


The Procurement Bill - selection, exclusion, conflict of interests and debarment

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On 11 May 2022, the UK Government introduced [the Procurement Bill](#) which seeks to **reform** the existing rules on [public procurement](#). The Bill underwent its second reading on 25 May 2022 and we can expect the Act to come into force some time next year. This article will take you through some of the proposed changes on selection, exclusion, conflict of interests and debarment in the procurement process.

Selection

One digital platform

The Bill proposes to create a simplified selection process by requiring contracting authorities to use a single, transparent, accessible, machine-readable and licence-free digital platform, which will retain most of the information required for a procurement. This will not only help suppliers see all opportunities in one place, but will also allow suppliers to register their details, which can then be used for all bids.

This is particularly advantageous for small and medium-sized enterprises, as businesses will only need to “submit certain types of information to demonstrate their credentials once to be considered for a public sector procurement”.

Slavery and human trafficking

Following the House of Lords’ second reading, [amendments to the Bill](#) include a risk register which will publicly disclose and disseminate details on which areas goods cannot be sourced without unreasonable risk of slavery and human trafficking being present in supply chains. This will make provision for eradicating from all public contracts goods or services that are tainted by slavery and human trafficking.

Enhanced standards of disclosure and transparency mean that all contractors, including prospective ones, must publish and verify information about the country of origin of all sourcing inputs in their supply chain. This has potential to further the ‘social’ factor in Environmental, Social and Governance (ESG) goals by pushing suppliers to look deep into their supply chains but will, undoubtedly, be a complex exercise. It runs the risk of causing trade disruptions for suppliers that can only locate resources and materials from certain at-risk countries, as well as reputational damage and contractual breach where an alternative provider may have to be found. Suppliers should use the six-month implementation period as an opportunity to mitigate these risks and scrutinise their supply chain network.

Environmental protection

A new clause was also tabled to ensure that public sector procurement policy is consistent with contributing to environmental protection and the improvement of the natural environment, and aligns with [the Environmental Act 2021](#). This is not surprising, given the Government’s overall ambition to achieve net zero by 2050. As above, this will require an in-depth analysis of each supply chain which will support the ‘E’ in ESG goals; however, may present resource and cost challenges to small and medium-sized enterprises.

Exclusion

Poor performance

A new regime gives relevant authorities the ability to exclude suppliers based on poor performance. The idea behind this change in policy is to make it easier to exclude underperforming suppliers in the procurement process.

Performance is considered poor where:

- a supplier has breached a contract and the breach was sufficiently serious;
- a court has ruled that the supplier breached a relevant contract and the breach was sufficiently serious;
- the supplier has not performed a relevant contract to the regulated authority's satisfaction, was given a proper opportunity to do so, and failed.

However, poor performance that occurred before the date the Procurement Act comes into force must be ignored. The intended benefit of this change in policy will, therefore, likely only be seen in the longer term, and may still risk the selection of underperforming suppliers in the short term as a result of ignoring any poor performance prior to the date of enactment, or where the supplier is a newly-established company without a background history.

Unethical behaviour

Bidders might also be excluded where they have acted unlawfully or unethically. Unlawful behaviour applies in relation to either the UK or the law of the country in which the supplier is operating. The definition of unethical, however, will need to be expanded upon so that it is clear whether this includes directors or any connected persons. Another consideration to be made is whether this includes acts performed in a personal capacity as, without clarification, this inclusion could lead to controversial results.

Acting improperly in procurement

A supplier is at risk of becoming an excluded supplier if they have failed to provide requested information or if they provide incomplete, inaccurate or misleading information, as it falls within the discretionary exclusion ground of 'acting improperly in procurement'. This has the potential to deter small and medium-sized enterprises from submitting a tender, as limited resource could result in accidentally providing late or incomplete information.

Conflict of interest

The Bill places an obligation on the contracting authority to:

- identify and keep under review any potential and actual conflicts of interest;
- take all reasonable steps to mitigate those conflicts so that there is no unfair advantage or disadvantage to other suppliers in relation to the specific procurement; and
- prepare an assessment of conflicts of interest before the tender notice, transparency notice or notice establishing a dynamic market is published.

This increase in transparency is most welcome and can prevent corruption by mitigating conflicts at an even earlier stage of the procurement process, before even publishing a tender notice or transparency notice; however, the mitigation procedures that might be expected to be implemented could result in the procurement process slowing down.

Debarment

Regulation 37 of the Procurement Bill will create a new 'debarment register' acting as an additional form of protection alongside the exclusion framework, which will be accessible to all public sector organisations.

This will require contracting authorities to provide notice within 30 days where:

- a contracting authority:
 - disregarded a tender from an excluded or excludable supplier;
 - excluded an excluded or excludable supplier from participating in, or progressing as part of a procurement procedure; or
 - are aware of an associated supplier or sub-contractor supplier having been replaced;
- the supplier was an excluded or excludable supplier on the basis of a relevant exclusion ground.

Suppliers can apply to be removed, but need to show a material change in circumstances, and there will be appeals procedures put in place. This system has the ability to increase transparency, reduce contracting authorities from duplicating checks, and prevent issues

such as fraud; however, there is a risk that suppliers may be unfairly excluded from the procurement process, given that it is not just the supplier that has to have committed any of the exclusion grounds but can also be a connected person.

Summary

We can see [public procurement](#) policy moving towards an increase in standards for bidders to meet through enhanced transparency and resilient supply chains. The protection mechanisms, such as the debarment register and notification requirements, show the Government's ambition to filter underperforming suppliers, corruption, fraud and conflicts of interest from the procurement system. This change in policy has the public interest at heart; however, the extra administrative costs and disclosure requirements may well delay the procurement process and present challenges for both suppliers and potential suppliers along the way.

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