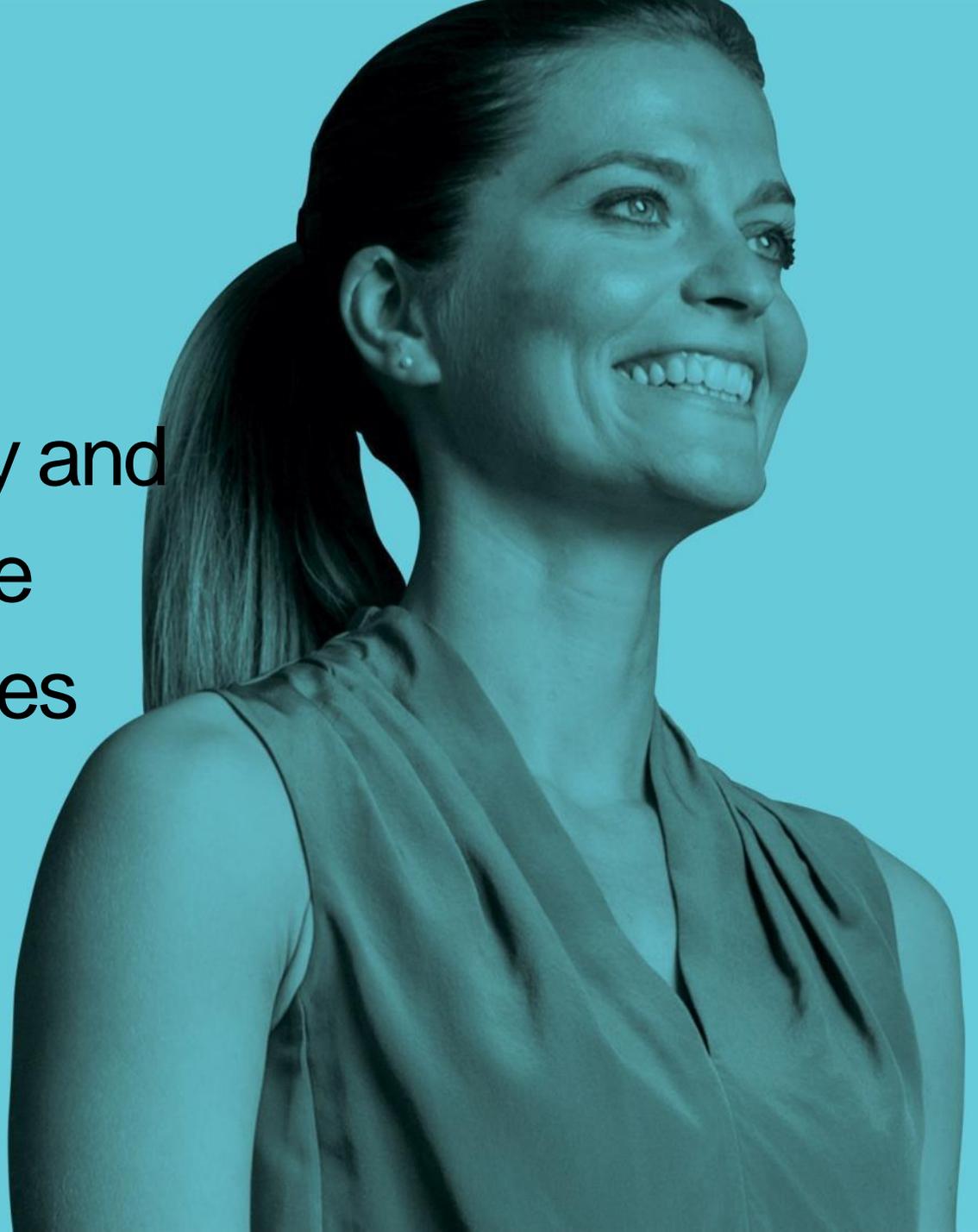


Awarding Public Contracts Skilfully and Lawfully within the Procurement Rules

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The Question(s)

- What is the key to an objective and legally robust assessment of a bidder's past performance?
- How much weight do you give it, especially if the bidder is a start-up, a phoenix company or new to the market?

Overview

- Why are you asking about past performance?
- At what stages can you take past performance into account?
- How can you do so in a lawful way?
- How should you cater for the situation of start-ups, phoenixes or new market entrants?

Exclusion

- Regulation 58(8)(c)
 - the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct which renders its integrity questionable
 - this includes past performance (of the very bad variety...)

Exclusion

- Commission v Spain (C-71/92)
 - Advocate General considered that the grave misconduct exclusion was available “*for a deliberate omission to perform contracts awarded*”
- Forposta (C-465/11)
 - Grave misconduct covers failure to perform a contract;
 - Not just any failure, grave implies “*a wrongful intent or negligence of a certain gravity*”

Exclusion (hot off the press bench)

- Esaprojekt (C-387/14)
 - an economic operator may be excluded for serious misrepresentation if it is guilty of making false declarations as to past experience
 - where operator is guilty of a certain degree of negligence...which may have a decisive effect on decisions concerning exclusion, selection or award...irrespective of whether there is wilful misconduct
- Current equivalent is Regulation 58(8)(h)

Exclusion

- Regulation 58(8)(g)
 - the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract [or utility contract/concession] which led to early termination of that prior contract, damages or other comparable sanctions

Exclusion - evidence

- For mandatory grounds Regulation 58 refers to contracting authority verifying or being otherwise aware of offence
- Verification should take place in accordance with
 - Regulation 60 (ESPD)
 - Regulation 61 (Means of Proof)
 - Regulation 62 (Recourse to E-Certis)
- Grave professional misconduct is a discretionary ground
 - “demonstrate by appropriate means”
- Deficient performance – provision is silent

Qualification & Selection

- Regulation 59(16) and 59(17)
 - with regard to technical and professional ability, a contracting authority may impose requirements ensure that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard
 - may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past

Qualification & Selection

- Regulation 61 – Means of Proof
 - Contracting authorities must not require means of proof other than those referred to in Regulation 61 and Regulation 59(17)
 - list of works for past 5 years and certificates of satisfactory completion
 - list of principal deliveries / supplies over the past 3 years
 - can go back further where necessary to ensure adequate competition

Qualification & Selection – References and Certificates

- Ambisig (C-46/15)
 - Suggestion by Advocate General that list of past services / supplies be accompanied by certification from past customers had disappeared
 - but ESPD is clear that it provides preliminary evidence
 - literal reading that nothing but the list is allowed renders bits of Regulation 58 (particularly re references) meaningless

Start-Ups

- You are legally obliged to consider how you can facilitate participation by start ups
- A sub-class of SME so considerations the same but more acute
- Market engagement
- Often innovative - allow for innovative solutions in your specification
- Proportionality is vital
- Allowing joint / collaborative bids
- Lotting strategies including direct award of small lots
- Your organisation's appetite for risk

Phoenixes and New Market Entrants

- Phoenixes
 - Establish exactly the nature of the (mythical) beast
 - React accordingly

- New Market Entrants
 - New to product market or geographic market?
 - Ask the right questions

References

- SIEPR Discussion Paper No. 16-036, *Contractors' Past Performance and Procurement Outcomes: A Firm-level Experiment*, Decarolis, Pacini, Spagnolo, Stanford Institute for Economic Policy Research
- <https://siepr.stanford.edu/sites/default/files/publications/16-036.pdf>

Any 
questions?