



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

A Guide for Commercial and Procurement Professionals

Introduction

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

2. The grounds for exclusion of bidders from public procurement procedures are set out in The Public Contracts Regulations 2015 (the 'Regulations'): these rules set out the circumstances in which bidders must, or may, be excluded from a public procurement process for a variety of criminal offences and in other specific situations¹. [Regulation 57](#) covers the grounds for mandatory and discretionary exclusion, exceptions to exclusions, duration of exclusion, and self-cleaning. Regulations 58 to 60 covers the methods by which the existence of grounds for exclusion can be verified.

Mandatory exclusion

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

4. While the list of mandatory exclusion grounds is exhaustive, and In-scope Organisations must not apply other grounds for mandatory exclusion, offences within the meaning of Article 57(1) of Directive 2014/14 which are created after the Regulations were made or which are offences in any jurisdiction outside of England, Wales and Northern Ireland, are also grounds for mandatory exclusion (Regulation 57 (1)(n)). Article 57(1) of Directive 2014/14 sets out offences under EU law equivalent to those listed in the Regulations. This means that future offences within the scope of this Article, as well as offences under foreign laws, are covered.

5. Exclusion is also mandatory if the person convicted is a member of the bidder's administrative, management or supervisory body or has power of decision, representation or control in the bidder (Regulation 57(2)). Members of the bidder's administrative, management or supervisory body will typically cover company directors (or equivalent for other corporate entities) and members of an executive board. Those who have power of decision, representation or control is likely to be more complicated and will depend on the

¹ Under the Utilities Contracts Regulations 2016, the grounds for mandatory exclusion set out in the Public Contracts Regulations 2015 are mandatory for utilities which are contracting authorities and discretionary for other utilities. All utilities, irrespective of whether they are contracting authorities, can apply the discretionary exclusion grounds set out in the Public Contracts Regulations 2015. Under the Concession Contracts Regulations 2016, the mandatory exclusion grounds apply to contracting authorities and utilities which are contracting authorities and are discretionary for other utilities. All contracting authorities and utilities, irrespective of whether they are contracting authorities, can apply the same discretionary exclusion grounds.

nature and structure of the bidder. It will be for the bidder to satisfy themselves that their self-declaration can be made in respect of all relevant persons. In-scope Organisations should be aware that the mandatory exclusion grounds apply in respect of persons and entities other than the bidding entity itself.

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

7. In-scope Organisations may, in limited circumstances, disregard the existence of any ground for mandatory exclusion. This is confined, on an exceptional basis, to where there are overriding reasons relating to the public interest such as public health or protection of the environment (Regulation 57(6)). The ground for mandatory exclusion for breach of tax and social security obligations no longer applies where the supplier has paid, or entered into a binding arrangement with a view to paying, the outstanding sums due including any interest or fines (Regulation 57(5)). In addition, this ground may be disregarded where exclusion would be clearly disproportionate, in particular where the unpaid amounts are only minor or the supplier did not have the opportunity to pay or agree to pay the outstanding amounts prior to the deadline for submitting a request to participate or tender (Regulation 57(7)).

Discretionary exclusion

8. The Regulations allow, but do not require, In-scope Organisations to exclude bidders in particular situations (Regulation 57(8)(a)-(i)). Unlike mandatory exclusion, the grounds for discretionary exclusion do not cover specific criminal offences. The situations listed below are a summary of the grounds set out in the Regulations. The examples are where the relevant ground may apply, although this will depend on the particular circumstances and must be considered by In-scope Organisations on a case by case basis. The examples are not set out in the Regulations and are not exhaustive.

- **Where the In-scope Organisation can demonstrate by any appropriate means a violation of environmental, social or labour law obligations.**
E.g. breaches of obligations relating to minimum wage, working hours or the deposit of controlled waste.
- **Where the bidder is bankrupt, is the subject of insolvency or winding-up proceedings, is in administration, where it is in an arrangement with creditors, where its business activities are suspended or it is in an analogous situation arising from a similar procedure under the laws and regulations of a foreign country.**
- **Where the In-scope Organisation can demonstrate by appropriate means that the bidder is guilty of grave professional misconduct which renders its integrity questionable.**
E.g. wrongful conduct which impacts on the professional integrity of the supplier, for example convictions for sufficiently serious criminal offences not covered under the grounds for mandatory exclusions, breach of ethical standards, or breach of contract which amounts to wrongful intent, gross negligence, anti-competitive behaviour,

breach of intellectual property rights or violations of environmental or social obligations.

- **Where the In-scope Organisation has sufficiently plausible indications that the bidder has entered into agreements with other economic operators aimed at distorting competition.**

E.g. agreements for price fixing, collusive tendering or market sharing.

- **Where a conflict of interest within the meaning of [Regulation 24](#) cannot be effectively remedied by other, less intrusive, measures.**

E.g. where relevant staff members have a direct or indirect financial, economic or personal interest which may compromise their impartiality in the procurement procedure and the conflict of interest cannot be otherwise remedied (for example by that particular person not being involved in the procurement).

- **Where a distortion of competition from the prior involvement of the bidder in the preparation of the procurement procedure, as referred to in [Regulation 41](#), cannot be effectively managed by other, less intrusive, measures.**

E.g. influencing the specification, or evaluation criteria to the advantage of their organisation.

- **The bidder has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions**

E.g. contract terminated due to supplier default, for example material non-fulfilment of goods and/or services.

- **Where the bidder is guilty of serious misrepresentation in supplying the information required for the verification of the absence of exclusion grounds or the fulfilment of the selection criteria; or has withheld such information or is unable to provide supporting documents required under [Regulation 59](#).**

proof
in support of their self-certification.

- **Where the bidder has undertaken to unduly influence the decision-making process or obtain confidential information that may confer upon it undue advantages in the procurement process, or has negligently provided misleading information that may have a material influence on decisions concerning exclusion selection or award.**

E.g. influenced the lot structure of a procurement or framework agreement to their advantage, or sought to gain pricing information from a competitor.

9. Additionally breach of obligations relating to the payment of tax or social security contributions demonstrated by any appropriate means is also a ground for discretionary exclusion (Regulation 57(3)). This is different to the mandatory exclusion ground for breach of tax or social security obligations insofar as a final and binding judicial or administrative

decision is not required. As with the mandatory exclusion ground, the ground for discretionary exclusion for breach of tax and social security obligations no longer applies where the supplier has paid, or entered into a binding arrangement with a view to paying, the outstanding sums due including any interest or fines (Regulation 57(5)).

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

Self-declaration

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

12. A self-declaration that exclusion grounds do not apply must be provided by bidders with their bids in open procedures and with requests for participation (i.e. the response to the Selection Questionnaire) in other procedures. However specific contracts (call-offs) placed via framework agreements do not require a self-declaration. In a Dynamic Purchasing System (DPS) the self-declaration must form part of the criteria for entry onto the DPS. An update to the self-declaration and supporting documentation can be requested at any time during the life of the DPS.

13. The procurement documents must provide details on how the self-declaration is to be accessed. As set out in Procurement Policy Note 08/16, there are three ways for a potential supplier to access the self-declaration i.e. using (i) the Standard Selection Questionnaire, (ii) the EU ESPD Service (an online version of the EU's European Single Procurement Document) or (iii) an interoperable e-procurement system. For works contracts (including the procurement of supplies and services subject to the Construction (Design and Management) Regulations 2015 and needed in relation to the works) PAS91 should be used. The best route for In-scope Organisations to select depends on the facilities available to you, but In-scope Organisations must accept a European Single Procurement Document, including ones in different formats from Member States, if a bidder submits one as part of the selection process.

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

selection criteria. However if one is required, then the procurement documents should explicitly state this.

Verification

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

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

17. **In-scope Organisations must request up to date evidence from the winning bidder before award of the contract. If the supplier fails to provide the required evidence within set timeframes, or the evidence demonstrates that a mandatory exclusion ground applies, the award of the contract should not proceed.** If the evidence demonstrates that a discretionary exclusion ground applies, In-scope Organisations may exclude the bidder. In-scope Organisations may then choose to amend the contract award decision and award to the second-placed supplier, provided that none of the exclusion grounds apply to them and they have submitted a satisfactory bid. Alternatively, the procurement process may be terminated. These actions may have legal risks associated with them and In-scope Organisations should consider these carefully and seek legal advice where appropriate.

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

Self-cleaning

19. If a bidder provides sufficient evidence of 'self-cleaning', In-scope Organisations must not exclude the bidder from the procurement procedure. Bidders must be given the

opportunity to submit evidence of self-cleaning, namely that measures taken by the bidder are sufficient to demonstrate its reliability despite an exclusion ground applying (Regulation 57(13)). This is usually requested with the bidder's responses to the Standard Selection Questionnaire.

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

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

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

Conflicts of interest

22. Regulation 24 requires In-scope Organisations to take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

23. This Regulation refers specifically to any situation where "relevant staff members" have a direct or indirect financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the procurement process. "Relevant staff members" refers to staff members of the In-scope Organisation, or of a procurement service provider² acting on behalf of the In-scope Organisation, who are involved in the conduct of the procurement process or may influence the outcome of that process.

24. In accordance with Regulation 57(8)(e), a bidder may be excluded where a conflict of interest within the meaning of Regulation 24 cannot be effectively remedied by other means. Effective remedies will vary on a case-by-case basis but may for example include the removal of the staff member from the team running the procurement. Measures taken should be documented in a procurement report, as required by [Regulation 84\(1\)\(i\)](#).

25. Regulation 41 sets out that where a bidder has acted in an advisory capacity to the contracting authority either in the context of preliminary market consultations or in the preparation of the procurement procedure, the In-scope Organisation shall take appropriate measures to ensure that competition is not distorted by the participation of that bidder. This

² A public or private body which offers ancillary purchasing activities on the market.

must include communicating to the other bidders any relevant information exchanged in the context of or resulting from the involvement of the bidder in the preparation of the procurement process and fixing adequate time limits for the receipt of tenders.

26. The bidder should only be excluded from bidding where there is no other way in which to treat all bidders equally. If the bidder is to be excluded, they must be given the opportunity to prove their previous involvement would not be capable of distorting competition. Measures taken should be documented in a procurement report, as required by Regulation 84(1)(i).

27. In-scope Organisations should refer to internal guidance and/or procedures on identifying, reporting and managing conflicts of interest. The National Audit Office report “Conflicts of Interest”³, is also a good source of information.

Whistleblowing

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

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

³ <https://www.nao.org.uk/report/conflicts-interest-2/>