



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 58(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.

The ESPD

Question Reference	Early termination	Answer
3D.14	Has the bidder experienced that a prior public contract, a prior contract with a contracting entity or a prior concession contract was terminated early, or that damages or other comparable sanctions were imposed in connection with that prior contract?	<input type="checkbox"/> Yes <input type="checkbox"/> No, I have not had this experience with a previous contract
3D.14.1	If yes , please provide details:	[text]
3D.14.2	If yes , has the bidder taken self-cleansing measures?	<input type="checkbox"/> Yes <input type="checkbox"/> No
3D.14.3	If it has , please describe the measures taken:	[text]



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