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 (subject to receiving satisfactory evidence of self-cleaning) and therefore a list of specific offences in UK law provides certainty and helps ensure that these rules are being applied consistently with respect to UK offences (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 itself, 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 itself, 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 34 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.

In-scope Organisations should also take steps to ensure that winning bidders are not at risk of an imminent conviction or under investigation by requiring suppliers to notify them of any actions, suits or proceedings or regulatory investigations that might affect a supplier's ability

to perform its obligations under the agreement. The Model Services Contract Clause 3.1(c) includes a warranty to this effect.

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 in the UK 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 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), may be sufficient to justify exclusion. This exclusion ground may also cover violations of formal rules which do not necessarily amount to convictions; as well as other wrongful conduct. This includes for example anti-competitive behaviour, conduct leading to a Deferred Prosecution Agreement, breach of intellectual property rights or violations of environmental or social obligations. In all cases the misconduct must be sufficiently grave.

Examples of grave professional misconduct from EU case law include:

- infringement of competition rules resulting in a financial penalty (Case C 470/13 Generali-Providencia Biztosító Zrt v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság and Consorzio Nazionale Servizi Società Cooperativa (CNS) v Gruppo Torinese Trasporti Gtt SpA (Case C-425/18);
- a pending criminal conviction for fraud related offence of a director of the tendering company, even though the conviction was not yet final. (Case C-178/16 Impresa di costruzioni Ing. E. Mantovani and RTI Mantovai e Guerrato).

Recital 101 of Directive 2014/24 provides other examples including:

- violations of environmental or social obligations, including rules on accessibility for disabled persons;
- violations of competition rules; and
- violations of intellectual property rights.

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. Although a conviction would clearly be sufficient evidence it is not required. For example, depending on the circumstances, a decision by a regulatory body such as 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. For example in Delta Antrepriză de Construcţii şi Montaj 93 SA v Compania Naţională de Administrare a Infrastructurii Rutiere SA (C-267/18) the European Court of Justice held that subcontracting of part of the works under a public contract, without the contracting authority's authorisation and which led to the early termination of a previous contract, constituted a significant or persistent deficiency and was capable of justifying exclusion of the economic operator from subsequent public procurement procedures if, after making its own evaluation of the integrity and reliability of the economic operator, that contracting authority considered that the subcontracting entailed a breaking of the relationship of trust with that economic operator.

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 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)).

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 and these should be verified where applicable. 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.

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. Can international debarment lists be used as a means of proof to justify exclusion?
The PCRs do not expressly refer to international debarment lists as a means of proof to justify exclusion**.** Public bodies may refer to debarment lists (E.g. The World Bank Listing of Ineligible Firms and Individuals) as part of their due diligence undertaken prior to award of contract and a winning bidder that appears on such a list may warrant further investigation. However, public bodies should not rely on international debarment lists as a means for exclusion in itself.

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. 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.

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; and
- 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:

- 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; and
- 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 the prosecutor may apply to have the suspension of the indictment covered by the DPA lifted so the prosecution can be resumed. 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.

DPAs themselves do not directly relate to the procurement rules. A DPA is not a criminal conviction and does not attract mandatory exclusion. The conduct 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 additional tools and/or guidance are available to help me identify and manage fraud and corruption risks within my organisation's procurement activity?

OLAF, the European Commission's Anti Fraud Office, published a handbook "Fraud in Public Procurement: A collection of Red Flags and Best Practices" in 2017. This handbook is without prejudice to national legislation, should be read in the context of UK law and guidance.

https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/Fraud%20in%20Public%20Procurement_final%2020.12.2017%20ARES%282017%296254403.pdf

The Ministry of Housing, Communities and Local Government published its "Review into the risks of fraud and corruption in local government procurement" in 2019. The report contains a tool that highlights the risks at all stages within the commercial lifecycle, linking these to indicators or 'red flags' as well as to possible mitigation measures. Creation of the matrix was supported by a procurement fraud and corruption working group involving the Home Office, the National Economic Crime Centre (NECC), Ministry of Defence, the Cabinet Office Centre of Expertise for Counter Fraud, NHS Counter Fraud Authority and HS2.

https://www.gov.uk/government/publications/local-government-procurement-fraud-and-corruption-risk-review

Conflicts of Interest

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[1] 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 within the In-scope Organisation running the procurement. As with all exclusion grounds, any self-cleaning evidence put forward by the supplier must be considered by the contracting authority and, if it is satisfactory, they must not exclude the supplier. Conflicts of interests detected and the measures taken should be documented, and this should be in the procurement report where one is required by Regulation 84(1)(i).

Q. Are conflicts of interest always apparent?

No. Some work and professional relationships with suppliers or potential suppliers may develop over time and eventually cross over into creating a conflict of interest where a friendship is created or a situation occurs where business delivery has become over dependent upon a supplier, creating a situation whereby this unduly influences the award of future work to the exclusion of others.

This would also relate to situations where an individual within a supplier actively attempts to befriend key members of a procurement team in order to influence contract decisions - this is not uncommon in cases of Organised Crime penetration of supply chains; or where an individual is targeted for an employment opportunity within the potential supplier.

Q. What is a perceived conflict of interest and how should it be managed?

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. For example a Minister has known connections with a company bidding for a procurement in their department. However, typically Ministers will have no involvement in their department's procurements or the opportunity to influence the award decision and therefore any conflict will be perceived rather than actual. It is important to still consider perceived conflicts of interest to confirm they are not actual conflicts and to guard against future allegations of apparent bias. Any perceived conflicts should be recorded, along with any remedy or action taken (which may include no action) and the rationale for doing so.

Q. Who is responsible for considering conflicts of interest in a procurement?

In any procurement it is the responsibility of the accounting officer to ensure that conflicts have been considered. Whilst responsibility may be delegated to other person(s) e.g. the budget holder or commercial director, the role of managing conflicts, should be agreed at the preparation and planning stage of the procurement. 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.

[1] A public or private body which offers ancillary purchasing activities on the market.

Q. How can declarations help to identify conflicts of interest?
If applied correctly, declarations can be essential in preventing, identifying and remedying conflicts of interests. Declarations are typically obtained by requiring relevant persons to 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. It may also include an undertaking of confidentiality, if the person is likely to access commercially confidential data from a bidder as part of the procurement.

Q. Who should complete a declaration?
A declaration should be completed by all relevant persons. This will be someone within the In-scope Organisation that has the opportunity (or a perceived opportunity) to influence the 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 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.

Q. What constitutes a financial interest which should be declared?
Financial interests may include directorships, employment and self-employment, shareholdings and other investments. For example, relevant persons should consider:

- any shares they hold in a particular company or corporate bonds (whether held directly or indirectly via a PEP or ISA);
- unit trust or trust holdings;
- personal or stakeholder pensions (including Added Voluntary Contributions),
- insurance products (including friendly assurance bonds);
- bank or building society accounts;
- gilt-edged stocks or National Savings products;
- loans outstanding to particular banks, building societies or consumer credit companies; and
- tax allowances that impact on you or your immediate families.

In most cases the impact of a particular action on a relevant person's financial position will be small and an actual or perceived financial interest is unlikely to arise. However some may be working in areas that may present a conflict of interest. If they are uncertain whether a financial interest should be declared, they should seek advice and / or err on the side of full disclosure.

Q. Should individuals declare memberships of certain bodies, associations and organisations?
Relevant persons who are members of professional bodies and associations, social organisations, sports and private membership clubs etc. should consider whether their relationship with other members of those bodies, associations, organisations and clubs might give rise to an actual, potential or perceived conflict of interest. If it does, this should be declared. If an individual is uncertain whether an interest should be declared, they should seek advice and / or err on the side of full disclosure.

Q. What should I do if a particular supplier is recommended to me?
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.

Q. What is a supplier or potential supplier expected to do in regard to preventing, identifying and managing conflicts of interest?
Conflicts of interest cannot be managed effectively by In-scope Organisations without supporting behaviours and procedures being adopted by suppliers. 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 competitions..."

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. This may include guidance, processes and procedures relating to declarations, assessment of conflicts, mitigation strategies, recording and monitoring, audit and sanctions.

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 declared by them?
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 or bidders are not treated unequally 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 effectively remedy the conflict and subject to consideration of any self-cleaning evidence. 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. Are conflicts of interest limited to the pre-procurement and procurement stages?
No. Conflicts of interest can occur at any stage in the process, even after the winning bidder has been selected. Conflicts which arise after contract award are not subject to the legal duties in the Regulations but are nevertheless important to consider. Such conflicts could involve intentionally poor supervision so that incomplete works or substandard goods are accepted, the requirements of the contract are reduced, or inappropriate variations to the contract are approved. This type of potentially fraudulent behaviour may be due to an illicit link between the winning bidder and an official of the contracting authority responsible for supervision of the contract implementation. In-scope Organisations should ensure that appropriate safeguards are in place. These may include but are not restricted to requiring contract managers to complete Declarations of Interest, undertake specialist training and adhere to contract variation control processes, alongside organisational contract audits, independent quality assessment and KPI monitoring.

Q. What other irregularities in behaviour or process might signal that a conflict of interest exists?
Conflicts of interest can occur at any stage in the commercial lifecycle. The Ministry of Housing, Communities and Local Government published its "Review into the risks of fraud and corruption in local government procurement" in 2019. One of the outputs of the Review was a "procurement fraud and corruption risk matrix", a useful tool which identifies key areas of risk (including conflicts of interest), indicators / red flags and preventative measures that can be taken.

https://www.gov.uk/government/publications/local-government-procurement-fraud-and-corruption-risk-review

Q. How can data analytics be used to identify and manage COI?
Data analytics can be used to identify potential undeclared Conflicts of Interest by using requirements, bid, corporate and individual data to:

- identify awards to the same supplier by an individual within the In-scope Organisation where the level of the awards are above the norm;
- identify the continuous exclusion of a supplier by an individual where bid information suggests that it should have on occasion won; and
- identify the terms and details used in the structuring of requirement documentation by an individual which continuously favours one supplier over another.

The use of data analytics can be further enhanced by the use of more detailed analytics such as network analysis on corporate structures to identify organisations that appear to be independent but are actually related through their corporate structure, such that the awarding of contracts appears to be across a set of organisations, whereas the actual affect is to continue to award contracts disproportionately to one organisation. This can be further supported by social network analysis to identify potential interrelationships between individuals in corporations winning bids and individuals involved in the awarding of a contract e.g. the director of the winning bidder shares the same home address as the procurement lead.

More information is available through the Counter Fraud Centre of Expertise who can help you with:

- the setting up and running of your own pilot and project;
- access to project delivery teams if you need support in developing and delivering your pilot and project; and
- access to analytical capability, if you are looking to run your own project but would like direction and support with analytics.

Q. If I am calling off a third party framework agreement or dynamic purchasing system, is the framework / DPS owner responsible for managing conflicts of interest risks?
Whilst the framework / DPS owner will be responsible for preventing, identifying and remedying conflicts of interest in relation to establishing the framework / DPS, conflicts may also arise at the call off stage. For example a relationship may exist between the staff member calling off the framework and the framework supplier. It is therefore for In-scope Organisations to ensure that when calling off a third party framework or DPS, they have undertaken the relevant checks to ensure that conflicts do not exist and where they do that appropriate remedies have been taken and records kept of the conflict and any measures taken.

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. In that case a consortium including Intrasoft was excluded from a tender on the basis of a risk of conflict of interest but the Court found that in the circumstances the risk of a conflict of interests had not been objectively established.

The English case of Counted4 Community Interest Co v Sunderland City Council [2015] EWHC 3898 (TCC) addresses the ground of "other personal interest" in Regulation 24(2) PCR 2015. The bidder alleged a conflict of interest arising from a member of the evaluation panel having previously been the subject of a complaint by the bidder in relation to the management of the previous contract.

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

Whistleblowing

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 (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.

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 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. The Commission may also hear a complaint directly.

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