

Exclusion from procurement procedures for previous poor performance

Ciara Kennedy-Loest

May 2016

The Question

- "What is a tangible methodology for excluding a bidder for significant or persistent deficiencies and what evidence can you rely on?"

Overview

- Directive 2014/24 and the English PCRs 2015 preserved the previous three/four elements of qualification/shortlisting:-
 - mandatory exclusion grounds (Reg 57(1) and (3))
 - discretionary exclusion grounds (Reg 57(8)) (Reg 58(8)(Scotland)
 - minimum conditions (pass/fails) (Reg 58)
 - identifying limited number to receive ITT (Reg 65)
- But slightly extended the mandatory exclusion grounds and significantly extended the discretionary grounds

Overview (cont)

- Authorities now permitted to exclude a contractor (inter alia) where it:-

"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 [ie utility] or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions" (Reg 57(8)(g))/(Reg 58(8)(g) (Scotland)

- Objectives include to avoid that Authorities should be obliged to shortlist unreliable contractors

Overview (cont)

- Where the stated circumstances apply, the contractor may potentially be excluded, subject to:-
 - long stop date (contractors not required to declare circumstances occurring more than 3 years previously (5 years for mandatory exclusions)); and
 - "self-cleaning" (contractors may not be excluded if they have taken sufficient prescribed measures to atone for/remedy past failures and prevent recurrence (see later))

Overview (cont)

- Directive gave Member States the option of making the discretionary grounds mandatory. UK declined.
- But England has adopted a new standard PQQ and via statutory guidance ("New Requirements relating to Pre-Qualification Questionnaires to help businesses access public sector contracts" from 2015) "recommends" all public sector Authorities to use it when buying goods/services. Non-use must be reported to Cabinet Office
- So "discretionary" exclusion grounds, including Reg 57(8)(g)/Reg 58(8)(g) (Scotland), are no longer really discretionary in England!

Elements of the Reg 57(8)(g) exclusion ground

- Obvious scope for divergence between contractors and Authorities as to what terms mean
- "Significant or persistent" can be one-off major breaches or series of small failings (see Directive's Recital 101)
- Interpretational difficulties side-stepped by the requirement that the breaches led to early termination, damages or other comparable sanctions?
- Public/utility contracts only, not private sector

Elements of the Reg 57/58(8)(g) exclusion ground (cont)

- Breach must be of a "substantive" requirement, not minor procedural failures. Recital 101 gives examples:-
 - " ...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"*
- Are liquidated damages or service credits "damages or other comparable sanctions"?
- What about "ex gratia" payments to settle disputes short of litigation?

Sources of Evidence

- Primary source of information will be contractor's PQQ response
- But Authority may have information that casts doubt on contractor's response eg tip off from another Authority; experience of staff that have joined from other Authorities; newspaper reports of disputes/failings etc
- PCR's do not preclude looking behind the contractor's submission. Procurement Policy Note on Taking Suppliers' Past Performance into Account (March 2015) clearly endorses such an approach

Sources of Evidence (cont)

- In the face of evidence that contradicts contractor's PQQ response, Authority will probably seek clarification from contractor using Reg 56(4)/Reg 57(5) (Scotland):-
"Where information or documentation to be submitted by an economic operator is or appears to be incomplete or erroneous ... the Contracting Authority may request the economic operator concerned to submit, supplement, clarify or complete the relevant information within an appropriate time limit ..."
- If contractor maintains denial, assess carefully strength of contradictory evidence: burden of proof is on Authority to show exclusion grounds are made out (see later)

Difficult issues

- Contractor is more likely to deny that circumstances are relevant than allege they never existed? For example:-
 - Previous contract was terminated early, but wrongfully and contractor is suing the terminating party; or
 - Exclusion from present procurement would be a disproportionate response to the previous breaches

Difficult issues: grounds being challenged

- If the litigation is directly relevant to whether the exclusion ground is made out, Authority should probably await outcome
- See *La Cascina (C-226/04 and C-228/04)* in which ECJ considered whether a contractor could be excluded for non-payment of tax and social security contributions if it was contesting the liability in court proceedings:-

"The effects of bringing administrative or legal proceedings are closely linked to the exercise and safeguard of fundamental rights in relation to judicial protection, respect for which is also guaranteed by the Community legal order. National legislation which paid no heed to the effects of bringing administrative or legal proceedings ... would risk infringing the fundamental rights of the parties concerned"

Difficult issues: proportionality

- Authorities must observe General Treaty Principles at every stage of a procurement process. Principles include proportionality (see Reg 18(1))
- Acting pursuant to explicit rights given by a Directive does not exclude the need to consider proportionality: exercising the rights may still be disproportionate in the circumstances. See *Baumbast* (C-413/99)
- Examples in procurement context include *Michaniki* (C-213/07) *Fabrimcom* (C-34/03) and *Forposta* (C-465/11)

Difficult issues: proportionality (cont)

- Forposta concerned Polish law requiring contractors to be excluded from procurements where they had breached an earlier contract and the non/under-performance amounted to at least 5% of the contract's value
- ECJ held that the rule was disproportionate to the legitimate object to be attained:-

"Not only does the national provision at issue apply automatically but in addition it goes beyond what is necessary to attain the aim of protecting the public interest, namely to eliminate contractors that are genuinely unreliable"

Difficult issues: proportionality (cont)

- Reg 57/58(8)(g) is arguably pre-loaded with proportionality: prior breaches must have led to stated consequences; self cleaning precludes exclusion etc
- Still, the proportionality of a measure/action must be considered in light of the (legitimate) objectives which it seeks to achieve
- Regulation 57/58(8)(g) primarily addresses contractor reliability

Difficult issues: proportionality (cont)

- Authorities should investigate the circumstances of the prior poor performance and assess what it tells them about contractor's likely reliability for the upcoming contract
- Perhaps the previous contract was unusually onerous, or conceptually doomed to fail?

Difficult issues: proportionality (cont)

- If Authority still wishes to exclude, bear in mind that:-
 - burden of proof is on Authority to demonstrate grounds (not on contractor to disprove grounds)
 - Authorities have no margin of appreciation where General Treaty Principles, including proportionality, are concerned (unlike a "manifest error" claim) so Judge will consider all the evidence and arrive at a view

Rehabilitation (Reg 57/58(13)-(17))

- Contractor may provide evidence to demonstrate its reliability notwithstanding existence of a ground for exclusion. If evidence considered satisfactory by Authority it must not exclude
- Measures appear prescriptive ("*...for this purpose the economic operator shall prove that ...*") and cumulative

Rehabilitation (cont)

- The contractor must have:
 - Paid or undertaken to pay compensation re any damage caused by the criminal offence or misconduct; and
 - Clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
 - Taken concrete technical, organisational and personnel measures appropriate to prevent further criminal offences/misconduct
- In determining sufficiency of measures taken, Authority must have regard to the gravity and particular circumstances of the offence/misconduct (Reg 57/58(16))

Rehabilitation (cont)

- In context of Reg 57/58(8)(g) first ground of self-cleaning will probably be readily made out: it may be the cause of the problem, as well as the solution!
- What does "actively collaborating" mean in this context?
- The concrete steps to avoid recurrence may be burdensome. See Directive's Recital 102:-

"... those measures might consist in particular of ... the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff re-organisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules".

Rehabilitation (cont)

- Where an Authority excludes, contractor entitled to a written statement of reasons
- English standard PQQ tendentiously suggests Authority's decision "will be final"!
- In fact, challengeable by contractor, probably on proportionality grounds again, or possibly "manifest error"

Conclusion

- A decision to exclude will always be contentious
- Profound implications for contractor concerned, and may also have implications for intensity of the Authority's competition. So not to be taken lightly
- Authority should proceed cautiously: assemble the evidence it relies on; document its decision-making process; allow the contractor a right of reply etc and always keep proportionality in mind!

Exclusion from procurement procedures for previous poor performance

Ciara Kennedy-Loest

ciara.kennedy-loest@hoganlovells.com

May 2016

6917188