

Centre for the Study of Corruption



What makes a Good Debarment Regime?
*Keeping corrupt and fraudulent companies
out of public procurement*

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Keeping corrupt and fraudulent companies out of public procurement

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- This could have both economic and social benefits for the UK, reducing fraud and corruption, creating a level playing field for companies that abide by the rules, and benefitting the public purse and the UK's international reputation.
- There is increasing global experience of operating debarment regimes. They have been shown to work. Creating an open and transparent debarment system in the UK is not only good for the economy but it is good for business too.

This paper recommends seven components of an effective debarment regime:

- i. *Establishing clear policy goals for the regime*
- ii. *Requiring effective internal controls as a condition of contracting*
- iii. *Ensuring that contractors can be suspended or debarred where there is sufficient evidence of corruption and fraud, not just where they have been convicted, subject to due process safeguards and where they have not self-reported*
- iv. *Centralising decision-making and guidance to ensure consistency and ensuring that properly trained officials, of senior rank, are empowered to take exclusion/debarment decisions*
- v. *Creating a central database of qualification and performance information on contractors*
- vi. *Enhancing detection by establishing a procurement-specific anonymous reporting tool for whistle-blowers and competitors*
- vii. *Using complementary tools to encourage compliance such as administrative agreements.*

1. Introduction

Public procurement and contracts in the UK are worth a quarter of a trillion pounds a year. It is one of the largest public procurement markets in the world. And in the post-Brexit context, access to the UK public procurement market will be one of the most attractive offers that the UK can make to trading partners. In this context, the government's ability to grant the right to participate in bidding is a significant mechanism available to the UK government for setting standards – both for UK companies and to ensure that overseas companies operating within the UK do so on a level playing field.

At central government level, the Cabinet Office estimates that the UK loses between £2.8 billion and £22.6 billion due to fraud and error annually, with procurement fraud the dominant type of fraud detected.¹ A recent review of corruption risks in local procurement in the UK calculated that between £275 million to £2.75 billion could be lost annually due to fraud and error at local government. It also found that nearly a quarter of local councils in the UK (23%) had experience of corruption or fraud in procurement processes in the 2017-2018 financial year.² The review recommended that the government examine the current regime for excluding bidders engaging in wrongdoing from procurement to see if more could be done.

The COVID-19 pandemic meanwhile has highlighted the reputational risks to government of public procurement, particularly in an emergency context, which might be perceived to be or indeed turn out to be fraudulent, corrupt or compromised by conflicts of interest.

A proper regime which ensures that public contracting incentivises and rewards ethical behaviour and that those who undermine fair procurement processes face consequences, is essential to protect the public purse, create a level playing field and build confidence in the public procurement system.

The UK, while bound by EU procurement rules, has fought shy of excluding bidders from procurement for wrongdoing – no company appears to have ever been excluded from public bidding in the UK on grounds of corruption. Brexit, and the reform of procurement rules which is already underway, provides the UK with an unusual opportunity to reform its current regime into an effective, targeted system that genuinely deters wrongdoing and protects the public purse.³

¹ Cabinet Office, *Cross-Government Fraud Landscape Annual Report 2019*, February 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864268/Cross-Government_Fraud_Landscape_Annual_Report_2019_WA__1_.pdf

² Ministry of Housing, Communities and Local Government, *Review into the Risks of Fraud and Corruption in Local Government Procurement*, June 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

³ See Arrowsmith, Sue, *Constructing Rules on Exclusions (Debarment) Under a Post-Brexit Regime on Public Procurement: A Preliminary Analysis* (July 24, 2020). Available at SSRN: <https://ssrn.com/abstract=3659909>

2. Why debarment?

A well implemented debarment or exclusion regime – where suppliers who have committed wrongdoing such as corruption, fraud and money laundering are precluded from bidding on or benefitting from some or all public contracts for a set period of time - can be an effective tool for ensuring the reliability and trustworthiness of government contractors. This can create greater value for money for government by protecting public procurement from fraud, corruption and collusion. It can also be an effective means of mitigating reputational risks to government, by preventing poor contracting practices that can lead to mis-spending and scandals,⁴ as well as providing a level playing field for companies that have not engaged in malpractice.

An effectively implemented regime will create wider social and economic benefits, the most important of which are:

- a. greater public trust in government and protecting the government from association with unlawful behaviour;⁵
- b. incentivising companies to put in place good corporate compliance procedures to prevent and detect fraud, corruption and collusion and deterring such acts;
- c. encouraging companies to self-report wrongdoing and cooperate with law enforcement authorities in order to avoid debarment, thus reducing the financial burden on the criminal justice system of lengthy investigations into corporate malpractice;
- d. creating a level playing field for companies that are abiding by the rules; and
- e. improving value for money for public procurement.

Debarment from public contracts is recognised in several international instruments as an important and effective sanction and deterrent for corporate wrongdoing particularly in the context of the global fight against corruption. This includes the OECD Convention on Combatting Bribery of Foreign Public Officials, and the UNODC legislative guide to implementation of the UN Convention Against Corruption.⁶ The 2016 London Anti-Corruption Summit Communique also stated that “*corrupt bidders should not be allowed to participate in public procurement tenders.*”

⁴ Christopher Yukins and Michal Kania, Suspension and Debarment in the US Government: Comparative Lessons for the EU's Next Steps in Procurement, 19-2 UrT 47 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422499

⁵ Sue Arrowsmith, “A taxonomy of horizontal policies in public procurement,” in S. Arrowsmith and P. Kunzlik (Eds.) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge University Press, 2009, <https://www.cambridge.org/core/books/social-and-environmental-policies-in-ec-procurement-law/taxonomy-of-horizontal-policies-in-public-procurement/42ED7A8F206BB71A18E9FC2D65E8933F>; Robert Anderson, Alison Jones and William E. Kovacic, “Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: a procompetitive program to improve the effectiveness and legitimacy of public procurement,” *forthcoming*.

⁶https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf

Debarment and suspension regimes have been effective in the US and the Multilateral Development Banks in protecting public money and deterring wrongdoing.⁷ Unlike EU procurement/debarment rules, the US has considerable flexibility in its regime. It allows, for example, debarments that are very short, or apply to specific parts of a company, or to specific types of government contract, as well as the ultimate sanction of long-term exclusion.

Meanwhile, as the UK seeks free trade agreements beyond Europe following Brexit, there is likely to be increasing pressure on the UK to show it is serious about debarring and suspending suppliers engaged in corruption and fraud. Any trade deal with the US for instance is likely to include debarment provisions. The United States-Mexico-Canada Agreement (USMCA, Article 13:17) specifically envisages “*measures to debar, suspend or declare ineligible from participation a supplier that the Party has determined to have engaged in corruption, fraud or other wrongful acts relevant to a supplier’s eligibility.*”

Other US free trade agreements go further, requiring Parties to “*identify the suppliers determined to be ineligible under these procedures, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action.*”⁸ Such a clause could be a huge advantage to the UK which currently struggles to get accurate information about the criminal records of overseas companies to vet them during tenders.⁹

3. The current situation

Under Article 57 of the EU Procurement Directives 2014 implemented through the Public Contract Regulations 2015, UK contracting authorities are required to exclude bidders under certain circumstances, including on a mandatory basis where they have been convicted for fraud, money laundering, corruption, modern slavery, terrorism, and breaches of tax obligations and on a discretionary basis where they have engaged in grave professional misconduct. They are allowed to make exceptions where contractors have ‘self-cleaned’ – or taken remedial measures following conviction.

However, Article 57 has largely been ineffective across the EU¹⁰ with few exclusions made, including in the UK, for the following reasons:

- implementation has been left to individual contracting authorities, who are often focused on awarding contracts as quickly and easily as possible while avoiding potential risks of litigation;
- there is limited central training or guidance to ensure consistency in application; and

⁷The number of suspension and debarments has doubled in the US over the past decade, with the US Department of Defence debarring 436 entities in 2018-2019.

https://www.acquisition.gov/sites/default/files/page_file_uploads/FY%202018%20873%20Report%20-%20Final%2010%2030%202019.pdf

⁸ https://ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file423_10348.pdf

⁹ United Kingdom Anti-Corruption Strategy 2017-2022, Year 2 update, July 2020:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902020/6.6451_Anti-Corruption_Strategy_Year_2_Update.pdf

¹⁰ Dr Pascal Friton, International Procurement Developments in 2018: Part II – Debarment in EU Public Procurement Law – Tentative Progress or Treading Water? http://publicprocurementinternational.com/wp-content/uploads/2019/03/YIR_session_2pt2_2019_Pascal-Friton.pdf

- it relies heavily on self-declarations by bidders with no central or comprehensive source for verifying these declarations.

While the EU Procurement Directives in theory provide scope for individual countries to implement national level debarment regimes,¹¹ only a few, including Germany, have chosen to do so.¹² Furthermore, recent EU case law¹³ militates against such regimes, by establishing that individual contracting authorities must not be bound by decisions about a contractor's trustworthiness made by another contracting authority. This means that a corrupt contractor excluded by one authority could continue to seek contracts from other authorities in the hope they will be less rigorous in their application of the rules. Ultimately, this lack of consistency fails to drive corrupt contractors out of public procurement.

So far the risk of corrupt bidders being excluded from public procurement in the UK has operated as a theoretical rather than a real threat.¹⁴ This is a missed opportunity. Brexit and the Rules Reform process offer an opportunity for the UK to develop a national-level debarment regime outside of the EU Procurement Directives which will protect UK public procurement from corruption, fraud and collusion, ensuring the integrity of suppliers and thus reducing loss to the public purse and helping build trust in government procurement. This will help the UK align with emerging international best practice in deterrence and prevention of corruption, fraud and collusion in procurement.

4. From threat to reality: seven components of an effective debarment regime

There is emerging consensus among procurement specialists about the components of an effective debarment regime.¹⁵ These are as follows:

4.1 Establishing clear policy goals for the regime

The ultimate policy goal of a debarment regime should be that public contracts are only given to trustworthy contractors. Additionally, the debarment regime should support and

¹¹ Recital 102 of the 2014 EU Procurement Directives state that are free to decide whether to allow individual contracting authorities to carry out relevant assessments or leave it to other bodies at a central or decentralised level.

¹² Dr Pascal Friton, International Procurement Developments in 2018: Part II – Debarment in EU Public Procurement Law – Tentative Progress or Treading Water? http://publicprocurementinternational.com/wp-content/uploads/2019/03/YIR_session_2pt2_2019_Pascal-Friton.pdf

¹³ <http://curia.europa.eu/juris/document/document.jsf?jsessionid=1C8FAFA06E67BC4B14E567BAD3402FFC?text=&docid=218622&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2451136>

¹⁴ Sope Williams-Elegbe, "The Implications of Negotiated Settlements on Debarment in Public Procurement: a Preliminary Inquiry," *forthcoming*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458869; Susan Hawley, Excluding Corrupt Bidders from Public Procurement: Real Threat or Pipe Dream? The UK Experience, paper given at Nottingham University Conference: Public Procurement - Global Revolution VIII, June 2017, <https://www.spotlightcorruption.org/banning-corrupt-companies-from-public-contracts/>

¹⁵ Christopher Yukins and Michal Kania, "Suspension and Debarment in the US Government: Comparative Lessons for the EU's Next Steps in Procurement," *19-2 UrT 47 (2019)* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422499; Collin Swan and Belita Manka, "Risky Business: Does Debarring Poor Performers Mitigate Future Performance Risks?", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3287348

amplify the government's key policy goals in tackling economic crime, such as fraud and corruption, by providing an enforcement tool against those who breach those rules.

4.2 Requiring effective internal controls as a condition of contracting

Prevention is better than cure. Ensuring that companies that want to contract with government have established internal controls to prevent fraud, corruption, money laundering and tax evasion, including clawback clauses for senior executives who have overseen companies found to have engaged in such misconduct, will help send a clear signal about what government expects of contractors and help improve corporate governance standards across the UK. Being able to evidence such controls should be a requirement for inclusion on approved contractor lists.

4.3 Ensuring that contractors can be suspended or debarred where there is sufficient evidence of corruption and fraud, not just where they have been convicted, subject to due process safeguards and where they have not self-reported

Convicted companies that have not cooperated with law enforcement and do not have independent evidence of remediation should face a realistic prospect of suspension or debarment from public procurement. This would boost incentives for companies to self-report wrongdoing and cooperate with authorities to avoid such a sanction, improving criminal justice outcomes and saving precious criminal justice system resource.

However, in terms of preventing corruption in public procurement, focusing on convictions may be shutting the stable door after the horse has bolted and is too narrow for assessing risk. Understanding whether contractors are subject to ongoing investigations by enforcement or regulators is crucial to preventing the serious reputational risk to government from contracting a company later found guilty of fraud or corruption. Suspending contractors from procurement if they are under investigation could provide a real incentive for them to cooperate with law enforcement authorities to bring speedier resolutions to corporate investigations.

Where contracting authorities find credible evidence of potential fraud or corruption by a contractor, this too should be properly assessed as potential grounds for suspension from public contracts. Too little use has been made under the current Public Contract Regulations of the opportunities for exploring discretionary exclusion for grave professional misconduct in these circumstances. Due process safeguards need to be developed however to make this effective such as allowing companies a right of defence and an opportunity to appeal such decisions.

4.4 Centralising decision-making and guidance to ensure consistency and ensuring that properly trained officials, of senior rank, are empowered to take exclusion/debarment decisions¹⁶

Individual contracting officials may lack experience of how to investigate and assess evidence of corruption and fraud, and of corporate remediation efforts. As a result, they are likely to avoid taking action to debar companies even where they believe wrongdoing may

¹⁶ See Arrowsmith, Sue, Constructing Rules on Exclusions (Debarment) Under a Post-Brexit Regime on Public Procurement: A Preliminary Analysis (July 24, 2020). Available at SSRN: <https://ssrn.com/abstract=3659909>

have occurred in order to avoid the cost and delays which litigation by contractors might bring.

For a debarment and suspension regime to work it needs highly qualified, properly trained senior officials to take key decisions on contractor reliability and qualification. It also needs to be consistently applied across government and local government through providing centralised guidance and advice on issues such as how long companies should be debarred for and the specific steps they need to take in order to re-qualify for eligibility. Any such centralised function needs to be properly resourced to be effective.

In the US, Suspension and Debarment Officers in key government departments take the decision about whether companies should be disqualified from bidding, while a central Interagency Suspension and Debarment Committee (ISDC) acts as a forum to coordinate suspension and debarment practice and develop a unified policy at a federal level. The Multilateral Development Banks have similarly centralised debarment functions which enable effective information-sharing. In Germany, meanwhile, a central authority (the German Competition Authority) has responsibility for determining whether a company has taken sufficient remedial action to become an approved public contractor.¹⁷

4.5 Creating a central database of qualification and performance information on contractors

Public procurement in the UK is split amongst multiple government departments and agencies, as well as between central and local government. The UK regime relies heavily on self-declaration by those bidding for contracts. There is little evidence that performance and qualification information is captured in a way that is easily accessible for contracting authorities and there is considerable scope for variance in how self-declarations are made, monitored or followed up. This allows companies or directors to escape detection for wrongdoing or poor behaviour for instance by establishing a company under a new name. The creation of a single central database capturing such information would save significant time and resource for contracting authorities.

The US currently has such a database of excluded entities integrated into its System for Award Management (SAM). The database is public. Similar exclusion lists are published by the Multilateral Development Banks. The EU Commission meanwhile operates an Early Detection and Exclusion System (EDES) – a centralised database containing information on contractors that pose a risk to the EU's financial interests, available to all those implementing EU funds.¹⁸ EDES only publically lists those excluded in serious cases.¹⁹ Germany has recently established a Competition Register implemented by the German

¹⁷ Christopher Yukins and Michal Kania, "Suspension and Debarment in the US Government: Comparative Lessons for the EU's Next Steps in Procurement," *19-2 UrT 47 (2019)*
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422499.

¹⁸ Dr Pascal Friton, *International Procurement Developments in 2018: Part II – Debarment in EU Public Procurement Law – Tentative Progress or Treading Water?* http://publicprocurementinternational.com/wp-content/uploads/2019/03/YIR_session_2pt2_2019_Pascal-Friton.pdf

¹⁹ https://ec.europa.eu/budget/edes/index_en.cfm

Federal Cartel Office which lists final judgements on fraud, bribery, money laundering, tax evasion and other offences where they can be attributed to a company.²⁰

If the UK were to establish such a database it would enable it to more easily receive and reciprocally share information about unreliable contractors with other jurisdictions including the US, EU, and Germany.²¹

4.6 Enhancing detection by establishing a procurement-specific anonymous reporting tool for whistle-blowers and competitors

Enhancing the detection of fraud, corruption and collusion in procurement is essential to any effective debarment/exclusion regime.²² Ensuring that competitors, who may often be the first to detect irregularities,²³ can make secure and anonymous tip-offs, would significantly enhance such detection. Whistle-blowers similarly should be given secure routes to feed evidence of corruption, fraud and collusion to a central procurement function.

4.7 Using complementary tools to encourage compliance such as administrative agreements

As the US regime shows, complementary measures alongside suspension and debarment can encourage companies to come clean about misconduct and to implement remedial measures. These include entering into published administrative agreements which specify what remedial measures a contractor must undertake in order to be eligible for government contracts. Such agreements can be particularly useful where competition would be severely restricted if a company were debarred from procurement.

Conclusions

Brexit and the consequent revision of the UK's quarter of a trillion pound public procurement and contracting regime offers the UK an opportunity to update its debarment and exclusion regime.

This could have both economic and social benefits for the UK, reducing fraud and corruption, creating a level playing field for companies that abide by the rules, and benefitting the public purse and the UK's international reputation.

²⁰ Dr Pascal Friton, *International Procurement Developments in 2018: Part II – Debarment in EU Public Procurement Law – Tentative Progress or Treading Water?* http://publicprocurementinternational.com/wp-content/uploads/2019/03/YIR_session_2pt2_2019_Pascal-Friton.pdf

²¹ [https://www.worldbank.org/content/dam/documents/sanctions/other-documents/2019/jun/SD%20Survey%20Event_May%2022%20Session%20Summary%20\(Updated%206.3.19\).pdf](https://www.worldbank.org/content/dam/documents/sanctions/other-documents/2019/jun/SD%20Survey%20Event_May%2022%20Session%20Summary%20(Updated%206.3.19).pdf)

²² Emmanuelle Auriol and Tina Soreide, 'An economic analysis of debarment' *International Review of Law and Economics* 50 (2017): 36-39. <http://publicprocurementinternational.com/wp-content/uploads/2019/01/IRLE-2017-Auriol-Soreide.pdf>

²³ Complaint from non-winning competitors is one of 8 significant red flags found to have a high correlation with incidences of corruption. See Joras Ferwerda, Ioana Deleanu and Brigitte Unger, "Corruption in Public Procurement: Finding the Right Indicators" *European Journal of Criminal Policy and Research* 23 (2017): 245-267. <https://link.springer.com/article/10.1007/s10610-016-9312-3>

There is increasing global experience of operating debarment regimes. They have been shown to work. Creating an open and transparent debarment system in the UK is not only good for the economy but it is good for business too. Honest companies that play by the rules can be reassured they are not being undercut by dishonest bidders. Public authorities can have confidence that they are dealing with reliable contractors. And the reputation of UK business will also be improved. A strong system at home, which drives up business integrity, will add to companies' reputations where they bid for overseas contracts, contributing to a strong post-Brexit exporting environment.

We have identified seven components of an effective debarment regime, drawing on the experiences of countries like the US with world-leading systems. To identify how this could work in the UK, the government should now consider establishing an independent advisory group of academics, procurement experts and procurement lawyers to design an effective post-Brexit debarment regime based on international best practice.

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