

How do you build a case for excluding a supplier for poor performance? What level of poor performance would have to be demonstrated, and would it need to be relevant to the contract being procured?

Charlie Banner KC
Keating Chambers

- (1) What “exclusion for poor performance” means;
- (2) How do you build a case for excluding a supplier for poor performance;
- (3) What level of poor performance would have to be demonstrated;
- (4) Would it need to be relevant to the contract being procured?

- The Procurement Act 2023 (**‘PA 2023’**) came into force on 24 February 2025 and replaces the previous Public Contracts Regulation 2015 (**‘PCR 2015’**)
- Contracts begun before 24 Feb 2025 → still under PCR 2015
- Contracts begun after 24 Feb 2025 → PA 2023
- Generally, a procurement will be “commenced” on the date that the contract notice/advertisement is published.

Regulation 57(8)(g) provides that an economic operator (i.e. a supplier) may be excluded:

*“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.**”*

The PA 2023 makes it clear that the right to exclude may now be exercised on broader discretionary grounds for breach of contract or poor performance of a relevant contract (Schedule 7, para 12).

A contracting authority may exclude a supplier (or an associated supplier) in three circumstances ...

(a) a supplier commits a **sufficiently serious breach of contract**, meaning that it has led to termination, damages or a settlement agreement (or where a court judgment rules that such a breach has occurred);

(b) a supplier has **not performed the contract to a satisfactory level** and has failed to improve performance to the satisfaction of the contracting authority (after being given the opportunity to improve);

(c) an authority has published a notice relating to breach or poor performance under section 71(5).

An authority must not exclude a supplier (or an associated supplier) on these grounds unless it considers that the circumstances giving rise to the exclusion **are continuing or likely to occur again** (per section 57(2)(a)(ii), PA 2023)

Before an exclusion occurs, a supplier must be given **a proper opportunity to improve performance**, typically through the contractual mechanism provided. These could include notification of poor performance and clear time periods to rectify, rectification plans or improvement plans.

The poor performance ground applies where performance has not improved following application of such mechanisms, which are common in most public sector contracts.

As the exclusion ground does not apply unless the supplier has been given an opportunity to rectify the failure first, contracting authorities should ensure that they **incorporate appropriate performance management mechanisms** into their contracts, and monitor (and react to) poor performance from suppliers in accordance with the contractual regime.

E.g. performance notices or rectification and improvement plans, etc.

Schedule 7 prevents consideration of events which the contracting authority was aware of (or which a reasonably well-informed decision-maker in their position would have been aware of) **more than 5 years ago** for the discretionary exclusion grounds.

The 5-year period is not a limitation period for exclusion as such; but if the event occurred longer than 5 years ago, then the supplier is no longer at risk of exclusion in relation to that event.

After an exclusion, an affected supplier also has the **right to challenge the decision**, in which case it would need to show that the authority applied the law unfairly or in error.

Following the award of a public contract, it will be an implied term of the contract that the authority can terminate where (among other things) the supplier has **become an excluded or excludable supplier** (per sections 78(1) and (2)(b)).

Key Performance Indicators (KPIs)



One of the most notable changes introduced by the Act is the requirement for contracting authorities to set and publish a **minimum of three KPIs for contracts valued at over £5 million**, and in relation to incidents of breaches of contract or poor performance (section 71).

Key Performance Indicators (KPIs)



A KPI is defined as a “*factor or measure against which a supplier’s performance of a contract can be assessed during the life cycle of the contract*” (section 52(4)).

Key Performance Indicators (KPIs)



Examples of KPIs:

- **(a)** Timeliness of delivery (e.g. a percentage of milestones that are met on schedule),
- **(b)** Quality (e.g. the number of issues reported for each deliverable),
- **(c)** Cost management (e.g. any disparity between budgeted and actual spend),
- **(d)** Health and safety compliance,
- **(e)** Environmental targets, and
- **(f)** Social value pledges

Key Performance Indicators (KPIs)



Contracting authorities are required to assess and report on supplier performance against the established KPIs **at least once every twelve months** and upon contract termination.

Key Performance Indicators (KPIs)



If a supplier breaches the contract or fails to meet performance standards, this information must be **disclosed within 30 days**, detailing the circumstances and outcomes of such breaches.

Step 1: Verifying exclusions



Check whether suppliers and their associated persons are on the debarment list:

- On receipt of (but before assessment of) requests to participate in a competitive flexible procedure;
- When assessing final tenders in any competitive procedure;
- Before making any permitted direct awards;
- When assessing applications for membership of a dynamic market;
- Before allowing a supplier to participate in a framework call-off procedure.

Step 1: Verifying exclusions



Contracting authorities should ask suppliers for the information listed below:

- Basic information about themselves and their connected persons;
- Self-declarations as to whether any mandatory or discretionary exclusion grounds apply;
- Where the supplier self-declares that an exclusion ground applies, (a) which exclusion ground applies; (b) a short description of the event giving rise to the exclusion ground; and (c) the name and contact details of the person who is the subject of the event.

A contracting authority should not designate the supplier as an excludable supplier unless it considers that the poor performance “**continuing or likely to occur again**”.

When establishing whether the circumstances giving rise to the application of an exclusion ground are continuing or likely to occur again, contracting authorities should look at a range of evidence and factors, as set out in section 58.

- **(a)** evidence that the supplier, associated person or connected person has taken the circumstances seriously (e.g. by paying compensation);
- **(b)** steps that the supplier, associated person or connected person has taken to prevent the circumstances occurring again (e.g. by changing staff or management, or putting procedures and training in place);
- **(c)** commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps;
- **(d)** the time that has elapsed since the circumstances last occurred; and
- **(e)** any other evidence, explanation or factor that the authority considers appropriate.

Step 2: Discretion to exclude



- Contracting authorities have discretion to exclude an *excludable supplier*.
- Contracting authorities must have regard to the objectives set out in s.12 of the PA 2023, including **(a)** delivering value for money, **(b)** maximising public benefit, information sharing, and **(c)** acting and being seen to act with integrity.

Step 2: Discretion to exclude



Relevant factors:

- **(a)** factors relating to the supplier; and
- **(b)** factors relevant to the procurement

E.g., in a procurement for IT support services, a contracting authority may decide not to exclude a supplier for environmental misconduct relating to its operations overseas in a different sector.

What level of poor performance would have to be demonstrated?



The Cabinet Office guidance indicates that the ground is intended to cover **serious performance failures** as determined by the terms of the contract.

Examples given in the guidance include a failure to meet a certain number of KPIs over a set period or a failure to meet other contractual requirements such as delivery dates, specification requirements or quality standards.

What level of poor performance would have to be demonstrated?



Example 1

Exclusion of a bidder from the procurement process for a public works contract on the basis that a prior contract with the bidder had been terminated early for its use of a subcontractor without seeking prior authorisation.

Case: *Delta Antrepriză de Construcții și Montaj 93 SA v Compania Națională de Administrare a Infrastructurii Rutiere SA* (C-267/18)

What level of poor performance would have to be demonstrated?



Example 2

Exclusion of an economic operator from a public contract to provide school meals on the ground of deficient performance of an earlier contract, after a number of pupils and staff suffered food poisoning due to the presence of coliform bacteria.

Case: *Meca Srl v Comune di Napoli* (C-41/18)

Would it need to be relevant to the contract being procured?



Discretionary exclusion grounds apply to specific situations where a supplier has breached or poorly performed “relevant contracts” with a “regulated authority”

“Regulated authority” is defined broadly as a contracting authority, another public authority or an authority outside the United Kingdom that the decision-maker considers to be equivalent (Schedule 7, para 12(6)).

Would it need to be relevant to the contract being procured?



“**Relevant contracts**” cover a broader range of contracts than just public contracts, including below threshold contracts and exempted contracts entered into with a contracting authority, as well as all types of contracts entered into by other public authorities.

N.B. Breach or poor performance of contracts the supplier has with *private entities* are not relevant to these grounds.

Contracting authorities can only exclude a supplier for poor performance where they have built a clear and well-evidenced case, usually by relying on objective measures such as KPIs, performance notices or rectification plans.

The performance failures must reach a sufficient level of seriousness to justify exclusion, such as repeated KPI breaches or other substantial failings, even if the supplier has not formally breached the contract.

Those failings must relate to a “relevant contract” with a regulated authority, meaning the exclusion ground does not extend to private contractual relationships.

Questions