



UK Public Procurement Reform Webinar: Exclusions and Debarment

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Speakers



Joanna Haigh
Legal Director
T+441133692765
Joanna.haigh@dlapiper.com



Martyn Scott
Legal Director
T: +441133692205
Martyn.scott@dlapiper.com



Matthew Cliff
Associate
T: +441512374726
Matthew.cliff@dlapiper.com



Rebecca Walker
Associate
T: +44 113 369 2180
rebecca.walker@dlapiper.com

Today's topics

- Pre-contractual phase
- Special cases
- Post-contractual phase
- Debarment

Pre-contractual phase

Exclusion: pre-contractual phase

- Grounds for exclusion: who *must* and who *may* be excluded?
- Connected and associated persons, and sub-contractors: who falls within scope?
- Making the exclusion decision: what matters?
- Who needs to be notified of an exclusion decision?



Basic rules on exclusion

- Two types of supplier:
 - **excluded**
 - **excludable**
- Contracting authorities:
 - **must exclude** excluded suppliers
 - **may exclude** excludable suppliers
- The rules reach:
 - **connected persons**
 - **associated persons**
 - **sub-contractors**



Is a supplier excluded?

- Contracting authority considers that:
 - **mandatory ground** in Schedule 6 applies to supplier, connected person or associated person
 - circumstances **continuing or likely to occur again**
- Mandatory grounds include:
 - range of **criminal offences** (theft, fraud, bribery, tax evasion)
 - failure to co-operate with investigation for the purpose of supplier being added to the debarment list
 - competition law infringements
 - **improper behaviour**
- Supplier or associated person on **debarment list** due to mandatory ground
- Mandatory grounds exist if they occurred in past 5 years (some including terrorism, bribery and money laundering have effect if committed prior to Act coming into force)



Is a supplier excludable?

- Contracting authority considers that:
 - **discretionary ground** in Schedule 7 applies to supplier, connected person or associated person
 - circumstances **continuing or likely to occur again**
- Discretionary grounds include:
 - potential competition infringements
 - professional misconduct
 - breach of contract and poor performance
 - labour market misconduct and environmental offences
 - **Insolvency**
- Supplier or associated person on **debarment list** due to discretionary ground
- Discretionary grounds exist if contracting authority was aware or ought to have been aware in past 5 years / 3 years for certain grounds (including insolvency, breach of contract, poor performance)



Associated and connected persons

- **Associated persons** are those the supplier relies upon to meet any condition of participation
- **Connected persons** are:
 - directors and shadow directors
 - parent companies
 - those with significant influence or control
- Contracting authorities may request information on connected and associated persons to determine if supplier is excluded / excludable
- If supplier fails to provide information or it is incomplete, supplier must be excluded and treated as an excluded supplier
- If a supplier is excluded or excludable only because an **associated person** is excluded or excludable, then contracting authority must:
 - notify supplier
 - give the supplier a reasonable opportunity to replace associated person



Sub-contractors

- Contracting authorities **must**:
 - request information about intention to sub-contract
 - seek to determine if sub-contractors are on debarment list
- Contracting authorities **may** request information to determine whether a sub-contractor is an excluded or excludable supplier
- If contracting authority then considers that a sub-contractor is an excluded or excludable supplier, then the **exclusion rules apply**
- **But** before excluding a supplier, contracting authority must:
 - notify supplier
 - give the supplier a reasonable opportunity to find another sub-contractor



Making the decision

For mandatory **and** discretionary grounds, contracting authorities must consider whether the circumstances are **continuing** or **likely to arise again**.

They can look at:

- evidence the supplier, etc, **takes the circumstances seriously**
- steps taken to **prevent a re-occurrence**
- **commitments** made to prevent a re-occurrence
- **time** since ground materialised

Process:

- supplier must have chance to **make representations** and **provide evidence**
- contracting authority cannot require **disproportionate** evidence or information



Notification requirements

- If a contracting authority has excluded a supplier, it must give notice to the relevant Minister (or other appropriate authority) within 30 days of the exclusion
- The notice must **provide details in the notice of the relevant exclusion ground(s)**
- Any notification may trigger an investigation and report, leading to the supplier being added to a centrally-managed debarment list



Key takeaways

Contracting authorities

- Regularly review the debarment list
- Consider what evidence you will require to support your assessment
- Plan in time to allow suppliers to make representations and provide evidence
- Also allow time for replacement of associated persons and sub-contractors

Suppliers

- Know your supply chain!
- Consider your approach to making representations
- Contingency planning for associated persons and sub-contractors



Special Cases

Special Cases

National Security

There are two circumstances where a supplier can be excluded on grounds of national security:

1. A power for the Minister to debar suppliers if the supplier:
 - poses a threat to the national security of the United Kingdom
 - would pose such a threat in relation to public contracts of that description

If the supplier is debarred this will become a mandatory exclusion ground.

The supplier is only to be treated as an excluded supplier in relation to public contracts of a kind described in the relevant entry.



Special Cases

National Security

2. Alternatively, a contracting authority has a discretionary ground to exclude if it determines that the supplier or a connected person poses a threat to national security in the UK but this is subject to the following provisions in section 29:

- The contracting authority may not disregard the tender, exclude the supplier or notify the supplier of its intention unless
 - the authority has notified the Minister of the Crown of its intention
 - the Minister considers that:
 - the supplier or an intended sub-contractor is an excludable supplier by reference to paragraph 14 of Schedule 7
 - the tender should be disregarded or supplier excluded



Special Cases

Conflicts of interest

- Contracting authorities must take all reasonable steps to ensure a conflict does not put a supplier at an unfair advantage or disadvantage
- This can include requiring the supplier to take reasonable steps
- It can also mean excluding a supplier from the procurement where:
 - the conflict puts the supplier at an unfair advantage; and
 - either:
 - the advantage cannot be avoided; or
 - the supplier will not take the steps required by the contracting authority



Special Cases

Disregarding tenders

- There are a number of circumstances in which contracting authorities can also 'disregard' tenders:
 - Contract authorities must disregard tenders from suppliers that do not satisfy conditions of participation.
 - Contracting authorities may disregard tenders:
 - from a supplier that is not in the UK or a treaty state
 - that offer a price that is abnormally low
 - which breach a procedural requirement set out in the tender notice or associated tender documents.



Post-contractual phase

Contract performance

- The Government wanted to:
 - provide the tools to take into account past performance
 - exclude suppliers without the capacity to deliver
- Discretionary exclusion for contract performance introduced



Breach or poor performance

The discretionary grounds include:

- the supplier breached a public contract **sufficiently seriously** (meaning leading to termination, damages or a settlement)
- a **court** ruled that the supplier breached a public contract, and the breach was sufficiently serious
- the supplier:
 - has not performed a relevant contract to the contracting **authority's satisfaction;**
 - was given proper opportunity to improve performance; and
 - **failed to do so**
- if a contracting authority has published a **contract performance notice** relating to breach or poor performance in respect of the supplier



Poor performance or breach notice

Contracting authorities must:

- publish a '**contract performance notice**' in cases of:
 - **breach**
 - **poor performance**
- do so within **30 days** after the performance improvement plan fails/ the resulting action from the breach is taken
- The notice should cover all elements set out in the Procurement Regulations 2024
- The notice is a ground for discretionary exclusion
- A contract performance notice triggers obligations on all other authorities
- Contract performance notices will also be used to rate supplier's performance against the key performance indicators published for contracts with a value over £5M



Terminating contracts

- Contracting authorities may **terminate existing contracts** where:
 - the supplier or an associated person have become excluded or excludable
 - a sub-contractor has become excluded or excludable
- To terminate because of a **sub-contractor**, the contracting authority:
 - did not know the supplier intended to sub-contract;
 - asked about sub-contractors, but did not discover they were:
 - on the debarment list
 - excluded or excludable



Post Contract – Example Case Study

- Factual scenario
 - The parties enter into a contract covered by the Act
 - The contracting authority isn't satisfied with the contractual performance of the supplier
 - The supplier does not agree that the current issues are its fault
 - There is no litigation or court order to determine the contractual issue
 - The contracting authority writes a letter to the supplier stating it is not performing to the authority's satisfaction and requires the supplier to improve its performance



Example Case Study (2)

- Implications
 - The supplier does not improve its performance
 - Obligation on the contracting authority to publish a Contract Performance Notice
 - That notice is a ground for discretionary exclusion
 - Once published, all other contracting authorities are therefore on notice – discretion to exclude the supplier
 - Is the problem continuing or will it occur again?
 - Rival suppliers in the market will be aware of the notice and may seek to apply pressure regarding exclusion



Example Case Study (3)

- Legal risks and mitigations
 - A dispute relating to one contract has the potential, quite quickly, to impact on a supplier's wider business with Government
 - Could be used as leverage by a contracting authority to apply pressure when there is a contractual dispute
 - Proactively manage the contract to avoid unwanted escalation
 - Suppliers must be aware of the potential consequences if the contracting authority puts forward an improvement plan to the supplier
 - Need for clear language in correspondence – signpost what would happen if the supplier's performance does not improve



Example Case Study (4)

- Legal risks and mitigations
 - Supplier needs to be aware of the low bar for the Authority - it does not need to establish breach
 - A Contract Performance Notice will damage the reputation/prospects of a supplier
 - Likelihood of challenge is high from supplier if it feels the notice is unjustified
 - Early engagement to understand the risks
 - Check if the correspondence is intended to trigger a notice
 - The supplier needs to actively monitor its contractual performance to minimise risk of escalation



Debarment

Debarment

- Exclusion through a debarment list
 - There is a new concept of a debarment list centrally managed by Government
 - Process for being added to the debarment list:
 - Contracting authorities are under an obligation to report a supplier to the Minister of the Cabinet Office if they exclude the supplier
 - The Minister must then decide whether to put the supplier on the debarment list following an investigation
 - Suppliers can apply to be taken off the list / revise the period they are stated to be on the list at any time



Debarment – practical steps

- Applications to be taken off the list will only be considered if there has been a material change of circumstances or if they are accompanied by significant information that has not previously been considered
- Best to avoid being put on the list in the first place. There is a debarment standstill period - 8 working days from when the Minister gives notice to the supplier that it is being put on the debarment list
- Suppliers can apply (via the Courts) for suspension of the decision to enter the supplier onto the list
- Once on the list, suppliers can also appeal decisions (1) to be added; (2) not to remove them from the list; or (3) regarding the length of time they are to be on the list
- The appeal must be brought within 30 days of knowledge of the decision and must establish a material mistake of law by the Minister
- Remedies available are setting aside the decision and wasted bid costs, where relevant

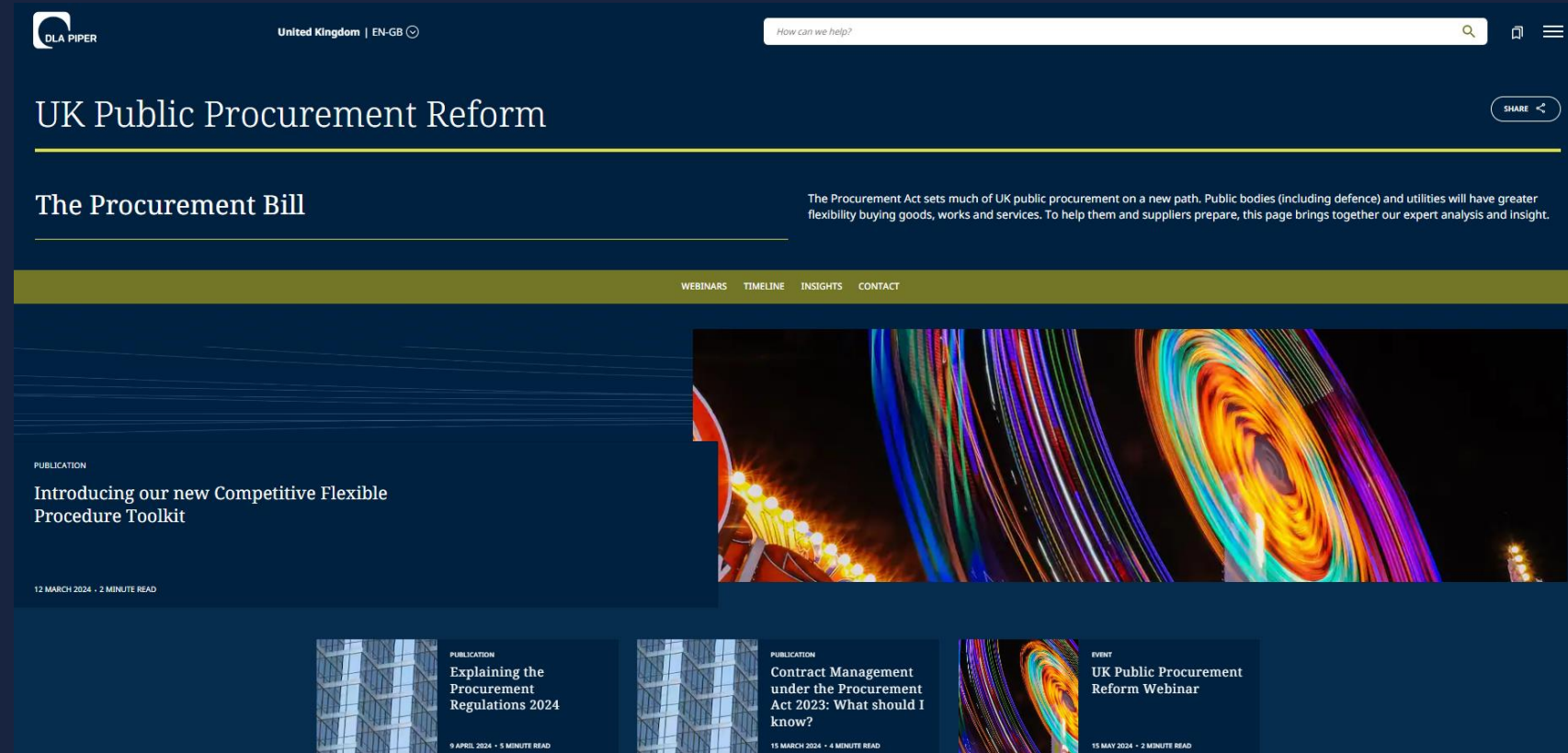


Poll

- **How ready are you for the new Procurement Act?**
- **Are you happy for our Procurement team to contact you?**

UK Public Procurement Reform Hub

Scan the QR code to visit our dedicated Procurement Reform Hub for the latest insights, including webinar replays and blogs.



The screenshot shows the website for the UK Public Procurement Reform Hub. At the top left is the DLA PIPER logo, followed by "United Kingdom | EN-GB" and a search bar with the text "How can we help?". The main heading is "UK Public Procurement Reform" with a "SHARE" button. Below this is the section "The Procurement Bill" with a sub-heading: "The Procurement Act sets much of UK public procurement on a new path. Public bodies (including defence) and utilities will have greater flexibility buying goods, works and services. To help them and suppliers prepare, this page brings together our expert analysis and insight." A navigation bar includes "WEBINARS", "TIMELINE", "INSIGHTS", and "CONTACT". The main content area features a large image of colorful light trails and a text box: "PUBLICATION Introducing our new Competitive Flexible Procedure Toolkit 12 MARCH 2024 - 2 MINUTE READ". Below this are three smaller article cards: "PUBLICATION Explaining the Procurement Regulations 2024 9 APRIL 2024 - 5 MINUTE READ", "PUBLICATION Contract Management under the Procurement Act 2023: What should I know? 15 MARCH 2024 - 4 MINUTE READ", and "EVENT UK Public Procurement Reform Webinar 15 MAY 2024 - 2 MINUTE READ".

Procurement Act 2023: Competitive Flexible Procedure Toolkit



1 PLANNING STAGE
Publish a pipeline notice
[Read more](#)

2 PLANNING STAGE
Publish a planned procurement notice
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3 PLANNING STAGE
Publish a preliminary market engagement notice
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4 PLANNING STAGE
Conduct preliminary market engagement
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Thank you for joining us

Please get in contact if you
have any queries regarding Procurement

ProcurementReform@dlapiper.com



Joanna Haigh
Legal Director
T+441133692765
Joanna.haigh@dlapiper.com



Martyn Scott
Legal Director
T: +441133692205
Martyn.scott@dlapiper.com



Matthew Cliff
Associate
T: +441512374726
Matthew.cliff@dlapiper.com



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Associate
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