

Mandatory Exclusion of Economic Operators



OGC Guidance on the Mandatory Exclusion of Economic Operators

The mandatory exclusion of economic operators in the Public Contracts and Utilities Contracts Regulations 2006

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1. Introduction

- 1.1 The Public Sector and Utilities Procurement Directives¹ as implemented by the Public Contracts and the Utilities Contracts Regulations 2006², include a mandatory requirement for contracting authorities to exclude economic operators (suppliers, contractors and services providers) from public contracts where they have been convicted of certain offences, including participation in criminal organisations, corruption, money laundering and fraud. This is a new provision. Under the previous Directives³ exclusion for any criminal convictions was at the discretion of the contracting authority.
- 1.2 This guidance note provides advice on the steps that contracting authorities can take to ensure compliance with this provision. It is subject to further updates in the light of on-going discussions with the European Commission and Member States and as a result of the proposed new Bribery Bill once it receives Royal Assent.
- 1.3 This guidance is not intended as a substitute for project specific legal advice, which should always be sought by a contracting authority where required.

2. Background

- 2.1 Regulation 23(1) of the Public Contracts Regulations 2006, (and an identical provision at Regulation 26 of the Utilities Contracts Regulations 2006) states:

“Subject to paragraph (2), a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences:

- (a) *conspiracy within the meaning of section 1 of the Criminal Law Act 1977 where that conspiracy relates to participation in a criminal organisation as defined in Article 2(1) of Council Joint Action 98/733/JHA;*
- (b) *corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906;*

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31st March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; and Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. Please see: Official Journal L 134.

² The Public Contracts Regulations 2006 (SI 2006 No.5): http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf and the Utilities Contracts Regulations 2006 (SI 2006 No.6): http://www.opsi.gov.uk/si/si2006/uksi_20060006_en.pdf

³ The Consolidated Works Directive (93/37/EEC), the Consolidated Supplies Directive (93/36/EEC), http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_uk_regulations_.asp the Utilities Directive (93/38/EEC), and the Services Directive (92/50/EEC).

- (c) *the offence of bribery;*
- (d) *fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Union, within the meaning of -*
 - (i) *the offence of cheating the Revenue;*
 - (ii) *the offence of conspiracy to defraud;*
 - (iii) *fraud or theft within the meaning of the Theft Act 1968 and the Theft Act 1978;*
 - (iv) *fraudulent trading within the meaning of section 458 of the Companies Act 1985;*
 - (v) *defrauding the Customs within the meaning of the Customs and Excise Management Act 1979 and the Value Added Tax Act 1994;*
 - (vi) *an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993; or*
 - (vii) *destroying, defacing or concealing of documents or procuring the extension of a valuable security within the meaning of section 20 of the Theft Act 1968;*
- (e) *money laundering within the meaning of the Money Laundering Regulations 2007; or*
- (f) *any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.*⁴

2.2 Paragraph 2 states:

“In any case where an economic operator or its directors or any person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a contracting authority may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.”

2.3 Paragraph 3 states:

“A contracting authority may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions listed in paragraph (1) if it considers it needs such information to reach its decision referred to in that paragraph.”

2.4 Subject to the derogation in regulation 23(2), a contracting authority must exclude an economic operator if it has “actual knowledge” that the economic operator has been convicted of one or more of the offences, listed within the regulation 23(1).

⁴ This is the literal text of the regulation as at the date of this Guidance. Anyone advising in relation to particular situations should be aware that various principles of statutory interpretation may affect the practical effect of the regulations (for example where relevant criminal offences or legislation have been amended or substituted for others).

- 2.5 In line with regulation 23(1)(f), it should be noted that the obligation to exclude also extends to any economic operator for which the contracting authority has “actual knowledge” of a conviction for “any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of the relevant state”. This applies whether an economic operator is based in an EU Member State, or a country which is a signatory to the World Trade Organisation’s (WTO) Government Procurement Agreement (GPA) to whose economic operators the benefits of the Directive are extended by virtue of Article 5.

3. **What steps might a contracting authority take to establish whether an economic operator has been convicted of a relevant offence?**

- 3.1 The Regulations do not dictate the steps a contracting authority must take to establish whether economic operators have been convicted of any of the offences listed in regulation 23(1). **To require actual evidence from every tenderer, for all procurements, would be unnecessarily burdensome, so contracting authorities should exercise discretion, having regard to the nature of the contract in question.** However, contracting authorities should, as a minimum, seek a declaration from all economic operators – either in the PQQ or ITT documents – confirming that they have not been convicted of any of the offences referred to in regulation 23(1). The PQQ template at <http://www.ogc.gov.uk/documents/pqq.doc> includes a recommended declaration for this purpose.

- 3.2 The declaration should be directed at the economic operator as a corporate entity and to all those who represent the economic operator. This could include the directors of a company, the partners of a firm and/or those in an equivalent position, or senior managers who have “powers of representation, decision or control”. The term “economic operator” here refers only to the contractor, supplier or services provider applying to tender for the specific contract in question – not any subsidiaries or sub-contractors who may be engaged by the economic operator to perform some of the work under the contract. The provisions of regulation 23 do not apply where it is the parent company of an economic operator that has been convicted of any offences referred to in regulation 23(1), unless that parent exercises direct control over the economic operator. Legal advice should be sought on this point where it is relevant to a specific procurement.

4. **What if a contracting authority considers it needs further information?**

Where a contracting authority has reason to believe that a response from an economic operator is unclear or incomplete, they should seek further clarification from the economic operator. If the contracting authority is still not satisfied with the response, they may apply to the relevant competent authority to obtain further information.

5. **Who is the “competent authority” for information on convictions of individuals?**

In the UK a contracting authority would apply to one of the competent authorities for further information in the form of a Disclosure. The competent authorities in the UK are Disclosure Scotland and the Criminal Records Bureau (CRB), depending on the type of Disclosure (Basic or Standard) required. If an economic operator is not based in the UK, the contracting authority must apply to the competent authority of the relevant Member State.

The Public Procurement Network, which is an informal group of procurement experts from across the EU Member States, can provide further advice in this respect. For more information on the Network, please see:
http://www.publicprocurementnetwork.org/pdf/05_ppn_en.pdf

6. What form does the further information on convictions of individuals in the UK take?

Two levels of Disclosure are relevant with regard to procurement: Basic and Standard. A Basic Disclosure will detail all convictions of an individual that are currently unspent⁵ under the Rehabilitation of Offenders Act 1974. A Standard Disclosure will detail all convictions of an individual on record, whether spent⁶ or unspent (under the Rehabilitation of Offenders Act 1974). A contracting authority should only need to consider the Standard Disclosure where it believes that the subject matter of the contract being awarded requires full disclosure.

Note: Information provided under either form of Disclosure would not be subject to the Freedom of Information Act 2000 (FOIA), as sensitive personal information is excluded from the FOIA and protected under the Data Protection Act 1998.

7. How does a contracting authority apply for further information on convictions of individuals from the competent authorities?

- 7.1 When a contracting authority decides that a Disclosure is required, it will need to call for one for each of the Directors working for the economic operator in question, who are also actively involved with the tender in question (or others with powers of representation, decision or control - see paragraph 3.2). Disclosures are only available for one individual per application and the method for obtaining a Disclosure for an individual varies between the Basic and Standard applications. For economic operators not based in the UK, please refer to paragraph 5 above.

Basic Disclosure

- 7.2 The Basic Disclosure (for all UK companies) is only currently available through Disclosure Scotland. To obtain this Disclosure, the contracting authority must ask that each of the relevant Directors of the economic operator (or others with powers of representation, decision or control) apply to Disclosure Scotland on 0870 609 6006. Further information is also available on their website [http://\(www.disclosurescotland.co.uk\)](http://www.disclosurescotland.co.uk). The individual concerned will be required to forward the Disclosure to the contracting authority once it has been received from Disclosure Scotland.

⁵ Unspent convictions are those which have not yet become spent (see footnote 6).

⁶ Spent convictions are convictions which are normally considered to be no longer live, because of the period of time that has elapsed without the individual incurring further relevant convictions. However, article 3(j) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (S.I. 1975/1023 as amended) enables contracting authorities and contracting entities to ask about spent convictions for the purpose determining whether or not to treat a person as ineligible under the relevant procurement Regulations.

- 7.3 Where a Basic Disclosure certificate confirms that a relevant Director of the economic operator (or other person with powers of representation, decision or control) has relevant unspent convictions relating to those under regulation 23(1), the economic operator must be excluded unless the exception in regulation 23(2) applies. See paragraph 8 below for further information.

Standard Disclosure

- 7.4 A Standard Disclosure is now available from the Criminal Records Bureau (CRB)⁷. This Disclosure provides information on all recorded convictions over and above the unspent convictions disclosed under the Basic Disclosure and must be treated as strictly confidential by the contracting authority. The CRB can be contacted on 0870 90 90 844 and their website is www.crb.gov.uk. The process for applying for Standard Disclosure is more thorough and demanding.
- 7.5 Where the contracting authority decides that the sensitivities surrounding the specific contract are such that information on spent convictions is required, it should ask for a Standard Disclosure to be provided. An example of a question that may be used for this purpose is as follows:

“Does any of your organisation’s directors or any other person who has powers of representation, decision or control with regard to the specific contract in question have any convictions relating to any of the offences covered by regulation 23 (1) of “the Public Contracts Regulations 2006” [regulation 26(1) of “the Utilities Contracts Regulations 2006”] which are spent within the meaning of the Rehabilitation of Offenders Act 1974? Any such convictions are to be disclosed by virtue of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (S.I. 1975/1023) as amended. If there are any, please list each such conviction with full details.”

In these circumstances, as the economic operator may not have access to its employees’ spent convictions and therefore be unable to answer this question fully, it would be appropriate to ask that each director or senior manager with “powers of representation, decision or control” complete their own declaration of convictions.

- 7.6 If a contracting authority requires a Standard Disclosure, it will have two options: either, apply to an Umbrella Body such as a solicitor, to undertake the application process, or register with either of the competent authorities to become a Registered Body and process the application themselves.
- 7.7 Umbrella Bodies are organisations registered by the competent authorities to process Standard Disclosures on behalf of other organisations. A contracting authority would have to satisfy the Umbrella Body that the Disclosure request was justified. Assuming that was the case, the Umbrella Body would send out application forms to the individual(s), carry

⁷ Since the amendment to the Rehabilitation of Offenders Act 1974 (exceptions) Order 1975 (S.I. 1975/1023) (“The Exceptions Order”), Implemented by Parliament (S.I. 2006/2143)

out identification checks and countersign the application. This application would then be sent to the competent authority. Within two weeks of receipt the Disclosure would be sent to the Umbrella Body and the individual(s) concerned who, in turn, would forward it to the contracting authority. The Umbrella Body will destroy their own copy within 6 months of receipt. Listings of Umbrella Bodies can be obtained by contacting the Criminal Records Bureau on 0870 90 90 811 or on their website (www.crb.gov.uk).

- 7.8 If the contracting authority wishes to become a Registered Body it must satisfy the competent authority that it understands its responsibilities in regard to criminal records and that it is capable of performing these functions. Further information about becoming a Registered Body can be obtained through the competent authorities; the Criminal Records Bureau's Registration Help Line on 0870 90 90 822 (www.crb.gov.uk) or Disclosure Scotland on 0870 609 6006 (www.disclosurescotland.co.uk). In some cases a contracting authority may already be a Registered Body as part of its Human Resources responsibilities. If this is the case the contracting authority will already have a registered signatory and will be able to add further signatories. If the contracting authority is acting as the Registered Body it will administer the whole application process; sending out and collating application forms, checking identifications, countersigning and forwarding the completed forms to the competent authority. The Registered Body and individual(s) concerned will be provided with copies of the Disclosure.

8. What happens in the case of corporate convictions?

Unlike convictions of individuals, corporate convictions do not currently become spent and there is no official central record kept. A corporate conviction for an offence that requires mandatory exclusion could therefore result, currently, in permanent exclusion of that company from public procurement contract opportunities, unless there are grounds for applying on a case by case basis the overriding requirements in the general interest exception (see paragraph 9).

9. What exceptions are there to the mandatory exclusion?

The Regulations make provision for an exception (regulation 23(2)) if the contracting authority "is satisfied that there are overriding requirements in the general interest" which would justify such an exception. These exceptions should only be used in the most serious of circumstances, for example in the case of a national emergency⁸. In such cases the approval of the Accounting Officer or Minister, as appropriate, should be sought and obtained to apply the exception to the particular procurement concerned, thereby allowing the contracting authority to be in compliance with the Regulations.

⁸ Such emergencies are defined by the Civil Contingencies Act 2004 (1); <http://www.opsi.gov.uk/acts/acts2004/40036--b.htm> - 1

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