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# Past performance, present procurement

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The logo for 11kbw, featuring the number '11' in a large, black, serif font, followed by the lowercase letters 'kbw' in a blue, sans-serif font.

# Some potential issues around past contractual performance

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- Discretionary disqualification under PCR 2015 reg 57(8)(g)
- Other relevant aspects of reg 57(8)
- Past performance as a minimum qualification requirement or a selection criterion at PQQ stage
- “Light touch” and below-threshold procurements

# Reg 57(8) and how it works

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- Nine potential grounds for exclusion
- Discretionary (not mandatory)
- Cannot be relied upon more than 3 years after the “relevant event”: reg 8(12)
- Subject to regs 8(13)-(17) “self-cleaning” provisions

# Reg 57(8)(g)

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Grounds for exclusion arise where:

“where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions”

# Reg 57(8)(g) – constituent elements

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- Right kind of contract – i.e. one with a contracting authority or a utility
- Performance of substantive requirements
- Significant/persistent deficiencies – presumably for authority’s judgment, subject to “manifest error” – what are implications of word “misconduct” used in later provisions?
- Led to early termination/damages/comparable sanctions – does this include performance-related payment adjustments?

# Reg 57(8)(g) – additional issues (1)

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- What would self-cleansing look like in a “poor performance” case?
  - “Measures taken . . . sufficient to demonstrate its reliability”
  - Compensation for damage caused
  - Collaboration with investigation
  - “Concrete technical, organisational and personnel measures” to prevent recurrence
- Proportionality as a general principle governing exercise of authority’s discretion

# Reg 57(8)(g) – additional issues (2)

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- What is the “relevant event” to set the 3 year period running?
  - First breach? Last breach?
  - Termination date? Award of damages?
- Whose breach counts? (References are to “the economic operator” to be excluded)
  - Associated undertakings?
  - Consortium members?
  - Sub-contractors? – see reg 71
  - Impact of reg 63(4)

## Reg 57(8)(g) – additional issues (3)

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- Dangers of inequality of treatment e.g.
  - Authority knows of breach by Bidder A, but not similar breach by Bidder B
  - Authority more concerned about bad prior performance of its own contracts
- Any duties to investigate/verify owed to other bidders (cf reg 56(1))? No duty to disqualify, but any duty to consider properly whether to do so?

# Other relevant aspects of reg 57(8)

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- Reg 57(8)(c): grave professional misconduct rendering integrity questionable (if authority can “demonstrate by any appropriate means”) – note C-465/11 *Forposta*; C-178/16 *Impresa di Costruzioni*
- Reg 57(8)(h): serious misrepresentation re exclusion grounds/selection criteria, or withholding information
- Reg 57(8)(i)(ii): negligent provision of misleading information that may materially influence decisions
- Note also reg 57(8)(a) re breach of reg 56(2) obligations

# Minimum qualification requirements and past performance

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- Minimum requirements have to:
  - Fall within regs 58(5)-(18): see reg 58(2)
  - Limited to what is appropriate to ensure ability to perform contract to be awarded: see reg 58(3)
  - Related and proportionate to subject-matter of contract
- Relevant provisions are regs 57(15) and (16):
  - Requirements ensuring possession of necessary human and technical resources and experience to perform contract to appropriate standard
  - Can require “sufficient level of experience demonstrated by suitable references from contracts performed in the past”
- Relationship with reg 60?

# Past performance as selection criterion between qualified bidders?

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- Not relevant in open procedures
- Presumably could be used in other procedures
- Reg 65(2): objective and non-discriminatory criteria
- Formidable problems in making comparisons on objective and informed basis

# The RWIND tenderer principle

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- “Reasonably well informed and normally diligent tenderer”
- Important to apply at PQQ stage (whether to minimum requirements or to selection criteria)
- See e.g. *Commission v Netherlands*:
  - Formulation of criteria should allow all RWINDTs “to know the exact scope thereof”
  - All conditions and detailed rules “must be drawn up in a clear, precise and unequivocal manner” so RWINDTs can “understand their exact significance”

# Other RWIND tenderer cases

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- *Healthcare at Home v Common Services Agency* [2014] 4 All ER 210 – objective test; could tenderer “understandably and plausibly” have interpreted differently?
- See also Lord Hodge in Outer House re what is realistic and practicable in complex procurements)
- *Clinton v DEL* [2012] NICA 48 suggests greater stringency in relation to minimum requirements?
- See most recently *MLS (Overseas) Ltd v Secretary of State for Defence* [2017] EWHC 3389 (TCC)

# The objectivity principle

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*Easycoach Ltd v Department for Regional Development* [2012] NIQB 10:

- Requirement (as minimum selection criterion) to provide details of a relevant project within last 3 years
- Sample project to demonstrate ability successfully to perform the required transport service, and to be similar in nature and scale to required service
- What has to be avoided is unrestricted freedom of choice – court will be alert to criteria formulated so as to confer excessive discretion and subjective assessment on contracting authority
- Criteria here were not apt to establish fairly, transparently and objectively that bidders possessed specified minimum standards - no clear link made with lot for which bidding – no benchmarks or minimum thresholds prescribed, including re project volume, characteristics, duration – panel left to form “intuitive and instinctive” opinions

# Light touch and below threshold procurements

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- General principles of transparency and equality apply (in below threshold cases, under TFEU if potential cross-border interest)
- Exclusion for poor past performance would have to be proportionate, serve a proper purpose, and probably reflect an objective approach laid down in advance
- But fine detail of reg 57 would not apply