



A&L Goodbody

What are the warning signs of a contractor in financial distress?

What can you actively do to ensure
that your service is continued and
delivered within the rules?

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signs of contractor distress

before (and during)

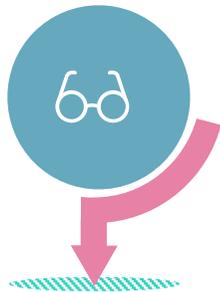
- lack of cash
- high debt, interest payments
- late payment
- falling profits, mounting losses
- qualified auditor's report

during

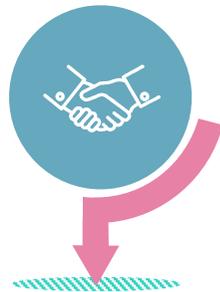
- work slows down
- asking for faster payment
- subcontractors asking for payment
- staff turnover
- materials or plant disappearing from site

protection first

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01
diligence



02
contract terms

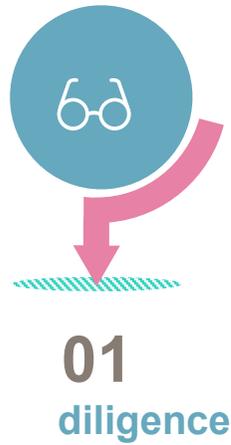


03
security



04
backup plan

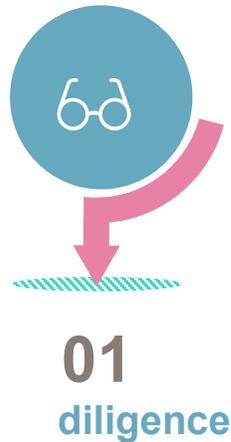
protection first



- pre-contract
- ongoing – warning signs

protection first

discretionary exclusion

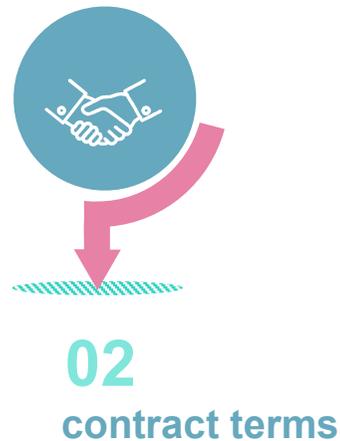


where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under the law of the State

European Union (Award of Public Authority Contracts) Regulations 2016, Reg 57(8)(b)

protection first

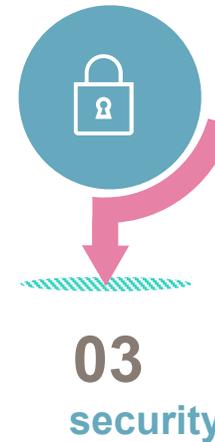
- payment profile
- retention
- set-off
- pay when paid (insolvency)



- title to goods and materials
 - modular
- documentation
 - safety file
 - O&M
 - certificates
- termination
- step-in

protection first

- bond
 - performance bond
 - retention bond
 - advance payment bond
- parent company guarantee



protection first

how will you get a replacement contractor quickly?

- what do you need from the contractor being replaced?
- change of contractor in the old contract (step-in)



04
backup plan

Regulation 72(1)(a) – ‘clear precise and unequivocal review clauses’

Contracts and framework agreements ... may be modified without a new procurement procedure ... where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, where such clauses -

- (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
- (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement

- *Presstext Nachrichtenagentur GmbH v Republik Osterreich* (C-454/06)
- *R (Redwood Health) v NHS Purchasing and Supply Agency* [2009] EWHC 2511 (Admin)

“where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, *provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations*”

If any of the events or circumstances listed in [termination clause] occurs, the Client may, by notice to the Contractor, transfer the Contractor's rights and obligations under this contract to a replacement contractor.

The notice will take effect on the date it is given, or on another date stated in the notice, to novate the Contractor's rights and obligations under this contract to the replacement contractor.

On the effective date of the notice, as between the Client and the Contractor (but not as between the Client and the replacement contractor) [the termination for default consequences clause] will apply as though this contract had been terminated under [that clause].

A replacement contractor must have been selected to tender for this contract, or have a framework agreement with the Client, or be nominated by the surety of the Performance Bond.

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if this happens



client's options on contractor insolvency



terminate

carefully
step-in to lower tier?
enforce security (bond)
usually no more pay
what then?



work with the insolvent contractor

change payment terms?
direct payment to subcontractors?
usually waive claims
unterminate?



Questions?
