DEBARMENT: ASIA PACIFIC RAISES THE BAR ON PUBLIC PROCUREMENT

Debarment regimes exclude companies from public procurement opportunities following conviction for specified offences. We examine the global trend towards the strengthening of these regimes and how this is likely to affect companies in the Asia Pacific.

Key issues

- Debarment regimes exclude companies from public procurement opportunities following conviction for specified offences such as corruption, money laundering and fraud.
- Well-established debarment regimes exist in the United Kingdom and the United States, whereas in the Asia Pacific, the regulatory landscape is largely discretionary. The latter regimes are only likely to strengthen, rather than loosen.
- The key is due diligence of not only contractors and other entities with which a company engages with, but also its own officers, operations and key personnel.

DEBARMENT LEGISLATION: FAR AND NEAR

Countries throughout Asia Pacific are starting to exclude companies from public procurement opportunities following convictions for corruption, money laundering, and fraud. With the region's well-publicised emphasis on enforcement and the increasing scrutiny of corporate activity comes additional pressure on governments to "get it right". Nowhere is this issue more relevant than in relation to public procurement. Scandals across the Asia Pacific region, particularly in relation to corruption in the infrastructure and energy sectors, continue to shape the approach that authorities take in awarding new public contracts to companies.

In reaction to public procurement scandals, legislation is being drafted across the region to restrict companies from bidding on, or being eligible to work on, public contracts following a conviction for specified offences. Companies and company directors need to be cognisant of these evolving legislative regimes, both within their own jurisdiction and further afield, and be prepared for any new developments. Failing to get ahead of the issue today can lead to forfeiture of valuable opportunities in the future.

Guidance can be taken from well-established debarment regimes in the United Kingdom and the United States. The United Kingdom has both mandatory and discretionary exclusion for companies convicted of certain offences under, for example, the Companies Act, as well as the Fraud Act. Included in this legislation, however, is a "self-cleaning" regime, so that a company may be able to overcome any such exclusion where it can show that it has implemented procedures to prevent future misconduct and remedy prior misconduct.

In the United States, there are regulatory regimes for exclusion from public bidding including in respect of violations of the Foreign Corrupt Practices Act (FCPA). The Federal Acquisition Regulations (FAR) set out a wide range of conduct that can result in a company or contractor being excluded from participating in public contracts. Similar legislation exists at the state level.

Across the Asia Pacific region, the debarment regulatory landscape is generally not so prescribed and is largely discretionary:

- In Australia, where public procurement may, depending on the nature and location of a project, be governed by either federal or state procuring authorities, the approach to debarment varies. States such as Victoria are explicit in their anti-corruption obligations in reviewing tenders, but other states are less clear. In 2018, the Senate Economics References Committee (in their report on foreign bribery) recommended a federal debarment framework.
- In Japan, the "Guidelines in disqualification of a firm or individual from competing for a contract" (Debarment Guidelines) were updated in June 2019 to further enhance how the Sanction Board of the Japan International Cooperation System (JICA) handles debarments.
- In China, tendering authorities have the ability to consider past conduct of bidding entities, among other things, in determining whether to award them with a contract.

Adding to the complexity of these varying legislative regimes is the potential cross-debarment practices of multilateral development banks, including the World Bank, the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstructions and Development, and the Inter-American Development Bank Group. These banks have joined the "Agreement of Mutual Recognition of Debarments" so that a company or person debarred by one multilateral bank may also be debarred by other multilateral banks.

DEBARMENT DEALS

The availability of deferred prosecution agreements in certain jurisdictions adds further complications. In addition to avoiding jail time or other consequences of criminal conviction, an incentive for entering into a deferred prosecution agreement, particularly for big name infrastructure players, has been to avoid the potential for debarment. As recently as 2019, Mr Justice Davis of the United Kingdom, in approving a deferred prosecution agreement with a subsidiary of an international conglomerate, extensively considered the potential for debarment of the parent company, its subsidiaries, and other group members, had a DPA not been entered into.

CONFRONTING THE CHALLENGES

What is clear from recent developments is that debarment regimes are more likely to strengthen, rather than loosen, in the coming years, and companies need to ensure they recognise and adapt to the changes.

The underlying conduct that debarment regimes seek to deter is naturally the first aspect to consider for any business. Having a robust and continuously reviewed compliance regime, as well as providing a secure mechanism for whistle-blowers, are instrumental and should be non-negotiable in today's regulatory landscape.

Key to ensuring your company and key stakeholders are protected in this area is adequate due diligence. This not only applies to due diligence of your contractors, or other entities that you engage with, but due diligence in respect of your own officers, operations, and key personnel on a regular basis. Without mechanisms for continuous internal assessment, and the development of internal plans for addressing issues as and when they arise, any crisis management will be impeded from the outset.

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