



PRIOR PERFORMANCE

White Paper Conference

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Prior Performance

- How can you deal with and curtail suppliers who score well on tender submissions but perform poorly on other contracts without making this known at the PQQ stage?



Overview

- The Law
- The Exclusion Process
- Self-Cleaning
- Caselaw
- Issues
- Practical Tips
- The UK and Future Developments

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THE LAW

Article 57 of Directive 2014/24/EU

Regulation 57 European Union
(Award of Public Authority
Contracts) Regulations 2016

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The Recitals - Directive 2014/24/EU

The Recitals give us an understanding of the meaning of the Directive provisions in relation to prior performance

- *(101) contracting authorities should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, 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*
- *In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion*

Regulation 57 of the European Union (Award of Public Authority Contracts) Regulations 2016

Article 57 is transposed by Regulation 57 of the Public Sector Regulations 2016

The key provision on prior performance is **Regulation 57(8)(g)**

- *“Subject to paragraphs (13) and (20), a contracting authority may exclude from participation in a procurement procedure any economic operator in one or more of the following situations:...*
- *(g) 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**”*
- Also note Regulation 57(8)(c) – *“where the contracting authority can demonstrate, by appropriate means, that **the economic operator is guilty of grave professional misconduct, which renders its integrity questionable**”*

Regulation 57

- *(12) An economic operator that is in one of the situations referred to in paragraphs (1), (2) or (8) may provide evidence to the effect that measures taken by the economic operator concerned are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.*
- *(13) Where the evidence provided under paragraph (12) is considered sufficient the economic operator concerned shall not be excluded from the procurement procedure.*
- *(14) For the purposes of paragraphs (12) and (13) the economic operator shall show that it has
 - *(a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct concerned,*
 - *(b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and*
 - *(c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct**
- *(15) The contracting authority shall, when evaluating the measures shown to be taken by the economic operator under paragraph (14), take into account the gravity and particular circumstances of the criminal offence or misconduct concerned.*

Regulation 57

- *(16) Where the contracting authority considers that the **measures shown to be taken by the economic operator under paragraph (14) are insufficient**, the contracting authority shall give the economic operator **a statement of the reasons for that decision***
- *(20) Paragraph (8) shall be construed so that the power under that paragraph to exclude an economic operator, in the manner there mentioned, shall not be exercisable where the contracting authority establishes that **3 or more years have elapsed since the date that the economic operator concerned was in the relevant situation referred to in that paragraph.***
- This is a **discretionary** exclusion ground, distinguished from **mandatory** exclusions in Regulation 57(1) (criminal organisation, corruption, fraud)
- There must be breach of a **substantive requirement** and not simply a breach of contract, and the breach must be **significant or persistent** – high bar
- The breach must lead to **termination, damages or “other comparable sanctions”**-relatively little caselaw guidance on these concepts

THE EXCLUSION PROCESS

Steps for Contracting Authorities

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Knowledge – How do you find out?

- ESPD – self declaration? - often no disclosure
- Bidder voluntarily discloses, they may be prepared from other procurement procedures and include self-cleaning statements
- Publicly available information or tip-off from a third party- Care required with basis of information
- However, no specific wording in Regulation 57(8)(g)- factual situation, no clear restraint on what or how CA becomes aware
- Regulation 57(11) – *“Authority may, **at any time** during the procurement procedure, exclude an economic operator **where the authority becomes aware...**”*

Verification

- At the time of submission of requests to participate or tenders, Regulation 59 requires tenderers to submit a European Single Procurement Document, consisting of an updated self-declaration that the tenderer does not fulfil any exclusion criteria
- Regulation 56(4) – CA may clarify where information or documentation submitted by an economic operator is, or appears to a contracting authority, **to be incomplete or erroneous, or where specific documents are missing ...** may request the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation

The Exclusion Process

- If the CA exercises its discretion to exclude, the effect of such an exclusion is to preclude the relevant economic operator from participating in future public tender competitions (for a limited period)
- The decision must be made on a case-by-case basis and such an exclusion is not necessarily absolute
- The CA must take steps to actively investigate the supposed deficiencies/misconduct and justify the requirement to exclude
- Exclusion should be a last resort, CAs must show that they have considered less intrusive measures before making the decision to exclude



The Exclusion Process

- The principle of proportionality is key - minor irregularity should generally not lead to exclusion, however a pattern of minor irregularities could lead to exclusion on the basis of unreliability (Recital 101)
- The period in which a discretionary exclusion can be applied is limited to 3 years from the date on which the economic operator was “in the relevant situation”
- It is of critical importance to establish the date on which this took place as this will have a bearing on the period in which a CA can exercise its entitlement to exclude that party



SELF-CLEANING

Rectifying mistakes and avoiding exclusion

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Self-Cleaning

- The option to “self-clean” is available to economic operators to demonstrate that they have rectified their issues of unreliability and lack of integrity
- A tenderer which is seeking to rely upon this option must show that it has (Regulation 57(14)):
 - paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct concerned
 - clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities **and**
 - taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct



Self-Cleaning

- Where a tenderer undergoes self-cleaning, the CA must consider the sufficiency of the measures undertaken and either accept or exclude the tenderer with **sufficient reasons stated for their decision**
- This **must** be through an examination of the specific facts of the case
- Proportionality is key here, lesser efforts may be required to self-clean a minor wrong in comparison to a major wrong



Self-Cleaning

- Recital 102 provides some examples of self-cleaning measures:-
 - Severance of links with persons or organisations involved in the misbehaviour
 - Appropriate staff reorganization measures
 - Implementation of reporting and control systems
 - Creation of an internal audit structure to monitor compliance
 - Adoption of internal liability and compensation rules



CASELAW

Prior Performance Exclusions in Practice

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Meca Srl v Comune di Napoli (Case-41/18)

- The Municipality of Naples issued tender to award a contract for school catering, it had entered into a contract with Sirio, contract was terminated due to a serious incident of food poisoning
- Sirio won new tender, Meca challenged their participation
- Italian law - a tenderer cannot be excluded for past prior performance issues if it has brought an action, still pending, against that termination
- The CJEU held that a CA cannot be forced by domestic law to refrain from excluding a tenderer just because this tenderer has challenged the termination of a contract in court
- CJEU also pointed out that it is CAs, not a national court, that are entrusted with determination that a tenderer be excluded, for them to assess integrity and reliability, discretion is hamstrung otherwise if there's an appeal

Delta v CNAIR (Case C-267/18)

- Delta was a lead contractor of a consortium for a leisure facility in Romania. Contract terminated as consortium used a subcontractor without the municipality's prior authorisation which caused around €500,000 of losses
- Delta later bid as part of a different consortium to another CA and was excluded for this past issue
- The Court held that it was for the CA to carry out its own evaluation of the economic operator's conduct which led to the early termination
- CA must examine *“diligently and impartially, on the basis of all the relevant factors, in particular the early termination decision, and in the light of the principle of proportionality, whether that operator is, from its point of view, responsible for significant or persistent deficiencies in the performance of a substantive requirement imposed on it under that contract, those deficiencies being such as to break the relationship of trust with the economic operator in question”*

Delta v CNAIR (Case C-267/18)

- The CA had to ask itself whether or not the unauthorised use of a subcontractor is likely to constitute a substantial amendment of the tender submitted by the successful tenderer in the sense that it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of new tenderers
- **CJEU - a CA cannot automatically infer that another CA's decision to terminate a contract early constituted “significant or persistent deficiencies” under a contract, it must carry out its own investigation, including consideration of the arguments put forward by the bidder**
- The information on previous contract termination was not declared in the ESPD and it should have been

Flying Holding v European Commission (Joined Cases T-91/12 and T-280/12)

- This case dealt with a failure by a tenderer to provide relevant safety audits. The tenderer argued it did not receive the documents, which was later proven false, so they were excluded for misrepresentation
- They argued instead that they had misunderstood the request, and that they had a right to put forward a defence before they were excluded
- The Court found that exclusion was a penalty and the tenderer had a right to be heard and put forward a defence
- The Court then examined whether the procedure at issue could have resulted in a different outcome if the Applicant had been given an opportunity to defend themselves
- The Court found that the Applicant had misrepresented themselves, whether intentionally or negligently, and their defence would not have changed the outcome of their exclusion, so the decision should not be annulled

Forposta and ABC Direct Contact (Case C-465/11)

- This case deals with a procurement for postal services, which was cancelled due to both tenderers being excluded for '*gross professional misconduct*'
- The tenderers argued that national law was too broad in its understanding of professional misconduct
- Automatic exclusion did not allow for specific and individual assessment of the conduct concerned and the gravity of it
- The CJEU interpreted grave professional misconduct quite broadly, stating: *“the concept of “professional misconduct” covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs”*

Vossloh Laeis GmbH v Stadtwerke Munchen GmbH (Case C-124/17)

- This case dealt with an exclusion from a tender for the provision of railway material
- The tenderer argued that they should not be excluded, as their deficient behaviour, participation in a cartel, fell outside of the time period prescribed by Article 57
- The CJEU determined that where the conduct in question is penalised by a competent authority, then the period of exclusion must be calculated from the date of that competent authority's decision, not the date of the incident
- Important to note that it is not necessarily the case that time limit will begin to run from the date of the actions/circumstances of the economic operator

VC v EU-OSHA (Case T-126/23)

- This case concerned a call for tenders for the provision of IT services (pursuant to Financial Directives)
- The case reinforces that a CA does not need to wait until full and final judgment in order to exclude a tenderer
- The tenderer submitted evidence to establish that it had terminated the duties of the people involved in the conduct, carried out an internal investigation, started a compliance program, created risk management and prevention committees, adopted ethics policies and started employee training
- However, on the actual examination of these measures necessary for claims of self-cleaning, the Court held that EU-OSHA had correctly found that there was **insufficient evidence that many of these measures were implemented**, and for those that were, that they were in any way effective in re-establishing the integrity and reliability of the tenderer, EU-OSHA were right to exclude

ISSUES

Practical issues with the operation of Article 57

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Issues

- Non-disclosure by tenderers
- Tender delays to investigate, allow for self-cleaning
- Time Limits: Maximum time limit of three years for grave professional misconduct, or significant or persistent deficiencies, when does this begin?
- CAs often choose to “wait out” contracts with deficient tenderers, rather than taking the efforts to terminate, creating difficulties further down the line when they wish to exclude tenderers but have established no ground to do so
- A lack of caselaw on the topic leads to a lack of clarity, leading to nervousness among CAs to actually pursue this as an exclusion ground



PRACTICAL TIPS

For dealing with Article 57 in practice

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Practical Tips for Contracting Authorities

- CA should ensure that there is sufficient evidence to satisfy itself that such a decision is appropriate, Recital 101 of the EU Procurement Directive confirms that “...*the contracting authority will be responsible for the consequences of its possible erroneous decision*”
- Carefully document each step of the process (**Article 84 Report**) and consider legal advice on any correspondence to or from the economic operator in question
- If CA is contemplating an exclusion, critical step to establish whether any evidence of ‘**self-cleaning**’ can be provided by the economic operator, and whether this is adequate in the circumstances, **remember the right of reply**
- CAs should take action to penalise or terminate contracts with poor-performing economic entities - cannot simply decide to “wait out” these contracts

Practical Tips for Bidders

- Disclose any circumstances/events which could meet one of the grounds for exclusion – ESPD
- Failure to do this is likely to be viewed negatively by a contracting authority (and any court) if they later discover the potential grounds for exclusion
- Prepare a self-cleaning response should the need arise that can be shared with CAs
- Put in place corrective measures, staff reorg, internal audit, reporting systems etc (Recital 102)

UK AND FUTURE DEVELOPMENTS

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UK and Future Developments

- The UK's Procurement Act 2023 has plans to reform the public procurement system, including in the area of exclusion for prior performance, such as:
 - The bar to be dropped for poor performance, now only having caused significant deficiencies in the performance of a previous public contract – a major change from the previous bar, **no longer requires a resulting termination**
 - CAs will also have the ability to **exclude a tenderer if their sub-contractor is guilty of a mandatory/discretionary exclusion** and the tenderer is unable to find a replacement sub-contractor within a reasonable time period
 - The time period for exclusion on these grounds will also be extended from **3-5 years**, subject to the right to self-clean

UK and Future Developments

- Increases number of grounds for mandatory exclusion
 - Takes into account offences by associated organisations
 - Sets out a requirement for CAs to **publish yearly notices** on contract performance **against set KPIs** for **contracts in excess of £5m** in value
 - Creates a **centralised debarment list**, operated by the UK Cabinet Office. The presence of a supplier on that list would either require or permit the exclusion of the supplier from any public tender process
- These changes, while not applicable in Ireland are important for economic entities with operations in the UK to be aware of (expected to be implemented by February 2025)
 - May also be influential to potential future developments in the European Union

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