Hogan Lovells

Not a silver bullet: public procurement lessons from the G4S DPA

August 2020

On 17 July 2020, a three-year Deferred Prosecution Agreement (DPA) between the Serious Fraud Office (SFO) and G4S Care & Justice Services (UK) Ltd (G4S) was approved. This DPA is the second arising from fraudulent conduct in the performance of electronic monitoring services for the UK government between 2005 and 2013, after Serco Geografix Limited (Serco) entered a DPA in 2019.

The judgment approving the G4S DPA contains some interesting observations for companies who might consider self-reporting to the UK authorities, particularly those involved in bidding for public contracts.

It is clear that a DPA will not be a silver bullet for any companies concerned by the risk of debarment. This article considers the relationship between DPAs and debarment in the UK, and discusses the way forward for companies concerned about the impact of alleged wrongdoing on their ability to bid for public contracts.

Background: the G4S DPA

Between 2005 and 2013, G4S provided electronic monitoring services to the Home Office and later the Ministry of Justice (MOJ), under a contract which entitled the government to recover half the value of any unanticipated savings which G4S achieved. In its reporting, G4S falsely represented the true cost of its expenditure to the tune of over £40 million, with a view to depressing profits and retaining money that the government were entitled to recover.

In March 2014, G4S reached a civil settlement with the Secretary of State for Justice, and agreed to repay the 50% share that the MOJ were entitled to, a figure of around £20 million. Accordingly, the DPA makes no provision for further compensation by G4S, but instead stipulates a financial penalty of three times the value of G4S's gain. This figure was discounted by 40%, reflecting G4S's cooperation with the SFO's investigation. In total, G4S agreed to pay nearly £45 million to the SFO, in addition to a range of far-reaching compliance measures.

Avoiding a ban from public contracts: is a DPA the answer?

Many companies who uncover wrongdoing become concerned about the impact of a conviction on their ability to bid for public contracts in the UK and globally. In the Airbus SE (Airbus) DPA approved in January 2020, on a worst case debarment scenario the company quantified a loss of revenue in excess of £200 billion.

But the G4S judgment suggests that a DPA is not an easy solution to the debarment problem. We take away three key points from the judgment:

1. A conviction will not necessarily lead to debarment and, conversely, a DPA will not stop a company being banned from entering public contracts. Considering the application of UK law to the facts of the G4S case, the Judge found that there was "*no material distinction to be drawn between* [a] *conviction and DPA*". A company may still bid for public contracts in either scenario; what matters is whether it has taken adequate remedial action.

2. The risk of debarment may be a factor when a Judge is considering whether a DPA is a proportionate alternative to a conviction, but only where there is actual evidence that a conviction would lead to a loss of contracts and the damaging effects this would have (i.e. significant job losses).

3. A multi-agency approach is required. Companies at risk of debarment should engage with their public sector clients and the government in order to demonstrate they are fit to bid for public contracts.

No material difference between a DPA and a conviction: a company may still bid for UK public contracts in either scenario

The UK procurement regulations provide for both mandatory and discretionary debarment in the event a company is involved in improper or unlawful conduct. Whilst a conviction for certain offences will lead to mandatory debarment, a conviction for certain less serious offences or misconduct not amounting to criminality may lead to discretionary debarment. However, even mandatory debarment does not mean a company is necessarily prohibited from bidding for public contracts in the UK; provided that the contracting authority considers that a company has demonstrated that it has taken appropriate remedial action by undertaking what is known as 'self-cleaning', it may participate in public tender processes.

In the G4S case, there was evidence before the Court from the government's Chief Commercial Officer, who works within the Cabinet Office and has overall responsibility for debarment decisions in the UK. Having considered this evidence, the Judge concluded that the DPA would have no bearing on the discretionary political decision of whether G4S was fit to bid for public contracts. What was important in that decision was not the fact of whether G4S had been convicted as opposed to entering a DPA, but whether the remedial steps it had taken satisfied the self-cleaning provisions of the procurement regulations.

What is the relationship between debarment and DPAs?

The risk of debarment remains relevant to whether a Court will approve a DPA. If it can be shown that debarment is a real risk resulting in lost contracts and job losses, this would be a factor demonstrating that a DPA is a proportionate alternative to conviction.

In the G4S decision, the Judge criticised the evidence provided on the question of debarment, indicating that there was insufficient information before the Court relating to the actual effects of a conviction on the company. This was contrasted with the "*specific evidence about the potential loss of contracts*" before the Court in the Airbus case, which provided detailed information about the potential loss of many thousands of jobs around the world. This evidence demonstrated the disproportionate consequences of a conviction, in particular the impact on innocent employees and third parties.

Going forward, therefore, companies will need to do more to explain the disproportionate effects of conviction. In some jurisdictions other than the UK, a conviction can lead to debarment with no opportunity for saving measures such as self-cleaning; companies will need to spell this out, explain what contracts would be lost, and point to likely job losses.

A DPA is not a silver bullet: a multi-agency approach is required

The G4S judgment makes clear that even if criminal penalties are avoided, the risk of debarment remains. A multi-agency approach to self-reporting is required: a company reporting wrongdoing to the SFO or other relevant authorities must also engage with their public sector clients when allegations of wrongdoing emerge.

The two processes may go hand in hand. Many of the remedial measures which demonstrate self-cleaning are often required as part and parcel of the self-reporting process leading to a DPA. Moreover, cooperation with the relevant authorities is a factor which public bodies must consider under the self-cleaning regime.

In the UK, it may be appropriate to build a dialogue with the Cabinet Office, which issues guidance to contracting authorities on debarment. This can be pivotal in public sector bodies' assessment of whether a company is fit to contract. In this context, the MOJ awaited advice from the Cabinet Office before deciding to re-appoint Serco to any public contracts. As part of self-cleaning, Serco is required to report annually to both the SFO and the Cabinet Office on its assurance programme. In addition to the DPA, the Cabinet Office required G4S to undertake a separate compliance programme, and recommended that the company be subject to ongoing monitoring in relation to its continuing corporate renewal.

Self-cleaning measures can be onerous, but this is the price of continuing to bid for – and win – public contracts: Serco and G4S have both been awarded contracts by the UK government on its COVID-19 testing and track-and-trace systems following successful self-cleaning.

Other businesses contemplating self-reporting should take note: a joined-up, multi-agency approach is required.