

Past Performance

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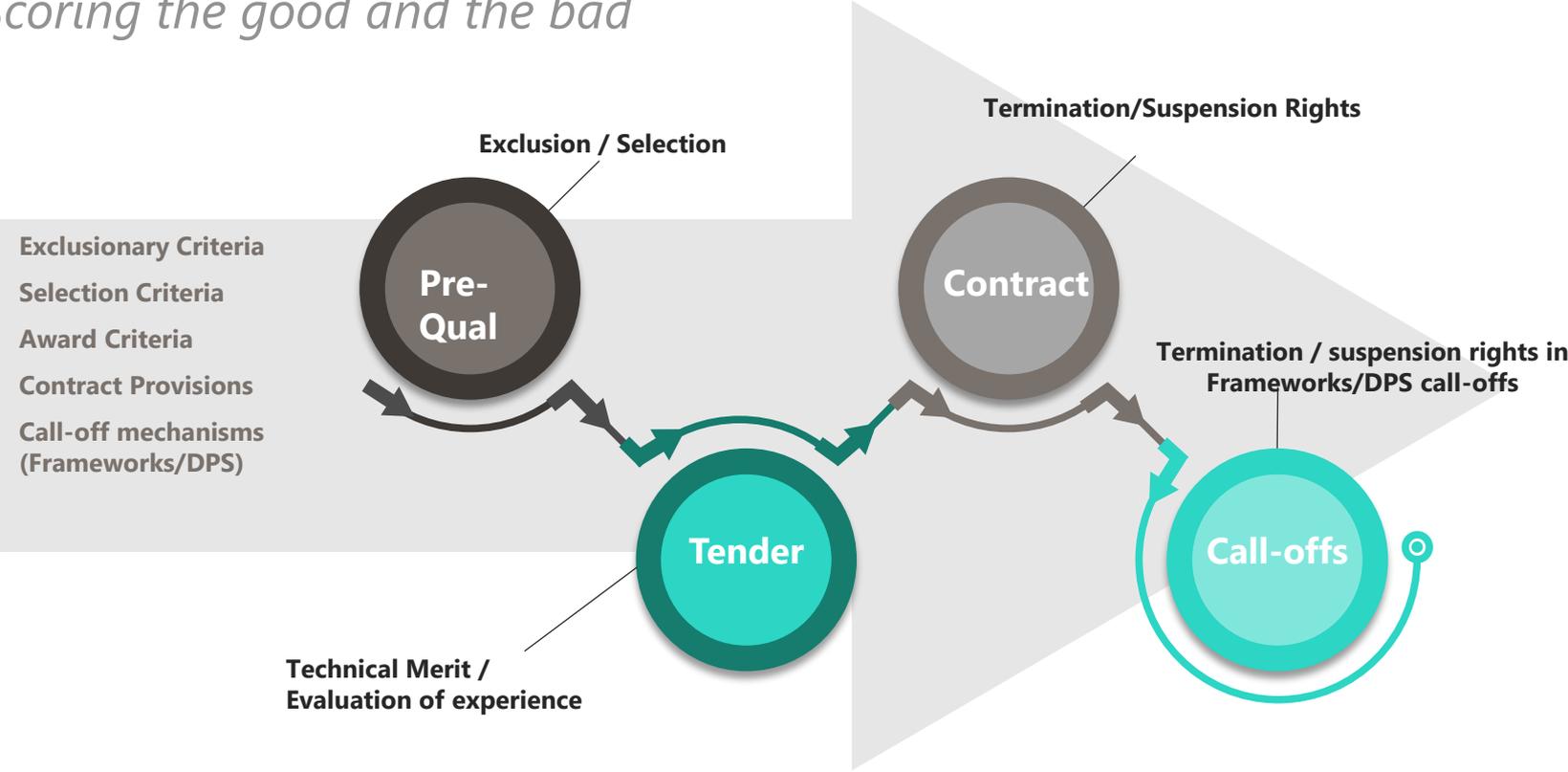
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- ***“Drawing on grey area examples, how do you score past performance and evaluate it meaningfully?”***
 - » ***What, when and who do you ask?***
 - » ***Can you take the feedback at face value?”***



Past Performance

Scoring the good and the bad



Pre-Qual Exclusion for Bad Prior Performance

Regulation 57(8)(g) of SI 284 of 2016 – Prior Performance

*May exclude 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***

Recital 101 of Directive 2014/24/EU – high standard....

*... CAs should be able to exclude where performance in earlier public contracts has shown **major deficiencies with regard to substantive requirements e.g. failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable** for the intended purpose, or **misbehaviour** that casts doubts as to the reliability of the economic operator*

CA must pay attention to proportionality. Minor irregularities should only in exceptional circumstances lead to exclusion; repeated cases of minor irregularities may give doubts about reliability justifying exclusion.

Regulation 57(8)(c) - *CA may exclude where it can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable*

Recital 101 of Directive 2014/24/EU - Examples: violation of environmental or social obligations, competition rules or of IP rights; demonstrate by appropriate means prior to a final and binding decision violations of tax or social security contributions...

- ***Forposta***, Case C-465/11 (judgment of 13 December 2012)
 - » Failure to abide by contractual obligations can be professional misconduct
 - » Grave professional misconduct is conduct that denotes a wrongful intent or negligence of a certain gravity
 - » Defective performance might demonstrate limited professional competence but might not amount to grave misconduct
 - » Case by case analysis

Does Regulation 57(8)(g) (past performance) narrow the scope of Regulation 57(8)(c) (grave professional misconduct)?

Self-cleaning...

Regulation 57(14) - Cannot exclude if there is evidence of measures sufficient to demonstrate reliability

- » Paid or undertaken to pay compensation in respect of any damage
- » Clarified the facts & circumstances in a comprehensive manner by actively collaborating with the investigating authorities
- » Taken concrete technical, organisational & personnel measures that are appropriate to prevent further criminal offence or misconduct

Measures to be evaluated taking into account the gravity and particular circumstances

Longstop date: 3 years from the date when the economic operator was in the relevant situation (see Vossloh Laeis GmbH, C-124/17 – period of exclusion calculated from date of decision of competent authority that there was a competition infringement)

The grey examples

The exclusionary conduct/termination relates to a parent or affiliated company not being relied upon

The relevant conduct/termination is being challenged by the contractor in the courts - see *Meca v. Naples*, Case C-41/18, AG's opinion of 7 March 2019 and *I/S Vestforbraendingen v. DSV Transport*, Danish Supreme Court judgment of 4 June 2013

There were significant or persistent deficiencies in the last contract but there was no sanction

The contracting authority has personal knowledge of the conduct - the bidder has not referenced it in the pre-qualification response

Scoring past performance at pre-qual

- Reg 58(17)
 - » *A contracting authority may require that an economic operator has a sufficient level of experience demonstrated by suitable references from contracts performed in the past*
- Must be related & proportionate to subject matter of contract (Reg 58(4))
- Objective is to demonstrate a “*sufficient*” level of experience – absolute and not a relative requirement

What, when and who do you ask?

- Risk of subjectivity if scoring third party references relating to past performance
- Taking third party feedback at face value would be risky – bidder must have an opportunity to respond to feedback (*Flying Holding*, Joined cases T-91/12 and T-280/12)

Scoring past performance at pre-qual

Reg 65 (1)

- *In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, **a contracting authority may limit the number of candidates who have met the selection criteria that it will invite to tender or to conduct a dialogue**, where the minimum number of qualified candidates is available, in accordance with this Regulation*
- Can a contracting authority shortlist by scoring past performance at pre-qual stage?

Reg 65(2)

- *Where a contracting authority intends to apply paragraph (1), the contracting authority shall indicate, in the contract notice or in the invitation to confirm interest, **the objective and non-discriminatory criteria or rules it intends to apply**, the minimum number of candidates it intends to invite and, where applicable, the maximum number.*

Scoring past performance and evaluating it meaningfully at pre-qual

Determine and publish the criteria/sub-criteria relating to past performance

Consider whether number of contracts to be relied on should be limited e.g. to three contracts within the last 5 years of a similar size, complexity and scope

Consider whether marks should be equally divided among the number of contracts being relied on e.g. 3 contracts each with 100 marks

Determine and publish the weightings/sub-weightings to be applied

Consider key performance requirements and evaluate these e.g. candidate's approach to meeting urgent delivery timescales

Scoring past performance and evaluating it meaningfully at tender stage

- Can past performance be scored as an award criterion?

“Criteria relating mainly to the experience, qualifications and means to ensure the proper performance of the contract concerned were considered to relate to the suitability of tenderers to perform that contract and not as ‘award criteria’, even though the contracting authority had classified them as such (see, to that effect, judgment of 24 January 2008, Lianakis and Others, C-532/06, EU:C:2008:40, paragraphs 30 and 31).”

Tirkonnen, Case C-9/17, CJEU judgment of 1 March 2017

Reg 67(3)(b))

- May evaluate “organisation, qualification and experience of staff assigned to performing the contract where quality of staff assigned can have a significant impact on the level of performance of the contract”

Scoring past performance and evaluating it meaningfully at tender stage

- No reason why a tenderer should not apply its knowledge and expertise from its past performance in responding to the award criteria
- In addressing quality criteria tenderer might be asked to outline risks and/or lessons learnt from previous contracts

What, when and who do you ask?

- *“...the quality of the tenders must be assessed on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts... (Case T-169/00, Esedra v Commission)*
- *Objective and transparent evaluation of the various tenders depends on the contracting authority, **relying on the information and proof provided by the tenderers**, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria (Case C-448/01, EVN)*

Past performance – contracts/frameworks

- Key Performance Indicators can be used to measure contractor performance under existing contract or framework agreement/DPS – contract management rather than a procurement mechanism
- Call-offs under frameworks/DPS must be awarded on the basis of award criteria, e.g.
 - » a contracting authority shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria specified in the procurement documents for the framework agreement (Reg 35(11)(iv) of SI 284 of 2016)
 - » the contracting entity shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria specified in the specifications of the framework agreement (Reg 50(5)(b) of SI 286 of 2016)
- Legitimate for a contracting authority to contractually provide that failure to meet KPIs may lead to suspension or termination of the contract or framework/DPS

Past performance – contracts/frameworks

- Sample termination clause

“...The Authority may terminate this Framework Agreement for material default by issuing a Termination Notice to the supplier in the event of two or more failures by the Supplier to meet the KPI Targets whether the failures relate to the same or different KPI targets, in any rolling period of three (3) Months...”

- Sample suspension clause

“If the Authority is entitled to terminate this Framework Agreement pursuant to Clause xx, the Authority may instead elect in its sole discretion to suspend the Supplier's ability to accept Orders under this Framework Agreement by giving notice in writing to the Supplier, and the Supplier agrees that it shall not be entitled to enter into any new Call Off Agreement during the period specified in the Authority's notice...”

Conclusions

- Score and evaluate past performance at pre-qualification stage
- Cautious about evaluating third party references
- Bidder has right to respond to negative feedback
- Past performance may be used by bidders in responding to award criteria but not an award criterion in itself
- Consider termination / suspension rights
- Need to manage contract to effectively apply KPIs



Thank you
