

UK Relaxes Rules on Exclusion From Public Contracts

MARCH 11, 2015

The Public Contract Regulations 2015 ("the 2015 Regulations"), which replace the 2006 regulations of the same name ("the 2006 Regulations"), implement the EU Directive on Public Procurement 2014/24/EU. Under the 2006 Regulations, companies convicted of certain specified criminal offences faced mandatory and indefinite exclusion from public procurement contracts. Under the 2015 Regulations, the period of exclusion is capped at five years and convicted companies may be able to avoid exclusion altogether if they fulfil certain conditions.

The 2015 Regulations apply to any contract, the award procedure for which commenced on or after 26 February 2015, the date when the Regulations came into force. Regulation 57 details the mandatory and discretionary grounds on which 'contracting authorities' can exclude companies¹ from participating in a public procurement process. The 2015 Regulations also create a process through which companies can avoid exclusion by providing evidence of "self-cleaning," i.e. demonstrating that the misconduct which gave rise to exclusion has been appropriately addressed and its effects remedied. This alert summarizes the grounds for exclusion and the avenues through which companies may be able to avoid it.

The Grounds for Exclusion and Their Scope

The 2015 Regulations stipulate various criminal offences, a conviction for which constitutes mandatory grounds for exclusion from participation in public procurement. As under the 2006 Regulations, the scheme of offences runs the gamut of economic and organised criminal activity including bribery, fraud, theft, money laundering, cheating the revenue and various terrorist offences. However, the period of exclusion is now capped at five years from the date of conviction.² Mandatory exclusion also applies where the subject of the conviction is a person who is a member of the administrative, management or supervisory body of the company or has powers of representation, decision or control over it.³

A company will also find itself excluded where it is in breach of its tax or social security obligations and where that breach has been judicially or administratively determined. The scope of this provision extends to extraterritorial conduct, where the company has been found to be in breach in

the jurisdiction in which it is established. In respect of such breaches which have not been subject to any formal determination, the contracting authority has a discretion to exclude the company. Under the 2015 Regulations, the period of discretionary exclusion is now capped at three years from the relevant event.⁴

The Avenues of Exception

Contracting authorities have a limited scope within which to forego their obligation to prohibit those companies subject to mandatory grounds of exclusion. Under Regulation 57(6), a contracting authority *may* disregard the prohibition on '**an exceptional basis**, for overriding reasons relating to the public interest, such as public health or protection of the environment.'⁵

Under the 2015 Regulations, a broader and more transparent avenue of exception⁶ now allows companies to present evidence of "self-cleaning" in order to avoid mandatory exclusion. The company must demonstrate its "reliability" by providing evidence of measures it has taken in response to the underlying misconduct. The 2015 Regulations reproduce the wording in the Directive that expands upon the meaning of "self-cleaning."⁷ To demonstrate "self-cleaning" a company will need to prove that it has: paid or undertaken to pay compensation for any damage caused by the misconduct; clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. How these requirements will be interpreted remains to be seen. Where the subject of the conviction is the company itself, the requirements are likely to be satisfied by compliance with the terms of any sentence or deferred / non-prosecution agreement. In other cases, where the contracting authority cannot look to a court order arising from the underlying conviction, it may be assisted by the approach taken in the US, where the concept of self-cleaning in procurement matters is well developed. Where the evidence provided by the company is deemed insufficient, the contracting authority must give the company a statement of reasons. However, if the evidence is sufficient to demonstrate the company's "reliability" the contracting authority has no discretion to exclude it from the procurement process.

Where a company's business includes public procurement, the effects of exclusion can be devastating. The 2015 Regulations are welcome in that they provide an avenue through which companies may be able to mitigate some of the collateral consequences of corporate convictions. While it remains to be seen what the relevant authorities will accept as evidence of "self-cleaning," companies can nevertheless derive some comfort from the additional certainty that the 2015 Regulations provide.

¹ The statutory wording for persons who could participate in the award of contracts is "economic operator." This term is defined as any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work,

the supply of products or the provision of services on the market.

² See Regulation 57 (11).

³ The scope of the exclusion appears to be broader than the equivalent provision under the 2006 Regulations, which applied to "directors or any person who has powers or representation, decision or control."

⁴ There are other discretionary grounds for exclusion contained in Regulation 57(8).

⁵ This is more restrictive than the equivalent provision under the 2006 Regulations, where the authority could disregard the prohibition "if it was satisfied that there [were] overriding requirements in the general interest which justify doing so in relation to that economic operator."

⁶ See paragraphs 13-17 of Regulation 57.

⁷ The term "self-cleaning" is derived from the literal translation of a similar German legal concept. The stipulated aspects of self-cleaning as stated in Regulation 57 (15) are thought to reflect, in part, German case law. Whether the UK courts will interpret the language of the Regulations in a similar fashion remains to be seen (see Priess, Hans-Joachim "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive," Public Procurement Law Review 2014, p. 112).