

Mandatory Exclusion

OGC Guidance on the Mandatory Exclusion of Economic Operators in the new Procurement Regulations

January 2006



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

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1. Introduction

The new public sector and utilities procurement Directives¹ as implemented by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006, include a new 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. In the past, the exclusion for these and other offences was optional. This guidance note sets out what this requirement means in more detail, and provides advice on the steps that contracting authorities can take to ensure compliance with this new provision. It should be noted that this guidance will be updated in the future by OGC as our knowledge of the EU-wide application of this provision develops and in the light of comments received. As part of this process OGC would welcome feedback on the use of this guidance in practice, including any instances in which the derogation mentioned in paragraph 2.2 is used.

2. Background

2.1 Regulation 23(1) 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;*
- (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 2003; 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.”*

¹ Directives 2004/18/EC and 2004/17/EC

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.”

3. What does it mean to have “actual knowledge” of an offence with regard to the mandatory exclusion?

3.1 Subject to the derogation in regulation 23(2) a contracting authority must exclude an economic operator if it has “actual knowledge” that an offence, listed within the Regulations, has been committed.

3.2 While there is no requirement within the Regulations proactively to seek “actual knowledge”, asking an economic operator to provide information about relevant convictions in, for example, a pre-qualification or selection questionnaire would be an appropriate approach to take given that such a questionnaire seeks information on a whole range of issues related to suitability to tender for public contracts.

3.3 A contracting authority should exclude any economic operator for whom they have “actual knowledge” of a conviction for a relevant offence, “within the meaning of Article 45(1) of the Public Sector Directive”, whether that economic operator is based in an EU Member State, a country which is a signatory to the World Trade Organisation’s (WTO) Government Procurement Agreement (GPA) or a third country.

4. What question might a contracting authority ask to establish “actual knowledge”?

4.1 The objective, of any question a contracting authority may use on this matter, is to obtain details of all relevant convictions an economic operator may have or a declaration that the economic operator has no such convictions. The question should seek information on all those who represent the “controlling mind”² of the economic operator, e.g. the directors of a company, the partners of a firm and/or those in an equivalent position, i.e. other 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 a contract – not parent companies, subsidiaries or sub-contractors which are separate entities. However, in the case of sub-contractors, it would be appropriate to ask economic operators to avoid using sub-contractors for the performance of the contract where there is actual knowledge that such subcontractors have relevant convictions.

4.2 The phrasing of any question used can affect, under certain circumstances, any additional information a contracting authority may wish to request from a competent authority. This will

² As defined by the Criminal Prosecution Service guidance on Corporate Manslaughter in the paragraph entitled “The Causal Link and Controlling Mind” at: http://www.cps.gov.uk/legal/section5/chapter_b.html

be covered in the section of the guidance for applying to a relevant competent authority. However a basic question may be worded as follows:

“Does your [organisation] or any of your [organisation’s] directors (of a company), partners (of a firm) or anyone in an equivalent position e.g. any other senior managers “who (have) powers of representation, decision or control” have any convictions relating to any of the offences listed under regulation 23(1), of “the Public Contracts Regulations 2006” [regulation 26(1) of “the Utilities Contracts Regulations 2006”]? If so, please list each conviction with full details.”

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

Where a contracting authority has reason to doubt a response from an economic operator, there is provision within the Regulations to “apply to the relevant competent authority to obtain further information”. In our view, there are steps which a contracting authority could take before making such an application. If there is reason to doubt information provided by an economic operator it would be reasonable, as a first step, to request further information, from the economic operator, in case there is a genuine misunderstanding of what is required. Perhaps it might be possible to obtain further evidence where appropriate. If this information proves satisfactory it would avoid the need to apply to the competent authority. However, should the information prove unsatisfactory, the contracting authority should approach the competent authority to obtain the further information required to make a decision on eligibility.

6. Who is the “competent authority”?

The competent authorities in the UK are the Criminal Records Bureau and Disclosure Scotland. If an economic operator is not based in the UK the contracting authority must apply to the competent authority of the relevant Member State.

7. What form does the further information take?

In the UK a contracting authority would apply to one of the competent authorities for further information in the form of a Disclosure. 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 unspent under the Rehabilitation of Offenders Act 1974. A Standard Disclosure will detail all convictions of an individual on record, whether spent or unspent (under the Rehabilitation of Offenders Act 1974). A contracting authority should consider the Standard Disclosure where the contracting authority considers that the subject matter of the contracts being awarded require full disclosure or where the contracting authority has reason to believe repeat offences may have been committed. Records from the competent authorities relate to individuals rather than to the companies themselves.

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.

8. How does a contracting authority apply for further information from the competent authorities?

- 8.1 When using Disclosures for the purposes of procurement the contracting authority will require a Disclosure for each of the Directors (working for an economic operator (or others with

powers of representation, decision or control - see paragraph 4.1), as Disclosures are only available for one individual per application. The method for obtaining a Disclosure for an individual varies between the Basic and Standard applications.

- 8.2 Currently the Basic Disclosure is available through Disclosure Scotland. In addition, a Basic Disclosure service through the Criminal Records Bureau should be available in the future. To obtain the Disclosures the contracting authority must ask that each of the Directors of the economic operator (or others with powers of representation, decision or control) apply to Disclosure Scotland for a Basic Disclosure. They can do this by contacting Disclosure Scotland on 0870 609 6006. Further information is also available on their website (www.disclosurescotland.co.uk). Once the individual receives the Disclosure, he/she can forward it to the contracting authority.
- 8.3 Where a Basic Disclosure certificate confirms that a Director of the economic operator (or other person with powers of representation, decision or control) has relevant unspent convictions, the economic operator should be excluded.
- 8.4 Subject to the approval of the amendment to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (S.I. 1975/1023) ("The Exceptions Order") by Parliament, Standard Disclosures should be available in the near future (OGC will update the guidance section of its website when this becomes available) through both the Criminal Records Bureau and Disclosure Scotland, and provide information on all recorded convictions over and above the unspent convictions disclosed under the Basic Disclosure. As such the process for applying for Standard Disclosures is more thorough and demanding.
- 8.5 If the contracting authority wishes to use Standard Disclosures it must ensure that it is clear, either as part of a pre-qualification or selection questionnaire, or as part of subsequent question, that information on spent convictions will be required. If, for example as above, a pre-qualification question were used to establish whether or not a company or its directors has been convicted of a relevant offence inserting words to the effect "***have any convictions (including those which are spent within the meaning of the Rehabilitation of Offenders Act 1974) relating to any of the offences listed under regulation 23 (1)***" or utilities equivalent should be satisfactory. 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" to complete their own declaration of convictions.
- 8.6 Once a contracting authority has established that it will ask an economic operator to provide Standard Disclosures for its Directors or others with "powers of representation, decision or control", the contracting authority has two options; either, apply to an Umbrella Body to undertake the application process, or to register with either of the competent authorities to become a Registered Body and process the application themselves. 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 relevant Directors, carry 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 applicant Director. The Director could then send the Disclosure to the contracting authority for further information. Listings of Umbrella Bodies can be obtained by contacting the Criminal Records Bureau on 0870 90 90 811 or on their website (www.disclosure.gov.uk).
- 8.7 If the contracting authority wishes to act as 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.disclosure.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 applicant Director will be provided with copies of the Disclosure.

- 8.8 Where a Standard Disclosure certificate confirms relevant offences have occurred the economic operator would need to be excluded.

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 emergency³. In such cases the Accounting Officer or Minister, as appropriate, should be satisfied that the circumstances are such that they will justify the exception and that the contracting authority will be in compliance with the Regulations.

OGC

January 2006

³ Such emergencies are defined by the Civil Contingencies Act 2004(1); <http://www.opsi.gov.uk/acts/acts2004/40036--b.htm> - 1