

Strike Out: Exclusion of bidders for past performance

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White Paper



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Agenda

- When can you lawfully exclude an incumbent or other bidder who has not performed twice or more?
- What counts as evidence?
- What if you know there is a problem but it is not public knowledge?

When can you lawfully exclude a bidder based on past performance?

Legislation

Public Procurement Directive 2014/24/EU

- Exclusions for past performance
Recital 101; Article 57(4)(g)
- Grave professional misconduct
Article 57(4)(c)
- Selection on technical and professional ability
Article 58(4)

Public Contracts Regulations 2015

- Exclusions for past performance
Regulation 57(8)(g)
- Selection on technical and professional ability
Regulation 58(15)-(18)

When can you lawfully exclude a bidder based on past performance?

Legislation

Recital 101:

“should be able to exclude candidates or tenderers whose performance in earlier 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”

Discretionary exclusion ground (Reg 57 (8))

(g) “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”

When can you lawfully exclude a bid from a bidder based on past performance?

In practice

2015 PPN: Taking account of suppliers' past performance

- Sets out the Government policy to ensure suppliers' past performance is taken into account. Contains two actions:
 - Required to establish selection criteria relating to a supplier's reliability as demonstrated by its performance of past contracts
 - Required to collate information about suppliers' past performance

2016 - Standard Selection Questionnaire

- Also includes express provisions regarding how to take into account past performance

What counts as evidence?

Public Contracts Regulations 2015

Contracting authorities are limited as to the evidence they can ask for as proof that exclusion grounds do **not** apply and that selection criteria have been met

- Generally can only ask for the “means of proof” in Regulation 60
- Proof of technical and professional ability – may be provided for example by:
 - List of the works carried out over at most the past 5 years, accompanied by certificates of satisfactory execution and outcome for the most important works
 - List of the principal deliveries effected or the main services provided over at most the last 3 years “with the sums, dates and recipients, whether public or private, involved”
- Contracting authorities can also ask for technical references (58 (16))

They cannot exclude economic operators for not providing proof outwith these provisions and must accept reasonable alternative evidence (*Case C-71/92, Commission v Spain*)

What counts as evidence?

Information available in practice

- Information provided by the bidder:
 - Details of previous contracts (but be mindful of the fact the exclusion ground is restricted to public contracts)
 - Certificates of performance
 - Where they indicate they have not performed satisfactorily – it should include reasons why performance was not in accordance with the contract
- NB** a further ground for exclusion is: where the economic operator has been guilty of serious misrepresentation in supplying information required for the verification of the absence of grounds for exclusion (Reg 57 (8) (h))
- Information held by other contracting authorities/government
 - Certain contracting authorities are required to provide information about past performance of suppliers to CCS – CSS is collating a central database of information
 - Information known to the contracting authority?

What counts as evidence?

So what can contracting authorities take into account?

- Regulation 57 (8) does not however limit the types of evidence that can be taken into account
- Simply refers to “**has shown** significant or persistent deficiencies”
- Equally when referring to exclusion during the procedure the Regulations provide that they may be excluded where the Contracting Authority “**becomes aware**”
- Therefore generally, a contracting authority may seek and use the evidence it chooses on these matters
- Must always be mindful of the specific ground for exclusion
- Also be aware of:
 - the obligations of equal treatment and transparency
 - the need to be able to prove its position if challenged
 - proportionality