

THE RT HON BARONESS GOLDIE DL
MINISTER OF STATE IN THE HOUSE OF LORDS

MSU/4/8/2/3/is

20 September 2022

Dear Vernon,

During the Procurement Bill Committee debate on Monday, 18 July, you referred to a report by the House of Commons Defence Sub-Committee where it was said that it was not possible to take into account contractor past performance in relation to the treatment of ancillary staff, and how this was addressed by the Bill. I hope you find the below helpful.

Current regulations

Past performance of public contracts is not specifically included as an exclusion ground in the Defence and Security Public Contracts Regulations 2011 (“DSPCR”). The DSPCR reflect the grounds which are listed in the defence procurement directive (2009/81/EC). The DSPCR do mandate the exclusion of suppliers for a range of criminal offences. There is also a range of discretionary exclusion grounds on which to exclude suppliers including grave professional misconduct and convictions for criminal offences linked to its business.

The Public Contracts Regulations 2015 (“PCR”) contain a list of broadly similar exclusion grounds but do specifically include a ground to exclude a supplier for “significant or persistent deficiencies” under a prior public contract (see regulation 57(8)(g)). However, there are limitations to this ground as the contractor’s past performance needs to have resulted in the early termination of that prior contract, damages or other comparable sanctions. In other words there has to be an identifiable deficiency with identifiable consequences.

The Procurement Bill

The grounds for exclusion in the procurement bill are contained in clauses 26 to 30 and schedules 6 and 7 in the introduction print of the bill. Schedule 6 are the mandatory exclusion grounds. They are primarily criminal offences. Schedule 7 contains the discretionary exclusion grounds.

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Paragraph 13 of Schedule 7 to the bill includes a discretionary ground to exclude a supplier for breach of contract and poor performance. This is broader than the past performance ground in the PCR as, in sub-paragraph (3), it includes failure to perform a relevant contract to a contracting authority's satisfaction where the contractor has failed to improve performance given proper opportunity to do so.

Therefore, there is some ability to take past performance into account in awarding a contract under the current regulations. This has been strengthened in the Bill. Additionally contracting authorities will be obliged to publish a notice whenever a contractor meets the definition of breach of contract or poor performance in the exclusion ground, ensuring that information about contractors associated with poor performance will be easily accessible.

I trust that this addresses your concern and I thank you again for your contribution to the development of the Procurement Bill.

I will also place a copy of this letter in the Library of the House.

*Yours sincerely,
Annabel Su Gobie*

BARONESS GOLDIE DL