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Past performance

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The question:

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 / phoenix / new to the market?

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Legislation

Directive 2014/24 and Public Contracts Regulations 2015 include two aspects of evaluating past performance:

- Reg 57 – disqualification criteria
 - 57(1) and (3) – mandatory exclusion grounds
 - 57(8) – discretionary exclusion grounds
- Reg 58 – selection criteria (pass/fail or scored)
- Reg 60 – evidence (references - 3 or 5 years)

Why are we looking at past performance?

- When letting a contract a CA will want to ensure:
 - Good and effective delivery of contract
 - Value for money
 - Reliability
 - Suppliers with the necessary technical and professional ability are selected to bid
- Past performance is used to demonstrate a supplier's
- Assumes that previous poor performance could undermine a bidder's reliability and ability to successfully perform upcoming contract
- Need to construct an objective and legally robust assessment to avoid successful challenge in the event of an exclusion BUT also avoid creating undue barriers to SMEs/new entrants etc.

Legislation cont.

- Reg 57(8)(g):

CAs are permitted to exclude a bidder (*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 or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions”

Setting the standard (objective and legally robust)

- Regulation 57(8)(g) – already sets a threshold to test unreliability:
- Is it a low threshold?
 - Only relates to terminated contracts/where damages have been paid/other sanctions have been applied
 - Breaches must be persistent and significant AND relate to substantive parts of the contract
 - Don't have to declare circumstances occurring more than 3 years previously (NB – 5 years for mandatory exclusions)
 - Subject to self-cleaning (eg contractor may nevertheless demonstrate reliability despite relevant ground for exclusion if it can prove that it has taken steps to remedy past poor performance and the CA thinks those steps are sufficient)
- (Protects contractor from a poorly performing client...?)

Setting the standard (cont.):

- When setting an objective and legally robust test, what does a CA need to consider?
 - What is a significant or persistent breach?
 - Major one-off breaches
 - Repeated cases of minor irregularities
 - Often early termination is avoided by settlement agreements
 - Could these be included, if they include contractor-side penalties/ex-gratia payments pursuant to “comparable sanctions”
 - Are LADs/service deductions “damages or comparable sanctions” ?

Crown Commercial Service 'SQ'

- Evidence of past performance will be primarily through a bidder's response to the CAs SQ
- The CCS standard Selection Questionnaire – mandatory format
 - Includes mandatory and discretionary exclusion criteria (in Parts 1 and 2):
 - Selection criteria: bidders must complete either Question 6.1 or 6.3 (and can add further questions in Part 3)

SQ overview

- Procurement Policy Note 08/16 – paragraphs 48-51:
 - CAs may evaluate past performance
 - Bidders may be required to have a sufficient level of experience
 - Experience demonstrated by references (3/5 years)
 - References must be factual
 - Criteria for evaluation should not discriminate against SMEs (see also 6.3)
 - Number of references requested must be relevant and proportionate (6.1 asks for three examples)
 - Consortia
- Also note CCS PPNs:
 - 11/14 (references and public procurement)
 - 04/15 (taking account of bidders' past performance)

Setting the level of performance for the selection criteria

- Limitations on requirements relating to performance:
 - Regulation 58(3) and (4) (principles of selection criteria to be applied):
 - Appropriate
 - Proportionate
 - Related to the subject matter of contract to be let
- Proportionality: *Forposta* (Case C-465/11):
 - Polish law: bidder must be excluded from a procurement where it had breach/under-performance of a previous contract = at least 5% of that contract's value.
 - CoJ: Disproportionate! This rule should not be applied automatically and goes beyond what is required to protect public interest against unreliable contractor performance

Setting the level of performance (2)

- Ensure that the requirement relates to the subject matter of the contract.
 - *Harrow* [1997] 3 C.M.L.R 870
- Appropriate: whose performance is key?
 - “Essential sub-contractors”
 - Consortia/groups
 - Is it important to flush out the ultimate performers of the contract?
 - Who is being relied on to perform the contract?

What if a new co. / phoenix / new to market: how much weight do you give it?

- Need to consider why you are asking for evidence of past performance
 - Reliability and likelihood of successful delivery:
 - On that basis:
 - High-value/complex procurements – CA may need to limit type of contracts concerned with past performance to those of a similar scale/size/type etc.
 - Lower value/simpler contracts (or markets where significant SME/new entrants etc): may allow wider range of contracts to avoid undue barrier

What if a new co. / phoenix / new to market: how much weight do you give it?

- Eg:
 - If a new entity, then CCS SQ 6.3 allows that bidder to ‘provide an explanation’ as to why it is unable to provide at least one reference/contract example at 6.1. (If bidding in a consortia/SPV structure – can they use performance of participants?)
 - Phoenix company: references/answers to exclusion criteria may flush out previous poor performance: consider self-cleaning provisions: have issues been addressed?
 - New to the market: CCS PPN 04/15: “performance of a previous contract may assist an assessment of the reliability of the supplier even if the goods or services provided under that contract were not the same as being procured”

Other evidence of past performance

- What if CA has heard gossip or information from other clients/press reports that undermines the bidders' SQ response as to previous performance problems?
 - PCR does not preclude CA taking it into account
 - Seek clarification pursuant to Reg 56(4)
 - If bidder maintains information is “alternative facts” CA must assess robustness of information and:
 - Consider whether it will affect bidders reliability in performing its contract
 - Consider self-cleaning requirements
 - Act proportionately: eg gravity and seriousness of particular circumstances

Final comments on past performance

- To create an objective and robust test:
 - Can use exclusion criteria and selection criteria
 - Must be appropriate, proportionate and related to the upcoming contract (different levels of reliability?)
 - Can use references and external information
 - Use references to consider reliability in a more detailed and focused manner
 - Proportionality means that CA probably has to prove grounds for exclusion in light of upcoming contract NOT in relation to previous contract

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