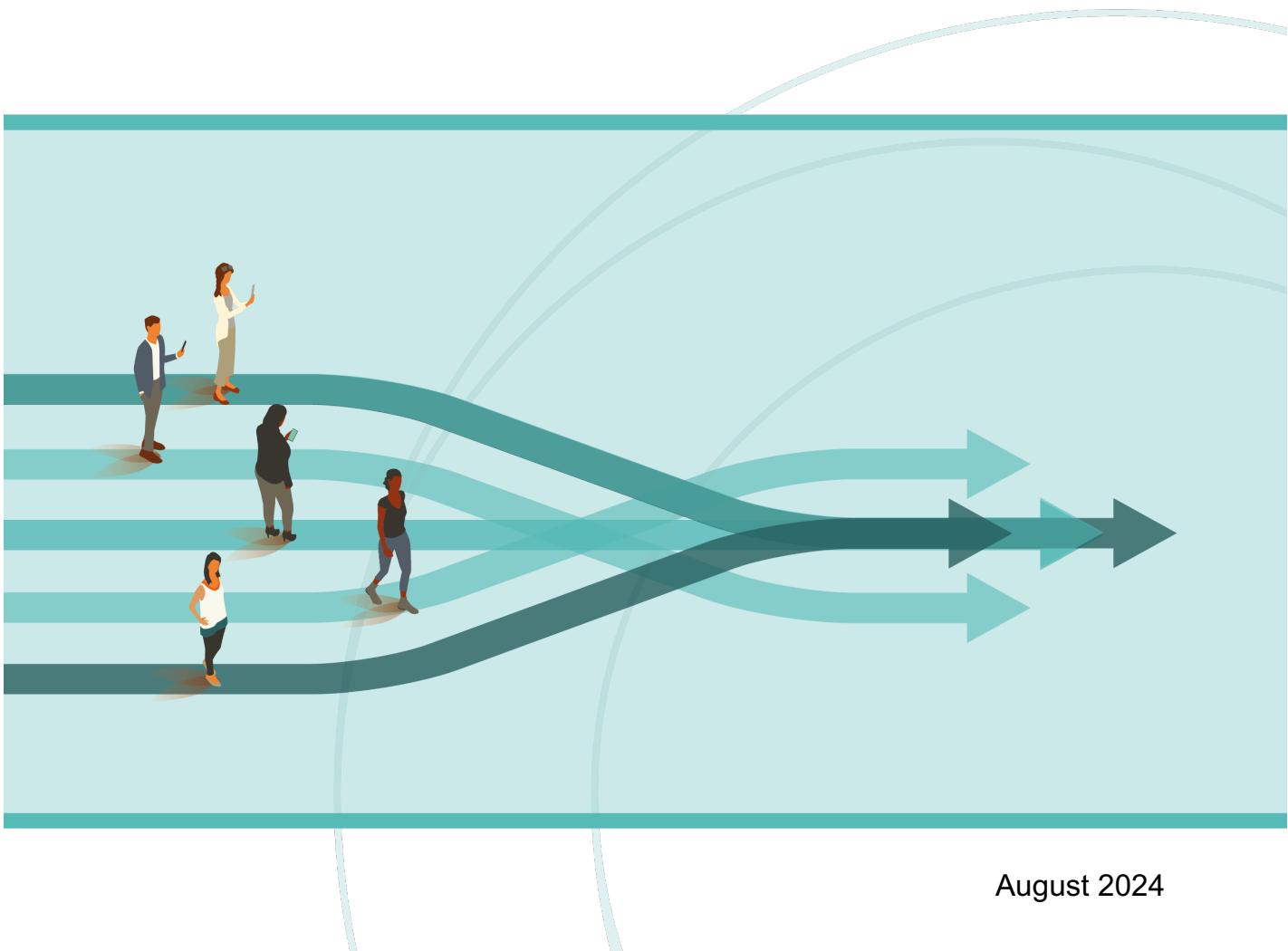




Government
Commercial
Function

Procurement Act 2023

Guidance: Exclusions



August 2024

Guidance on Exclusions

What are exclusions?

1. Fundamental to the new procurement regime is ensuring fair and open competition and treating suppliers equally. Contracting authorities should be confident that suppliers taking part in their procurements and delivering their contracts are reliable. Contracting authorities should use conditions of participation to satisfy themselves that suppliers have the legal and financial capacity and technical ability to deliver the specific goods, works or services involved.
2. Exclusion is a broad term used in this guidance to describe a number of different circumstances where suppliers are not permitted to participate in a covered procurement, to have their tender considered or to be awarded a public contract.
3. The exclusions regime enables, and where appropriate requires, the exclusion of suppliers where they pose particular risks to public procurement. It provides a framework within which contracting authorities must consider a supplier's recent past behaviour and circumstances to determine whether it should be allowed to compete for or be awarded a public contract.
4. These risks fall into the following categories:
 - a. reliable delivery of public contracts: the risk that a supplier will fail to deliver contractual requirements, either through a breach of contract or inadequate performance. This does not relate to the supplier's ability to deliver a particular requirement but rather that there is a general risk of failure to perform;
 - b. effective competition for public contracts: the risk that a procurement, including the assessment of the exclusions, cannot be undertaken in accordance with the legal regime and in particular the procurement objectives in section 12 of the Procurement Act 2023 (Act);
 - c. public confidence in the honesty, integrity and probity of suppliers in the delivery of public contracts: the risk that public confidence may be undermined due to a supplier not acting in good faith;
 - d. protection of public funds: the risk that a supplier may incur additional costs for the public sector (and therefore the taxpayer) during the delivery of public contracts;
 - e. protection of the public, the environment, national security interests and the rights of employees: the risk that a supplier may be a risk to these aspects which are considered particularly important in relation to suppliers to the public sector.
5. The exclusions regime is not intended to be a punishment for circumstances or past misconduct. The regime is also not imposed in order to have a deterrent effect on suppliers in future, although of course all suppliers to the public sector are expected not to engage in

criminal activity or other misconduct. Exclusion is a purely risk-based approach centred on the specific risks posed by the supplier.

What is the legal framework that governs exclusions?

6. The Act covers exclusions in three main ways:
 - a. Sections 26 and 27 cover how the exclusion grounds must be considered and applied in different procurement procedures. Section 28 deals with excluding suppliers by reference to sub-contractors and section 29 applies where a contracting authority intends to exclude a supplier on a discretionary basis for national security reasons.
 - b. Sections 57 and 58 define the concepts of excluded suppliers and excludable suppliers. They also detail matters a contracting authority may have regard to when considering whether the circumstances giving rise to an exclusion ground are continuing or likely to occur again.
 - c. The mandatory exclusion grounds are set out in Schedule 6 and discretionary exclusion grounds in Schedule 7.
7. In addition to the exclusion grounds, the Act makes provision elsewhere for tenders to be disregarded on other grounds. These are outlined and cross-referred to in sections 19(3), (9) and (10) and include disregarding tenders from suppliers that are not UK or treaty state suppliers, reserving public contracts to supported employment providers and qualifying public service mutuals under sections 32 and 33, and disregarding tenders from suppliers that are not members of a dynamic market under section 34. For further information see the guidance on treaty state suppliers, reserved contracts and dynamic markets.
8. The Act also requires a supplier to be treated as an excluded supplier in circumstances outside of the mandatory exclusion grounds. This is the case where:
 - a. the nature of a supplier's involvement in preliminary market engagement means it has an unavoidable unfair advantage in the procurement under section 16;
 - b. where a supplier has acted improperly in the procurement under section 30; and
 - c. where a supplier has an unavoidable unfair advantage due to a conflict of interest in the procurement under section 82.
9. In summary, a tender from an excluded supplier or an excludable supplier must or may (respectively) be disregarded in a competitive tendering procedure (see section 26). In addition, the supplier must (for excluded suppliers) or may (for excludable suppliers) be excluded from participating in, or progressing as part of a competitive flexible procedure (see section 27). 'Progressing' in the procedure could mean being permitted to continue in the procurement beyond the submission of requests to participate, submitting initial tenders, or any subsequent stage in the procedures.

What has changed?

10. The Act constitutes a significant refresh of the previous legislation and brings together a single exclusions regime replacing those currently set out in the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011.
11. Below is a high level overview of some of the broader changes to the exclusions regime:
 - a. introducing new mandatory exclusion grounds (included in the full list of grounds outlined in Annex 1) to expand the circumstances in which contracting authorities must exclude suppliers for convictions of certain offences and other certain serious misconduct;
 - b. introducing new discretionary exclusion grounds (also included in the full list of grounds outlined in Annex 1) in areas such as poor performance, labour misconduct and national security threats, enabling contracting authorities to take tougher action on underperforming suppliers and suppliers who pose unacceptable risks;
 - c. making the exclusion grounds UK-specific but also ensuring they apply to certain events which occur overseas and equivalent non-UK offences, regulatory rulings and other decisions;
 - d. creating a clearer set of rules outlining when a supplier must or may be excluded due to an exclusion ground applying to 'connected persons' (such as beneficial owners, directors, parent and subsidiary companies) or 'associated persons' (such as certain key sub-contractors) and making it clear that these apply to both mandatory and discretionary grounds;
 - e. giving contracting authorities greater flexibility to consider a range of evidence of 'self-cleaning' by suppliers in order to assess whether the circumstances giving rise to an exclusion ground are continuing or are likely to occur again;
 - f. extending the time limit for consideration of relevant events for discretionary exclusion grounds to 5 years to match that of mandatory exclusion grounds.

Key points and policy intent

12. The Act sets out a list of mandatory and discretionary exclusion grounds and places a duty on contracting authorities to consider both sets of grounds for each procurement, as well as whether the circumstances are continuing or likely to occur again. Contracting authorities must exclude an excluded supplier and may exclude an excludable supplier.

Meaning of 'excluded supplier' and 'excludable supplier'

13. Section 57 defines the concepts of 'excluded supplier' and 'excludable supplier'. Although the definitions in section 57 refer to exclusion grounds applying to the supplier or an associated person, it is important to remember that many of the exclusion grounds themselves also apply where an event or circumstance has been determined or applies in relation to the supplier or a connected person (see Schedules 6 and 7 and paragraphs 41-45). Section 28 separately provides for exclusion of a supplier on the basis of a subcontractor.
14. A supplier is an 'excluded supplier' where the contracting authority considers, firstly, that a mandatory exclusion ground applies to the supplier or an associated person and, secondly, that the circumstances giving rise to the exclusion ground are continuing or likely to occur again. A supplier will also be an excluded supplier where a Minister of the Crown has already determined this; i.e. where the supplier or an associated person is on the debarment list because of a mandatory exclusion ground.
15. A supplier is an 'excludable supplier' where the contracting authority considers, firstly, that a discretionary exclusion ground applies to the supplier or an associated person and, secondly, that the circumstances giving rise to the exclusion ground are continuing or likely to occur again. A supplier will also be an excludable supplier where a Minister of the Crown has already determined this; i.e. where the supplier or an associated person is on the debarment list because of a discretionary exclusion ground.
16. In other words, the supplier will be an excluded supplier or an excludable supplier either where the contracting authority considers this to be the case in the context of a particular procurement or where the supplier is already listed on the debarment list.

What is the significance of debarment?

17. Debarment is a new mechanism under which a Minister of the Crown can put a supplier on the centrally-published debarment list if the Minister is satisfied that a supplier is an excluded supplier or an excludable supplier. The list will be managed by the Procurement Review Unit (PRU) and published on gov.uk. The debarment list must always be checked by contracting authorities when undertaking covered procurement.
18. Where a supplier is on the debarment list, other than in limited cases, contracting authorities must or may exclude that supplier from the procurement, depending on whether the exclusion ground for which the supplier has been put on the debarment list is mandatory or discretionary.
19. For more detail on debarment, please refer to the guidance on debarment.

Exceptions to the standard exclusions process

20. The general rules differ in two instances. Firstly, in covered procurements carried out by a private utility, an excluded supplier must be regarded as an excludable supplier. This means that a private utility can choose whether or not to exclude a supplier from a procurement for a ground that would result in a mandatory exclusion for all other contracting authorities, providing increased flexibility for private utilities regarding the exclusion of suppliers. For further information see the guidance on utilities contracts.
21. Secondly, for exclusions on the basis of the discretionary exclusion ground relating to national security in Schedule 7, paragraph 14, a contracting authority (other than a Minister of the Crown, government department or Corporate Officer of the House of Commons or Lords) may not exclude the supplier unless:
 - a. the contracting authority has notified a Minister of the Crown (in practice this must be a Cabinet Office minister who can be notified via the debarment gov.uk page) of its intention to do so; and
 - b. the Minister considers that the supplier is an excludable supplier on the basis of this exclusion ground and the tender should be disregarded or the supplier excluded.
22. There is also one difference in how the debarment list operates where the supplier is on the debarment list for the mandatory exclusion ground relating to national security in Schedule 6, paragraph 35. Unlike the other exclusion grounds, this entry on the debarment list may not be relevant to all covered procurements. For this ground to apply, the Minister must have determined that the supplier is a threat to national security in relation to contracts of a particular description or descriptions. Where a supplier is put on debarment list on this ground, the supplier is an excluded supplier only for procurements for those types of contracts. A type of contract might be described on the debarment list as a contract for the provision of particular types of goods, works or services, to particular types of locations, or awarded by particular types of contracting authorities. Contracting authorities must exclude suppliers listed on the debarment list in relation to this ground only for the specified type(s) of contracts.

The exclusion grounds

23. Schedule 6 of the Act sets out the mandatory exclusion grounds, which are the most serious, high risk scenarios. The grounds in Part 1 require a conviction of specific offences in the UK. They also cover convictions for an offence outside of the UK which would be an offence if it had been committed in the UK. For example, if a supplier is convicted of a fraud offence in another country, this will be a mandatory exclusion ground if that misconduct would have been an offence in the UK had it been conducted in the UK. Part 1 also includes ancillary offences, such as aiding and abetting.

24. The grounds in Part 2 do not require a conviction for an offence and cover national security threats in relation to particular contracts and certain tax misconduct and competition law infringements. The tax misconduct and competition law infringement grounds include misconduct and infringements that occurred outside of the UK. Part 2 also includes failure to cooperate with a debarment investigation as a mandatory exclusion ground, which only a Minister of the Crown can consider.
25. Schedule 7 of the Act sets out the discretionary exclusion grounds, which mostly do not require a conviction but represent situations which may pose unacceptable risks. These cover a broad range of situations, such as insolvency, potential competition law infringements, professional misconduct, breach of contract and poor performance, general national security threats, as well as misconduct in areas like labour and the environment. The grounds in Schedule 7 cover situations where misconduct has occurred outside of the UK. They also include a discretionary exclusion ground where the supplier has acted improperly in another procurement.
26. The full list of mandatory and discretionary exclusion grounds are set out in Annex 1.

Time periods

27. As the purpose of the exclusions regime is not to punish suppliers for past misconduct but rather to safeguard against unacceptable risks, Schedule 6 prevents consideration of convictions, regulatory decisions, events or conduct which occurred more than 5 years ago for the mandatory exclusion grounds. Schedule 7 prevents consideration of events which the contracting authority was aware of (or which a reasonably well-informed decision-maker in their position would have been aware of) more than 5 years ago for the discretionary exclusion grounds. In this guidance, for brevity, the term 'event occurred' is used. For mandatory exclusion grounds this is the legal test, whereas for discretionary exclusion grounds the test is when the contracting authority was aware of the event or a reasonably well-informed decision-maker in the contracting authority's position would have been aware of the event. Where an event occurred longer than 5 years ago, it is not considered to give rise to the risks the regime is seeking to mitigate against.
28. The 5 year period is not a time period for exclusion as such; but if the event occurred longer than 5 years ago, then the supplier is no longer at risk of exclusion in relation to that event.
29. To avoid suppliers being subject to potential exclusion action based on events which occurred prior to the relevant provisions in the Procurement Act 2023 coming into force where the exclusion grounds are new or were subject to a 3 year time period in previous legislation, Schedules 6 and 7 provide additional rules on time periods (in addition to the 5 year rule previously outlined):
 - a. For exclusion grounds which are new (as outlined in Schedule 6, paragraph 44(3) and Schedule 7, paragraph 15(4)), events which occurred before the exclusions regime came into effect cannot be considered. For example, corporate manslaughter is a new mandatory exclusion ground and serious labour misconduct is a new

discretionary exclusion ground so a corporate manslaughter conviction or labour market misconduct that occurred before the exclusions regime came into force cannot be considered.

- b. For exclusion grounds which are the same as, or substantially similar to, a discretionary exclusion ground under the previous legislation (as outlined in Schedule 6, paragraph 44(4) and Schedule 7, paragraph 15(3)), events which occurred more than 3 years before the Schedules come into force cannot be considered. For example, professional misconduct is similar to the discretionary exclusion ground of grave professional misconduct under the previous legislation with a 3 year time limit, therefore under the Act such misconduct that occurred prior to 3 years before the Act comes into effect cannot be considered.

Individuals and entities connected to or associated with the supplier

30. For a contracting authority to be satisfied that a supplier should be allowed to participate in a procurement and potentially awarded a contract, it should also consider whether the exclusion grounds apply to certain individuals or entities:
 - a. with significant influence or control over the supplier;
 - b. which the supplier has significant influence or control over; and
 - c. which have certain associations with the supplier.
31. The exclusion grounds indicate particular risks exist; thus, if they apply to a relevant individual or legal entity as mentioned above, it may mean that the supplier poses such risks through association or connection.
32. Significant influence or control is not limited to those who have full control or influence over the supplier or over which the supplier has full control or influence, nor is association as broad as every individual or entity associated with the supplier. The Act provides for two categories of persons which must be considered with regard to exclusions: associated persons and connected persons. It also provides for a third category which is treated slightly differently: sub-contractors.

Associated persons

33. A supplier may be an excluded supplier or an excludable supplier if any exclusion ground applies to either the supplier or an associated person (see the references to 'associated person' in section 57 of the Act) and if the circumstances giving rise to the ground are continuing or likely to occur again.
34. An associated person for these purposes is defined in section 26(4) as a person the supplier is relying on in order to satisfy the conditions of participation (other than a guarantor). Guarantors are included as an associated person for the conditions of participation

provisions but not for the exclusions provisions, to avoid contracting authorities having to check entities such as banks for potential exclusion grounds.

35. Associated persons are likely to be within the first tier of sub-contractors, but may be further down the supply chain, for example in procurements of contracts with highly technical elements.
36. An example of an associated person for the purpose of exclusions is a specialist sub-contractor or a consortium member the supplier is relying on to deliver particular technical elements of the contract where the contracting authority has set demonstration of technical ability in this area as a condition of participation.
37. For example, a cleaning supplier bidding for an integrated facilities management contract which includes both soft (e.g. cleaning) and hard (e.g. buildings maintenance) services, might need to rely on a specialist buildings maintenance supplier in order to meet conditions of participation relating to that aspect of the service. The cleaning supplier could structure its bid either as a consortium, jointly bidding with the buildings maintenance supplier, or with the cleaning supplier as the prime supplier using the buildings maintenance supplier as a sub-contractor. In either case the buildings maintenance supplier would be an associated person. It is worth noting that not every sub-contractor will be an associated person. Other sub-contractors might be used to perform all or part of the public contract. If these are not relied on by the supplier to meet conditions of the participation they will not be associated persons. In the integrated facilities management example, depending on the conditions of participation set by the contracting authority, an 'other sub-contractor' might be a security services supplier that provides security staff.
38. A supplier can also be an excluded or excludable supplier by virtue of a connected person (see paragraphs 41-45 below) of an associated person. For example, a director of an associated person of the supplier.
39. If a supplier is an excluded supplier or an excludable supplier by virtue of an associated person (and the circumstances giving rise to the exclusion ground are continuing or likely to occur again), the supplier must be given the opportunity to replace the associated person before being excluded.
40. Contracting authorities may wish to include within their tender documents the process to be followed if the supplier is determined to be an excluded supplier or an excludable supplier by virtue of an associated person. A re-assessment of the tender should be done in a way that avoids any unfair disadvantage to other suppliers or any changes to the tender beyond those directly linked to the replacement of the associated person.

Connected persons

41. A supplier may be an excluded supplier or an excludable supplier if certain exclusion grounds apply to a connected person and if the circumstances giving rise to the ground are continuing or likely to occur again. For example, a supplier may be an excluded supplier if

any offence in Schedule 6, Part 1 has been committed by a connected person and the circumstances giving rise to that ground are continuing or are likely to occur again.

42. A connected person is defined in Schedule 6 of the Act. In summary, it covers:

- a. persons with significant influence or control over the supplier or persons over which the supplier has significant influence or control, including for example majority shareholders;
- b. directors and shadow directors;
- c. parent and subsidiary companies. (Sister companies of the supplier, i.e. a company with the same parent, are not connected persons unless they fall within one of the other categories of associated persons);
- d. predecessor companies (companies which have become insolvent and ceased to trade and the business has effectively been transferred to the supplier);
- e. other persons who can reasonably be considered to stand in an equivalent position to the above categories.

43. Connected persons include those who exercise (or have a right to exercise) significant influence or control over the supplier as well as those over which the supplier exercises (or has the right to exercise) significant influence or control.

44. Where a supplier is an excludable supplier because of the misconduct of a connected person, contracting authorities may factor in the strength of the connection between the connected person and the supplier when exercising their discretion on whether or not to exclude. Where the connection is weak, this might suggest that the risk of misconduct arising in the supplier is lower and therefore the situation is less serious, meaning discretion is appropriate to permit the supplier to continue in the procurement.

45. Excluding a supplier on the basis of connected persons is different from associated persons and sub-contractors because it cannot be replaced for the particular procurement in the same way as entities in these other categories can. This means that there is no requirement to give a supplier a reasonable opportunity to replace a connected person before exclusion.

Sub-contractors

46. Contracting authorities must ask for details of all sub-contractors a supplier intends to use as part of the procurement (as required by section 28(1)(a) of the Act). This is not restricted to sub-contractors that the supplier is relying on to meet conditions of participation (who will in any event be associated persons) but applies to all sub-contractors (of all tiers) the supplier intends to sub-contract the performance of all or part of the contract to.

47. The supplier must provide an exhaustive list of all their intended sub-contractors in the supply chain proposed for the contract. However, this does not include every supplier with whom the supplier has a commercial relationship; for example, an existing supply contract where there is no intention to specifically sub-contract all or part of the contract to that supplier. If a sub-contractor is unknown at the start of the procedure (or brought in during it), this should be made clear by the supplier and relevant details of the sub-contractor should be provided once their identity and role is confirmed. This information should be shared with the contracting authority as soon as possible and at least by final tenders. In a competitive flexible procedure, which is likely to include multiple stages, it is best practice to seek updated details of sub-contractors at each stage.
48. A contracting authority must check whether any of the intended sub-contractors are on the debarment list (as required by section 28(1)(b) of the Act). In addition, a contracting authority should ensure that the successful supplier will not contract with a sub-contractor that is on the debarment list during the term of the contract for the purpose of delivering the contract. This should be included as a restriction in the contract to be awarded.
49. The contracting authority may also ask suppliers for further information to determine whether any of the intended sub-contractors are excluded or excludable suppliers. This should be done for categories of sub-contractors, such as first tier sub-contractors only, or for sub-contractors that are providing key services or supplies, or if particular supply chain risks are identified for the procurement, particularly in high risk areas or industries. These risks can be considered regardless of how far down the supply chain they are.
50. As with associated persons, if a supplier is an excluded supplier or an excludable supplier by virtue of a sub-contractor, the supplier must be given the opportunity to replace the sub-contractor before being excluded. If the supplier suggests a replacement, a contracting authority must check that the newly-proposed sub-contractor is not on the debarment list and, if the sub-contractor is within the relevant category of sub-contractors for which the contracting authority has chosen to consider exclusions, the contracting authority should also check that the sub-contractor is not subject to an exclusion ground along with any relevant self-cleaning evidence. The contracting authority should also check that the supplier still meets any conditions of participation following the proposed change.
51. As with associated persons, contracting authorities may wish to include within their tender documents the process to be followed if the supplier is determined to be an excluded supplier or an excludable supplier by virtue of a sub-contractor; for example the time period allowed at tender stage to find an alternative, that no changes should be made to the tender other than to reflect a different sub-contractor, and how any changes will be assessed. A re-assessment of the tender must be done in a way that avoids any unfair disadvantage to other suppliers or any changes to the tender beyond those directly linked to the replacement of the associated person.
52. A supplier can also be considered an excluded or excludable supplier by virtue of a connected person of a sub-contractor.

Self-cleaning

53. When establishing whether the circumstances giving rise to the application of an exclusion ground are continuing or likely to occur again, contracting authorities should look at a range of evidence and factors, as set out in section 58. These include:

- a. evidence that the supplier, associated person or connected person has taken the circumstances seriously, for example by paying compensation;
- b. steps that the supplier, associated person or connected person has taken to prevent the circumstances occurring again, for example by changing staff or management, or putting procedures and training in place;
- c. commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps;
- d. the time that has elapsed since the circumstances last occurred;
- e. any other evidence, explanation or factor that the authority considers appropriate.

54. In the context of self-cleaning, 'circumstances giving rise to the application of an exclusion ground' includes the underlying issues in addition to the specific misconduct. For instance, underlying issues might include a toxic office culture, due diligence failures, a lack of a compliance function or inappropriate governance mechanisms.

55. When considering whether the circumstances are likely to 'occur again', the recurrence could be at any point in the future. However, given the purpose of the exclusions regime is to minimise risks to public contracts, when considering this in the context of a particular procurement, contracting authorities may wish to focus on the risk of recurrence within the lifetime of the contract. This does not mean that there must be a risk of recurrence in connection with the delivery of the contract. The circumstances could re-occur elsewhere in the supplier's operations (or a connected person's, associated person's or sub-contractor's) operations and still be relevant to this judgement.

56. What constitutes good self cleaning in any particular situation will be specific to the circumstances giving rise to that exclusion ground. When seeking to determine whether circumstances are continuing or likely to occur again, contracting authorities should consider what expectations (if any) are set by the appropriate authority if one exists, such as the Environment Agency for environmental misconduct or the Competition and Markets Authority (CMA) for competition infringements.

57. Contracting authorities should also factor in the level and nature of co-operation with appropriate authorities when seeking to determine whether the supplier has 'taken the circumstances seriously'. For example, the [Serious Fraud Office \(SFO\) corporate co-operation guidance](#) provides a set of principles that may be used to help assess cooperation

and defines co-operation as “providing assistance to the [relevant authority] that goes above and beyond what the law requires.”

58. Before deciding whether a supplier is an excluded supplier or an excludable supplier, the contracting authority must give the supplier a reasonable opportunity to make representations, including, for example, as to whether exclusion grounds apply, and to provide evidence that the circumstances giving rise to the exclusion ground are not continuing or likely to occur again (by reference to the information set out in the bulleted list above).
59. Where an exclusion ground applies because of the circumstances or misconduct of a connected person, associated person or sub-contractor, the self-cleaning evidence should relate to that individual or entity as well as any measures put in place by the supplier, including to prevent further misconduct by the relevant person and more generally. For example, a supplier may have put in place more robust training, due diligence and oversight arrangements for group companies following a subsidiary company being engaged in professional misconduct.
60. When asking for particular evidence or information, the contracting authority must ensure such requests are proportionate based on the nature and complexity of the matters being assessed, and the design of the procurement. For example, a supplier could be asked for details of a business-wide corporate renewal programme where there has been professional misconduct, whereas a summary of changes made to payroll systems and procedures may be sufficient where there has been a breach of national minimum wage laws. Contracting authorities should consider when it would be appropriate for suppliers to submit evidence and information, having regard to the procurement objectives and what is required to ensure the proper conduct of the procurement. For example, it may not be proportionate to require all evidence at the participation stage of a competitive flexible procedure.
61. It is for the supplier to demonstrate it has self-cleaned and this must be to the satisfaction of the contracting authority, taking into account the gravity and particular circumstances giving rise to the ground for exclusion. In order to conclude that a supplier is an excluded supplier or an excludable supplier, the contracting authority does not need to be satisfied that the particular situation will occur again but rather that the circumstances leading to it are continuing or are likely to occur again. Suppliers can be asked to pay for an independent audit of self-cleaning action if the contracting authority deems this proportionate, reasonable and necessary.
62. Where a supplier has been investigated for a debarment, but not been placed on the debarment list for a mandatory or discretionary exclusion ground, a debarment investigation report will be available which may include a description of the circumstances and evidence considered as part of that investigation. This is a good example of additional evidence that a contracting authority could consider as outlined in section 58(1)(e) of the Act.

Factoring time elapsed in self-cleaning assessments

63. In general, the more time that has elapsed since the misconduct or circumstances occurred, the less likely they are to occur again. However, time elapsed by itself should not be sufficient to demonstrate that misconduct is unlikely to occur again; any other relevant evidence should also be considered.
64. Evidence that misconduct or circumstances would have arisen but were prevented from occurring, for example by measures put in place by the supplier, should be taken into account. However, time elapsed might not be sufficient evidence if there were no opportunities for the circumstances to arise in that time.

Factoring future commitments into self-cleaning assessments

65. Future commitments should not be given equal weight to actions already taken. In the absence of any concrete action, commitments alone should not be sufficient evidence that misconduct is unlikely to occur again.
66. Any future commitments provided should be SMART, (specific, measurable, achievable and time-bound). Contracting authorities should ensure there is a robust mechanism for monitoring the implementation of commitments made, especially if these are a significant factor in the decision that a supplier is not an excluded or excludable supplier and the supplier is subsequently awarded the contract. For example, this might include the appointment of an independent auditing firm, paid for by the supplier, to verify steps taken, or regular reporting to the contracting authority.

Verifying exclusions

67. Contracting authorities should ask suppliers for the information listed below to be submitted with their requests to participate in a competitive flexible procedure or with their tenders in an open procedure:
 - a. basic information about themselves and their connected persons and associated persons;
 - b. self-declarations as to whether any mandatory or discretionary exclusion grounds apply to the supplier, connected persons or associated persons;
 - c. where the supplier self-declares that an exclusion ground applies:
 - i. which exclusion ground applies;
 - ii. a short description of the event giving rise to the exclusion ground;
 - iii. the name of the person who is the subject of the event;
 - iv. the person's name, contact postal address and email address;

- v. in the case of a conviction or other event where there is a recorded decision of a public authority which is the authoritative basis for the conviction or other event:
 - 1. a link to the webpage where the decision can be accessed; or
 - 2. a copy of the decision;
 - 3. any evidence that the person who is the subject of the event:
 - a. took the event seriously, for example by paying any fine or compensation;
 - b. took steps to prevent the event occurring again, for example by changing staff or management, or putting procedures or training in place; and
 - c. committed to take further preventative steps, where appropriate; and
 - 4. if the circumstances which led to the event have ended, the date when they ended.
- 68. Contracting authorities are not required to ask suppliers to self-declare the national security ground; this should be investigated by contracting authorities as part of their standard due diligence checks and only used following a referral to NSUP.
- 69. Contracting authorities must always request details of intended sub-contractors (of all tiers) in each procurement so that checks can be made that sub-contractors are not on the debarment list. Contracting authorities may also wish to request further information about sub-contractors in order to themselves consider exclusions (in addition to checking the debarment list) as explained above.
- 70. Information about the supplier and connected persons must be provided by the supplier via the central digital platform before the end of the tendering period but can be provided prior to that either directly to the contracting authority or via the platform. For example, in a competitive flexible procedure, the contracting authority will need this information in order to consider exclusions at the invitation to participate stage and can obtain this information directly or by asking suppliers to register on the platform and provide it via the platform at this stage. It is also best practice to encourage associated persons and sub-contractors to register on the central digital platform to gain a unique identifier so that the supplier can provide their information via the platform as well, but this information can also be provided directly by the supplier and not via the platform. Before the end of the tendering period in open and competitive flexible procedures (or prior to contract award for a direct award or a

competitive selection process under a framework), contracting authorities must seek confirmation from the supplier that it has:

- a. registered on the central digital platform;
- b. submitted the above information about itself and connected persons to the central digital platform; and
- c. shared that information with the contracting authority via the central digital platform.

71. It is best practice to seek confirmation that any information provided directly to the contracting authority that has not been provided via the central digital platform is also up-to-date.
72. Contracting authorities can use the questions outlined in Annex 2 to obtain the required associated persons and any appropriate sub-contractor declarations.
73. Contracting authorities should undertake further due diligence, particularly where the contract raises particular risks, such as cartel behaviour in the construction industry or risks of modern slavery. There are a variety of resources and tools available to assist with contracting authorities' due diligence including Companies House and Spotlight, government's online automated due-diligence tool which includes insights from Dun and Bradstreet. The Spotlight tool is available on gov.uk.
74. Contracting authorities may also wish to undertake further due diligence for other reasons, for example if they are aware or suspicious of misconduct from publicly-available information but the supplier has not provided this information.
75. Contracting authorities may seek information from relevant regulatory bodies. Requests for evidence should be limited to cases where the conduct gives rise to an exclusion ground.

Discretion to exclude

76. Where a supplier is an excludable supplier, contracting authorities have a discretion to exclude the supplier. In exercising this discretion, contracting authorities are reminded of the duty to have regard to the objectives set out in section 12 of the Act including delivering value for money, maximising public benefit, information sharing and acting (and being seen to act) with integrity. More generally, the risk posed by the circumstances or misconduct giving rise to the exclusion ground should be considered and whether this outweighs the public interest in allowing the supplier to participate in the procurement.
77. Contracting authorities should consider all relevant factors when exercising discretion to exclude a supplier, or not to exclude a supplier. This will depend on the particular circumstances, but an example of where it may be appropriate to allow a supplier to continue to participate in the procurement or to be awarded a contract is where the type of contract is

such that the relevant risk is unlikely to arise in relation to the contract even if the circumstances giving rise to the exclusion ground are likely to occur again.

78. Discretion should not be used:

- a. to avoid a decision on whether an exclusion ground applies or looking at self-cleaning evidence. Discretion only arises when a contracting authority considers that a discretionary exclusion ground applies and that the circumstances giving rise to the ground are continuing or are likely to occur again (i.e. having considered self-cleaning evidence); or
- b. to take into account irrelevant factors such as the cost of the supplier's tender. The cost of the supplier's tender (and other matters relating to the tender) should be considered as part of the assessment of tenders.

79. The factors that may be relevant in any particular situation include (but are not limited to):

- a. factors relating to the supplier, such as the seriousness of the circumstances or misconduct giving rise to the exclusion ground and the time elapsed since the circumstances or misconduct in question; and
- b. factors relevant to the procurement, such as whether there are other suitable suppliers, the impact of exclusion on public services and whether the risks posed by the supplier due to being an excludable supplier are likely to transpire in the delivery of the particular contract. For example, in a procurement for IT support services, a contracting authority may decide not to exclude a supplier for environmental misconduct relating to its operations overseas in a different sector.

80. Contracting authorities should not operate a policy to always exclude, or to never exclude, on particular exclusion grounds. Case by case decisions must be made on the basis of the circumstances of each procurement and consideration of all relevant factors at that time.

81. Contracting authorities also have a discretion under section 41(2) of the Act to directly award a contract to an excluded supplier where a direct award justification applies and there is an overriding public interest in awarding that contract to that supplier. There is an overriding public interest in this context if one of the following circumstances listed in section 41(5) applies:

- a. the procurement is essential for the construction or maintenance of critical national infrastructure. This means those critical elements of infrastructure (namely assets, facilities, systems, networks or processes and the essential workers that operate and facilitate them), the loss or compromise of which could result in:

major detrimental impact on the availability, integrity or delivery of essential services (including those services whose integrity, if compromised, could

result in significant loss of life or casualties) taking into account significant economic or social impacts; and/or

significant impact on national security, national defence, or the functioning of the state;

- b. the procurement is in a strategically important sector for the UK. Strategically important sectors are those that are vital to the defence and security of the UK's national interests. These are discussed in detail in the Defence and Security Industrial Strategy;
- c. failure to award the contract to the excluded supplier would prejudice the conduct of military or security operations or the effective operation of the armed forces or intelligence services;
- d. there is a situation of extreme and unavoidable urgency and the contract cannot be awarded to another supplier.

82. If there is evidence to suggest any of the discretionary exclusion grounds may apply, the burden is on the contracting authority to be satisfied that the relevant conduct or circumstances have occurred. A contracting authority can rely on a wide range of available information, such as the examples listed below. In all cases, the evidence must be specific to the relevant supplier (or other relevant person's conduct or circumstances). There is no single type of evidence that would automatically satisfy the evidentiary requirements. However, the more reliable the evidence, the more likely it is that the evidence will be sufficient.

83. A contracting authority conducting due diligence (for example where it is aware of or have a suspicion that relevant misconduct may be a particular risk for that procurement or have occurred) is encouraged to review a wide range of information on suppliers, including from the sources below:

- a. international debarment lists (e.g. US Customs and Border Protection's Withhold Release Orders or US Department of Commerce's Bureau of Industry and Security Entity List);
- b. international policy institutes (e.g. Australian Strategic Policy Institute);
- c. government business registries;
- d. local government reports;
- e. company websites;
- f. NGOs or independent research organisations;

- g. peer-reviewed academic articles;
- h. media reports

Operation of exclusions for dynamic markets and frameworks

84. Dynamic markets are open lists of suppliers that have met certain conditions to be eligible to tender for public contracts in competitive flexible procedures open only to members of the market. Frameworks are themselves public contracts which provide for the award of future contracts to suppliers who are on the framework by direct award or a competitive selection process.
85. An excluded supplier must not be admitted to a dynamic market, whilst a contracting authority has discretion not to admit an excludable supplier (see section 36 of the Act). When undertaking a competitive flexible procedure restricted to members of a dynamic market, the same rules apply as to a normal competitive flexible procedure. In other words, tenders must be disregarded where a supplier is an excluded supplier and may be disregarded where a supplier is an excludable supplier. Depending on whether the supplier is an excluded supplier or an excludable supplier, suppliers must or may be excluded from participating in or progressing as part of the procedure.
86. A supplier must be removed from a dynamic market if it is on the debarment list on the basis of a mandatory exclusion ground and the supplier may be removed if it is otherwise an excluded supplier or an excludable supplier (see section 37 of the Act). For example, if a contracting authority managing a dynamic market determines that a supplier is an excluded supplier, it has a discretion to remove them from the dynamic market or allow them to remain there. If the supplier remains on the market, it will not be able to compete for contracts (and should be excluded by contracting authorities if it tries to do so) but keeping them on the market may be a way for the contracting authority to incentivise the supplier to undertake self-cleaning.
87. When a framework is awarded, the rules on disregarding tenders and excluding suppliers from participating in or progressing as part of the procurement procedure apply as normal. A framework must not allow for the award of a contract to an excluded supplier (see section 45) but may allow for the award of a contract to an excludable supplier. The contracting authorities who establish frameworks should consider on a regular basis whether each supplier on a framework has become an excluded supplier or an excludable supplier. Any contracting authority awarding a contract under a framework must also consider whether a supplier is an excluded supplier, and should consider whether a supplier is an excludable supplier, prior to the award of each public contract under the framework.

Applying the exclusions provisions during the procurement process

88. Preliminary market engagement: Contracting authorities should use this opportunity to familiarise or remind suppliers of the exclusion grounds. All exclusion grounds must be considered for all covered procurements but contracting authorities can also use preliminary

market engagement to focus due diligence efforts on a supplier by understanding if there are exclusion grounds that may be particularly relevant. For example:

- a. if a supplier has an overseas supply chain for low cost goods, there may be a higher likelihood of labour market misconduct;
- b. if a supplier is operating in the agriculture sector, the environmental misconduct grounds may be particularly relevant.

89. Supplier information: At the start of a competitive flexible procedure, contracting authorities must check the debarment list on gov.uk. Each supplier's exclusion grounds information either provided directly by the supplier or provided via the central digital platform must also be checked, including details of associated persons and sub-contractors (where relevant) and any additional information requested by the contracting authority at that stage. Contracting authorities may undertake the same check at some or all stages of a competitive flexible procedure. The check must be made when assessing final tenders in both competitive flexible and open procedures.

90. Identification of an excluded supplier or an excludable supplier: If the contracting authority determines that the supplier is an excluded supplier or an excludable supplier at any point in the procedure prior to assessment of tenders, the supplier should not be allowed to continue with the procedure if the supplier is an excluded supplier or, if the supplier is an excludable supplier, consideration should be given as to whether to allow the supplier to continue or not. At the point of assessment of tenders, the contract cannot be awarded to an excluded supplier and consideration should be given to awarding to an excludable supplier. Contracting authorities should provide suppliers with the reasons for any exclusion.

91. Excluding on the basis of an associated person or sub-contractor: If the supplier is an excluded supplier or an excludable supplier by virtue of an associated person or an intended sub-contractor, the supplier must be given the opportunity to replace that person or sub-contractor before they are excluded.

92. Reporting: Contracting authorities must notify the appropriate authority (for authorities other than devolved Welsh authorities or transferred Northern Ireland authorities, this is a Minister of the Crown, via the PRU) within 30 days of excluding a supplier. Exclusion can be reported to the PRU via gov.uk.

93. Contracting authorities may wish to consider the implications of a supplier being investigated or added to the debarment list during a live procurement, particularly if the decision is taken towards the end of a competitive tendering procedure and consider setting out in the tender documentation how it will progress to contract award in such a circumstance.

Exclusions post-contract award

94. If a supplier (or a sub-contractor in respect of which the contracting authority requested information during the procurement procedure for the purpose of determining whether the

sub-contractor was an excluded supplier or an excludable supplier under section 28(2)) is found to be an excluded supplier or an excludable supplier during the term of a public contract (including a framework), the contracting authority should decide whether to terminate the contract with that supplier. Section 78 of the Act implies a right to terminate in these circumstances into each public contract, and section 48 provides for the same in relation to each framework.

95. The implied right in section 78(2)(c) allows for termination where the contracting authority finds out that a sub-contractor was an excluded supplier or an excludable supplier at the point of award of the contract but the contracting authority did not know that the supplier intended to sub-contract the performance of all or part of the contract (see section 78(4)), or that the sub-contractor was an excluded or excludable supplier (see sections 78(5) and (6)), in all cases despite seeking the relevant information and making the necessary checks during the procurement procedure. For example, new information may come to light that the contracting authority was not aware of during the procurement procedure. The implied right in section 78(2)(b) also allows for termination where a sub-contractor becomes an excluded or an excludable supplier after contract award.
96. The implied right in section 78(2)(b) allows for termination if the supplier (including by virtue of an associated person) becomes an excluded supplier or an excludable supplier after being awarded the contract. For example, the supplier may be convicted of an offence or may commit misconduct which constitutes an exclusion ground. Section 78(11) ensures that this implied right does not apply where the supplier was excludable during the procurement but the contracting authority exercised their discretion so as not to exclude them. Contracting authorities cannot re-visit that decision without there being any change in circumstances.
97. The right to terminate is discretionary, even where the supplier is an excluded supplier (i.e. subject to a mandatory exclusion ground). Before terminating a contract because a sub-contractor is an excluded supplier or an excludable supplier, the contracting authority must give the supplier the opportunity to replace the sub-contractor.
98. Notwithstanding these implied terms, contracting authorities may wish to expressly replicate these implied terms in their contracts and may wish to include ancillary terms, for example, to provide for an orderly exit and payment of sums due. Contracting authorities may also wish to provide for processes on the replacement of sub-contractors who become an excluded supplier or an excludable supplier, including a right to approve such sub-contractors. It would be appropriate to refuse approval where the replacement sub-contractor is an excluded supplier and contracting authorities will want to allow themselves a right to refuse approval also where the replacement is an excludable supplier.
99. Contracting authorities should, as a matter of best practice, expressly include in their contracts that suppliers must notify them if it or any relevant sub-contractor that was checked during the procurement procedure becomes an excluded or excludable supplier (including where it is put on the debarment list during the term of the contract or by virtue of connected persons or associated persons). The implied right to terminate applies only to those sub-contractors in respect of which the contracting authority sought information in relation to

exclusions during the procurement procedure and not to other sub-contractors. For example, if the contracting authority sought information about tier 1 sub-contractors only, then the implied right to terminate applies with respect to those tier 1 sub-contractors only.

100. Transparency of changes to a supplier's connected persons once the contract has been awarded is also important, as it provides the contracting authority with visibility of individuals or entities that have influence or control over the supplier. Contracting authorities should therefore, as a matter of best practice, expressly include in their contracts a requirement that the supplier must notify them (within a specified timeframe) of any changes to their connected persons during the contract term. Non-compliance either through failing to notify within the specified timeframe or by providing information that is incomplete, inaccurate or misleading should be set out in the contract as constituting grounds for contract termination. These terms should be included expressly in contracts.

101. When exercising discretion on whether to terminate contracts in these situations, contracting authorities should consider factors including:

- a. time elapsed on the contract;
- b. time remaining in the contract;
- c. the nature and relevance of the misconduct to the contract;
- d. the impact of termination on public services; and
- e. the cost of termination and re-procurement.

Reporting requirements when excluding a supplier

102. Contracting authorities must notify a relevant appropriate authority within 30 days of excluding a supplier.

- a. For devolved Welsh authorities, the appropriate authority is Welsh Ministers.
- b. If the contracting authority is a transferred Northern Ireland authority, the relevant authority is the Northern Ireland department that the contracting authority considers it most appropriate to notify.
- c. In any other case, the relevant authority is a Minister of the Crown.

103. This reporting requirement also applies where a contracting authority notifies a supplier that it is an excluded supplier or an excludable supplier due to an associated person or sub-contractor and gives the supplier the opportunity to replace the associated person or sub-contractor. Similarly, it applies where a contracting authority has rejected an application from a supplier for membership of a dynamic market or has removed a supplier from a dynamic market.

104. A key purpose of these notification requirements is to allow appropriate authorities to consider whether they may wish to investigate the supplier for potential debarment. For that reason, notification is not required where the supplier is excluded on the basis it is on the debarment list, other than in respect of the mandatory exclusion ground for national security in Schedule 6, paragraph 35 of the Act.

105. To notify a Minister of the Crown, contracting authorities must report each exclusion of a supplier to PRU via gov.uk. For the purposes of a centralised record of exclusions, Welsh and Northern Irish devolved authorities should report any exclusions to PRU as well as to the Welsh Ministers or Northern Ireland department (as appropriate).

What notices are linked to this aspect of the Act?

Transparency notice

106. The information in this notice about each supplier who is to be awarded a contract will include their unique identifier and, where the contract is being directly awarded to an excluded supplier because the contracting authority considers that there is an overriding public interest the contract to that supplier, the fact that it is an excluded supplier, the direct award justification, which exclusion ground applies and why the contracting authority believes there is an overriding public interest to award the contract to that supplier. When awarding to more than one supplier, the contracting authority will need to be clear about which supplier is an excluded supplier. See the guidance on direct award for more information.

107. This information will normally have been provided to the contracting authority by the supplier through the central digital platform as required by regulation 6. The identifier and details that are entered in the notice should therefore correspond to the information the supplier has submitted.

Contract award notice

108. When publishing a contract award notice relating to a direct award to an excluded supplier, the information to be included in the contract award notice replicates the information that must be included in the transparency notice. See the guidance on contract award notices and standstill for more information.

Contract details notice

109. Regulation 35 sets out the information required to be included in a contract details notice published following a direct award.

110. Where a direct award has been made, contracting authorities must include in this notice whether the contract was awarded directly to a supplier that is an excluded supplier because the contracting authority considered there was an overriding public interest in awarding the

contract to that supplier in accordance with section 41(2) of the Act. In this situation, contracting authorities must detail which ground in section 41(5) of the Act applies and an explanation of why the contracting authority considers that it applies. See the guidance on contract details notices for more information.

Contract termination notices

111. The contract termination notice is used to fulfil the breach provision in section 71(5) (assessment of contract performance) which requires certain information to be published where the contract is terminated in full as a result of a breach of contract. This ensures there is a public record of which suppliers are subject to the discretionary exclusion ground relating to breach of contract, primarily to make it easier for authorities to apply the ground, but also for transparency purposes. For all other circumstances relating to breach of contract, including partial termination of the contract, the contract performance notice must be used instead. This avoids the need for two notices to be published in respect of the same event. See the guidance on contract termination for more information.

What other guidance is of particular relevance to this topic area?

Guidance on debarment
Guidance on conditions of participation
Guidance on direct award
Guidance on competitive tendering procedures
Guidance on contract termination

Annex 1: Ground-Specific Guidance

Summary of Schedule 6 - Mandatory Exclusion Grounds

1. Schedule 6 of the Act sets out the mandatory exclusion grounds, which are the most serious, high risk scenarios. These are broken down into Part 1 and Part 2.
2. The grounds in Part 1 apply to a supplier where the supplier or a connected person of the supplier has been convicted of specific offences. Only UK offences are listed but the grounds also apply if the supplier or a connected person of the supplier has been convicted of an offence outside of the UK which would have been one of the listed offences if it had been committed in the UK. Where equivalent or similar offences are covered by separate legislation in Scotland and Northern Ireland, these are also included in Schedule 6.

Specific offences

3. The specific offences in Part 1 are as follows:
 - a. *Corporate manslaughter or corporate homicide*: these offences apply where the way in which a relevant organisation's activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
 - b. *Terrorism*: this covers a range of offences, which include offences relating to proscribed organisations, terrorist property, failure to disclose information about acts of terrorism, directing terrorism, possessing things and collecting information for the purposes of terrorism, eliciting information about members of armed forces etc., entering or remaining in a designated area and inciting terrorism outside the UK, as well as offences relating to the use of noxious substances or things and offences relating to encouragement of terrorism, preparation and training for terrorism, radioactive devices and material and nuclear facilities.
 - c. *Theft, fraud, bribery etc*: this includes offences of bribing another person, being bribed and bribing a foreign official, offences of bribery relating to elections and offences of blackmail, as well as offences of fraud and fraudulent trading. It also covers offences of theft, robbery, burglary and relating to stolen goods.
 - d. *Labour market, slavery and human trafficking offences*: this covers the most serious forms of labour abuse, which are those within the purview of the Director for Labour Market Enforcement, as well as modern slavery and human trafficking offences. It also covers offences relating to the carrying out of an employment agency or employment business, the offence of refusing or wilfully neglecting to pay the national minimum wage and gangmaster offences.

- e. *Organised crime*: this covers the offence of participation in the activities of an organised crime group and the offence of agreeing with another person to become involved in serious organised crime.
- f. *Tax offences*: this includes the offence of cheating the public revenue and the offence of fraudulent evasion of tax. Other misconduct in relation to tax which do not amount to criminal convictions are covered in Part 2 of Schedule 6.
- g. *Cartel offences*: this applies where there has been a criminal cartel offence. A person commits the criminal cartel offence if they agree with at least one other person that two or more undertakings will engage in certain prohibited cartel arrangements, namely price fixing, market sharing, bid-rigging, and limiting output, subject to certain exclusions and defences. This offence applies only to individuals so would be relevant only to suppliers who are individuals and those categories of connected persons who are individuals.
- h. *Ancillary offences*: these include aiding and abetting, encouraging or assisting crime, inciting crime and conspiring or attempting to commit a crime in relation to the listed offences are also covered.

4. The mandatory exclusion grounds in Part 2 do not require a conviction and are outlined below:

5. *National security*

- a. A mandatory exclusion ground applies to a supplier in relation to contracts of a particular description where an appropriate authority determines that the supplier or a connected person poses a threat to the national security of the UK, and would pose such a threat in relation to public contracts of that description. An appropriate authority in this case is a Minister of the Crown, the Welsh Ministers or a Northern Ireland department when conducting an investigation which may lead to a Minister of the Crown putting a supplier on the debarment list.
- b. This exclusion ground only applies where a Minister of the Crown has subsequently put the supplier on the debarment list in relation to particular types of contracts. This is set out in paragraph 35(3), which refers to an appropriate authority's functions under the debarment provisions of the Act. These provisions only enable a Minister of the Crown to put a supplier on the debarment list and this ground cannot be relied on by a contracting authority where there has been no such entry.

6. *Misconduct in relation to tax*

- a. The Act also includes as mandatory exclusion grounds certain tax non-compliance. These include where the supplier or connected person has:
 - i. been convicted of a common law offence of cheating the public revenue;

- ii. been convicted of an offence of being knowingly concerned in or taking steps with a view to the fraudulent evasion of tax;
- iii. been convicted of an offence under sections 45 or 46 of the Criminal Finance Act 2018 or failure to prevent facilitation of tax evasion;
- iv. been liable to a penalty under section 69C of the VAT Act 1994 (transactions connected with VAT fraud) or section 25 of the Finance Act 2003 (evasion of tax or duty);
- v. been liable to a deliberate penalty under Schedule 24 of the Finance Act 2007 (errors in tax documentation) or Schedule 41 of the Finance Act 2008 (failure to notify certain VAT and excise wrongdoing);
- vi. been the subject of a successful challenge by HMRC in relation to tax arrangements under the General Anti-Abuse Rule (GAAR) or the Halifax Abuse Principle. A successful challenge could follow a ruling by the HMRC GAAR panel or HMRC issuing a decision using the HMRC Abuse Principle;
- vii. incurred a defeat of an avoidance scheme which was, or should have been, notified under the Disclosure of Tax Avoidance Schemes framework (DOTAS) or the Disclosure of Avoidance Schemes for VAT and other Indirect Taxes (DASVOIT). This is determined by reference to the fact that a Scheme Reference Number (SRN) has been allocated to the supplier or connected person, which means the supplier (or connected person) will know that its arrangements are DOTAS/DASVOIT ones;
- viii. been subject to a penalty or a decision by a regulator, court or other authority outside of the UK where that conduct would give rise to a penalty or decision in the UK if it had been committed in the UK;
- ix. had a tax advantage counteracted outside of the UK where it would have incurred a defeat of an avoidance scheme in the UK had the tax advantage arisen in respect of tax payable in the UK;

The trigger point for the supplier becoming an excluded supplier will be the point at which the supplier (or connected person)'s tax position is finalised, such as a successful challenge by HMRC and defeat of an avoidance scheme or where HMRC has determined a final penalty and all avenues of appeal have been exhausted.

7. *Competition law infringements*

- a. A mandatory exclusion ground applies to a supplier if the CMA (or a concurrent regulator) has made a decision that there has been an infringement of the 'Chapter I prohibition' through participation in a cartel. Chapter I of the Competition Act 1998

prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK. It will usually be clear from the decision whether the infringement was through participation in a cartel (including practices such as fixing or co-ordinating purchase or selling prices or other trading conditions, sharing markets and customers, bid-rigging or output restrictions).

- b. This ground does not apply where the supplier or connected person is an 'immunity recipient', i.e. it was granted immunity from financial penalties in respect of its participation in the infringement under a cartel leniency programme. Guidance on leniency can be found in the CMA guidance [here](#).
- c. As with the tax misconduct grounds, it is also a mandatory exclusion ground where the supplier or a connected person has been subject to a competition law infringement decision by a regulator, court or other authority outside of the UK where that conduct would give rise to a decision in the UK if it had been committed in the UK.
- d. The public register of decisions made under the Competition Act 1998 is available [here](#).

8. *Failure to cooperate with investigation*

- a. This covers instances where an appropriate authority (for example, PRU NSUP on behalf of a Minister of the Crown) has given the supplier or connected person a relevant notice requesting documents or other assistance in connection with a debarment investigation and the relevant entity has failed to comply with the notice to the satisfaction of the authority, in the period specified.
- b. This exclusion ground only applies where a Minister of the Crown has determined that a failure to provide the information or assistance requested in the timeline specified is sufficiently serious to warrant a mandatory exclusion ground.
- c. Further information is provided on the debarment process in the guidance on debarment.

9. Offences or misconduct listed in Schedule 6 will only constitute a mandatory exclusion ground where it has occurred within the relevant time periods set out in Schedule 6, paragraph 44. See paragraphs 27-29 above in relation to these time periods.

Summary of Schedule 7 - Discretionary Exclusion Grounds

10. Schedule 7 of the Act sets out the discretionary exclusion grounds, which do not all require a conviction but represent situations that may pose unacceptable risks. Guidance for each ground is briefly outlined below.

11. Labour market misconduct

- a. This ground will allow contracting authorities to exclude suppliers for certain types of serious labour misconduct.
- b. Paragraph 1 provides for a discretionary exclusion ground where a supplier or a connected person of the supplier has been subject to regulatory enforcement in relation to labour misconduct by way of being issued certain orders. These include Slavery and Trafficking Prevention Orders (STPOs), Interim Slavery and Trafficking Prevention Orders (ISTPOs), Slavery and Trafficking Risk Orders (STROs) and Interim Slavery and Trafficking Risk Orders (ISTROs) under Part 2 of the Modern Slavery Act 2015. The Home Office has published comprehensive guidance on these orders [here](#). Equivalent orders under Scots and Northern Irish laws are also included.
- c. These also include Labour Market Enforcement Orders (LMEOs) under section 18 of the Immigration Act 2016, which are intended for more serious or persistent offenders where this type of intervention is judged appropriate to prevent further offending. The Government published a Code of Practice on LMEOs that contains comprehensive guidance on these orders.
- d. Contracting authorities should be aware of the potential overlap of this ground with the mandatory exclusion grounds for labour offences. The orders listed above can be issued without a conviction, however, there are circumstances in which these orders will be issued following a conviction for an offence that is itself a mandatory exclusion ground. In these circumstances, contracting authorities should consider whether either or both grounds apply.
- e. Paragraph 2 provides for a discretionary exclusion ground where conduct committed outside of the UK would have resulted in a relevant order being made if it had been committed within the UK.
- f. Paragraph 3 provides for a discretionary exclusion ground where there is sufficient evidence that a supplier or connected person has engaged in modern slavery, irrespective of where that occurred, that would if it occurred in the UK constitute an offence under relevant modern slavery and human trafficking legislation. This ground captures modern slavery or human trafficking occurring in jurisdictions that are failing to prosecute the offenders.

12. Environmental misconduct

- a. This ground applies where the supplier or a connected person of the supplier has been convicted of certain environmental misconduct offences. It applies to offences where the conduct constituting the offence caused or had the potential to cause significant harm to the environment.

- b. 'Incidents causing potential or actual environmental impact' refer to categories 1 and 2, and category 3 but only by virtue of 'risk of category 2 harm', set out at step 3 of the Environmental Offences Definitive Guideline for organisations and individuals (as appropriate).
- c. The harm category is determined by the court as part of the sentencing process. Contracting authorities should make it clear to suppliers that they should self-declare that this exclusion ground applies if the supplier (or a connected person) has been convicted of an environmental offence meeting the relevant harm categories. Further details of the offence and the harm category will usually be evident from the court judgement, which can be requested from the supplier or the relevant court.
- d. The incident does not need to result in an environmental impact and includes potential impact, as it may be possible to prevent damage occurring. Incidents that have a potential or actual environmental impact include the following:
 - i. environmental harm/pollution of surface waters or groundwater;
 - ii. environmental harm to land, air and water from a site, substance or process;
 - iii. impacts on human health or nuisance to the local community from a site, substance or process;
 - iv. major air pollution incidents;
 - v. fish kills and illegal fishing;
 - vi. damage to nature conservation sites and species;
 - vii. illegal abstraction and low river flows;
 - viii. speeding vessels and closure of a navigation fairway;
 - ix. flooding or potential causes of flooding; and
 - x. environmental harm from land drainage works.
- e. This ground is broad enough to cover offences under the following legislation, where the conviction relates to incidents that have caused or have the potential to cause significant harm to the environment. However, this list is not exhaustive and the exclusion ground may also capture other offences relating to incidents of this nature.
 - i. Animal By-Products (Enforcement) (England) Regulations 2013;
 - ii. Animal By-Products (Enforcement) (Wales) Regulations 2014;

- iii. Control of Major Accident Hazards Regulations 2015;
- iv. Control of Pollution (Amendment) Act 1989, sections 1, 5 and 7;
- v. End-of-Life Vehicles Regulations 2003;
- vi. End-of-Life Vehicles (Producer Responsibility) Regulations 2005;
- vii. Environment Act 1995, section 110;
- viii. Environmental Permitting (England and Wales) Regulations 2016;
- ix. Environmental Protection Act 1990;
- x. Food and Environment Protection Act 1985, section 9;
- xi. Hazardous Waste (England and Wales) Regulations 2005;
- xii. Hazardous Waste (Wales) Regulations 2005;
- xiii. Health & Safety at Work etc Act 1974;
- xiv. Landfills Disposals Tax (Wales) Act 2017;
- xv. Pollution Prevention and Control (England and Wales) Regulations 2000;
- xvi. Producer Responsibility Obligations (Packaging Waste) Regulations 2007;
- xvii. Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012;
- xviii. Scrap Metal Dealers Act and 2013;
- xix. Transfrontier Shipment of Waste Regulations 2007;
- xx. Vehicles (Crimes) Act 2001, Part 1;
- xxi. Waste (England and Wales) Regulations 2011, regulation 42;
- xxii. Waste Batteries and Accumulators Regulation 2009;
- xxiii. Waste Electrical and Electronic Equipment Regulations 2013; and
- xxiv. Water Resources Act 1991, sections 202 and 206.

13. Insolvency, bankruptcy, etc.

- a. This ground applies where a supplier or connected person is declared bankrupt, or is subject to certain types of insolvency or pre-insolvency proceedings in the UK or similar procedures outside of the UK.
- b. A separate ground applies where the supplier or connected person has suspended or ceased carrying on all or a substantial part of its business.

14. Potential competition infringements

- a. These grounds cover a broader range of infringements than are covered by the mandatory exclusion grounds for cartel competition law infringements, as well as situations where a case is not prioritised by the CMA for investigation or where a case is being investigated but that investigation has not yet concluded.
- b. The first discretionary ground applies where a contracting authority considers that an agreement or concerted practice which the supplier or a connected person of the supplier has participated in has infringed the Chapter I prohibition (or a substantially similar prohibition outside of the UK). Unlike the mandatory exclusion ground, this is not limited to where the infringement is through participation in a cartel and does not require a decision by the CMA (or concurrent or non-UK regulator), although the ground may also cover situations where there has been such a decision. Where the CMA (or a concurrent regulator) has made a decision that there has been an infringement of the Chapter I prohibition through participation in a cartel, a mandatory ground for exclusion will apply.
- c. As with the mandatory exclusion grounds, this discretionary ground does not apply if the supplier or connected person is an 'immunity recipient' (or has been granted similar immunity outside of the UK). Guidance on leniency can be found in the CMA guidance [here](#).
- d. The second and third grounds relate to infringements of the 'Chapter II prohibition'. Chapter II of the Competition Act 1998 prohibits the abuse of a dominant position in a market if it may affect trade within the UK. The second ground applies where a contracting authority considers that the supplier or a connected person of the supplier has infringed the Chapter II prohibition (or a substantially similar prohibition outside of the UK). The third ground applies where the CMA (or concurrent regulator or a non-UK authority) has made a decision that the supplier or a connected person has infringed the Chapter II prohibition (or a substantially similar prohibition outside of the UK).
- e. The final ground in this section applies where a contracting authority considers that the supplier or a connected person of the supplier has engaged in conduct constituting a criminal cartel offence under section 188 of the Enterprise Act 2002 (or a substantially similar offence outside of the UK). This offence applies only to

individuals so would be relevant only to suppliers who are individuals and those categories of connected persons who are individuals. This ground does not apply where the individual has received an immunity from prosecution letter in connection with the conduct (or has been granted similar immunity outside of the UK). Guidance on such letters has been published by the CMA [here](#).

- f. The legal framework for information sharing in relation to competition matters is contained within Part 9 of the Enterprise Act 2002 (EA02). This includes important restrictions on the disclosure of information relating to individuals and businesses.

15. Professional misconduct

- a. The first ground relating to professional misconduct applies where a contracting authority considers that the supplier or a connected person of the supplier has engaged in professional misconduct which brings into question the supplier's professional integrity.
- b. The second ground relating to professional misconduct applies where a court, regulator or other authority has ruled that the supplier or a connected person of the supplier has engaged in such professional misconduct. This covers situations where there has been a finding by a court, such as a conviction for a criminal offence, but also extends to decisions taken by wider authorities including regulators and/or other authorities, such as for a breach of standards or for rulings by a professional disciplinary body like the Financial Conduct Authority. The fact that a regulatory body has entered into a Deferred Prosecution Agreement (DPA) (or similar) with a supplier may be sufficient evidence of professional misconduct but this will depend on the underlying misconduct. A DPA may also be evidence of self-cleaning in order to demonstrate that the circumstances giving rise to the misconduct are not likely to occur again due to measures taken by the supplier and agreed as part of the DPA.
- c. The concept of 'professional misconduct' in both of these grounds is expressly stated to include dishonesty, impropriety and a serious breach of ethical or professional standards applicable to the supplier (whether those standards are mandatory or not). Although this list is not exhaustive, it is indicative of the types of misconduct that are covered by these grounds. The professional misconduct grounds are intended to cover a broad range of misconduct, including certain offences that are not covered by the mandatory exclusion grounds and behaviour where there has been no conviction.
- d. For example, it may apply for convictions for the offence of failing to prevent bribery under section 7 of the Bribery Act 2010; the offence of participating in a fraudulent business carried out by a sole trader under section 9 of the Fraud Act 2006; the offence of obtaining services dishonestly under section 11 of that Act and the liability of company officers for offences committed by the company under section 12 of that Act.

- e. When considering whether there has been 'impropriety', a contracting authority should consider whether there has been improper behaviour. There is no legislative definition of impropriety in this context but improper behaviour might include failing to act in good faith or to act impartially where that would be expected in the particular profession the supplier operates in, or a breach of trust where there are standards or expectations of professional trust.
- f. When assessing what constitutes a serious breach of ethical or professional standards, a contracting authority should consider both whether the standard applies to the supplier or connected person and whether it is an ethical or professional standard. The breach must also be serious.
- g. Ethical or professional standards applicable to the supplier or connected person may be generic, such as data protection, corporate governance or standards relating to the treatment of employees, or may depend on the industry. Accounting standards in the finance industry, for example, may be relevant for one supplier, but a manufacturing code of conduct relevant for another. The standards do not have to be mandatory and could include standards set by a regulator or professional disciplinary body, voluntary industry codes of conduct that the supplier has signed up to, internal policies or statements of company values, or technical standards such as building regulations.
- h. In order for these grounds to apply, the misconduct must be serious enough to call into question the supplier's integrity: it cannot be minor or of a nature that does not impact on the supplier's overall integrity. For example, where a supplier has been dishonest, this does not necessarily mean either of these grounds will apply and consideration must be given to whether the supplier's integrity has been called into question by the dishonesty. This will be particularly relevant where the misconduct has been committed by a connected person, as it is the supplier's (not the connected person's) integrity which must be called into question for the grounds to apply.

16. Breach of contract and poor performance

- a. These grounds are aimed at covering situations where suppliers have a poor track record of delivering on certain types of contracts. These grounds relate to breaches and poor performance of contracts to which a 'regulated authority' is a party. A regulated authority for these purposes is a contracting authority, another public authority or equivalent authorities outside of the UK. This covers a broader range of contracts than just public contracts, including below threshold contracts and exempted contracts entered into with a contracting authority, as well as all types of contracts entered into by other public authorities. Breach or poor performance of contracts the supplier has with private entities are not relevant to these grounds. These grounds also do not apply in relation to connected persons.
- b. The first two grounds (Schedule 7 section 12(1) and (2)) relate to breach of contract. Firstly, where the supplier has breached a relevant contract and the breach was

sufficiently serious. Secondly, where a court has ruled that the supplier has breached a relevant contract and the breach was sufficiently serious. When considering whether either of these grounds apply, a breach is sufficiently serious where it has led to termination, damages or a settlement agreement. A settlement agreement is where the parties have entered into an agreement to settle a contractual dispute. Damages in this context include liquidated and unliquidated damages, including on an indemnity basis, but not debts payable under contracts.

- c. The third ground (Schedule 7 section 12(3)) applies where a supplier has not performed a relevant contract to a satisfactory level, and has failed to improve their performance, having been given an opportunity for improvement. This is intended to cover serious performance failures, as determined by the terms of the contract, such as failure to meet a certain number of key performance indicators (KPIs) over a set period, or a certain level of KPI failure, as well as failure to meet other contractual performance requirements like delivery dates, specification requirements or quality standards. Contracts should set out clear standards for performance.
- d. A supplier must be given a proper opportunity to improve performance. This will usually be by reference to contractual mechanisms. These could include (but are not limited to) notification of poor performance and clear time periods to rectify, rectification plans, or improvement plans. The poor performance ground applies where performance has not improved following application of such mechanisms, which are common in most public sector contracts. Guidance on performance management is outlined in the [Sourcing Playbook](#). Contracting authorities should ensure that any remedial actions provided for in improvement or other similar plans are SMART.
- e. In determining whether the poor performance ground applies, contracting authorities should consider the nature and frequency of performance failures, any mitigating factors such as contributory actions by the relevant authority, as well as other relevant circumstances.
- f. The final ground in this section (Schedule 7 section 12(4)) applies where a contracting authority has published information relating to breach or poor performance under section 71(5). This information will be published in a contract performance notice or contract termination notice. More detail on the publication of this information is provided in the guidance on the contract performance and contract termination notices.

17. Acting improperly in procurement

- a. This ground applies where a supplier has acted improperly in a procurement and, as a result, has put itself at an unfair advantage in relation to the award of a public contract.
- b. The types of improper behaviour identified in relation to this ground are:

- i. failing to provide information requested by the contracting authority;
- ii. providing information that is incomplete, inaccurate or misleading;
- iii. accessing confidential information;
- iv. unduly influencing the contracting authority's decision-making.

This list is not exhaustive but is indicative of the type of behaviour covered by the ground.

- c. Where a supplier acts improperly in relation to the particular procurement and has gained an unfair advantage in the procurement as a result, the supplier must under section 30 be treated as an excluded supplier and must not be allowed to progress further in that procurement. However, this discretionary exclusion ground also covers situations where a supplier has behaved improperly in a different procurement to the one being carried out, meaning the supplier could be excluded from multiple procurements as a result of a single act.

18. National security

- a. This ground is intended to protect the UK's national security interests in covered procurements.
- b. A discretionary exclusion ground applies to a supplier if a decision-maker determines that the supplier or a connected person poses a threat to the national security of the UK. However, the contracting authority may not exclude the supplier or notify the supplier of its intention to do so unless:
 - i. the authority has notified a Minister of the Crown of its intention (in practice this must be a Cabinet Office minister who can be notified via PRU on gov.uk); and
 - ii. the Minister of the Crown considers that:
 - a. the supplier is an excludable supplier by reference to Schedule 7, paragraph 14; and
 - b. the tender should be disregarded or the supplier excluded.
- c. This same process applies where the supplier is an excludable supplier under this ground by virtue of an associated person or intended sub-contractor and the contracting authority intends to notify the supplier to give them the opportunity to replace the associated person or sub-contractor.

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