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Poor Performance

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What level of poor performance would have to be demonstrated before you can exclude a tenderer? How would you evidence it, and could you look into other contracts?

Agenda

Why is poor performance relevant?

What is “poor performance”?

Evidencing poor performance

Practical challenges





Why is poor performance relevant?



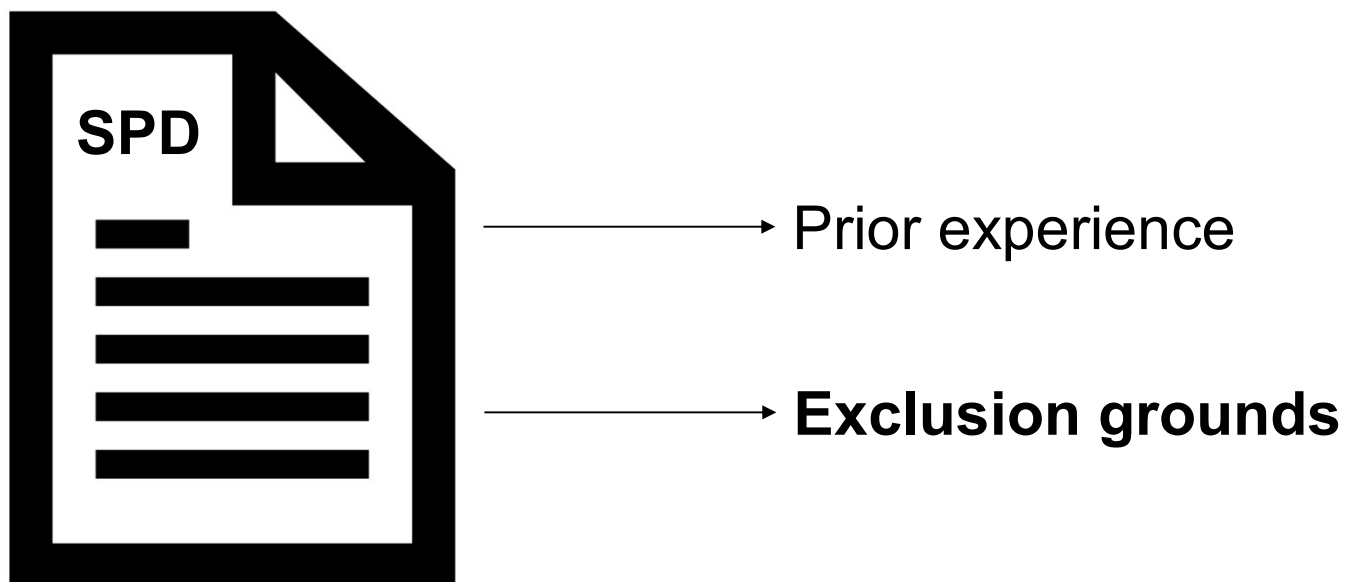
**Government writes off £1.4bn of PPE
from Covid deal**

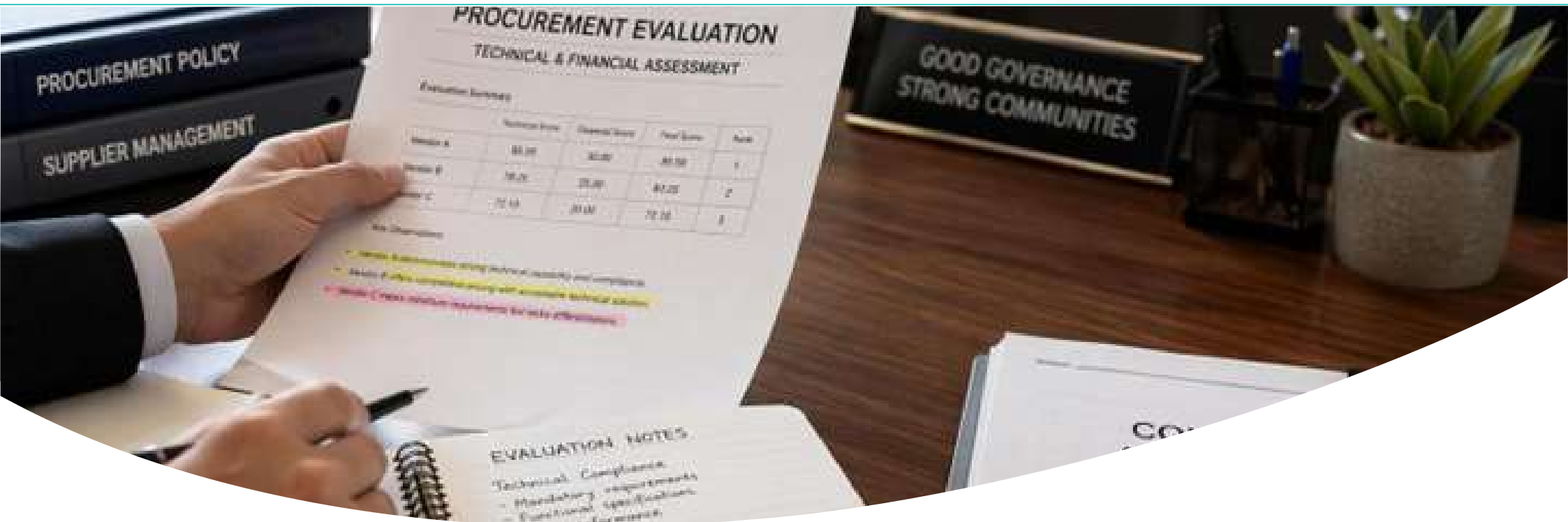
**G4S stripped of contract to run
Birmingham prison**

**Post Office finally announces plans to
ditch Fujitsu after Horizon IT scandal**

**Some former state employees across the country have been left with no
income this month after the company managing civil service pensions failed
to pay them.**

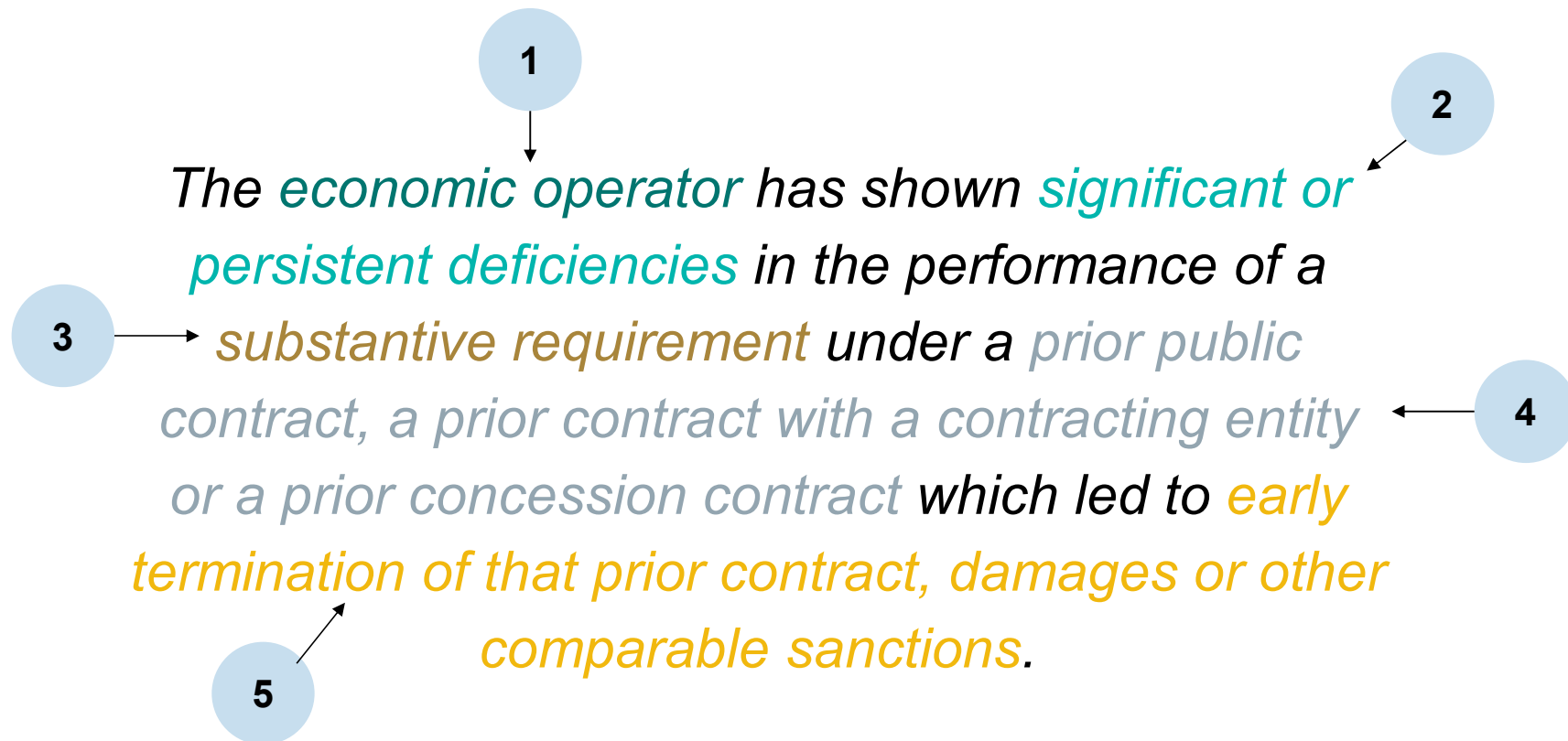
Poor performance as a relevant consideration



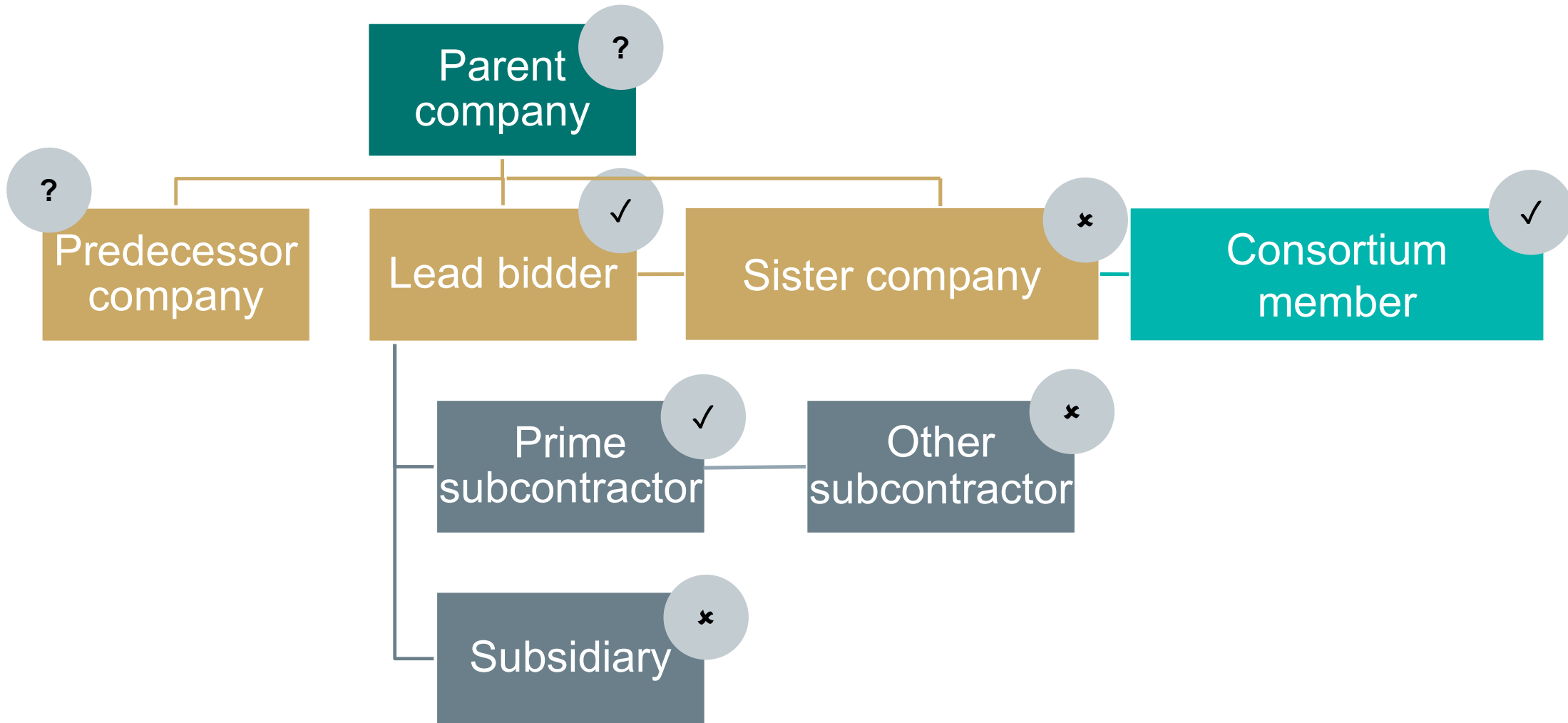


What is poor performance?

Regulation 58(8)(g)



“Economic operator”



“Prior public contract...”

- Types:
 - Public contracts
 - Regulated utility contracts
 - Concession contracts
- Does not include:
 - Private contracts
- Locations:
 - Scotland
 - England and Wales, Northern Ireland
 - Any country with which the UK has a relevant free trade agreement

“Significant or persistent deficiencies”

Significant

- failure to deliver or perform
- significant shortcomings of the product or service delivered, making it unusable for the intended purpose
- misbehaviour that casts serious doubts as to the reliability of the economic operator

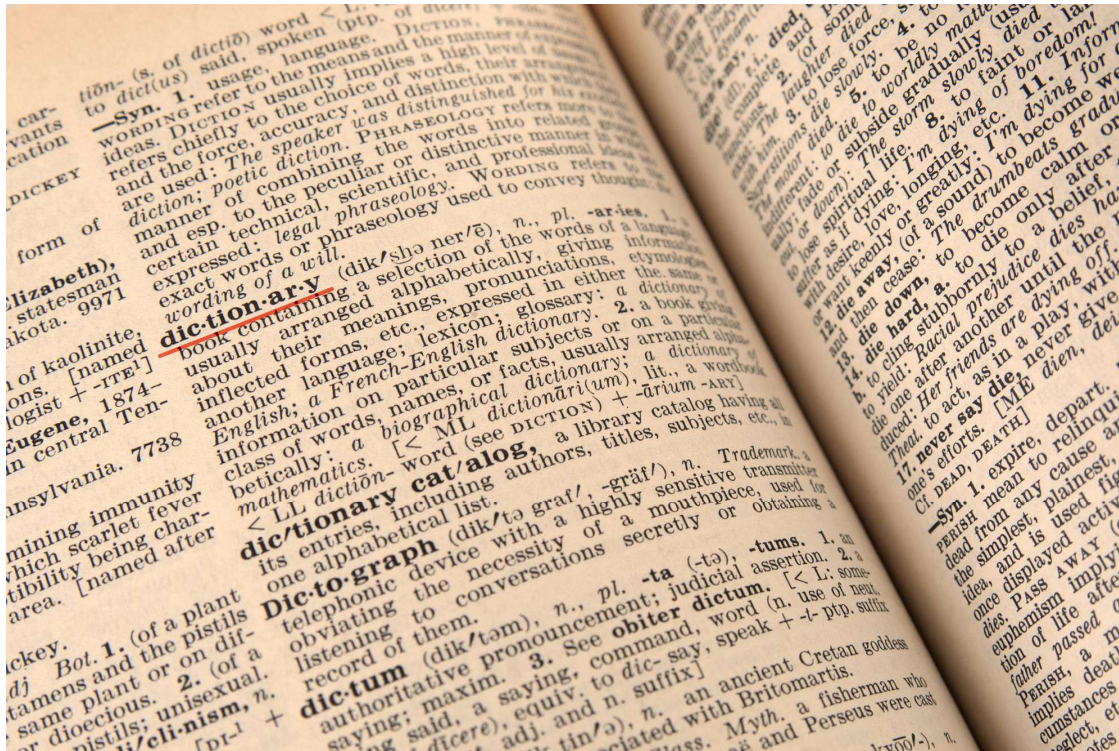
Persistent

- repeated cases of minor irregularities which give rise to doubts about the economic operator’s reliability

Deficiency

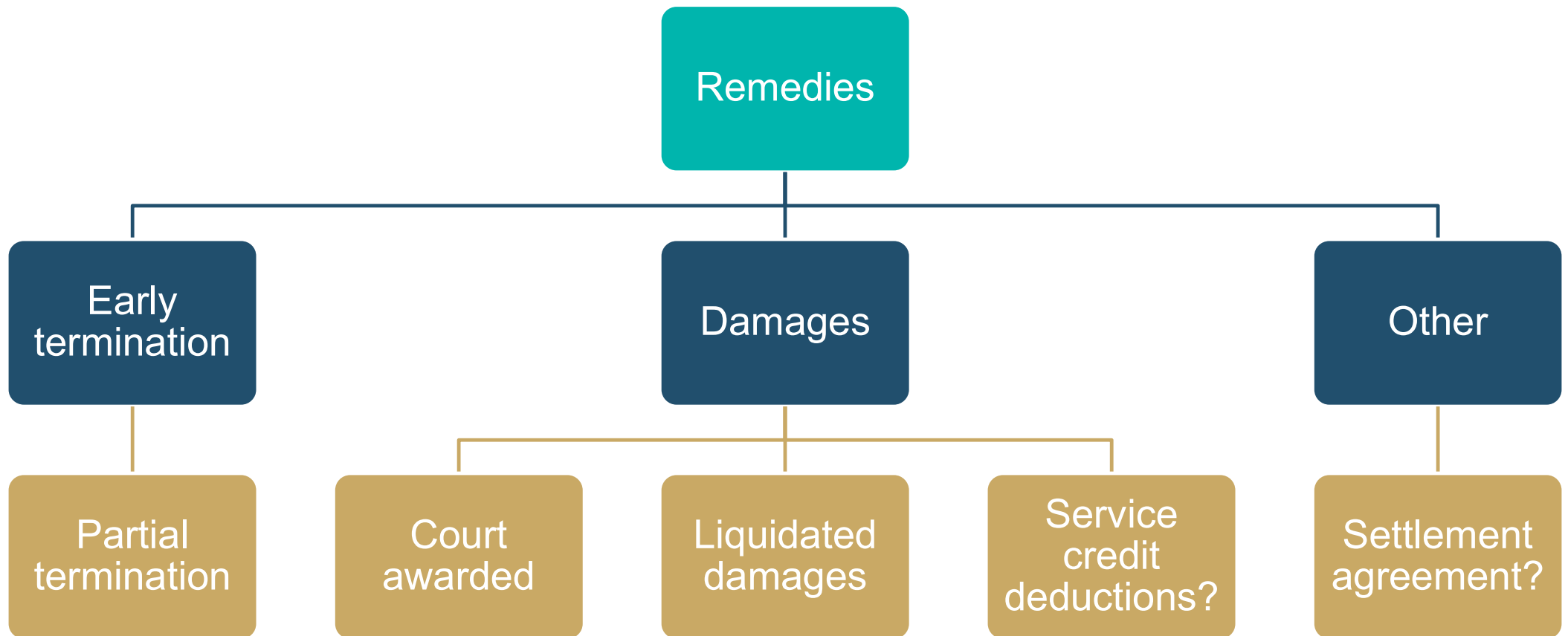
- deficient act
- deficient omission

“Substantive requirement”




- No clear definition
- Moot point? If it led to termination / damages / other comparable sanction, hard to imagine it wasn't substantive

“Early termination, damages, or other comparable remedy”



Scenario 1

- 
- A settlement agreement states that the supplier accepts no liability and no fault on the part of the contractor.
 - Nonetheless, the agreement states that the contract will terminate early and the supplier will pay a sum to the contracting authority.
 - Does this count as a “comparable remedy” to early termination and/or damages?

Procurement Act

- The Act does not reproduce the phrase "significant or persistent deficiencies." Instead, Schedule 7 sets out revised discretionary exclusion grounds for breach of contract and poor performance using notably different language:
 - *A discretionary exclusion ground applies to a supplier if the supplier has breached a relevant contract, and the breach was sufficiently serious.*
 - A breach is "**sufficiently serious**" if it results in termination (or partial termination) of the contract, the award of damages, or a **settlement agreement** between the supplier and the regulated authority.*
 - *Additionally, a new and distinct ground covers poor performance without breach: a discretionary exclusion ground applies to a supplier if the supplier has **not performed a relevant contract to the regulated authority's satisfaction, was given proper opportunity to improve performance, and failed to do so.***

Relevance

1. Contracting authorities have a wide margin of discretion to assess relevance and the court's role is supervisory.
2. In *Siemens*, the contracting authority decided the supplier's previous failure due to software problems was **not relevant** because, in this procurement, the supplier was proposing to use a different software developer, software platform and development process.
3. The court held this was not irrational or a manifest error

Siemens Mobility Limited v High Speed Two (HS2) Limited
[2023] EWHC 2768 (TCC)



Practical issues

Independence

1. The contracting authority **must carry out its own assessment** of any incident of poor performance
2. Cannot simply rely on the decision of the other contracting authority

***Delta Antrepriză de Construcții și Montaj v
Compania Națională de Administrare a
Infrastructurii Rutiere (Case C-267/18)***

What can you take into account?

- Self-declaration by the bidder that no exclusion grounds apply is only “preliminary evidence”
- Only realistic evidence you can rely on is references from other contracting authorities confirming no poor performance by the bidder
- In practice, getting these references may be quite arduous:
 - Your procurement documents must require the bidder to disclose every public contract it has been involved in during the previous 3 years and the contact details for the public body counterparty
 - You must then contact every public body and ask them to state whether there was any poor performance
 - Realistic? Proportionate?
- Regulation 61 (means of proof) no specific “hook” for poor performance but authority has the right to require bidder to supplement such information under regulation 60 (Single Procurement Document)



Lack of evidence

- Transparency gap
 - No mandatory publication of poor performance
 - No centralised performance database
 - NDAs / settlements restrict disclosure
- Informal contract management
- N.B.
 - Regulation 58(8)(g): requires deficiencies + consequence
 - No formal action → weak basis for exclusion
- → Outcome: Difficult to exclude despite known failure



Scenario 2

The papers publicise poor performance under a contract.

This organisation (or part of the organisation) is participating in your competition.

They have not declared any poor performance.

What can you do?



Self-Cleaning



- Legal basis: Regulation 58(13)–(17) Allows suppliers facing exclusion grounds to demonstrate reliability
- Supplier must evidence (Reg 58(14)):
 - Compensation for harm caused
 - Cooperation with investigating authorities
 - Concrete compliance and preventative measures
- Contracting authority assessment (Reg 58(15)):
 - Considers seriousness and circumstances
- Outcome:
 - ✓ If measures sufficient → supplier must not be excluded
 - ✗ If insufficient → supplier remains excluded + reasons required (Reg 58(16))

A final thought...

Conclusion

Exclusion grounds

58.—(1) A contracting authority must exclude an economic operator from participation in a procurement procedure where the authority has established, by verifying in accordance with regulations 60 (European Single Procurement Document: use, content and form of the ESPD), 61 (means of proof) and 62 (recourse to e-Certis), or is otherwise aware that that economic operator or a person to whom paragraph (2) applies has been convicted of any of the following offences—

- What level of poor performance would have to be demonstrated before you can exclude a tenderer?
 - Regulation 58(8)(g) exclusion: fact-sensitive, high threshold; needs significant/persistent deficiencies & clear consequence (termination, damages, sanction).
- How would you evidence it?
 - With great difficulty without the co-operation of other authorities and without effective contract management
 - If poor performance not recorded/acted on during contract, hard to rely on
- Could you “look into” other contracts?
 - Yes, but...

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