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Geldards Public Sector: Procurement Update

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Agenda

- Recent Guidance
- Case Law Update
- Exclusion and Debarment
- Frameworks
- Practical Preparation

Guidance – Contract Modifications

- Legal framework
 - Sections 74-77
 - Schedule 8
- Changes from previous legislation
 - New grounds:
 - Urgency and protection of life
 - Materialisation of known risk
 - Grounds specific to defence authority contracts
 - Contract change notices required for contracts valued over £5million

Guidance – Contract Modifications

- Key points and policy intent
 - Modification grounds and use of these
 - Modification of frameworks, call off contracts and dynamic markets
 - Convertible contracts
 - Transparency obligations – contract change notices

Guidance – Contract Modifications

- Other guidance of relevance to this topic area:
 - Valuation of contracts
 - Competitive tendering procedures
 - Direct award
 - Contract award notices and standstill
 - Publication of information

Guidance – Key Performance Indicators

- Legal Framework
 - Section 52 – Definition
 - Section 71 – Assessment against KPIs
- Key points and policy intent
 - Setting and publishing KPIs
 - Notices – contract details notice, contract performance notice, contract termination notice

Guidance – Key Performance Indicators

- Other guidance of relevance to this topic area:
 - Contract performance notices
 - Contract details notices
 - Contract termination notices

Guidance – Contract Termination

- Legal framework
 - Sections 78-80
- Changes from previous legislation
 - Mandatory contract termination notice
- Key points and policy intent
 - Meaning of “termination”
 - Implied grounds for termination
 - Notices – contract termination notice, contract details notice, contract change notice

Guidance – Contract Termination

- Other guidance of relevance to this topic area:
 - Exclusions
 - Contract details notice
 - Contract performance notice
 - Publication of information

Guidance – Contract Performance Notices

- Legal framework
 - Section 52 – Key performance indicators
 - Section 71 – Performance Assessment
 - Open frameworks – Section 49
- Key points and policy intent
 - Assessment and publication of KPI information
 - Use of contract performance notice when removing supplier from multi-supplier contract
 - Other notices – contract details notice, contract change notice, contract termination notice

Guidance – Contract Performance Notices

- Other guidance of relevance to this topic area:
 - Key performance indicators
 - Publication of information
 - Contract details notice
 - Exclusions

Guidance – Procurement Termination Notices

- Legal Framework
 - Section 55
- Key points and policy intent
 - Notice required if contracting authority decides not to award public contract after publication of tender or transparency notice
 - Timing
 - Other relevant notices – pipeline notice, preliminary market engagement notice, planned procurement notice, tender notice, dynamic market notice, tender notice, transparency notice, contract award notice,

Guidance Procurement Termination Notices

- Other guidance of relevance to this topic area:
 - Competitive tendering procedures
 - Direct award
 - Frameworks
 - Dynamic markets
 - Publication of information

Guidance - Exclusions

- Legal Framework
 - Sections 26 and 27 – Application of exclusion grounds
 - Sections 57 and 58 – Excluded and excludable supplier
 - Schedules 6 and 7 – Mandatory and discretionary grounds
- Key points and policy intent
 - Meaning of excluded and excludable supplier
 - Exceptions
 - Individuals and entities connected to or associated with a supplier
 - Self cleaning
 - Reporting requirements
 - Notices – transparency notice, contract award notice, contract details notice, contract termination notice

Guidance - Exclusions

- Other guidance of relevance to this topic area:
 - Debarment
 - Conditions of participation
 - Direct award
 - Competitive tendering procedures
 - Contract termination

Guidance - Debarment

- Legal Framework
 - Section 59 – Notification
 - Sections 60 and 61 – Investigations of suppliers
 - Sections 62-64 – Debarment List
 - Sections 65-66 – Appeals and procedure
- Key points and policy intent
 - Debarment investigations and decisions
 - Right to appeal

Guidance - Debarment

- Other guidance of relevance to this topic area:
 - Exclusions
 - Contract performance notice
 - Contract termination

Guidance - Remedies

- Legal Framework
 - Sections 100-109
- Key points and policy intent
 - Scope
 - Time limits
 - Automatic suspension
 - Interim remedies
 - Pre and post contractual remedies
 - Managing risk

Guidance - Remedies

- Other guidance of relevance to this topic area:
 - Key definitions
 - Principles and objectives
 - Award of public contracts and procedures
 - Management of public contracts
 - Conflicts of interest
 - Implementation of international obligations
 - Information and Notices

Guidance – Assessment Summaries

- Legal Framework
 - Section 50
- Key points and policy intent
 - Required assessment information
 - Timing
 - Lots, dynamic markets and frameworks

Guidance – Assessment Summaries

- Other guidance or relevance to this topic area:
 - Competitive tendering procedures
 - Awarding a contract following a competitive tendering procedure
 - Contract award notice and standstill
 - Publication of information

Guidance – Contract Award Notices and Standstill

- Legal framework
 - Section 50 –Contract award notices and assessment summaries
 - Section 51 - Standstill
- Key points and policy intent
 - Application and information to be included
 - Lots
 - Timing

Guidance – Contract Award Notices and Standstill

- Other guidance of relevance to this topic area
 - Publication of information
 - Direct award
 - Competitive tendering procedures
 - Assessing competitive tenders
 - Assessment summaries

Guidance – Procurement Oversight

- Legal framework
 - Sections 108-110
- Key points and policy intent
 - Procurement Review Unit
 - Procurement investigations

Guidance – Contract Details Notices

- Legal framework
 - Section 53
 - Section 87
- Key points and policy intent
 - Contents of notices
 - Timing

Guidance – Contract Details Notices

- Other guidance of relevance to this topic area
 - Contract award notices and standstill
 - Key performance indicators
 - Publication of information

Guidance – Electronic Communications

- Legal framework
 - Section 96
- Key points and policy intent
 - Contracting authorities to communicate electronically so far as is practicable and to ensure suppliers communicate electronically
- Other guidance of relevance to this topic area
 - Covered procurement objectives
 - Central digital platform

Published Guidance

- Plan Phase
 - Transitional and saving arrangements
 - Contracting authority
 - Covered procurement
 - Exempted contracts
 - National Procurement Policy Statement
 - Pipeline Notice

Published Guidance

- Plan Phase
 - Utilities Contracts
 - Defence and Security Contracts
 - Concession Contracts
 - Light touch Contracts
 - Reserving contracts for supported employment providers

Published Guidance

- Define Phase
 - Valuation of Contracts
 - Thresholds
 - Mixed Procurement
 - Planned Procurement Notice
 - Preliminary Market Engagement
 - Technical Specifications

Published Guidance

- Define Phase
 - Direct Award
 - Competitive Tendering Procedures
 - Below Threshold Contracts
 - Frameworks
 - Dynamic Markets
 - Lots
 - Treaty State Suppliers
 - Conflicts of Interest

Published Guidance

- Procure Phase
 - Modifying a competitive procurement
 - Time Periods
 - Assessing Competitive Tenders
 - Conditions of Participation
 - Procurement Termination Notices
 - Exclusions
 - Debarment

Published Guidance

- Procure Phase
 - Remedies
 - Assessment Summaries
 - Contract Award Notices and Standstill
 - Procurement Oversight
 - Contract Details Notices
 - Electronic Communications

Published Guidance

- Manage Phase
 - Contract Termination
 - Key Performance Indicators
 - Contract Performance Notices
 - Contract Modifications

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 – Section 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

Exclusion Grounds Overview

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

Practical Preparation

- Updating contract procedure rules
- Training
- Understanding notice requirements and timescales
- Approach to competitive flexible procurement

Links to guidance

- Contract Modifications
- [Guidance: Contract Modifications \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/contract-modifications)
- Key Performance Indicators
- [Guidance: Key Performance Indicators \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/key-performance-indicators)
- Contract Termination
- [Guidance: Contract Termination \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/contract-termination)
- Contract Performance Notices
- [Guidance: Contract Performance Notices \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/contract-performance-notice)

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- Procurement Termination Notices
- [Guidance: Procurement Termination Notices \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/procurement-termination-notices)
- Exclusions
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- Debarment
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Links to guidance

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- [Guidance: Remedies \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/remedies)
- Assessment Summaries
- [Guidance: Assessment Summaries \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/assessment-summaries)
- Contract Award Notices and Standstill
- [Guidance: Contract Award Notices and Standstill \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/contract-award-notice-and-standstill)

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Thank You

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