ALERTER

Procurement Act 2023: the new Debarment Regime

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On 24 February 2025, the Procurement Act 2023 comes into force, repealing and replacing the EU-based procurement regime for public contracts in the UK. Although much remains the same in terms of challenging decisions of contracting authorities (notably, limitation and remedies), the 2023 Act introduces an innovative and extended "Debarment Regime" with potentially far-reaching impacts on suppliers and a rich source of litigation.

The Procurement Act 2023 is the culmination of the previous government's post-Brexit policy objective to simplify the procurement regime, open public contracts up to new entrants, take tougher action on underperforming and "risky" suppliers and to embed transparency into the deployment of public money.[1] In keeping with its promise to be tough on underperformers and suppliers deemed to pose unacceptable risks, Chapter 6 of the 2023 Act provides for a new regime on "debarment", permitting Ministers to publicly debar certain suppliers from tendering for public contracts altogether.

The so-called Debarment Regime set out in Chapter 6 of the Act is accompanied by Government Guidance, which emphasises that while debarment is not intended to be punitive, it is a "risk-based measure" which seeks to ensure risky suppliers stay away from public projects.[2] The objective is twofold: first, to consolidate what was previously a more fragmented approach to exclusion across multiple sets of regulations; and secondly, to give Ministers a clear and proactive role in identifying, investigating, and ultimately debarring suppliers who fail to meet minimum standards of integrity or pose particular risks (including threats to national security).

DEBARMENT

Difference with "exclusion" of suppliers

While "exclusion" is still a concept within the Act, it refers a contracting authority's decision in a specific procurement exercise to disregard a tender or prevent a supplier from proceeding. Debarment goes further. While a contracting authority alone can exclude a supplier without ministerial involvement (provided the tests under ss. 26–28 are met), in order for debarment to become a reality a Minister must investigate and be satisfied that a supplier is an excluded or excludable supplier (s.62(1)). Those exclusion grounds are extensive, and include not only the well-known grounds of corporate manslaughter and organised crime, but new grounds of national security (Schedule 6, Part 2, s.35) and "misconduct in relation to tax" (Schedule 6, Part 2, s. 36). A supplier may also be excluded for a failure to co-operate with an investigation into debarment (Schedule 6, Part 2, s.43). Debarment is therefore reserved for more serious cases, where there has been an investigation under the Act (ss.60–61), culminating in a decision by a Minister of the Crown that the supplier should be placed on the debarment list.

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Debarment, therefore, escalates a supplier's exclusion to a national level. A supplier that becomes subject to a debarment decision is added to a central register which is made public (s.62(11)).[3] The list includes not only the supplier's name but also (i) the exclusion ground to which the debarment relates; (ii) whether the exclusion ground is mandatory or discretionary; (iii) for national security threats, a description of the contracts in relation to which the supplier is to be an excluded supplier; and (iv) the date on which the Minister expects the exclusion ground to cease to apply (s.62(4)). Contracting authorities thereafter are required to reject that supplier—usually across the board—so long as the supplier remains listed. The debarment list is kept under constant review by the Minister concerned (s.62(8)).

The debarment process

The machinery of debarment is set out in ss.59–62 of the Act:

a. Section 59 obliges contracting authorities, within 30 days, to notify the appropriate authority (e.g. a Minister of the Crown) whenever they exclude or disregard a supplier on a relevant exclusion ground (such as fraud, corruption, or threat to national security). This statutory duty alerts central government to potentially high-risk suppliers at the first opportunity.
b. Section 60 empowers the Minister to investigate a supplier if there is reason to suspect that the supplier is indeed an excluded or excludable supplier. The Guidance emphasises national security as a key impetus for these investigations, although the provision applies equally to other misconduct.
c. Section 61 then requires the Minister to produce a report, which must be given to the supplier (unless sensitive national security or confidential commercial information justifies redaction or non-disclosure). The report states whether the Minister is satisfied that the supplier meets one or more relevant exclusion grounds.
d. Section 62 provides for the Minister, once satisfied, to enter the supplier's name on the debarment list, following a standstill period of eight working days. The supplier will receive notice of the Minister's decision before any listing, ensuring it has an opportunity to seek interim relief (section 63) to challenge the decision.

Effects of debarment

Beyond the reputational issues of publication on the debarment list, once a supplier's name appears on the debarment list, any contracting authority that falls within the Act's scope must treat that supplier as excluded. This effectively prohibits the supplier from participating in new competitive tendering procedures, from being awarded call-off contracts under framework agreements, or from remaining in dynamic markets for as long as it remains listed.

Suppliers listed on grounds of national security may be barred only from specific categories of contract if the Minister so decides, providing nuance in circumstances in which certain procurements (e.g. those involving high-level data access or defence contracts) pose greater security risks. However, even a narrowly-drawn entry on the debarment list could have implications for a supplier's reputation and commercial standing, as contracting authorities may be reluctant to engage with any entity on the debarment list.

Challenging debarment by suppliers

Two initial routes of challenge are open to suppliers placed on the debarment list:

a. Interim Relief (s.63): If the supplier believes the Minister's decision to debar is misguided or unlawful, it may apply to the High Court (or Court of Session in Scotland) during the standstill period of eight days for an order suspending that decision. The court will balance the public interest in excluding risky suppliers against the potential harm to the supplier, considering factors such as the supplier's financial interests and the seriousness of any alleged wrongdoing.
b. Application for Removal (s.64): Even after debarment, a supplier may apply to the Minister at any time requesting removal or revision of its entry on the list. The Minister need only consider such an application if there has been a material change of circumstances or other significant new information. This is intended to allow for genuine "self-cleaning" by suppliers that address

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misconduct, restructure their management, or otherwise remedy the root causes of their debarment status.

In addition to interim relief, a supplier may bring appeal proceedings (s.65) on the limited ground that the Minister made a material mistake of law in deciding to debar (or in setting the scope of that debarment). Proceedings must be commenced within the same strict 30-day time limit as challenging decisions of contracting authorities (which has not changed in the new Act), of when the supplier knew (or ought to have known) of the Minister's decision. Although this provides a route for review of ministerial reasoning, it subjects it to strict time limits and an ostensibly high threshold for successful challenge.

Where national security concerns are involved, the closed material procedure provisions in the Justice and Security Act 2013 may be invoked (s.66). The ability to shield sensitive evidence from full disclosure to the supplier underscores the seriousness of threats the Act is designed to address, albeit at the cost of more conventional public disclosure requirements.

CONCLUDING THOUGHTS

The new debarment regime comes in the context of a heightened sensitivity around national security: the removal of Huawei from 5G networks in 2022,[4] Parliament's Intelligence and Security Committee report on China in 2023,[5] and the Synnovis NHS cyber-attack in 2024,[6] are just a few examples of well-publicised national security issues intersecting with public infrastructure. The debarment regime is therefore expected to be a rich source of litigation as suppliers are openly debarred from public contracts and an early flashpoint in the interpretation of the new Act, as suppliers rush both to assist with investigations and clear their names when so designated.

ENDNOTES

[1] Transforming Public Procurement Programme (2022). Accessible here: https://www.gov.uk/government/collections/transforming-public-procurement.

[2] https://www.gov.uk/government/publications/procurement-act-2023-guidance-documents-procure-phase/guidance-debarment-html

[3] It is also worth noting that not only is the debarment list made public, but so too are investigations which fall short of debarment: see the Government Guidance on Debarment (3 December 2024).

[4] https://www.gov.uk/government/news/huawei-legal-notices-issued

[5] https://www.gov.uk/government/publications/government-response-to-the-isc-china-report/government-response-to-the-intelligence-and-security-committee-of-parliament-report-china-html

[6] https://www.england.nhs.uk/2024/06/synnovis-cyber-attack-statement-from-nhs-england/

ABOUT THE AUTHOR

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William has a busy practice with a particular emphasis on group actions, commercial litigation and public procurement. He has acted for or acts for clients including the British Business Bank, Qatar Airways, and a Defendant manufacturer in the NOx litigation.

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