



Past performance

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The questions

- Drawing on grey area examples, how do you score past performance and evaluate it meaningfully?
- What, when and who do you ask?
- Can you take the feedback at face value?

My additional question

- What, when and who....
- But why?

Three opportunities to consider

- ESPD exclusion
- ESPD selection criteria
- Tender evaluation

Opportunity 1 – ESPD exclusion

- Regulation 58(8)(g)
- 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.

Unpacking the exclusion regulation (1)

-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

Grey area 1

- Exclusion “where the economic operator has shown significant or persistent deficiencies...”
- Not those in control of the economic operator
- A secondary argument
 - “grave professional misconduct, which renders its integrity questionable”

Grey area 2

- “Significant or persistent deficiencies in the performance of a substantive requirement”
- Contract performed, but not very well managed administratively
- Recital 101:
 - 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

Grey area 3

- “..... under a prior public contract, a prior contract with a contracting entity, or a prior concession contract”
- Relevance of delays on public sector loan repayment

Unpacking the exclusion regulation (2)

-which led to early termination of that prior contract, damages or other comparable sanctions
 - There must have been enforcement
 - What is comparable to termination?
 - What is comparable to damages?

Grey areas 4

- “We would never contract with them again but at the end of the day the job got done”
- “We agreed a cut to our profit margin rather than go to an adjudication”
- “The system was never going to work so we bought the IP and we were both happy to walk away”
- “We paid out under an environmental indemnity but the authority never claimed breach”

Grey area 5

- “We cannot be seen to be working with them again”
- Delegation to the courts of difficult decisions

Taking evidence at face value (1)

- Procurement rules
 - Equal treatment / no discrimination
 - Transparency
 - Proportionality
- Judicial review principles
 - Error of fact
 - Irrelevant considerations
 - Unreasonableness / irrationality
 - Reasons

Taking evidence at face value (2) (exclusion)

- Non-compliance with environmental and social and labour law provisions, and tax and social security contributions
 - “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 the past performance exclusion sets a different test
 - “the [bidder] has shown significant or persistent deficiencies”

Taking evidence at face value (3)

- Misrepresentation
 - “serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria”
- Negligence
 - “has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award”

Exclusion constraints

- Time limit – 3 years
- Self cleaning:
 - Measures to demonstrate reliability
 - If satisfied sufficient, authority must not exclude
- Bidder must have in place technical, organisational and personnel measures that are appropriate to prevent further misconduct

Opportunity 2 – ESPD selection

- Regulation 59
- Selection criteria may relate to:
 - suitability to pursue a professional activity
 - economic and financial standing
 - technical and professional ability
- Must be appropriate, related and proportionate
- 16: requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard
- 17: sufficient level of experience demonstrated by suitable references from contracts performed in the past
- 19: the skills, efficiency, experience and reliability of the economic operator

Grey area 6

- Should a bidder accept the scoring decision of one authority, or challenge it and risk a court endorsement of it?

Tender submissions

- VFM issues relevant to exclusion and shortlisting
- Focus on recovery and rectification
- Questions about contract management and partnership approach

Grey area 7

- Expertise and competence a question again at tender stage

The answers

- How do you score past performance and evaluate it meaningfully?
 - Exclusion if you know; ESPD scoring if you don't
 - Misrepresentation and negligently provided information
 - Plans for correction of problems, rather than the absence of them
- What, when and who do you ask?
 - What: questions focussed on the regs
 - When: as early as possible
 - Who: those who would stand up and say it again
 - Why: should be the guiding question
- Can you take the feedback at face value?
 - No, but no reason not to ask the question



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