

## Annex B: Frequently Asked Questions

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## Mandatory exclusion

### **Q. Why does Regulation 57(1) list mandatory exclusion offences in UK law?**

In-scope Organisations **must** exclude a potential supplier for a relevant conviction and therefore a list of specific offences in UK law provides certainty and helps ensure that these rules are being applied consistently (Regulation 57 (1)(a)-(m)).

### **Q. In case of large and /or multinational companies, does conviction for a mandatory exclusion offence of one subsidiary require exclusion of the whole group?**

The exclusion applies to the bidding entity and to any other entities which have powers of decision, representation or control in the bidding entity; for example, if an intermediate parent company had a relevant conviction, it would be excluded from bidding, as would any subsidiary in which that company has powers of decision, representation or control; and if the ultimate parent was convicted, it would be excluded from bidding, as would any companies in its corporate group in which that company has powers of decision, representation or control.

Where the management and business of the convicted entity is substantially transferred into a new entity, and the new entity is the bidding entity, mandatory exclusion will not apply unless the convicted entity retains powers of decision, representation or control in the new entity.

Exclusion will not automatically apply to the whole corporate group and each particular circumstance must be considered by In-scope Organisations on a case-by-case basis.

### **Q. What if a winning supplier is actually subject to a ground for mandatory exclusion, but that only comes to light after contract award?**

The contract may be terminated under provisions which must be included in the contract (or which are deemed to be included) under [Regulation 73\(1\)\(b\)](#), where a mandatory exclusion ground applied to the supplier or a member of its administrative, management or supervisory body who has powers of representation, decision or control in the supplier at the time of contract, and the supplier should therefore have been excluded from the procurement procedure.

In-scope Organisations should have provision for this within their terms and conditions. For example within Crown Commercial Service's [Public Sector Contract](#) terms, Clause 10.4.1 enables the Relevant Authority to immediately terminate its Contract by issuing a Termination Notice to the Supplier where Regulation 73 (1)(b) applies.

The Model Services Contract, Clause 33 enables the 'Authority' to terminate the Agreement where a Supplier Termination Event has occurred. Limb (p) of the definition of Supplier Termination Event applies where the Authority has become aware that the Supplier should have been excluded under Regulation 57(1) or (2) of the Public Contracts Regulations 2015.

## Discretionary exclusion

### **Q. How should criminal offences not covered by mandatory exclusion be treated?**

The Regulations do not include conviction of a bidder for criminal offences other than those listed. However, a conviction for another offence may give rise to a discretionary exclusion ground, for example offences relating to the conduct of business or profession may constitute grave professional misconduct (Regulation 57 (8)(c)), although each instance should be considered on a case by case basis.

### **Q. What constitutes “grave professional misconduct” under Regulation 57(8)(c)?**

There is no definition of grave professional misconduct in the Regulations, but EU case law and domestic case law indicate that criminal and other offences may be sufficient to justify exclusion and that this exclusion ground may also cover violations of formal rules which do not necessarily amount to convictions; as well as wrongful conduct which impacts on the professional integrity of the bidder. This includes for example anti-competitive behaviour, breach of intellectual property rights or violations of environmental or social obligations. In all cases the misconduct must be sufficiently grave.

The exclusion on this ground would be for a period of 3 years (Regulation 57(12)). However, exclusion will not apply where the bidder provides sufficient evidence of self-cleaning.

### **Q. What does the term “sufficiently plausible indications” mean in relation to Regulation 57 (8)(d).**

The discretionary exclusion grounds include a number of words and phrases concerning the evidence for, or nature of, grounds for exclusion, which rely on interpretation. These include “sufficiently plausible indications” but also phrases such as “appropriate means”, “serious misrepresentation” and “unduly influence”. These phrases need to be interpreted and applied on a case-by-case basis depending on the circumstances.

In regard to “sufficiently plausible indications” (Regulation 57 (8)(d)), which relates to the exclusion of suppliers for agreements aimed at distorting competition, the use of this term indicates that definitive evidence of collusion is not required for the exclusion to apply. For example, depending on the circumstances, a decision by the Competitions and Markets Authority (CMA) finding a company to have restricted, distorted or prevented competition may amount to a “sufficiently plausible indication”.

### **Q. What might be grounds for exclusion for “significant or persistent deficiencies” under Regulation 57(8)(g)?**

The discretionary exclusion ground under Regulation 57(8)(g) applies "where the economic operator 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".

The key elements are:

- there must have been significant or persistent deficiencies in performance;
- the deficiencies in performance must be of a substantive requirement;
- the deficiencies in performance must relate to a contract covered by the public procurement rules; and
- the deficiencies in performance must have led to early termination of the contract, damages or other comparable sanctions.

Deficiencies in performance must be significant or persistent and must be of substantive requirements. In other words, minor breaches or deficiencies in performance of minor requirements will not generally be sufficient. Persistent cases of minor breaches may be sufficient, although the combined effect of the breaches and the regularity of their occurrence must be sufficiently serious in order to engage this exclusion ground.

This is also evident from the requirement in Regulation 57(8)(g) that the deficiencies must have led to early termination, damages or other comparable sanctions. There is no definition of "other comparable sanctions" in the Regulations or in case law. Although this has not been tested in the courts, sanctions which may be considered to be on a par with termination and damages may include the exercise of step-in rights - although this would need to be for a sufficiently significant element of the contract and for a sufficiently long period of time and may also depend on whether the supplier is paid during the step-in and/or has to pay for the costs of step-in.

Conversely, lesser sanctions such as improvement plans, remedial plans and increased contract monitoring may not be considered to be comparable sanctions. In each case, In-scope Organisations should consider whether the sanction is comparable to termination and damages, taking account of the nature of the contract and the range of remedies available under it.

**Q. What represents a “conflict of interest” under the grounds for discretionary exclusion?**

In accordance with Regulation 57(8)(e), a supplier may be excluded where a conflict of interest within the meaning of Regulation 24 cannot be effectively remedied by other means. Regulation 24 refers to 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” refers to staff members of the contracting authority, or of a procurement service provider<sup>1</sup> 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.

Effective remedies will vary on a case-by-case basis but may include the removal of the staff member from the team running the procurement. Measures taken should be documented in a procurement report, as required by Regulation 84(1)(i).

It is good practice for In-scope Organisations to ask staff to complete a “Declaration of Interest” form on an annual basis, when market engagement or a new procurement commences, and/or immediately when a new interest arises. Where declarations have been made, the In-Scope Organisation should ensure that appropriate safeguards are in place.

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<sup>1</sup> A public or private body which offers ancillary purchasing activities on the market.

The Supplier Code of Conduct<sup>2</sup> states that suppliers should mitigate appropriately against any real or perceived conflict of interest through their work with government.

**Q. What should I do if I am aware of a conflict of interest between someone within my organisation and a supplier which has not been flagged in their response to the Standard Supplier Questionnaire or equivalent document?**

Concerns should, in the first instance, be raised with your line manager or if that is not possible with somebody more senior in the line management chain. You may also wish to consider if this is a matter for “whistleblowing” - refer to question “What is whistleblowing and when does it apply to a procurement process?”

**Q. What should I do if I am aware that a supplier has been previously involved in the preparation of the procurement process (approach, documentation etc)?**

In-scope Organisations must take appropriate measures to ensure the competition is not distorted by the participation of a bidder in the preparation of the procurement procedure (Regulation 41). 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 the preparation of the procurement process and fixing 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).

**Q. Is there any useful case law or material relating to conflicts of interest?**

The importance of recognising conflicts of interest in the public sector and managing them effectively is highlighted in a report by the [National Audit Office](#). Conflicts of interest can bring decision-making into disrepute, if not well-managed. Often the perception of conflict is alone enough to cause concern. This can lead to reputational damage and undermine public confidence in the integrity of institutions. The NAO report published in 2015, provides examples of conflicts that have arisen in the delivery of public services.

There is little case law on the issue of conflicts of interest in public procurement, however Case T-403/12 [Intrasoft International v European Commission](#) provides some useful insight into the General Court of the CJEU's approach.

OLAF, the European Commission's Anti Fraud Office, has published a guide on “Identifying conflicts of interests in public procurement procedures for structural actions”, which provides practical examples on aspects such as declarations, verification and red flags.

[http://www.esfondi.lv/upload/02-kohezijas\\_fonds/Lielie\\_projekti/EK\\_vadl\\_par\\_interesu\\_konflikta\\_identif\\_publ\\_iepirk\\_EN.pdf](http://www.esfondi.lv/upload/02-kohezijas_fonds/Lielie_projekti/EK_vadl_par_interesu_konflikta_identif_publ_iepirk_EN.pdf)

**Q. What is whistleblowing?**

If you are asked to do something, or became aware of the actions of another, which you consider to be wrongdoing or a breach of the values of the Civil Service Code<sup>3</sup> (integrity, honesty, objectivity and impartiality), you can raise your concerns. “Whistleblowing” occurs when a person raises a concern about past, present or imminent wrongdoing, or an attempt to cover up wrongdoing.

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<sup>2</sup> <https://www.gov.uk/government/publications/supplier-code-of-conduct>

<sup>3</sup> <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>

There are legal protections for workers who ‘blow the whistle’ by disclosing wrongdoing, in certain circumstances. To be covered by these employment protections for whistleblowers, a worker must have made a ‘qualifying disclosure’. This is disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that one or more of the following has occurred, is occurring or is likely to occur:

- a criminal offence (this may include, for example, types of financial impropriety such as fraud or corruption);
- a breach of a legal obligation;
- a miscarriage of justice;
- danger to the health or safety of any individual;
- damage to the environment; or
- the deliberate covering up of wrongdoing in the above categories.

For a qualifying disclosure to be protected, it must generally be made by a worker to:

- the employer or other person responsible for the matter;
- a Minister of the Crown, in relation to certain public bodies;
- a ‘Prescribed Person’ designated for the purpose in law – these bodies and office-holders (often regulators) are listed on Gov.uk; or
- a legal adviser.

If a protected disclosure is made and the worker suffers detriment or is dismissed as a result, the worker has a right to redress through the employment tribunal.

**Q. Should I contact the Public Procurement Review Service (previously Mystery Shopper) within Cabinet Office to report any conflicts of interest, criminal offences or wrongdoing in a procurement process?**

No. The Public Procurement Review Service does not handle whistleblowing cases. If you are a public sector employee concerned about a procurement activity within your own organisation, you should refer to your internal whistleblowing policy which will outline the process which you should follow. This may include raising your concerns to your line manager or senior manager, a nominated officer or in extremely serious cases your chief executive.

Evidence of criminal or unlawful activity should be reported to the police or other appropriate regulatory authorities. Civil servants can raise a concern directly with the Civil Service Commission. If a concern is raised directly with the Commission, without it being raised within your organisation first, the Commission will ask why it was not appropriate to raise the matter internally. However if you have followed internal procedures and do not receive what you consider to be a reasonable response, you may reasonably raise the concern with the Civil Service Commission<sup>4</sup>. The Commission may also hear a complaint direct.

For more information on whistleblowing, refer to your departmental policy and procedures. There is a general guide for all workers on Gov.uk: “Whistleblowing for Employees”<sup>5</sup>

**Q. What happens if a supplier provides false or misleading information in respect of the exclusion grounds?**

Serious misrepresentation or failing to provide information required for the verification of the exclusion grounds, are themselves grounds for exclusion (Regulation 57(8)(h)).

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<sup>4</sup> <http://civilservicecommission.independent.gov.uk/>

<sup>5</sup> <https://www.gov.uk/whistleblowing>

The Standard Selection Questionnaire states that should a supplier seriously misrepresent any factual information in filling in the questionnaire, and so induce an authority to enter into a contract, there may be significant consequences. They may be excluded from the procurement procedure, and from bidding for other contracts for three years. If a contract has been entered into they may be sued for damages and the contract may be rescinded. If fraud, or fraudulent intent, can be proved, they or their responsible officers may be prosecuted and convicted of the offence of fraud by false representation, and they must be excluded from further procurements for five years.

## **Self-declaration of exclusion grounds & means of proof**

### **Q. When and how should In-scope Organisations investigate whether the exclusion grounds apply?**

In-scope Organisations should accept a self-declaration from bidders in relation to the exclusion grounds during the selection stage. Usually, only the winning bidder should be required to submit evidence or supporting documentation to verify their self-declaration, however In-scope Organisations can require information from any bidder at any stage if it is necessary to ensure proper conduct of the procurement procedure. For example, In-scope Organisations may seek evidence where a response appears inconsistent with information provided in a previous procurement, or inconsistent with information already known from other reliable sources.

In-scope Organisations must ask the successful bidder to provide up to date evidence and supporting documentation before award. Where an In-Scope Organisation can obtain confirmation directly from freely available databases, they are required to do so. In-scope Organisations must not require bidders to provide information that they already hold. This is to reduce bureaucracy and unnecessary burdens on bidders.

### **Q. What evidence should I request from the winning bidder?**

Regulation 60 sets out an exhaustive list of means of proof for exclusion grounds. When requesting means of proof from winning bidders, In-scope Organisations should ask for the following:

- For mandatory exclusion grounds other than breaches of taxes or social security obligations, an extract from a relevant register or an equivalent document issued by a judicial or administrative authority; and
- For mandatory and discretionary exclusion grounds for breaches of taxes or social security obligations and for discretionary exclusion grounds, a certificate issued by a competent authority; or
- In each case, where such documents or certificates are not issued, an appropriate declaration.

Winning bidders are not required to submit means of proof in so far as the In-scope Organisation has the possibility of obtaining certificates or relevant information directly by accessing a national database in any member state that is available free of charge. For example an In-scope Organisation can check if a UK winning bidder is bankrupt, or is the

subject of insolvency or winding-up proceedings (Regulation 57 (8)(b)) by searching the Bankruptcy and Insolvency Register.<sup>6</sup>

In-scope Organisations can also check for company director disqualification by searching the Companies House database of disqualified directors. Disqualifications can be applied for a range of reasons including non-payment of taxes, fraud and other unlawful activity which a contracting authority may determine constitutes gross professional misconduct. Apart from The Insolvency Service, other bodies can apply to have directors disqualified including the Competition and Markets Authority. Any evidence requested should be proportionate and relevant to the procurement and the approach should be clearly set out in the procurement documentation.

**Q. What happens if the winning bidder cannot in fact provide the necessary evidence to demonstrate the exclusion grounds do not apply?**

If the winning bidder fails to provide the required evidence within set timeframes, or the evidence proves 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 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.

## **Duration of exclusion and self-cleaning**

**Q. When does the exclusion period start and finish?**

Mandatory exclusion runs for five years from the date of conviction. 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.

**Q. How should the rules on self-cleaning be applied?**

The rules on self-cleaning allow the bidder to submit evidence that it has:

- Paid or undertaken to pay compensation in respect of any damage caused by its actions.
- Clarified the facts and circumstances in a comprehensive manner by collaborating with investigating authorities.
- Taken concrete technical, organisational and personnel measures that are appropriate to prevent further offences or misconduct.

In practice, the specific and detailed actions will depend on the individual circumstances, such as the nature of the exclusion ground and the particular situation of the bidder, but may include several or all of the following:

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<sup>6</sup> <https://www.gov.uk/search-bankruptcy-insolvency-register>

- Voluntary provision of all documents required by investigating authorities, detailed answers to any questions and enquiries, and access to any staff where required.
- Demonstrable improvements to business processes, such as enhanced management and reporting requirements of operational units or subsidiaries that were responsible for the misconduct.
- Implementation or strengthening of teams responsible for business ethics and compliance, or the implementation of an appropriate and effective compliance programme, (reporting through a separate line from operational units).
- Strengthening of the board of directors, for example a senior non-executive director with specific oversight of ethics.
- Strengthening of audit functions.
- It might be appropriate to change the external auditors (of the whole business or of the units involved) if there is any reason to consider they might reasonably have detected the malpractice but did not.
- Dismissal of staff, including managers and directors directly responsible for the offences, and any staff who have been personally convicted of a relevant offence.
- Removal from sensitive positions of staff who failed to control or question, when in a position to do so, the activities of those directly involved.
- Enhanced training of all staff in business ethics particularly for those in relevant roles.
- An obligation on all staff to sign an acknowledgement of their responsibilities.

This is not intended as an exhaustive list, and it does not have any formal status. The specific details will vary from case to case.

The bidder should be given the opportunity to provide evidence of the actions undertaken, and also provide additional information and clarification that the In-Scope Organisation authority may request. If the evidence is sufficient, the In-Scope Organisation must not exclude the bidder.

**Q. What if different In-scope Organisations come to different views about self-cleaning?**

Each In-Scope Organisation is responsible for its own procurement decisions, including as to whether the self-cleaning evidence is sufficient. If an In-Scope Organisation considers self-cleaning evidence is insufficient it must give reasons in writing.

**Q. How does exclusion and self-cleaning under the public procurement rules interact with other sanctions such as Deferred Prosecution Agreements (DPA)?**

DPAs were introduced by section 45 and Schedule 17 of the Crime and Courts Act 2013. DPAs can be used for fraud, bribery and other economic crime (the offences listed at Part 2 of Schedule 17). They apply to organisations, not individuals, and a DPA is for a defined period. Under a DPA a prosecutor charges a company with a criminal offence but the indictment is suspended upon approval of the DPA by the court. Under a DPA the company agrees to a number of conditions, such as paying a financial penalty, paying compensation, instituting management changes, the independently monitored implementation of a new compliance regime, and co-operating with future prosecutions of individuals. If the company does not honour the conditions, the DPA may be varied, or for serious breaches it may be terminated and a prosecution of the predicate offending resume. At the expiry of a DPA (i.e.

where the organisation has complied with all its requirements) the suspended charges are discontinued and no fresh proceedings for that offending can be instituted.

DPA's themselves do not directly relate to the procurement rules. A DPA is not a criminal conviction and does not attract mandatory exclusion. The misdeeds of a bidder which had led to a DPA might be relevant to an In-scope Organisation's consideration of whether discretionary exclusion ground applies, including for example grave professional misconduct. Likewise the actions required by a bidder under a DPA may also be relevant to demonstrate self-cleaning.

In-scope Organisations should not assume that a discretionary exclusion ground necessarily applies or, if it does apply, that exclusion must continue until the DPA has expired. A bidder might demonstrate effective self-cleaning for the purposes of ending exclusion whilst the DPA is still in place. In-scope Organisations should consider any evidence on its own merits. The fact that a company is subject to a DPA does not itself directly affect the bidder's ability to bid for and win public sector business, unless the circumstances leading to the DPA give rise to a discretionary exclusion ground and the bidder has not provided sufficient evidence of self-cleaning.

Where there is non-compliance with a DPA, a court may be invited to review the terms of a DPA, which may have a bearing on exclusion. Where a DPA is terminated by a Court and the suspended indictment reinstated, In-scope Organisations may need to reconsider whether there is a conviction which gives rise to a mandatory exclusion ground or whether the circumstances give rise to a discretionary exclusion ground depending on the nature of the offence.

## General

### **Q. Does proportionality require different treatment of large and small suppliers in respect of exclusion?**

Application of the exclusion grounds does not depend on the bidder's size. It is the nature and gravity of the offence or misdeed and not the size of the bidder that is relevant. In-scope Organisations must treat suppliers equally and without discrimination in their application of the exclusion grounds.

### **Q. Can an In-Scope Organisation consider the exclusion grounds when undertaking an individual competition (call-off) under a framework or when admitting suppliers to a Dynamic Purchasing System?**

No. Individual award of contracts under a framework or DPS must be to the bidder that submitted the best tender on the basis of the award criteria (for framework agreements, these are as set out in the procurement documents for the framework agreement and, for DPS, these are as set out in the contract notice for the dynamic purchasing system or in the invitation to confirm interest).

The exclusion grounds must be considered when bidders are awarded a framework agreement or admitted to the DPS. For framework agreements once awarded, the same rules apply as for other public contracts: the In-Scope Organisation can terminate the framework agreement if at the time of award of the framework agreement an exclusion ground applied in relation to a supplier.

For DPS, updated self-declarations and supporting documentation can be required and verified at any time during the term of a DPS. If an exclusion ground applies in relation to a supplier during the course of the DPS, the DPS “owner” must (in the case of mandatory exclusion grounds) or may (in the case of discretionary exclusion grounds) remove the supplier from the DPS.

**Q. What tools are available to help me identify and manage the risk of corruption and bribery within my organisation and/or procurement activity?**

Screening for cartels: tool for procurers:

The Competition and Markets Authority has produced a free tool to help spot unusual bidder behaviour and pricing patterns identified in past cartels. It will tell you which (if any) of your procurement exercises show any signs of bid-rigging. Having a cartel in your supply chain can raise prices by 30% or more from competitive levels. Cartels operate in secret and can be difficult to spot. Further information about this tool and access details are available at <https://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers>

Bribery & corruption assessment template:

The Home Office has produced a bribery and corruption assessment template, to assist departments in assessing their organisational response to corruption. Employees and those associated with central Government have significant influence and access to sensitive information ranging from state secrets through to commercially confidential material and are at risk of being targeted by those seeking to corrupt. For departments, organisations and individuals to protect themselves from bribery and corruption a comprehensive understanding of the unique risks posed is essential to manage and mitigate the threat. This self-assessment template takes the user through key questions all organisations will want to consider in order to: better understand and articulate the threat; establish the risks faced; and assess the organisation’s capacity to manage and mitigate that risk. Further information about this tool is available at <https://www.gov.uk/government/publications/bribery-and-corruption-assessment-template>