

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or meeting room at night. They are looking at laptops and talking. The room has large windows showing a city view at night. The lighting is warm and focused on the people. The woman is on the left, wearing a grey blazer. The man in the middle is wearing a light blue sweater. The man on the right is wearing a dark red shirt and has a beard. There are coffee cups and a small potted plant on the table.

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Wales Public Sector: Procurement Update

18th July 2024

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Agenda

- Procurement (Wales) Regulations 2024
- Guidance
- Social Partnership and Public Procurement (Wales) Act 2023
- Case Law Update
- Resources
- Exclusion and debarment

Procurement (Wales) Regulations 2024

- Made 3 July 2024
- Regulations and Explanatory Memorandum
- Additional detail supplementary to Procurement Act 2023

Procurement (Wales) Regulations 2024

- Publishing notices on central digital platform by submission to Welsh digital platform
- Form and content of notices
- Specification of light touch and reservable light touch services
- Definitions of central government authorities and works
- Amendments to legislation

Guidance – Direct award

- Legal framework
 - Direct award possible when section 41, 42 or 43 applies
 - Section 25 – Contracting authority may require direct award of a sub-contract
 - Transparency notice required
- Other guidance of relevance to this topic area:
 - Covered procurement objectives
 - Conflicts of interest
 - Exclusions
 - Contract award notices and standstill

Guidance – Competitive Tendering Procedures

- Legal Framework
 - Award of public contracts following competitive tendering procedure
 - Competitive tendering procedures
 - Notices and associated tender documents
- Choice and design of competitive tendering procedure
- Carrying out a competitive tendering procedure
- Notices

Guidance – Competitive Tendering Procedures

- Other guidance of relevance to this topic area:
 - Assessing competitive tenders
 - Conditions of participation
 - Exclusions
 - Modifying a competitive procurement
 - Covered procurement objectives
 - Preliminary market engagement
 - Lots
 - Time periods
 - Contract award notices and standstill

Guidance – Below Threshold Contracts

- Legal framework
 - Definitions
 - Thresholds
 - Procedure for below threshold contracts
- Notices

Guidance – Below Threshold Contracts

- Other guidance of relevance to this topic area:
 - Thresholds
 - Valuation
 - Publication of information and the central digital platform
 - NPPS
 - Treaty state suppliers

Guidance – Frameworks

- Legal framework
 - Sections 45-49 Procurement Act 2023
 - Open frameworks – Section 49
- Award of frameworks
- Award of call-off contracts

Guidance – Frameworks

- Other guidance of relevance to this topic area:
 - Conditions of participation
 - Competitive tendering procedures
 - Assessing competitive tenders
 - Direct award
 - Below threshold contracts
 - Contract award notices and standstill

Guidance – Dynamic Markets

- Legal Framework
 - Sections 34-40 Procurement Act 2023
- Establishment and membership of dynamic markets
- Notices
- Other guidance of relevance to this topic area:
 - Conditions of participation
 - Competitive tendering procedures
 - Assessing competitive tenders
 - Contract award notices and standstill

Social Partnership and Public Procurement (Wales) Act 2023

- Appointment of Minister for Social Partnership
- Social Partnership Council established
- Online learning packaged launched
- Social partnership conferences
- Guidance and model clauses for socially responsible procurement in preparation

Case Law Update – Time Limits

- *Lancashire County Council v Brookhouse Group Ltd* [2024] EWCA Civ 717
- Challenge to award of a development agreement
- Claimant argued 6 month time limit to bring a claim applied
- Authority argued 30 day time limit applied – Regulation 93 Public Contracts Regulations 2015
- Court found 6 month time limit applied – There had been no competition and no contract award notice

Exclusion and Debarment

- Exclusion grounds
- Look-back period
- Poor contract performance
- Likelihood of reoccurrence
- Connected persons
- Debarment
- Appeals
- Practical considerations

Exclusion Grounds Overview

- Similar to PCR 2015: Mandatory and discretionary exclusion grounds (Schedules 6 and 7 of the Act)
- Mandatory grounds: Result in immediate exclusion from procurement or contract termination; reported to Secretary of State for possible debarment
- Discretionary grounds: Allow authority to exclude or terminate, potentially leading to debarment

Changes under the Procurement Act 2023

- Act introduces new grounds:
 - Improper conduct in procurement processes
 - Prior poor performance beyond breach of contract, including unsatisfactory performance despite opportunity for improvement
 - Section 75 mandates transparency: Contract performance issues must be published by authorities

Understanding Timescales for Exclusion

- Refer to Schedules 6 and 7 of the Act:
 - Section 44 (Schedule 6): Covers mandatory exclusion matters
 - Section 15 (Schedule 7): Covers discretionary exclusion matters
- Timescales vary:
 - Some grounds apply up to 5 years before schedule enforcement
 - Others apply from 3 years prior
 - Some grounds enforce from the schedule's effective date

Revised Timeframes for Exclusion

- Mandatory and some discretionary grounds now cover offences or conduct within the past five years
- Some discretionary grounds have shorter "look back" periods:
 - Three years or from when Schedule 7 of the Act comes into effect (refer to section 15 of Schedule 7)
- Consideration of Discretionary Exclusion Grounds
 - Decision-makers must disregard any event known before the five-year period ending on the determination date when assessing discretionary exclusion grounds for a supplier

Revised Timeframes for Exclusion

Timeframe	Exclusion Grounds
Last 5 years (Mandatory)	Terrorism offences, bribery, money laundering offences, slavery and trafficking offences, organised crime
Last 3 years (Mandatory)	Blackmail, fraud and fraudulent trading, labour market offences, breach of orders under that Act, breach of labour market enforcement order, tax offences, cartel offence, tax misconduct, competition law infringements
Last 3 years (Discretionary)	Insolvency and bankruptcy, competition infringements, professional misconduct, breach of contract, acting improperly in a procurement
Schedule coming into force (Mandatory)	Corporate manslaughter or homicide, theft, robbery, burglary, threat to national security
Schedule coming into force (Discretionary)	Labour market misconduct, environmental misconduct, poor performance, national security

Poor Contract Performance

- Background
 - UK Government frustration over underperforming suppliers
 - Advocacy for changes in 2014 EU Directive
- Legislative Impact
 - Inclusion of Contract Performance Notices (CPNs) in PA 2023
 - Mandates for KPIs and CPNs for contracts exceeding £5m

Exclusion and Debarment Risks

- CPN Requirements
 - Issuance upon contract breaches or failures
 - Details breaches, mitigation efforts, and damages
- Implications
 - Potential exclusion from future procurements
 - Enhancing transparency and oversight in public contracts

Likelihood of reoccurrence

- New Requirement in Procurement Act 2023
 - Contracting authorities must assess likelihood of exclusion ground reoccurring
 - Integral part of decision-making process
- Evidence Considered
 - Seriousness of the conduct
 - Steps taken to prevent reoccurrence
 - Timeframe since initial occurrence
- Documentation
 - Authorities must document evidence used
 - Ensures transparency and accountability

Connected Persons

- Expanded Definition
 - Covers offences or misconduct within and outside the UK
 - Includes actions by 'connected persons' of the supplier
- Definition of Connected Persons
 - Beneficial owners ("persons with significant control")
 - Directors (including shadow directors)
 - Parent or subsidiary undertakings
- Subcontractor Impact
 - Subcontractors falling under exclusion grounds may impact primary supplier
 - Opportunity for primary supplier to replace excluded subcontractors to avoid exclusion

Debarment Process

- Centralised Debarment List
 - Managed by government
 - Accessible to all contracting authorities
 - Includes details of excluded and excludable suppliers
- Reporting and Investigation
 - Authorities report exclusion grounds to relevant Minister
 - Investigation initiated to verify exclusion grounds

Debarment Decision and Legal Process

- Confirmation of Exclusion
 - Minister confirms mandatory or discretionary exclusion
 - Suppliers notified and allowed to make representations
- Debarment Standstill Period
 - Eight working days for legal proceedings
 - Allows supplier to seek interim relief

Appeals, Removal, and Implications

- Appeals and Removal
 - Suppliers can appeal inclusion or refusal to remove
 - Removal possible with material change in circumstances
- Debarment Types and Impact
 - Mandatory debarment: Generally excludes from all procurements
 - Discretionary debarment: Allows exclusion from specific procurements at authority's discretion; challengeable if decision is irrational

Appeals Under Procurement Act 2023

- Challenges to Exclusion Under General Rules on Remedies
- Appeals Against Debarment Decisions

Practical Considerations

- Confidentiality
- Exclusion of liability

Frameworks

- Public authority may award a public contract in accordance with a framework
- Maximum term is four years except for
 - Defence and security framework and utilities framework
 - Open framework

Frameworks

- Call-offs
 - May be awarded with or without competition
 - In competitive selection, assessment must be based on award criteria used to assess tenders for appointment to the framework
 - Cannot be used to award another framework or a concession

Resources

- Transforming Public Procurement Resources

[Procurement Act 2023 - Guidance documents - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/procurement-act-2023-guidance-documents)

[Transforming Public Procurement - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/transforming-public-procurement)

- Welsh Government Guidance

[Procurement Act 2023 | GOV.WALES](https://gov.wales/procurement-act-2023)

- Welsh Government Social Partnership Newsletter

[Subscribe to the Social Partnership newsletter | GOV.WALES](https://gov.wales/social-partnership-newsletter)

- UK Procurement Policy Notes

[Procurement policy notes - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/procurement-policy-notes)

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Thank You

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