



# Strike-out: failure to perform

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

# The law

- Regulation 57(8)(g) (from Article 57 of the Directive)
- 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.

## Back to the (easier) questions

- It does not matter whether the economic operator is an incumbent or not.
- It does not matter whether it is a single event, or twice (or more).

# Unpacking the regulation (1)

- .....where the economic operator
  - Does not extend to related companies.
- .....has shown significant or persistent deficiencies
  - Persistent yet insignificant deficiencies can count.
- ...in the performance of a substantive requirement
  - Self-fulfilling part of the test?
- ....under a prior public contract, a prior contract with a contracting entity, or a prior concession contract
  - Includes utilities
  - Value
  - Geography

## Unpacking the regulation (2)

- ....which led to early termination of that prior contract, damages or other comparable sanctions
  - There must have been enforcement.
  - Comparable to termination?
    - De-scoping
    - Shortening
    - Change
  - Comparable to damages?
    - Pay less notices in construction contracts
    - KPI enforcement
    - Warning notice regime
    - Indemnity protection

# Sufficient evidence?

- General principles: “the contracting authority can demonstrate by any appropriate means.....”
- Grave misconduct: “the contracting authority can demonstrate by appropriate means.....”.
- Competition: “the contracting authority has sufficiently plausible indications to conclude...”
- In contrast prior poor performance is a clean (or absolute) test.

# Sources of knowledge

- Personal knowledge vs market knowledge.
- What is serious enough depends on the contract of the other authority and its enforcement.
- Confidentiality and reputational issues.
- Central registers of certificates of performance.
- Timing: at any time during the procedure (and so not just the ESPD check).
- Separate exclusion grounds for serious misrepresentation and withholding information.

# Constraints

- Time limit: 3 years from the relevant event.
- Self cleaning:
  - Measures to demonstrate reliability.
  - If satisfied sufficient, must not exclude.
  - Proportionality, and must take into account the gravity and particular circumstances of the event.
  - Obligation to give reasons
- Bidder must prove:
  - Paid compensation
  - Clarified facts and circumstances through collaboration
  - Concrete technical, organisational and personnel measures that are appropriate to prevent further misconduct

# Balance of risk

- Accept the private decision of one authority; or challenge it and risk a court endorsement of it?
- From the authority perspective, preference to allow the courts to make the decision in borderline situations.



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