

White Paper Conference

Public Procurement 2024

How do the new supplier performance rules impact contract management and supplier selection for new contract opportunities?
Same old or watch this space?

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Procurement Act

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A new procurement regime

The new Procurement Act

The Procurement Act 2023

Regulations / Statutory Instruments
(inc. The Procurement Regulations 2024)

Knowledge
Drops

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What are we fixing?

What are we fixing?

- Significant concerns that supplier performance was not being adequately assessed:
 - Repeated award of contracts to suppliers with poor performance history
 - Lack of transparency once contracts awarded
 - Lack of data upon which to assess performance
 - Lack of clear framework to ensure performance is measured appropriately and fairly

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The new supplier performance rules

Performance of supplier contracts

Three key areas where performance of suppliers is considered

**Key Performance
Indicators**

**Assessing and
reporting
on
contract
performance**

**Exclusion and
debarment**

Creation of data: Key Performance Indicators

- New requirement to set and publish a minimum of three key performance indicators (**Section 52**):
 - Before entering into a public contract with an estimated value of more than £5 million, a contracting authority must set **at least three** key performance indicators in respect of the contract.
 - Key performance indicators must be published by the contracting authority.
 - A “key performance indicator” is defined as a factor or measure against which a supplier’s performance of a contract can be assessed during the life-cycle of the contract.
- Not required where the contracting authority cannot appropriately assess performance by reference to KPIs.
- Detailed guidance on KPIs not yet published.

Reporting: Assessment of contract performance

- Where KPIs are established, CAs are required to then assess and report on the performance of the supplier against the KPIs (**Section 71**):
 - At least once in every period of twelve months during the contract and on termination of the contract the contracting authority must —
 - a) assess contractual performance against the key performance indicators, and
 - b) publish information in relation to that assessment.
 - If a supplier:
 - breaches a public contract, and the breach results in termination of the contract, the award of damages, or a settlement agreement between the supplier and the contracting authority; or
 - is not performing a public contract to the authority’s satisfaction, has been given proper opportunity to improve performance, and has failed to do so
- then within 30 days the contracting authority must publish that either of the above has occurred and the circumstances of such.

Exclusion and debarment: a new approach

- **Debarment list:**

- A new centralised public list of suppliers who the Minister of the Crown has determined is excluded or excludable will be created.
- Contracting authorities have a duty to notify the relevant Minister whenever they exclude a supplier (or sub-contractor), so a determination can take place.
- Greater transparency – contracting authorities can much more easily identify unfit suppliers.

- **Section 57:**

- A supplier is an “**excluded supplier**” if the contracting authority considers that—
 - a) a mandatory exclusion ground applies to the supplier or an associated person, and the circumstances giving rise to the application of the exclusion ground are continuing or likely to occur again, or
 - b) the supplier or an associated person is on the debarment list by virtue of a mandatory exclusion ground.
- A supplier is an “**excludable supplier**” if the contracting authority considers that—
 - a) a discretionary exclusion ground applies to the supplier or an associated person, and the circumstances giving rise to the application of the exclusion ground are continuing or likely to occur again, or
 - b) the supplier or an associated person is on the debarment list by virtue of a discretionary exclusion ground.

Discretionary exclusion: Past performance

- The Act includes an updated discretionary exclusion for ‘poor performance’ (**Schedule 7, para 12**) where:
 - a) the supplier has breached a relevant contract, and the breach was sufficiently serious;
 - b) a court has ruled that the supplier breached a relevant contract, and the breach was sufficiently serious;
 - c) the supplier has not performed a relevant contract to the regulated authority’s satisfaction, was given proper opportunity to improve performance, and failed to do so; or
 - d) if a contracting authority has published information in respect of the supplier concerning either breach or poor performance.
- A breach of a contract is “sufficiently serious” if it results in termination (or partial termination) of the contract, the award of damages or a settlement agreement between the supplier and the regulated authority.

Discretionary exclusion ground: acting improperly

- Also includes discretionary exclusion if a decision-maker considers that the supplier has acted improperly in relation to any procurement, and in so doing, the supplier put itself at an unfair advantage in relation to the award of a public contract. (**Schedule 7, para 13**)
- A supplier might act improperly in relation to a procurement by—
 - a) failing to provide information requested by the contracting authority;
 - b) providing information that is incomplete, inaccurate or misleading;
 - c) accessing confidential information;
 - d) unduly influencing the contracting authority's decision-making.

Exclusion ground: contractual performance and supply chains

Greater scrutiny of supply chains. Exclusion grounds applied to the entity that is bidding, their connected persons and the associated persons.

Associated suppliers

- Suppliers may be excluded from a tender process by virtue of an exclusion ground applying to their associated suppliers.
- “Associate suppliers” includes any supplier that the bidding entity “is relying on in order to satisfy the conditions of participation” . (**Section 26(4)**)
- If the supplier is excluded or excludable only by virtue of an associated person, the contracting authority must give the supplier reasonable opportunity to replace the associated person. (**Section 26(3)**)

Sub contractors

- CAs must request information about whether a supplier intends to sub-contract the performance of all or part of the public contract, and determine whether any intended sub-contractor is on the debarment list.
- If a contracting authority considers that a supplier intends to sub-contract to a supplier that is an excluded/excludable supplier, the contracting authority must/may exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure.
- Must give the them reasonable opportunity to find an alternative supplier with which to sub-contract.

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Same old or watch this space?

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More data:

- Key issue in the past was lack of information and access to data re contractual performance
- Significant shift BUT impact will depend on the quality of that data
- Expect significant challenges in setting clear, measurable, targeted and appropriate KPIs
- Concern around the potential wide use of the carve out for contracts where KPIs not appropriate
- Reporting obligations risk being burdensome on already overstretched and under resourced contracting authorities
- Concern remains regarding a lack of clear framework for really monitoring performance

Debarment list:

- Potential to have a real impact
- Concern regarding how this will play out in practice

Same old or watch this space?

Wider exclusion grounds:

- Past performance ground is broader
- Real potential impact is the greater scrutiny of supply chains
- Issue in the past was the need to rely on information provided on a case by case basis to contracting authorities for a particular opportunity and inability to really verify that information
- Overtime, with careful and dedicated consideration, the increased data and reporting has the potential to get to the heart of this issue

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