

THE PROCUREMENT ACT 2023: THE ROLE OF THE NEW DEBARMENT AND EXCLUSIONS REGIME IN REGULATING CONSTRUCTION PRODUCTS



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INTRODUCTION – WHAT IS THIS ALL ABOUT?

- Exclusion prevents suppliers from participating in the procurement process
- Exclusion is not about satisfying conditions of participation, nor the quality of a bid
- It is about who the supplier is (and any associated persons) and what they are alleged to have done.
- The Procurement Act 2023 has broadened and strengthened the exclusion regime, including with the introduction of a central debarment register

EXCLUDED VS EXCLUDABLE? S.57 OF THE PROCUREMENT ACT 2023

(1) A supplier is an "excluded supplier" if—

(a) the contracting authority **considers that**—

(i) a mandatory exclusion ground applies to the supplier or an associated person, **and**

(ii) **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.

(2) A supplier is an "excludable supplier" if—

(a) the contracting authority **considers that**—

(i) a discretionary exclusion ground applies to the supplier or an associated person, **and**

(ii) **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.

Procurement Act 2023 - Part 3 - Chapter 6 - Section 62 - **Debarment List** - Where a supplier is on the debarment list, 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.

Please note that the debarment regime became effective on 24th February 2025. As such, the powers to investigate were granted from this date, and until a ministerial decision is made to add a supplier following an investigation, the list will remain blank.

DEBARMENT LIST

a) NAME OF SUPPLIER	b) PUBLIC PROCUREMENT ORGANISATION NUMBER (PPON)	c) COMPANY/CHARITY REGISTRATION NUMBER (IF DIFFERS TO COLUMN b)	d) THE EXCLUSION GROUND THAT APPLIES	e) ARE THE EXCLUSION GROUND(S) MANDATORY/DISCRETIONARY	f) IN THE CASE OF AN ENTRY MADE ON THE BASIS OF PARAGRAPH 35 OF SCHEDULE 6 (THREAT TO NATIONAL SECURITY), A DESCRIPTION OF THE CONTRACTS IN RELATION TO WHICH THE SUPPLIER IS TO BE AN EXCLUDED SUPPLIER;	g) DATE EXCLUSION GROUND EXPECTED TO CEASE TO APPLY	h) LINK TO DRS REPORT

1. Is the supplier/associated person on the debarment list?

No

2a. Does the CA consider that a mandatory exclusion ground applies to the supplier/an associated person?

No

Yes, mandatory exclusion ground

EXCLUDED*

**Public utilities to treat 'excluded' as 'excludable' – s.57(4)*

May make a direct award to an excluded provider if there is overriding public interest s41(2)

Yes, discretionary exclusion ground

EXCLUDABLE

Yes

2b. Does the CA consider that the circumstances giving rise to the application of that ground are continuing or likely to occur again?

Yes

EXCLUDED*

No

3a. Does the CA consider that a discretionary exclusion ground applies to the supplier/an associated person?

No

NOT EXCLUDED NOR EXCLUDABLE

Yes

3b. Does the CA consider that the circumstances giving rise to the application of that ground are continuing or likely to occur again?

Yes

EXCLUDABLE

MANDATORY EXCLUSION GROUNDS – SCHEDULE 6 TO THE PA 2023

- **Serious criminal offences** including corporate manslaughter, corporate homicide, terrorism, theft and fraud related offences, bribery, money laundering, fraudulent trading, labour market offences, slavery and human trafficking, organised crime groups, cartels
- **Conduct giving rise to statutory penalties** including fraudulent tax evasion and other tax irregularities, serious breaches of competition law
- Paragraphs 36 and 42 of Schedule 6 – **includes offences/conduct outside the UK** that would be either criminal offences or incur penalties if committed in the UK
- **Non-compliance with an investigation** (*potentially)
- **Generally**, restricted to conduct going back 5 years before the determination **but** there are detailed rules and carve outs in paragraph 44 to Schedule 6

DISCRETIONARY EXCLUSION GROUNDS – SCHEDULE 7 TO THE PA 2023

- **Suspension or cessation of trading/bankruptcy/insolvency/winding up proceedings etc.**
- Offences concerning conduct that caused, or had potential to cause, **significant harm to the environment**
- CA considers (or a court/regulator/authority has determined) that supplier/connected persons have engaged in **professional misconduct** (dishonesty, impropriety, serious breach of ethical or professional standards whether mandatory or not) that brings the supplier's integrity into question
- **Acting improperly in relation to any procurement** and in so doing has put itself at an unfair advantage in relation to the award of a public contract

DISCRETIONARY EXCLUSION GROUNDS CONT'D – SCHEDULE 7 TO THE PA 2023

- **Sufficiently serious breach of a relevant contract** with a regulated authority (termination/damages/settlement)
- If a CA has published information regarding **supplier's breach or poor performance** under s.71(5) – *not yet in force, but part of the focus on KPIs*
- Supplier **not performed a relevant contract to CA's satisfaction**, was given proper opportunity to improve performance, and failed to do so
- **Generally**, restricted to conduct going back 5 years before the determination but there are detailed rules and carve outs in paragraph 15 to Schedule 7

NATIONAL SECURITY EXCLUSIONS

- Schedule 6, paragraph 35 – **mandatory exclusion**: if the appropriate authority considers that the supplier/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
 - Section 57(3) – the supplier is to be treated as an excluded supplier only in relation to those kind of contracts (as described in the relevant entry)
- Schedule 7, paragraph 14 – **discretionary exclusion**: if a decision-maker determines that the supplier or a connected person poses a threat to the national security of the UK.
- **Requires ministerial approval and an entry on the debarment list** – see Sch 6 para 35(3) and s29(2) PA 2023

THESE PROVISIONS APPLY TO SUPPLIERS... AND “ASSOCIATED PERSONS”

- A CA can consider whether a mandatory or discretionary exclusion ground applies to either the supplier in question, or an “associated person”
- S26(4): In this Act, “associated person” means a person that the supplier is relying on in order to satisfy the conditions of participation
- Not every sub-contractor will be an associated person – just those who are relied upon to meet conditions of participation

EXCLUSION GROUNDS TO ALSO CONSIDER “CONNECTED PERSONS”

- Many of the exclusionary provisions in Schedule 6 and 7 capture the role and conduct of any “connected person”, as defined in para 45 to Schedule 6:
 - “(a) a person with “significant control” over the supplier (within the meaning given by section 790C(2) of the Companies Act 2006 (“CA 2006”));*
 - (b) a **director or shadow director** of the supplier;*
 - (c) a **parent undertaking or a subsidiary undertaking** of the supplier;*
 - (d) a **predecessor company**;*
 - (e) any other person who it can reasonably be considered stands in an **equivalent position in relation to the supplier** as a person within paragraph (a) to (d);*
 - (f) any person with the right to exercise, or who actually exercises, **significant influence or control over the supplier**;*
 - (g) any person over which the **supplier has the right to exercise, or actually exercises, significant influence or control”***

NOTIFICATION OF EXCLUSION, INVESTIGATION AND ENTRIES ON THE DEBARMENT LIST

- S59(2) - **A CA must notify a minister within 30 days** if a supplier is disregarded/excluded, or a sub-contractor or associated person is replaced
- S60 - A minister **may investigate whether a supplier should be excluded/excludable and added to the disbarment list** accordingly, and has powers to request documents and any assistance necessary
- There is no restriction on which suppliers can be investigated, including overseas, subcontractors etc.
- Following an investigation, **a minister must prepare a report** setting out the application of any excluded/excludable grounds, and whether the Minister intends to make an entry to the debarment list.
- A supplier can be **on the debarred list for a maximum of 5 years**

REGULATING CONSTRUCTION PRODUCTS

- Procurement Act 2023 debarment regime
- Single construction regulator
- Introduction of new construction product regulations
- Common law/statutory causes of action, such as s.148/149 BSA 2022
- The Grenfell Tower Inquiry Phase 2 report
- The Government's response to the Phase 2 report
- The Construction Products Reform Green Paper
- The Construction Products Reform White Paper
- Criminal investigations

THE CONSTRUCTION PRODUCTS REFORM GREEN PAPER – FEB 2025

“... evidence considered by the Grenfell Tower Inquiry ... relayed the ‘systematic dishonesty on the part of those who made and sold rainscreen cladding panels and insulation products’. This green paper focuses on the future regime, but let me also be clear that this government is working relentlessly to ensure accountability from manufacturers for their failings identified by the Inquiry report. This includes using new powers under the Procurement Act 2023 to enable government to hold to account suppliers through access to public contracts. We are investigating organisations criticised by the Inquiry under the Procurement Act 2023, and will be making decisions on these at pace.”

“We are investigating organisations criticised by the [Grenfell Tower] Inquiry, using new debarment powers in the Act, to establish whether professional misconduct has taken place. We will make decisions on these organisations at pace.”

THE CONSTRUCTION PRODUCTS REFORM WHITE PAPER – FEB 2026

“Future serious non-compliance or unsafe practices which are identified by the regulator may also potentially provide a basis for public bodies to exclude relevant manufacturers or other economic operators from contracts for public constructions projects which are covered by the Procurement Act 2023.”

THE LIKELY EFFECTIVENESS OF THE DEBARMENT REGIME'S ROLE IN REGULATING CONSTRUCTION PRODUCTS – PROS AND CONS

- **Pros**

- Deterrent
- Centralised control and consistency
- Efficiency and reduced duplication
- Improved transparency
- Supplier representations

THE LIKELY EFFECTIVENESS OF THE DEBARMENT REGIME'S ROLE IN REGULATING CONSTRUCTION PRODUCTS – PROS AND CONS

- Cons

- Litigation risk
- Continued discretion
- Ability to bypass exclusion in limited circumstances
- Contract management reliance
- Concentration of power
- Overreliance
- Outsized/disproportionate consequences
- Reputational damage
- New case law
- Ongoing public law obligations/challenges
- Interaction with other investigations – criminal proceedings, public inquiries, inquests
- Identifying the appropriate supplier in a multi-product arrangement

CHALLENGING ASSESSMENTS OF EXCLUDED/EXCLUDABLE

- The provisions concerning the assessment of suppliers as potentially excluded/excludable, including the duty to give requisite notice and opportunity to address, are enforceable in civil proceedings – see s.100
- Challenges:
 - Breach of duties in respect of procurement objectives in s12(1)-(3)
 - Breach of procedural requirements
 - CA has committed a manifest error

CHALLENGING AN ENTRY ON THE CENTRAL DEBARMENT LIST (SS.59–66 PCA 23)

- Before making an entry on the list, the **supplier must be notified** of the decision along with rights of appeal – s62(5)
- There must be a **standstill of 8 working days** from the date of the notice during which the supplier can apply to court to **suspend the decision** – s62(6) and s.63. If those proceedings are commenced, the Minister may not enter the supplier's name on the debarment list – s62(7)
- After the standstill, a supplier can still appeal provided they do so **within 30 days of knowledge of the Minister's decision.**

CHALLENGING AN ENTRY ON THE CENTRAL DEBARMENT LIST (SS.59–66 PCA 23)

- A challenge can only be made on the ground that there was a **material mistake of law** – s.65(2)(b) (query broader grounds of challenge in judicial review?)
- Once on the debarment list, a supplier can apply at any time requesting **removal/revision** (including length of time on the list) – s64. Decisions on such applications can be appealed – s.65(1)(d).
- Similarly, the Minister must **keep the debarment list under review** and may revise or remove entries – s.62(8).

FURTHER READING

- The [provisions](#) of the Procurement Act 2023
- [Explanatory notes](#) to the Procurement Act 2023
- The Procurement [Regulations](#) 2024
- National Procurement [Policy Statement](#) and Explanatory Memoranda
- Cabinet Office [Exclusion Guidance](#) including [Annex 2](#) on national security grounds
- Cabinet Office [Debarment Guidance](#)
- CMA's [Competitions Exclusions guidance](#)
- The government's [template procurement specific questionnaire](#)
- [Guidance](#) on the Procurement Review Unit (PRU)
- [Guidance](#) on the National Security Unit for Procurement (NSUP)

THANK YOU FOR LISTENING!

ANY QUESTIONS?



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