracting authority’s satisfaction despite being given a ‘proper’ opportunity to improve; or the supplier has acted improperly in relation to a procurement and put themselves at an advantage in relation to the award of a public contract (for example, by failing to provide information requested or by unduly influencing a contracting authority’s decision making).

These expanded grounds for debarring suppliers respond to concerns highlighted by the UK Competition and Markets Authority (CMA) regarding the significant risk of procurement collusion in the UK's public procurement market. The CMA has initiated several investigations into potential bid-rigging.

In the pre-Procurement Act era, the focus was primarily on the main contractor, with limited scrutiny of sub-contractors or associated entities. The new regime expands the focus to sub-contractors and other associated persons, bringing under scrutiny the conduct of a supplier’s supply chain partners, group companies and even its senior management. A ‘connected person’ is defined as including directors and shadow directors, parent companies and subsidiaries, persons who exercise or have the right to exercise significant influence or control over the supplier and persons over which the supplier exercises or has the right to exercise significant influence or control.

A supplier earmarked for the debarment list may be subject to an investigation by a contracting authority. The supplier is to be given notice of an investigation and a reasonable opportunity to make representations and provide evidence as to whether the exclusion grounds apply. The supplier may be required to provide documents, information and any other assistance the authority may reasonably require. Suppliers will want to actively engage with the investigation process, not least because failure to cooperate may itself be enough to justify entry on the debarment list. Reports of investigations are to be published, albeit with a right to seek redactions of sensitive commercial information.

The right of appeal

A supplier may apply to the court for interim relief in the form of a suspension of the decision to enter the supplier’s name on the debarment list, so long as the application is brought within an eight-working-day "debarment standstill period" beginning the day on which the Cabinet Office gives notice of the decision to the supplier.

Suppliers may also appeal the decision on the grounds that the Cabinet Office minister made a mistake of law in making the decision to include the supplier on the debarment list. Appeals must be brought within 30 days, beginning on the day the supplier knew or ought to have known of the decision.

The courts can set aside the decision and can also award the supplier its costs of participating in a procurement from which it is excluded as a result of the wrongful inclusion on the debarment list. However, the opportunity for the supplier to win that contract will be lost, and there is no ability to seek damages for that lost opportunity. This means that bringing an appeal, including an application for interim relief, during the debarment standstill period will be key.

A supplier may apply to the Cabinet Office at any time to be removed from the debarment list. The minister is only required to consider such an application if there has been a material change of circumstances or there is significant new information since the entry was made.

Analysis

While the stated objectives of integrity, transparency, and efficiency are of course laudable, the Procurement Act gives the Cabinet Office very wide discretion to debar suppliers, on potentially tenuous grounds.

For example, what amounts to a 'threat to national security?' The courts have previously afforded a wide discretion to the Government's decision-making under the National Security and Investment Act 2012 (the NSA), on the grounds that national security is a matter for elected officials. Government suppliers with links, however remote, to (for example) Russia, Iran and China may find themselves excluded from government contracts.

And what about 'labour market misconduct?' The Act provides for a discretionary exclusion ground where a supplier or connected person engages in conduct overseas which the decision-maker suspects could result in (for example) a trafficking and exploitation risk or prevention order being made, had the conduct occurred in the UK. Erstwhile suppliers to the UK government have found themselves embroiled in litigation relating to alleged forced labour in their supply chain(2)—is that enough to put them at risk of disbarment?

What will amount to 'conduct which calls into question a supplier's (or a connected person to the supplier's) integrity? Will it be enough to justify a place on the debarment list that, for example, a senior executive (surely a 'connected person') sexually harasses another person or makes a racist comment? Or what about a company which has dialed back its DEI commitments in light of the Trump Administration's recent Executive Orders. Does such a stance call into question a supplier's integrity, if viewed from the perspective of a UK government committed to addressing inequalities in the workplace?

As for the ability to debar on the grounds of a breach of contract, or poor performance, this leaves suppliers potentially very vulnerable. It is common in large and complex contracts for the parties to be in dispute, for example as to whether delays are the fault of the supplier or the contracting authority, or whether contractual milestones have been achieved, or whether cost overruns are justified by the variation in the scope. Out of commercial pragmatism the parties will often resolve their differences on a 'no admission of liability' basis and enter into settlement agreements. The very fact of a settlement agreement between supplier and authority renders a breach sufficiently serious to justify debarment. It will be important to ensure therefore that any settlement agreement excludes as far as possible the application of the debarment provisions. The poor performance grounds offers significant room for a range of opinions on the seriousness and cause of any poor performance.

It is evident that existing and potential suppliers to the UK government will need to stay on the government's 'good list' if they are to avoid a five-year stint on the Cabinet Office's 'naughty list.' That means toeing the party line on important areas of government policy, as well as ensuring that sub-contractors adhere to a supplier's policies and standards. Suppliers will wish to identify potential reasons they may be excluded and seek to 'self-clean.'

Given the far-reaching commercial and reputational consequences of being listed, and the potential for contentious decisions to exclude suppliers, the debarment regime will undoubtedly be a rich source of litigation. Only time will tell if the Procurement Act truly achieves the overarching objective of simplifying—and making more efficient—government contracting in the UK, post-Brexit.

We will be covering other aspects of the new procurement regime in subsequent editions of this Update.

Footnotes

[1] This includes the Public Contract Regulations 2015, the Defence and Security Public Contracts Regulations 2011, the Utilities Contracts Regulations 2016 and the Concessions Contracts Regulations 2016.

[2] Limbu and Others v Dyson [2024] EWCA Civ 1564

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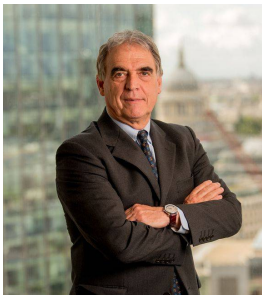

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