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Exclusion: controlling the risk

Evidential thresholds, and grounds that emerge after final evaluation

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Damned if you do, damned if you don't

Exclude … and the excluded bidder sues

Optima v DWP: excluded for three pricing errors worth 0.02%; best quality bid by far. Discretion not exercised. *[2025] EWCA Civ 127;*

InHealth v NHS England: excluded after a portal upload failure; three-day trial (exclusion upheld). *[2023] EWHC 352 (TCC)*

Stagecoach v DOT 4 bidders excluded for refusing to take pensions risk. They lost, but only after an expedited, long and expensive trial.

vs

Don't exclude … and the losers sue

Robert Heath v Orbit: winner should have been disqualified for a conflict. *[2024] EWHC 3039 (TCC);*

Siemens v HS2: JV should have been disqualified. *[2023] EWHC 2768 (TCC);*

Bromcom v Arbor: loser sues the winner and its directors for unlawful means conspiracy. *[2026] EWHC 1605 (KB)*

Failing to disqualify can itself breach equal treatment: *Stagecoach [2020] EWHC 1568 (TCC) at [55]*

What the Act changed: six key points

1 Two-stage test

Ground + “continuing or likely to occur again”

s.57(1)–(2)

2 Right to be heard

Representations and evidence before you decide

s.58(2)

3 Look-back from knowledge

5 years (3 for some grounds), from when you knew or ought to have known

Sch 7 para 15

4 Poor performance recast

Termination, damages … or a settlement

Sch 7 para 12(5)

5 Debarment list

30-day notification; central list

ss.59, 62

6 Termination after award

Implied right; no contracting out

s.78

PCR 2015 continue to govern procurements commenced before 24 February 2025

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Meeting the evidential threshold

PART 1

Who has to prove what

The authority

Must be “satisfied” the ground applies.

Evidence specific to the supplier; the more reliable, the better.

Exclusions guidance para 81

The supplier

Must demonstrate self-cleaning.

You need not predict a repeat, only that the causes persist.

Exclusions guidance para 61; s.58(1)

No statutory standard of proof. Review is for manifest error, broadly equivalent to irrationality, and in turn that imports a duty to inform yourself of the relevant information.

Stagecoach [2020] EWHC 1568 (TCC) at [62]–[64] (Tameside)

The evidence ladder

↑

Debarment list entry (mandatory ground) *Question answered for you* — *s.57(1)(b)*

Conviction, court ruling, CMA decision, final HMRC penalty *External determination* — *Schs 6–7*

Investigation report; s.71(5) performance notice *Useful, but dated and maybe redacted* — *Debarment guidance para 12*

Your own records: termination, KPIs, rectification plans *Your conclusion, your risk* — *Sch 7 para 12*

Self-declaration only *"Should" do more in high-risk sectors* — *Exclusions guidance para 72*

Investigation ≠ ground: unlisted supplier = your own assessment (Debarment guidance para 20) | Bromcom at [21], [39]: you get the answers you ask for

Poor performance: the construction trap

Sch 7 para 12(5): a breach is "sufficiently serious" if it results in …

Termination | **Damages** | **Settlement**

Damages include LDs, not contract debts (Annex 1 para 16(b))

But you still need a breach

Para 12(1): a settlement without admission of liability does not prove breach. Get separate evidence.

Para 12(2): a court ruling does the work for you.

Para 12(3): poor performance needs a proper chance to improve: SMART plans (CO Guidance Annex 1 para 16(d)).

Glenman v Galway CC

Previous contract terminated for delay; termination disputed.

Conciliator upheld it; Glenman rejected the recommendation.

"Minded to exclude" letter: self-cleaning evidence by 6 January.

Reply: nothing to self-clean. Excluded 11 January.

Challenge 60 days out of time; merits never reached.

[2023] IEHC 336 at [66], [86], [130]–[137]

Discretion: use it, don't fetter it

"

I don't necessarily believe it is fair. However, I do not believe we really had a choice.

DWP witness, Optima v DWP [2025] EWCA Civ 127 at [97(f)]

"That is not the language of a proper exercise of a discretion" [98]

1. **Exclusion rules must be clear, precise and unequivocal**
   Optima [43]–[50]

2. **A reserved right to exclude is a discretion: exercise it**
   Optima [45], [98]

3. **Materiality, and choose the least onerous option**
   Optima [107]; InHealth [29]–[30]

4. **Don't exclude for reasons the rules don't give**
   Bechtel [2021] EWHC 458 (TCC) [301]

Showing your working

The decision record

- ✓ Who decided, and with what authority
- ✓ The ground, and the limb, relied on
- ✓ The evidence, and where it came from
- ✓ What the supplier said (s.58(2))
- ✓ Recurrence and self-cleaning (s.58(1))
- ✓ Options considered, and why rejected
- ✓ **“For the reasons set out in [x]”**

Stagecoach

No note of the Minister’s meeting; notes disclosed on and after the last day of trial.

[67]–[68], [368]

Bechtel

Records must enable the court to exercise its supervisory function.

[293]

Involve v DWP

Evidence from the official with delegated authority carried the day.

[2026] EWHC 2209 (TCC) [147]

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When the ground arises late in the process

PART 2

Where are you on the timeline?



PCR 2015

reg 57(9)–(10): exclude “at any time during the procedure”

reg 73(1)(b): terminate (mandatory ground at award)

Act 2023

s.27: stop progressing (CFP) s.26: disregard at assessment; check final tenders (guidance 88–89)

The gap
Act and guidance silent

s.78: implied right to terminate, incl. ground discovered after award

Fill the gap in the tender documents: right to revisit, right to pause standstill (guidance para 92; debarment guidance para 32)

Siemens v HS2: no duty to keep checking, but check rationally if you do

1

No general duty to re-verify

once the published evaluation is done

[583]–[588]

2

Unless something changes

notification or discovery of a material change, or of incorrect information

[617]

3

If you check, check rationally

no fresh evaluation under new tests: that breaches equality

[619], [640]

What HS2 did right

Reserved rights to re-check and disqualify up to award; bidders bound to notify changes [585]–[586].

Re-ran financial tests; weighed the explanations; recorded the reasons [599]–[606].

Reviewed problems on other projects and explained why each didn't matter [632]–[641].

[2023] EWHC 2768 (TCC)

How not to do it: Northstone

8 road resurfacing contracts, one competition

McQuillans ranked first in 6

Resources for 4 at most

Private talks after scoring

McQuillans withdrew from 2; runners-up promoted

"Red lights should have been flashing"

[108]

"a secret, bilateral and unrecorded process"

[123]

Not clarification [110]; negotiation [114]; the bidder chose the winners [113]; manifest error [122]

Department for Infrastructure v Northstone (NI) Ltd [2021] NICA 23

Conflicts

Siemens v HS2

Authority has an active duty to investigate (eVigilo).

Fair-minded and informed observer test.

[748]–[752]

Robert Heath v Orbit

Ex-employee joins the winner's group.

Low threshold: serious issue; early disclosure.

[63]–[64], [98]–[100]

Involve v DWP

Incumbent broke agreed mitigation.

Exclusion lawful: not "manifestly disproportionate".

[140]–[149]

Under the Act it's a duty: unfair advantage that can't be avoided → treat the supplier as excluded

s.82(3)–(4) (conflicts); s.16(4)–(5) (preliminary market engagement)

Sub-contractors, connected persons and debarment

Associated persons & sub-contractors

Notify and allow replacement first.

Re-assess without unfair advantage, no other changes.

ss.26(3), 27(4), 28(5); guidance para 51

Connected persons

No replacement right.

A late ground can lead straight to exclusion.

Sch 6 para 45; exclusions guidance para 45

Debarment mid-procurement

Investigation is not a ground.

8 working-day debarment standstill: not yet listed.

Say in the ITT how you'll proceed.

Debarment guidance paras 20, 32, 38; s.62(6)

Found out after award or during litigation

Involve v DWP

Excluded for failing a threshold score.

Conflict breach emerges in the proceedings [138]–[140].

Official with delegated authority: “I would have excluded” [147].

No relief, no damages [153], [159].

[2026] EWHC 2209 (TCC)

s.78(2)(b)	Supplier becomes excluded or excludable after award
s.78(11)(b)	Includes discovering, after award, it was excludable all along
s.78(2)(c)	Sub-contractor limb (if you asked under s.28)
s.78(7)	Notice, reasons, representations first
CO Guidance Para 96	Discretion, even on a mandatory ground

Doesn’t fit a ground? Ryhurst v Whittington

The facts

Preferred bidder for a 10-year estates partnership.

Group company had refurbished Grenfell Tower.

MPs and campaigners objected; regulator’s support cooled; Trust abandoned.

[2020] EWHC 448 (TCC)

Held: lawful

Four genuine, rational reasons; only one linked to Grenfell [246]–[248].

But [249]: abandoning because of a bidder’s nationality, dressed up with “trumped up reasons”, would not be saved.

Under the Act

Reputation by association is not a ground: evidence must be specific (CO guidance para 81; Annex 1 para 15(h)).

Abandon openly: procurement termination notice (s.55).

Ingenuity and time

Bromcom v Arbor

Loser sues winner and its directors: unlawful means conspiracy.

SQ answers on financial standing: implied misrepresentation arguable [25]–[27].

No free-standing duty of disclosure [40]–[41].

Act: inaccurate connected-person or sub-contractor information → must treat as excluded (s.30(5)–(6)).

[2026] EWHC 1605 (KB)

Glenman: 60 days late

Arguing in correspondence is no reason to issue late.

[2023] IEHC 336 at [130]–[137]

Verity v Cambridgeshire (Act s.106)

30 days from when a RWIND tenderer ought to have known [74].

Waiting for a reply isn't a good reason [93]; merits don't rescue [97].

[2026] EWHC 2830 (TCC)

Ten rules for a defensible exclusion

1. Write the rules before you need them
2. Ask the right questions at the start
3. Due diligence in proportion to risk
4. Pin it to a ground, and a limb
5. Evidence: specific and reliable
6. Hear the supplier: minded-to letter
7. Assess recurrence, not just history
8. Least onerous option; never “no choice”
9. Decide in the open: no side deals
10. Record who, what, why: “for the reasons in”

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Thank you for listening

Questions?

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