



Government  
Commercial  
Function

# **Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing**

## **A Guide for Commercial and Procurement Professionals**

## Introduction

This guidance applies to all Central Government Departments, their Executive Agencies and Non Departmental Public Bodies in conducting procurement procedures regulated by the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016.<sup>1</sup> These are referred to as 'In-scope Organisations' in this guidance. It is also relevant to the wider public sector such as local authorities and NHS bodies in carrying out procurements for public contracts, utilities contracts and concession contracts.

The guidance provides In-scope Organisations with the relevant information, advice and direction to support activities relating to the application of exclusions in public procurement (Section 1); and the prevention, identification and remedy of conflicts of interest in a commercial context (Section 2). In addition, the Civil Service Code provides a framework for the process to be followed ('whistleblowing') by civil servants who are concerned about any perceived wrongdoing in a procurement procedure (Section 3).

**It is recommended that this guidance is read in conjunction with the Frequently Asked Questions document which provides practical examples, legal interpretation and case law.**

## SECTION 1: APPLYING EXCLUSIONS

The grounds for exclusion of bidders from public procurement procedures are set out in The [Public Contracts Regulations 2015](#) (the 'Regulations'): these rules set out the circumstances in which bidders must, or may, be excluded from a public procurement process for a variety of criminal offences and in other specific situations<sup>2</sup>. Regulation 57 covers the grounds for mandatory and discretionary exclusion, exceptions to exclusions, duration of exclusion, and self-cleaning. Regulations 58 to 60 covers the methods by which the existence of grounds for exclusion can be verified.

### **Mandatory exclusion**

The Regulations require In-scope Organisations to exclude bidders where they have established by verification or are otherwise aware that the bidder has been convicted of certain offences in UK national law (Regulation 57(1) (a)-(n)). These include certain offences relating to bribery, corruption, conspiracy, money laundering, as well as certain offences related to terrorism, proceeds of crime, drug trafficking, human trafficking and modern slavery. In addition to these offences, a final and binding judicial or administrative decision that a bidder is in breach of tax and social security obligations is also a ground for mandatory exclusion (Regulation 57(3)). Mandatory exclusion runs for five years from the date of conviction or binding decision.

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<sup>1</sup> These regulations have been amended by the [Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020](#)

<sup>2</sup> Under the Utilities Contracts Regulations 2016, the grounds for mandatory exclusion set out in the Public Contracts Regulations 2015 are mandatory for utilities which are contracting authorities and discretionary for other utilities. All utilities, irrespective of whether they are contracting authorities, can apply the discretionary exclusion grounds set out in the Public Contracts Regulations 2015. Under the Concession Contracts Regulations 2016, the mandatory exclusion grounds apply to contracting authorities and utilities which are contracting authorities and are discretionary for other utilities. All contracting authorities and utilities, irrespective of whether they are contracting authorities, can apply the same discretionary exclusion grounds.

While the list of mandatory exclusion grounds is exhaustive, and In-scope Organisations must not apply other grounds for mandatory exclusion, certain offences which are created after the Regulations were made or which are offences in any jurisdiction outside of England, Wales and Northern Ireland, are also grounds for mandatory exclusion.<sup>3</sup> This means that if certain new offences within this scope are created in future they can be grounds for exclusion as well as equivalent offences under foreign laws. These include offences related to participation in a criminal organisation, corruption, fraud, terrorist offences, money laundering or terrorist financing, and child labour and other forms of trafficking in human beings.

In-scope Organisations should be aware that the mandatory exclusion grounds apply in respect of persons and entities other than the bidding entity itself. Exclusion is also mandatory if the person convicted is a member of the bidder's administrative, management or supervisory body or has power of decision, representation or control in the bidder (Regulation 57(2)). It is likely that company directors (or equivalent for other corporate entities) and executive board members are likely to be considered as members of the bidder's management or supervisory body. The nature and structure of the bidder will determine who would have power of decision, representation or control. It will be for the bidder to satisfy themselves that their self-declaration covers all relevant persons.

Mandatory exclusion only applies in cases of conviction for criminal offences: a finding in a civil case or the imposition of a civil penalty is not a mandatory ground for exclusion. However, depending on circumstances, civil matters may be relevant to the discretionary exclusion grounds, for example grave professional misconduct which renders the supplier's integrity questionable (Regulation 57(8)(c)).

In-scope Organisations may, in limited, exceptional circumstances, proceed with an award of contract even if there are grounds for mandatory exclusion. Regulation 57(6) allows such an award where there are overriding reasons relating to the public interest. As an example, if urgently needed vaccines or emergency equipment can only be purchased from such an economic operator, then the contracting authority can proceed.

The ground for mandatory exclusion for breach of tax and social security obligations no longer applies where the supplier has paid, or entered into a binding arrangement with a view to paying, the outstanding sums due including any interest or fines (Regulation 57(5)). In addition, this ground may be disregarded where exclusion would be clearly disproportionate, in particular where the unpaid amounts are only minor or the supplier did not have the opportunity to pay or agree to pay the outstanding amounts prior to the deadline for submitting a request to participate or tender (Regulation 57(7)).

### **Discretionary exclusion**

The Regulations allow, but do not require, In-scope Organisations to exclude bidders in particular situations (Regulation 57(8)(a)-(i)). Unlike mandatory exclusion, the grounds for discretionary exclusion do not cover specific criminal offences. For discretionary exclusion, exclusion runs for three years from the date of the event, or if the event is continuing, for three years from when the event no longer applies. Case law provides that where a discretionary exclusion is based on a ruling (for example by a competition authority) the 3 year time period runs from the date of the ruling not from the date of the event.

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<sup>3</sup> Regulation 57 (1)(n) of Public Contracts Regulations 2015) which refers to Article 57(1) of Directive 2014/14

The situations listed below are a summary of the grounds set out in the Regulations. The examples given are for illustration, are not set out in the Regulations and are not exhaustive. Organisations must consider specific circumstances on a case by case basis before deciding whether or not to exclude a bidder. The grounds for discretionary exclusion are:

- **Where the In-scope Organisation can demonstrate by any appropriate means a violation of environmental, social or labour law obligations.**  
e.g. breaches of obligations relating to minimum wage, working hours or the deposit of controlled waste. Annex X of Directive 2014/24 gives a list of relevant International Labour Organisation and environmental conventions.
- **Where the bidder is bankrupt, is the subject of insolvency or winding-up proceedings, is in administration, where it is in an arrangement with creditors, where its business activities are suspended or it is in an analogous situation arising from a similar procedure under the laws and regulations of a foreign country.**  
e.g. if a company is subject to winding up proceedings under Insolvency Act 1986.
- **Where the In-scope Organisation can demonstrate by appropriate means that the bidder is guilty of grave professional misconduct which renders its integrity questionable.**  
e.g. wrongful conduct which impacts on the professional integrity of the supplier, for example convictions for sufficiently serious criminal offences not covered under the grounds for mandatory exclusions (such as fraud), a Deferred Prosecution Agreement (DPA) where the underlying conduct demonstrates grave professional misconduct, breach of ethical standards, gross negligence or breach of intellectual property rights.
- **Where the In-scope Organisation has sufficiently plausible indications that the bidder has entered into agreements with other economic operators aimed at distorting competition.**  
e.g. agreements for price fixing, collusive tendering or market sharing including matters covered by the Competition Act 1998.
- **Where a conflict of interest within the meaning of Regulation 24 cannot be effectively remedied by other, less intrusive, measures.**  
e.g. where relevant staff members in the In-scope Organisation have a direct or indirect financial, economic or personal interest which may compromise their impartiality in the procurement procedure and the conflict of interest cannot be otherwise remedied (for example by that particular person not being involved in the procurement).
- **Where a distortion of competition from the prior involvement of the bidder in the preparation of the procurement procedure, as referred to in Regulation 41, cannot be effectively managed by other, less intrusive, measures.**  
e.g. influencing the specification or evaluation criteria to the advantage of the bidding organisation.

- **The bidder has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions.**  
e.g. contract terminated due to supplier default, for example material non-fulfilment of goods and/or services.
- **Where the bidder is guilty of serious misrepresentation in supplying the information required for the verification of the absence of exclusion grounds or the fulfilment of the selection criteria; or has withheld such information or is unable to provide supporting documents required under Regulation 59.**  
e.g. non-disclosure of grounds for exclusion, or inability to provide documentary proof in support of their self-certification that grounds for exclusion do not apply.
- **Where the bidder has undertaken to unduly influence the decision-making process or obtain confidential information that may confer upon it undue advantages in the procurement process, or has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.**  
e.g. influenced the lot structure of a procurement or framework agreement to their advantage, or sought to gain pricing information regarding a competitor.

Additionally, a breach of obligations relating to the payment of tax or social security contributions is also a ground for discretionary exclusion (Regulation 57(3)). This is different to the mandatory exclusion ground for breach of tax or social security obligations insofar as a final and binding judicial or administrative decision is not required. As with the mandatory exclusion ground, the ground for discretionary exclusion for breach of tax and social security obligations no longer applies where the supplier has paid, or entered into a binding arrangement with a view to paying the outstanding sums due including any interest or fines (Regulation 57(5)).

The discretionary exclusion grounds do not apply to persons or entities beyond the bidder, unlike the mandatory exclusion grounds. Also, the provision which allows for In-scope Organisations to disregard the existence of grounds for mandatory exclusion does not apply to discretionary exclusion grounds.

### **Self-declaration**

The Standard Selection Questionnaire template asks bidders to self-declare their status against the exclusion grounds. This reduces the burden on bidders providing evidence that the exclusion grounds do not apply and aligns with the process required by the Regulations for the Single Procurement Document (see Regulation 59).

Bidders must provide a self-declaration that exclusion grounds do not apply with their bids in open procedures and with requests for participation (i.e. the response to the Selection Questionnaire) in other procedures. Specific contracts (call-offs) placed via framework agreements do not require a self-declaration. A self-declaration also must be provided before entry into a Dynamic Purchasing System (DPS). The contracting authority can request an update to the self-declaration and supporting documentation at any time during the life of the DPS.

The procurement documents must provide details on how bidders can access the self-declaration form. Three options are available: (i) the Standard Selection Questionnaire, (ii) the SPD (previously the EU's European Single Procurement Document) or (iii) an interoperable e-procurement system. For works contracts (including the procurement of supplies and services subject to the Construction (Design and Management) Regulations 2015 and needed in relation to the works) the relevant pre-qualification questionnaire should be used. The best route for In-scope Organisations to select depends on the facilities available, but In-scope Organisations must accept a Single Procurement Document, including ones in different formats, if a bidder submits one as part of the selection process.

A self-declaration is usually required from all organisations that form part of the bidder's bidding group/consortium and any subcontractors that the bidder relies on to meet the selection criteria regardless of which tier they represent in the supply chain. Where the bidder is a group of organisations, including a joint venture or partnership created (or to be created) for the purpose of the contract, each organisation in that bidding group and each relevant subcontractor must complete the self-declaration in relation to all the exclusion criteria. Where a bidder is relying on another member of its corporate group to meet the selection criteria and that entity is not a subcontractor (for example where a parent company is being relied upon to meet selection criteria relating to economic and financial standing), that entity should be treated as being part of the potential supplier's group/consortium and must complete the self-declaration. These requirements must be made clear in the procurement documents.

### **Verification**

In-scope Organisations will usually only verify the self-declaration made by the winning bidder prior to award. Verification can be completed with reference to means of proof and/or supporting documentation. Evidence can be sought at any time if this is necessary to ensure the proper conduct of the procedure (Regulation 59(8)). Information must not be sought when it can be obtained directly and free of charge from a national database or if the contracting authority already possesses the information (Regulation 59(11)).

Regulation 60 sets out an exhaustive list of means of proof for verification of the exclusion grounds. For mandatory exclusion grounds these are an extract from the judicial register, such as judicial records, or equivalent documents issued by a Member State or the country where the bidder is based, and for discretionary grounds, these are certificates issued by a competent authority in a Member State or other country. Where such documents are not issued, a declaration on oath, or solemn declaration before a competent judicial or administrative authority, a notary or a competent professional or trade body, may be provided (Regulations 60(4) and (5)). Regulation 59 (10) enables In-scope Organisations to ask bidders to supplement or clarify the certificates received under Regulation 60.

**In-scope Organisations must request up to date evidence from the winning bidder before award of the contract. If the supplier fails to provide the required evidence within set timeframes, or the evidence demonstrates that a mandatory exclusion ground applies, the award of the contract should not proceed.** If the evidence demonstrates that a discretionary exclusion ground applies, In-scope Organisations may exclude the bidder. In-scope Organisations may then choose to amend the contract award decision and award to the second-placed supplier, provided that none of the exclusion grounds apply to them and they have submitted a satisfactory bid. Alternatively, the

procurement process may be terminated. These actions may have legal risks associated with them and In-scope Organisations should consider these carefully and seek legal advice where appropriate.

If a supplier negligently provides misleading information that may have a material influence on decisions concerning exclusion, then this is a ground for discretionary exclusion (Regulation 57(8)(i)). The Standard Selection Questionnaire is clear that suppliers that seriously misrepresent any factual information in filling in the questionnaire, and so induce an In-scope Organisation to enter into a contract, may face significant consequences such as being excluded from the procurement procedure, and from bidding for other public contracts for three years. If a contract has been entered into, the supplier may be sued for damages and the contract may be rescinded. If fraud, or fraudulent intent, can be proved, the supplier or their responsible officers may be prosecuted and convicted of the offence of fraud by false representation, and excluded from further procurements for five years.

### **Self-cleaning**

If a bidder provides sufficient evidence of 'self-cleaning', In-scope Organisations must not exclude the bidder from the procurement procedure. Bidders must be given the opportunity to submit evidence of self-cleaning, namely that measures taken by the bidder are sufficient to demonstrate its reliability despite an exclusion ground applying (Regulation 57(13)). This is usually provided with the bidder's responses to the Standard Selection Questionnaire.

In order to demonstrate that self-cleaning evidence is sufficient, the bidder must demonstrate that it has:

- i) paid compensation in respect of any damage caused by the criminal offence or misconduct;
- ii) clarified the facts and circumstances in a comprehensive manner by collaborating with investigating authorities; and
- iii) taken concrete technical, organisational and personnel steps that are appropriate to prevent recurrence of the offence or misdemeanour (Regulation 57(15)).

It is for the bidder to demonstrate it has self-cleaned, but this must be to the satisfaction of the In-scope Organisation, taking into account the gravity and particular circumstances giving rise to the ground for exclusion (Regulation 57(16)). If the In-scope Organisation considers the evidence to be sufficient, the bidder must not be excluded from the procurement procedure (Regulation 57(14)). Where the In-scope Organisation considers the evidence to be insufficient, it should exclude the bidder and provide the reasons for their decision (Regulation 57(17)).

## **SECTION 2: CONFLICTS OF INTEREST**

### **Definitions**

A range of circumstances can arise in the context of procurement and other commercial activity which constitute a conflict of interest. The Regulations say that a conflict exists where

relevant staff members have direct or indirect financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the procurement process.

Avoiding conflicts of interest is particularly important in supplier selection decisions but In-scope Organisations should ensure **all** commercial interactions, pre and post contract are suitably protected, as personal interests risk influencing decision-making. Conflicts of interest in public procurement typically fall into one of three categories - **actual**, **potential** or **perceived**:

An **actual** conflict involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the procurement decision-making process.

e.g. A person owns shares in a company. This company takes part in a procurement process in which the person is a member of the evaluation panel.

A **potential** conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.

e.g. A member of the commercial team's spouse is the CEO of a business that is in the process of acquiring ownership of another company. That company has recently submitted a bid.

A **perceived** conflict can be said to exist where circumstances are such that it could reasonably appear that a public official's private interests could improperly influence the procurement decision-making process but this has not in fact occurred.

e.g. A senior person within the department has known connections with a company that is taking part in a procurement process; however, they have no direct involvement in the procurement or influence over the award decision.

### **What exists today**

The UK public sector takes a principles-based approach to addressing conflicts of interest through ethical standards and behaviour. Existing central government direction describes how to manage conflicts of interest, with guidance and codes of conduct that outline principles and expected behaviour for Ministers, special advisers, civil servants, board members and accounting officers. The approach relies on local implementation and enforcement. Alongside this there are specific legal duties in the Regulations requiring In-scope Organisations to take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures, so as to avoid any distortion of competition and to ensure equal treatment of all bidders and suppliers.

*Codes of conduct:* The [Civil Service Management Code](#) is clear that civil servants must not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. Additionally, the [Ministerial Code](#) sets out the

standards of conduct expected of Ministers and how they discharge their duties. Under the terms of the Ministerial Code, Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their ministerial position and their private interests, financial or otherwise. A list of relevant interests of Ministers is published on Gov.uk.<sup>4</sup>

*Legal duties in relation to procurements:* Regulation 24 requires In-scope Organisations to take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all bidders and suppliers. This Regulation says the concept of conflicts of interests covers any situation where ‘relevant staff members’ have a direct or indirect financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the procurement process. ‘Relevant staff members’ are defined as staff members of the In-scope Organisation, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement process or may influence the outcome of that process. In accordance with Regulation 57(8)(e), a bidder may be excluded where a conflict of interest within the meaning of Regulation 24 cannot be effectively remedied by other means. Effective remedies will vary on a case by case basis but may for example include the removal of a conflicted staff member from the In-Scope Organisation’s team engaged in the procurement. Measures taken should be documented in writing and included in the procurement report, as required by Regulation 84(1)(i). Additionally, Regulation 41 sets out that where a bidder has acted in an advisory capacity to the contracting authority either in the context of preliminary market consultations or in the preparation of the procurement procedure, the In-scope Organisation shall take appropriate measures to ensure that competition is not distorted by the participation of that bidder. This must include communicating to the other bidders any relevant information exchanged in the context of or resulting from the involvement of the bidder in preparation for the procurement process and setting adequate time limits for the receipt of tenders. The bidder should only be excluded from bidding where there is no other way in which to treat all bidders equally. If the bidder is to be excluded, they must be given the opportunity to prove their previous involvement would not be capable of distorting competition. Measures taken should be documented in a procurement report, as required by Regulation 84(1)(i).

### **Why COI is important**

Conflicts of interest can take many forms and can span the whole of the commercial lifecycle, from preparation and planning, publication, selection, evaluation and award, to contract implementation, including management of disputes, variations to contract, extension, expiry and termination.

When conflicts do arise, whether actual, potential or perceived, if they are not managed appropriately there can be far-reaching consequences, for example:

- reputational damage, undermining public confidence in the integrity of the organisation and Government as a whole;

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<sup>4</sup> <https://www.gov.uk/government/publications/list-of-ministers-interests>

- an impression that the organisation or individual is not acting in the public interest;
- breach of the Ministerial or Civil Service Code;
- prosecution of individuals for fraud, bribery, corruption through abuse of position or misconduct in public office;
- exposure to accusations of collusion;
- potential risk of legal challenge for breach of the Regulations and/or on public law grounds of actual or apparent bias.

It is therefore imperative that measures are taken to identify and prevent or remedy conflicts.

### **Framework for managing conflicts**

In order to manage conflicts which may arise in a procurement process effectively, In-scope Organisations must have an internal framework of procedures and guidance, including appropriate checks and balances. An effective framework will include:

- guidance and training;
- declarations of interests;
- conflict identification and resolution;
- audit and sanctions; and
- supply-side requirements.

#### **1 - Guidance and training**

Commercial policy guidance on conflicts of interest will help to ensure that relevant staff members are aware of what constitutes a conflict, what to do if a conflict arises and how to ensure that decision-making is efficient, transparent and fair. Staff members should automatically receive a copy of the conflicts of interest commercial policy guidance when they take up a commercial / procurement related post, or a post involving management of contracts.

Guidance is likely to include information relating to:

- defining conflicts of interest;
- examples of common conflicts which can arise across the whole commercial lifecycle;
- legal duties - in particular under the Public Contracts Regulations 2015;
- declarations;
- conflict identification and resolution;
- monitoring and maintaining records;
- audits and sanctions - resulting from undeclared conflicts; and
- supply-side requirements.

Policy guidance should be supported by training including awareness raising sessions, and cross-government or external training. Examples include:

- Civil Service Learning - Counter Fraud, Bribery and Corruption

- Cabinet Office - Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing
- Cabinet Office - Contract Management Capability Programme (Foundation Level)
- The Chartered Institute of Purchasing & Supply - Ethical Procurement and Supply Module

## **2 - Declarations**

Declarations of interests are an essential tool in preventing, identifying and remedying conflicts of interests. Relevant persons should complete a Conflict of Interest Declaration Form, confirming whether or not an actual / perceived conflict exists, or such a conflict has the potential to exist in the future. If the person is likely to access commercially confidential data from a bidder as part of the procurement then an undertaking of confidentiality should also be given. A Conflict of Interest Declaration form which must be used by In-scope Organisations is provided at Annex A.

In the context of declarations a 'relevant person' is within the In-scope Organisation and has the opportunity (or a perceived opportunity) to influence decision-making. This includes those who have directly relevant roles, e.g. the senior responsible officer, budget holder, commercial director, members of the management board, commercial staff, members of the evaluation panel, external experts, private sector secondees and consultants, as well as those whose role could be perceived as having some relevance, e.g. non-executive board members, special advisers, private office employees and Ministers. Existing available declarations, including Ministers' interests, should be checked, where appropriate. Declarations may also be required from those outside the organisation, for example where a person(s) has a cross-government role which could influence or be seen to influence a commercial decision.

Interests which may give rise to a conflict may include shareholdings, prior involvement with a bidder (previous employer), and other relevant financial, personal or social interests. If partners (married, civil partnership or not), siblings and children work for or have a major interest in a bidder or potential bidder then this should be declared. This list of relationships is not meant to be exhaustive. When a relevant person completes a declaration, they should consider:

- nature of the interest - could it compromise or be perceived to compromise their impartiality and independence in the context of the procurement procedure?
- relevance of the interest - is the connection between the interest and the procurement procedure sufficiently close to assume that a conflict exists? For example if their pension fund has a shareholding in a company and they have no control over how that fund is managed, should an interest be declared?
- scope of the interest - whether an interest should be declared even though it extends beyond the defined scope of partners, siblings and children; for example, if a close friend is the CEO of a bidding company.

If the declarer is uncertain whether an interest should be declared, they should seek advice and / or err on the side of full disclosure.

For individuals regularly involved in procurements, a declaration should be refreshed annually and after any significant change in circumstances. All those involved in a new procurement should declare any interests at the preparation and planning stage. Declarations must be updated as and when a new interest arises. Interests can change over time and can vary across different procurements and therefore an annual declaration in isolation is not sufficient.

Declarations should be audited, recorded, stored and monitored in accordance with data protection legislation and those responsible for managing this information should have undergone relevant data protection training. Checks made on declarations should be proportionate, taking into account the balance between the need for assurance and the nature of the contract and the procurement (complexity, value, political sensitivity, assessment of the conflict risk etc). Verification may be undertaken using various internal and publicly available sources of information, including but not restricted to: published / in-house declaration and gifts and hospitality registers; employment history records; Companies House register; the Electoral Commission donations reports, third party sources and other open data sources.

### ***3 - Identifying and remedying conflicts***

The role of managing conflicts should be agreed at the preparation and planning stage of the procurement. In any procurement it is the responsibility of the accounting officer to ensure that conflicts of interest have been considered and the necessary assurances have been undertaken. As the 'authorised individual' on the Conflicts of Interest Declaration Form (Annex A), the accounting officer is responsible for managing the disclosure of procurement information and conflicts of interest, including the approval of any mitigating actions. This responsibility may be delegated to another person e.g. the budget holder, senior responsible officer, or the commercial director.

The accounting officer or their nominee should take reasonable steps to identify and assess risks associated with conflicts of interest, whether they be actual, potential or perceived. While conflicts will primarily be identified through declarations (as described above), they may also be flagged through other means including the media, open data sources, internal or cross-government counter fraud activity and whistleblowing.

In-scope Organisations should also be alert to irregularities in behaviour or process which may signal that a conflict of interest exists. For example, if a staff member asks for information about a procurement in which they are not involved; or if there is a suggestion that the selection or award criteria favour a particular bidder; or if inappropriate variations to the contract are approved; then it is appropriate to conduct an investigation.

Particular care should be taken where a supplier is recommended by individuals within the In-scope Organisation. Whilst it is entirely legitimate for information to be shared internally about the supplier market, additional checks should be made to ensure all interests are properly declared and appropriate action is taken in relation to any conflicts. The rationale for inviting or selecting particular suppliers must always be made on the basis of relevant consideration of their expertise, experience, capacity, etc. according to the selection or award criteria for the procurement.

Any conflicts identified should be recorded throughout the procurement process and a Regulation 84 report should be produced for procurements to which that requirement applies. Records should include the nature and category (actual, potential, perceived) of the conflict, any remedy or action taken and the rationale for doing so. Action taken should be effective and proportionate to the risk and consider the opportunity (or the perception of an opportunity) for the conflicted person to influence the decision, and the likelihood that the conflict will distort competition or create unequal treatment among bidders or suppliers.

It should be recognised that the potential for personal connections may be higher in certain markets, for example specialised sectors where there is a reduced choice of suppliers. In these cases, there may be additional risks and therefore extra controls may be appropriate. The action taken will need to be considered on a case by case basis, taking into account the materiality of the conflict, and may include, but not be restricted to:

- reassigning individuals with a conflict or potential conflict away from decisions;
- cancelling and re-running the procurement;
- excluding a bidder from the procurement (only where the conflict cannot be remedied by other, less intrusive measures).

A record of decisions should provide:

- evidence of conflicts having been declared and considered;
- details of conflicts of interests detected and subsequent measures taken including action taken to mitigate the effect of any conflicts;
- the rationale for decisions, for example if a bidder is excluded under Regulation 24 because the In-scope Organisation determines the conflict could not be effectively remedied by other, less intrusive measures; and
- any other information to meet the requirements of Regulation 84 (where applicable).

Interests may change over time and therefore it is necessary to ensure that conflicts of interest are regularly reviewed and recorded. As a minimum, reviews should be undertaken at key stages in the commercial lifecycle including but not restricted to preparation and planning for procurement, selection and award, contract implementation (including contract variations and extensions) and closure. All reviews should be signed-off by the accounting officer or their appointed nominee.

#### **4 - Audit and Sanctions**

In-scope Organisations are responsible for assuring the integrity of their management of conflicts of interest. This may include an audit of:

- internal processes and procedures - declarations, conflict of interest records, separation of duties, business appointment rules;
- internal data - gifts & hospitality register, previous employment records;
- commercial data - contracts database, eProcurement system;
- commercial decisions - selection of procedure, evaluation panel members, preferred bidder;

- contract implementation - variations to contract, invoices, contract extensions.

Audits should be independent and outside of the commercial team, for example in the organisation's counter fraud function.

To support the integrity of the conflicts of interest regime, In-scope Organisations should also include in policy guidance a clear process for staff to escalate concerns including reference to its internal whistleblowing policy. Staff members should be assured that any concerns will be taken seriously and addressed appropriately.

Should it come to light via audit or other means that a relevant interest has not been declared, this should be treated as a serious matter and policy guidance should be clear that relevant sanctions may be applied in line with the In-scope Organisation's HR processes.

In addition to sanctions for those individuals failing to declare, consideration will also be required for the potential risk of legal challenge for breach of the Regulations and/or on public law grounds of actual or apparent bias. A successful challenge may require a setting aside of the award decision and a rerun of the procurement and/or damages.

### **5 - Supply-side requirements**

Conflicts of interest cannot be managed effectively by In-scope Organisations without supporting behaviours and procedures being adopted by suppliers. The Government's [Supplier Code of Conduct](#) states that:

"We expect suppliers to mitigate appropriately against any real or perceived conflict of interest through their work with the government. A supplier with a position of influence gained through a contract should not use that position to unfairly disadvantage any other supplier or reduce the potential for future competition..."

It is therefore crucial that suppliers and potential suppliers to the government have equivalent systems in place to prevent, identify and remedy conflicts of interest. In-scope Organisations should assure themselves that bidders have in place:

- ethical codes which address conflicts of interest;
- a conflicts of interest policy - including provision for training and awareness raising;
- clear and robust processes for preventing, identifying and remedying conflicts of interest e.g.
  - declarations;
  - assessment of conflicts;
  - mitigation strategies;
  - recording and monitoring; and
  - audit and sanctions.

The level of assurance undertaken by the In-scope Organisation should be proportionate to the value, nature and complexity of the procurement.

Bidders should routinely be asked to make a declaration that they are unaware of any conflicts of interest including in line with the factors set out in Regulation 24. Alternatively, if they are aware of such a conflict they should declare it to the In-scope Organisation together with any proposed mitigation. This might include knowledge of a financial or social interest that any person connected to the In-scope Organisation might have with the bidding entity. This may include political interests, for example where an individual in the bidding entity, the company itself or a related entity has made political donations to the governing party or to individuals who might be considered to have influence over selection and award. Family and personal relationships should also be declared. In making a declaration, bidders should also make the authority aware of situations that might give the perception of a conflict of interest.

Bidders should be aware that withholding knowledge of such interests may result in disqualification from a competition. Once a contract is awarded, the supplier will have a continuing obligation to make the In-scope Organisation aware of any new conflicts and to maintain where necessary any mitigating actions such as ethical walls.

Other aspects to consider on the supply side include:

**Ethical wall agreement** - this is a protocol agreed between the In-Scope Organisation and supplier(s) who intends to bid for the procurement. Such an agreement may be used where an incumbent supplier is bidding on a retendering exercise, or where one division of a supplier is involved in advising the In-Scope Organisation and another is bidding for a procurement. The agreement should clearly define the protocols to be followed to prevent, identify and remedy any conflict of interest (whether actual, potential or perceived) in the context of the procurement including what the supplier will do to enforce the ethical wall and what sanctions they have in place for those found to be breaching the agreement. Examples of protocols include separation of teams, information barriers, etc.

**Gifts and Hospitality** - In-scope Organisations must not receive gifts, hospitality or benefits of any kind from a supplier or potential supplier which might be seen to compromise their personal judgement or integrity. In-scope Organisations are therefore required to have arrangements in place to cover circumstances in which gifts and hospitality are offered, the process for registering receipt of any gifts or hospitality, and sanctions for failure to declare. Additionally, since 2010, the government has required In-scope Organisations to publish information relating to hospitality, gifts, travel and meetings with external organisations, for Ministers, the most senior officials and special advisors. These are available to view on Gov.uk

**Terms and conditions** - In-scope Organisations should include provision for managing conflicts of interest within contract terms and conditions, including in contracts for the services of an expert. Terms should also include provision for sanctions against relevant breaches. For example:

- the supplier must take action to ensure that neither the supplier nor the supplier staff are placed in the position of an actual or potential conflict of interest;

- the supplier must promptly notify and provide details to the In-scope Organisation if a conflict of interest happens or is expected to happen;
- the In-scope Organisation can terminate its contract immediately by giving notice in writing to the supplier or take any steps it thinks are necessary where there is or may be an actual or potential conflict of interest; and
- if a clawback / cost recovery mechanism applies on termination on other grounds e.g. for default, then this mechanism should be extended to termination arising from an undeclared conflict of interest.

## **6 - Special situations**

Whilst conflicts of interest can arise in any commercial process, there are certain situations which require special attention. These include direct awards, pro-bono work, and employment of civil servants by suppliers or recruitment from suppliers. In-scope Organisations should ensure that suitable provisions are in place to address such situations:

**Direct Awards** - for direct awards In-scope Organisations should have in place a clear approvals mechanism with relevant points of escalation. The approach taken should be adaptable so that it is proportionate to apply it to low value procurements, as well as higher value, complex, and contentious procurements. For example in a simple, low value procurement, the highest point of escalation may be the Commercial Director, however, where a recommended course of action is novel or contentious (for example due to the risk of perceived conflict of interest), the Commercial Director may decide that the Permanent Secretary's approval should be sought. An example escalation process is included at Annex B.

**Pro-bono Work** - pro bono, zero charge or trial contracts can have a market distorting effect if advantages are given to a single supplier, and can attract a high risk of both actual and perceived conflict of interest. Also given such arrangements may be on high level and/or unenforceable terms, they introduce significant legal, financial and reputational risk to the In-scope Organisation. As such, contracts of this type should only be used in very exceptional circumstances and with prior authorisation of a senior official e.g. the Commercial Director. Where they are used, these contracts should be subject to the same commercial principles and controls as other contracts, containing:

- clear statements defining the scope of work, quality standards and necessary performance indicators. For trial services, clear success and failure criteria must be agreed up front;
- a defined duration for the arrangement (scope or time limit);
- key dependencies and limitations on liability;
- confirmation that any subsequent work will be strictly competed, with necessary clauses to ensure appropriate knowledge transfer from the supplier to the In-scope Organisation as well as any future suppliers of follow on work;
- clear records, including but not limited to consideration of conflicts of interest, details of how the In-scope Organisation will be protecting value for money and ensuring a level playing field for competing bids for any ongoing services.

**Employment of Civil Servants** - Individuals transferring from government to the private sector may be associated with risk of conflicts of interest, for example exploiting privileged access to contacts in Government, or sensitive information (about competitors). To help prevent such risks the Civil Service Management Code includes [business appointment rules](#) which apply to civil servants who intend to take up an appointment or employment after leaving the Civil Service. The rules can apply up to two years after leaving the Civil Service and can place a requirement on former civil servants to stand aside from involvement in certain activities, for example, commercial dealings with his or her former Department, or involvement in particular areas of the new employer's business. The advice given to former Crown servants in relation to new appointments or employment (including the conditions imposed) by the Advisory Committee on Business Appointments can be accessed on [Gov.uk](#). In-scope Organisations (and suppliers) should therefore consider these situations as part of their conflicts of interest assessment. It is, however, in the public interest that people with experience of public administration should be able to move into other sectors, and that such movement should not be frustrated by unjustified concern over a particular appointment; therefore a test of reasonableness should be applied in regard to any perceived conflicts.

Conflicts of interest can also arise when civil servants are recruited or seconded from private sector organisations. In-scope Organisations (and suppliers) should therefore consider these situations as part of their conflicts of interest assessment and take mitigating action as required. This may include requiring staff/seconded to recuse themselves from dealing with their former employers for a certain period of time.

### **SECTION 3: WHISTLEBLOWING**

Whistleblowing is a process for raising a concern about a possible past, current or future wrongdoing in an organisation or group of people. In the Civil Service this may include reporting something you are worried may break the rules of the [Civil Service Code](#) (the Code). It also includes reporting illegal activity, failure to meet legal obligations as part of your work, threats to national security or actions that might cause danger to colleagues, the public or the environment.

Civil servants concerned about conflicts of the Code or any other perceived wrongdoing within a procurement activity should in the first instance refer to their organisation's whistleblowing policy, which will outline the internal process that should be followed. If you become aware of actions by others which you believe conflict with the Code you should report this to your line manager or someone else in your line management chain; alternatively you may wish to seek advice from your nominated officer. Evidence of criminal or unlawful activity should be reported to the police or other appropriate regulatory authorities. Concerns that are in conflict with the values in the Code can be raised directly with the [Civil Service Commission](#). Employees of wider public sector organisations should refer to their employer's whistleblowing policy to understand what they need to do in such circumstances.

## **Annex A: Conflicts of Interest Declaration Form**

Provision of: *[enter procurement title and reference]*

### **Introduction**

This Declaration Form is intended to capture conflicts of interest relating to individuals involved in the aforementioned procurement in order to avoid any distortion of competition and to ensure equal treatment of all companies seeking to do business with the Contracting Authority.

Involvement, in the context of conflicts of interest, may relate to any stage in the commercial lifecycle including preparation and planning, publication, selection and award and contract implementation.

Individuals must avoid placing themselves in a position where there is a conflict between their personal and/or outside interest and their official duties in a procurement and must comply with internal policy relating to gifts, hospitality and conflicts of interest at all times.

Examples of conflicts of interest may include, but are not restricted to:

- if you are a current or previous employee of a company, or have a member of your family, your partner (married, civil partnership or not), your siblings, your children, or any close personal or professional relationships that are an employee of a company, that is seeking to do business with the Contracting Authority;
- if you, or a member of your family/friends (as set out above), has a financial interest in a company that is seeking to do business with the Contracting Authority;
- if you, or a member of your family/friends (as set out above), has a financial relationship of any kind with a company seeking to do business with a Contracting Authority.

**This is a non-exhaustive list of examples and it is your responsibility to ensure that any and all actual, potential or perceived conflicts are disclosed prior to you being involved in the procurement.**

If you are unsure whether your current or previous relationship or involvement with a company that is seeking to do business with the Contracting Authority constitutes a conflict of interest, you should seek advice from an Authorised Individual stated below.

This Form also includes a requirement for individuals involved in the procurement to treat information (including but not restricted to bid documents, supplier evaluations etc.) with the appropriate level of confidentiality, and not make any unauthorised disclosures of this information.

All individuals with access to procurement information must sign this Form.

## **Authorised Individuals**

Authorised Individuals are responsible for managing the disclosure of procurement information and conflicts of interest. The Authorised Individuals for the procurement are:

*[insert name and title of accounting officer and any person(s) to whom management has been delegated]*

If conflicts of interest arise at any time during the commercial lifecycle, an Authorised Individual must be notified. Any disclosure of procurement information must also be approved by an Authorised Individual prior to disclosure.

## **Statements**

1. I acknowledge that my official duties cause me to have access to documents or data pertaining to the above procurement. I am aware that unauthorised disclosure of information could damage the integrity of the procurement and that transmission or revelation of such information to unauthorised persons will subject me to disciplinary action.
2. I will not divulge, publish or reveal by word, conduct, or any other means such information or knowledge, except as necessary to do so in the performance of my official duties related to this procurement and in accordance with the laws of the United Kingdom, unless specially authorised in writing in each and every case by an Authorised Individual of the Contracting Authority.
3. I acknowledge that the information I receive will be given only to persons specifically granted access to the procurement, and it may not be further divulged without specific prior written approval from an Authorised Individual.
4. If at any time during the procurement my participation might result in an actual, potential or perceived conflict of interest, I will immediately report the circumstances to the appropriate Authorised Individual.

## **Declaration Guidance**

Declaration A should be signed if there are no actual, potential or perceived conflicts of interest.

Declaration B should be signed if there are actual, potential or perceived conflicts of interest. The conflicts of interest and mitigation must be stated in Appendix 1 below, as must the role that the individual will be carrying out (where appropriate) within the procurement. An Authorised Individual must also sign Declaration B to confirm that they accept that appropriate mitigations have been put in place.

### **Declaration A (if no conflicts of interest)**

By signing this Form, I declare that I have read and accept the Statements above, and that there are no conflicts of interest of any nature which would prevent me from participating in the aforementioned procurement.

If any actual, potential or perceived conflicts of interest arise in the future, I will inform an Authorised Individual immediately.

Name:

Job Title:

Organisation / Department:

Signature:

Date:

### **Declaration B (if actual, potential of perceived conflicts of interest)**

By signing this Form, I confirm that the conflicts of interest in Appendix 1 have been mitigated appropriately to allow me to participate in a suitable role within the procurement.

If any other actual, potential or perceived conflicts of interest arise in the future, I will inform an Authorised Individual immediately.

Name:

Job Title:

Organisation / Department:

Signature:

Date:

## **Appendix 1**

My conflict(s) of interest, including mitigations, is/are:

Conflict of interest *[insert text]*

Mitigation *[insert text]*

*[Delete as appropriate]*

Therefore my role in the procurement will be *[briefly describe role]*  
*OR*

Therefore I will not have a role in the procurement.

## **Authorised Individual**

By signing this Form, I confirm that the conflicts of interest in Appendix 1 have been mitigated appropriately, and therefore the individual's role in the procurement, also stated in Appendix 1, is appropriate.

Name:

Job Title:

Organisation / Department:

Signature:

Date:

**Annex B: Example process for escalation when a recommendation is made for direct award**

