

Past Performance

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White Paper Conference

- **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, a phoenix company or new to the market?**

- Standard Selection Questionnaire (SQ)
- How to approach the discretionary exclusions
- Self cleansing
- Weightings
- EOs with limited track record - proportionality and equal treatment

Standard Selection Questionnaire (SQ)



CCS Action Note 8/16

- **Part 1** potential supplier information
- **Part 2** Exclusion grounds – contains all grounds, whether mandatory or discretionary – onus on supplier to tell CA about everything in Regulation 57
- **Part 3** Selection questions
- **1 and 2 Mandatory**; Part 3 may add questions provided **relevant** and **proportionate**

- Reviewed by the CCS – July 17 publication
- Changes to Part 3, section 8.4, to make applicable to local authorities
- EOs to provide
 - List of **relevant principal contracts** in last 3 years
 - **Certificate of Performance** (“CoP”) for each contract or explain why they can’t
 - If the CoP says performance unsatisfactory, supply information which explains why won’t re-occur in this contract



- Central Government
- Contracts with value £20m or more, IT, FM, Business processing outsourcing
- Has some general guidance which might assist CAs generally
- May be amended **July 2017** to extend scope to all CAs

- Examples
 - Grave professional misconduct

 - Significant or persistent deficiencies in performance in prior public contract which led to early termination, damages or other comparable sanctions

Significant or persistent deficiencies – more help?



- Additional guidance re exclusion
- **Major deficiencies** with regard to substantive requirements, for instance
 - **failure to deliver or perform**
 - **significant shortcomings of the produce or service delivered**, making it unusable for the intended purpose
 - **misbehaviour which casts serious doubts** as to the reliability of the EO”

See Recital 101 to Directive 2014/24

Obligation/right to exclude continues throughout the procedure



- The obligation/right to exclude continues throughout the procedure (Reg 57(9) and (1))
- Make sure that your procurement documents
 - **require EOs to continually update** you of any material changes to their response to the SQ or the tender generally
 - **you make your right to exclude based upon new information explicit**

Long stop date



- If no sufficient measures are taken, exclusion period
 - 5 years from the date of criminal conviction
 - 3 years from the date of the relevant event for discretionary exclusions

BUT

- Whole regime is subject to
 - **Proportionality**
 - **Equal treatment**
 - **Self cleansing provisions**

Proportionality



- CAs must act proportionally at all stages of the process (Reg 18(1))
- Proportionality is a General Treaty principle in respect of which there is no margin of appreciation
- Even if acting in accordance with explicit rights conferred by the Directive, CAs must act proportionately (Forposta (C-465/11))

What is proportionality?



- ...the principle of proportionality requires that **measures...do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued** and that where there is a choice between several appropriate measures **recourse must be had to the least onerous.**

Case T - 211/02 Tideland Signal Ltd

Equal treatment



“...equality of treatment means not only treating like cases alike but unlike cases differently”

Public Interest Lawyers v Legal Services Commission
[2010] EWHC 3277 (Admin)

Self cleansing PCR 57 (13)



Self cleansing (1)



- In relation to the grounds for exclusion, a bidder can provide evidence to enable the CA to assess whether it has taken measures sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion
- If the CA considers sufficient, the EO **shall not** be excluded from the procurement

(Reg 57 (13), (14))

Self cleansing (2)



- EO Measures:
 - Payment of compensation
 - Comprehensive clarification/ collaboration;
and
 - Concrete technical, organisational and personnel measures appropriate to prevent further misconduct

Self Cleansing - What must CA do? (1)



Consider all information, clarify

- Personnel/organisational measures - **sever links with persons or organisations** involved in misbehaviour
- **Staff reorganisation**
- Implementation of **reporting and control systems**
- Creation of **internal audit structure** to monitor compliance
- Adoption of **internal liability and compensation rules**

(Recital 101 to Directive 2014/24)

Self Cleansing - What must CA do? (2)



- Evaluate the measures taken by EO in the light of the gravity of the offence/misconduct
- Timescales for investigation must be reasonable and proportionate, as must the extent of that investigation
- Burden of proof is on the CA (“where the CA can demonstrate...” Reg 57(8))

Self Cleansing - What must CA do? (3)



- Process must be transparent
- Clear audit trail of decision and reasons for decision
- The decision and reasons (for or against) must be in the Regulation 84 Report
- Reasons must be factually accurate and a fair summary of CA decision making process
- If the CA decides that the evidence is insufficient, it must give a statement of reasons
- Potential for challenge by EO or other bidders

Self Cleansing - What must CA do? (4)



- Think hard about, and document:
 - What you decide to do and the reasons you decided to take that course
 - What information you received
 - Any clarifications sought and why they were sought
 - Who evaluated it
 - What their conclusions were
 - Their reasons for those conclusions
- Consider a proportionate external review; within the organisation or from outside

Self cleansing PCR 57 (13)



Significant or persistent deficiencies - tricky areas



- What if formal dispute over the performance of previous contract? See Action Note 04/15 – Authority has to form its own view
- What about liquidated damages in a works contract, service credits or KPI deductions in a long running PFI?
- Ex gratia payments to settle disputes and avoid litigation?
- Tip offs?

How much weight do you give Past Performance



- Weightings should be set at the start of the procurement
- Weightings should be dictated by the needs of the procurement
- If market engagement demonstrates that you are likely to get bidders with little track record, you need to decide how to design your procurement so as to encourage competition and innovation (and SMEs etc.)
- **Cannot** adjust weightings afterwards

Start Ups, Phoenix Company, New to the Market



- Market engagement prior to publication of documents
- What do you want and will it attract EOs who are likely to struggle with evidence of performance for good reasons?
- What is the right balance between attracting innovation and managing risk to public services and public money?
- Proportionality and equal treatment

- Procurement Policy Note 02/13 18.2.13
 - **Credit rating reports** part of a broader appraisal, should not be sole assessment tool for above threshold procurements
 - No deselection on the basis of **turnover alone**, but after analysis of financial position, capacity, capability and dependency
 - **Clear evidence** that the supplier's financial position places **public money or services at unacceptable risk**

- Alternative evidence
 - Parent company accounts
 - Deeds of guarantee
 - Bankers statements and references
 - Accountants references
 - Management Accounts
 - Financial projections and cash flow forecasts
 - Details and evidence of previous contracts including contract values
 - Capital availability
- Require EOs to update CA of relevant changes

References (technical and professional capability)



- Contract Notice should say
 - References will be taken up to assess skills, efficiency, experience and reliability
 - An EO who for good reason cannot supply references may submit specified examples of past performance
 - If there are relevant changes during the procurement, reserve right to re-evaluate and say what basis of evaluation will be

Problems with references



- Subjective - depends on whether referee is
 - knowledgeable about the contract
 - in a hurry/under pressure
 - away or on holiday
 - very effusive, alternatively very mean with praise, alternatively terminally cautious
 - hated the EOs contract manager because he supported Arsenal/didn't support Arsenal
- David Gollancz has suggested that EOs be asked to provide relevant case studies; CA can ask referees if they are a fair account of contract performance

Conclusion



- In all things be **proportionate** and **treat EOs equally**
- Discretionary exclusions
- Adequate self cleansing?
- Conduct a proportionate and rigorous assessment
- Document it at every stage and give reasons for what has been done
- Be very cautious about exclusion without a thorough, documented and defensible review; it has profound implications and may well be challenged

Thank you for listening

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