

## Strike out:

When can you lawfully strike out a bid in a regulated public procurement procedure?

Mark Bassett, Counsel

# Whitepaper questions:

- When can you lawfully strike out a bid from an incumbent (or other bidder) who has not performed twice or more?
- What counts as evidence and when is the evidence sufficiently serious?
- What if you "know" there is a problem (but it is personal rather than public knowledge)?

# The law - the Regulations (i)

- Regulation 57(8)(g) of the Public Contracts Regulations 2015 (transposed from Article 57 of the Public Sector Directive)
- States that:
  - The contracting authority **may** exclude an economic operator...
  - ...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**.

# The law - the Regulations (ii)

- But:
  - Regulation 58(12) - The period during which the economic operator may... be excluded is **3 years** from the relevant date
    - What is the relevant date? Termination? Award of damages?
  - Regulation 58(14) - provides that "**self cleaning**" may be relevant

# The law - aids to interpretation (i)

- Recital 101
  - They should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance **failure to deliver or perform, significant shortcomings of the product or service delivered**, making it unusable for the intended purpose, or **misbehaviour that casts serious doubts as to the reliability of the economic operator**.
    - Status of Recitals: aid to interpretation - not a legal rule itself (Casa Fleischhandels C-215/88)

# The law - aids to interpretation (ii)

- UK Government guidance:
  - Procurement Policy Note (PPN) 04/15: taking account of suppliers' past performance
  - Standard Supplier Questionnaire (SSQ) (in PPN 8/16) - includes questions to address past performance

# When can you lawfully strike out a bid from an incumbent (or other bidder) who has not performed twice or more?

- From an incumbent...
  - The fact that a bid is received from an incumbent would make no difference to the decision
    - Except that you might be more likely to be privy to otherwise confidential information about the performance of the bidder in relation to your own contracts
- Who has not performed twice or more...
  - "Twice or more" - not strictly relevant if breach is significant and relates to a substantive requirement
  - If breach is not significant - would "twice" be sufficient for a breach to be persistent

# When can you lawfully strike out a bid?

Regulation 57(8)(g):

Requirement	Comment
"may"	Discretionary - equal treatment - are you treating other bidders in a similar situation the same way?
"economic operator"	Relevant entity is the economic operator; not sister companies /subsidiaries. Consider Reg 63(4) - subcontractors etc.
"significant / persistent deficiencies"	Judgement taken by authority as to significant deficiency or persistent [non-significant] deficiency. "Manifest error" test applicable to decision?
"substantive requirement"	Clearly would not be relevant to breach of administrative requirement. Recital 101 gives a steer.
"prior public contract"	Includes utilities contracts/concessions - not explicit, but suggest it should include EU contracts
"early term./ damages or comparable sanctions"	Early termination and damages are easy to understand. But what might comparable sanctions also include? Service credits? Partial termination?

# When can you lawfully strike out a bid?

But consider...

Requirement	Comment
"3 years from the date of the relevant event"	What is the relevant event: first breach? last breach? Date of award of damages? Date of termination? In marginal cases this could be disputed.
"self cleaning"	Economic operator may evidence of measures: <ul style="list-style-type: none"><li>• "to demonstrate its reliability despite the existence of a relevant ground for exclusion"</li><li>• Must also:<ul style="list-style-type: none"><li>• Pay compensation</li><li>• Work collaboratively to establish the facts</li><li>• Take technical/organisational/personnel measures to prevent re-occurrence.</li></ul></li></ul> Subject to proportionality principle

# What counts as evidence and when is it sufficiently serious?

- What counts as evidence in relation to exclusion for significant or persistent deficiencies?
  - Regulation 58(10), "where [the contract authority] becomes aware, at any time"
  - Does not place a restriction on how the authority becomes aware
  - Typical sources of information:
    - SSQ response - but note restrictions about information that can be sought in Reg. 60
    - Press/trade reports about projects
    - Crown Commercial Service certificates - what if they are disputed?
    - Rumour?! Gossip?!
- Evidence "sufficiently serious" - judgement for the authority
  - Where the source is from a third party (e.g. press) - present to economic operator for rebuttal?

# What if you "know" there is a problem (but it is personal rather than public knowledge)?

- As above:
  - Regulation 58(10), "where [the contract authority] becomes aware, at any time"
    - Does not place a restriction on how the authority becomes aware
  - Knowledge the result of a current/recent contractual engagement?
- But - potential pitfalls in relation to equal treatment
  - Incumbent bidder argues that extent of the authorities knowledge of its performance differs greatly when compared to other bidders
  - Overall sufficient to amount to a different means of assessment
- What the authority "knows" should be tested:
  - Consider source of information - is it confidential? Can it be disclosed to the bidder?

# Other relevant provisions in the Regulations

- Regulation 57(8)(c) - grave professional misconduct
  - Where the economic operator is guilty of "grave professional misconduct, which renders its integrity questionable"
  - Authority must demonstrate with "appropriate means" (stricter than R57(8)(g))
- Regulation 57(8)(h) - misrepresentation
  - Where the economic operator is guilty of "serious misrepresentation in supplying the information" required for the evaluation of grounds of exclusion
- Regulation 57(8)(i) - negligent supply of misleading information
  - Where the economic operator has "negligently provided misleading information that may have a material influence on decisions"

# Thank you

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Dentons UK and Middle East LLP  
One Fleet Place  
London  
EC4M 7WS  
United Kingdom

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