

# The use of KPIs for exclusion on grounds of past performance in public contracts

Written by Gracia Vara Arribas

The latest EU Public Procurement legislative package, the 2014 Directives, provided new grounds for excluding suppliers from public tendering procedures. Some of them are mandatory, whereas other grounds for exclusion are discretionary. Article 57 of the Directive 24/2014/EU regulates them, providing a margin of discretion for some exclusion causes to the Member States.

The UK is now analysing the possibility of using Key Performance Indicators (KPIs) to justify the exclusion of past poor performers from public contracts. The current UK procurement regulations follow the Directives which allow contracting authorities to take into account the past performance of a supplier only in specific circumstances. The UK new proposal might bring interesting insights into the development of methods for evaluating the past performance of bidders. This blog entry briefly presents the UK Government's proposal, and the initial debate in the UK around it.

On 15 December 2020, the UK Cabinet Office launched a public consultation, *Transforming Public Procurement*, on the reform of Public Procurement rules due to Brexit. The document is presented as "an opportunity to design something that delivers for our communities and our businesses". Quoting Lord Agnew, Minister of State for the Cabinet Office, the UK's exit from the European Union "provides a historic opportunity to overhaul our outdated public procurement regime".

## The proposed new public procurement regime

The consultation paper makes public the Government's position on the new public procurement regulation in the UK. The so-called "Green Paper" is some 78 pages in length and explains the Government's current thinking in terms of what a "new" regime may look like. Even when analysts already claim that many of the ideas proposed within the paper require much further clarification, I would like to briefly analyse some of the changes proposed in the rules for the exclusion of economic operators from public procurement procedures. The reason is that these ideas might inspire other EU Member States to adopt the ideas in the proposed UK approach. For example, in the application of Art 58 (4) where "the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability".

The approach of the EU legislator has been to adopt grounds for exclusion based on behaviour sanctioned "by final judgment" (Art. 57), for the mandatory grounds set out in Art 57 (1). The stated exclusion grounds are rooted in the establishment of the facts by due legal procedure.

The Directive also includes grounds for exclusion which are either discretionary for the contracting authority or made mandatory by a Member State in Art 57 (4).

These include Art 57(4)(g), which refers to where an economic operator has "shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract **which led to early termination of that prior contract, damages or other comparable sanctions**".

Now, paragraphs 120 to 127 of the Green Paper explain the UK government proposal for new grounds for exclusion of bidders: it intends to

amend the grounds for exclusion on the grounds of past poor performance.

The Green Paper eliminates the need for proven termination or sanctions. The new ground for exclusion would be based on “**significant or persistent deficiencies in the performance** of a substantive requirement under a prior public contract, a prior contract with a contracting authority, or a prior concession contract”, even without formal termination. This possibility would remain limited for up to the three years for discretionary exclusion, which are now in force, as would the supplier’s ability to self-clean.

### A post-Brexit UK refers to the USA

Looking for models outside the EU, the post-Brexit UK discusses best practices from other countries. It explicitly refers to the USA system, which requires authorities to **evaluate suppliers’ contract performance based on prescribed Key Performance Indicators (KPIs)**. The Government would provide guidance to support commercial teams in understanding the circumstances when a supplier may be excluded for poor performance on previous contracts.

According to the Green Paper, the ability to exclude suppliers for unsatisfactory performance would need to be balanced against the need to be objective and transparent and ensure that suppliers are not excluded unfairly. Therefore, evidence will be needed to take decisions in relation to past performance. The system would require, according to the Green Paper, contracting authorities to evaluate the contract performance based on set KPIs “deemed important by the contracting authority and included in the contract”. This principle will need, in my opinion, further clarification before it becomes operational.

The Green Paper illustrates similarities, following the model of the USA, on how the evaluation could be made providing a list of indicators: it must address the quality of the product or service supplied by the supplier, its

efforts to control costs, its timeliness and compliance with schedules, its conduct of management or business relations, its performance in subcontracting with small businesses, and other applicable factors (e.g., payment of tax). This system will require public buyers to evaluate the contract performance based on a series of indicators (KPIs) that would need to be published and available to all contracting authorities and the public.

Data becomes essential to improve the transparency of past performance, and the Government proposes to be able to set a threshold for past performance using this data. In case of quantified performance below the established threshold, then the supplier might be excluded.

### The use of KPIs comes with many issues for debate

Questions are, however, already being raised about the future functioning of these new systems and the impact the use of KPIs might have on economic operators’ transparency. How these criteria can be objectively taken into account and assessed by contracting authorities entails important risks. These are major possible changes. It is important for all contracting authorities, business and any other organisations (in and out of the UK) to be aware of these proposals. The Cabinet Office has asked for feedback on its plan by **10 March 2021**. Whilst there will undoubtedly be issues for debate about the practical implementation, it will be important to maintain and ensure clarity regarding the exclusion grounds in public procurement contracts. We will have to be attentive to the potential influence such an approach may have on the EU Member States’ legislators.

**Are you a public procurement professional? Have a look at our Procurement Activities coming up.**

**Do you have a specific question?  
Contact the author and public  
procurement expert Gracia Vara  
Arribas.**

The views expressed in this blog are those of the author and not necessarily those of EIPA.