



# Achilles

## Public Procurement Update and Case Law

Professor Sue Arrowsmith and Jennifer Smith

# Agenda

Aim of the session

Timetable for the Reform of the Procurement Regulations

New Procurement Case Law of the UK Courts and ECJ

Q&A

# THEMiS: regulated procurement advice and documentation



- Online library that provides policy guidance from the Cabinet Office, court cases summarised by Prof. Sue Arrowsmith, definitions, and articles written by experts in regulated procurement.



- Obtain guaranteed expert response to your queries within hours.



- As a result, you will never get caught out by legislative changes.



# Update on reform of the procurement Regulations





# Update on reform of the procurement Regulations

- Green Paper is from the Westminster jurisdiction
- Wales will follow Westminster approach
  - With supplementary rules
- Scotland?





# Outline of case law (UK cases)

- Covid-19 contracts:
  - Grounds for using the reg.32 procedure
  - Procedures for awards without prior publication
  - Standing to challenge
  - Legal effect of guidance
- Remote debriefing
- Late submission of documents
- Awarding contracts in lots







# Outline of case law (UK cases)

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- Below-threshold contracts after Brexit
- Classification of services
- Definition of procurement documents





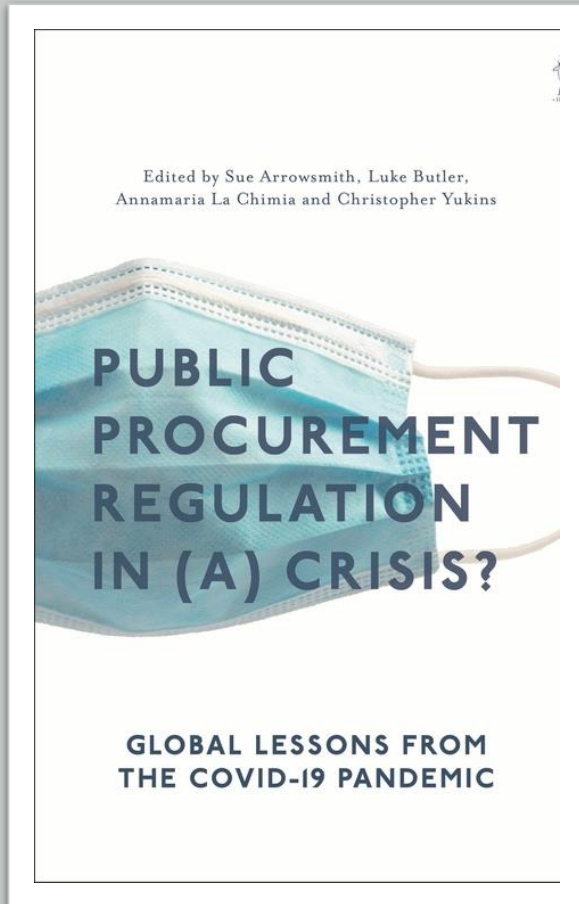
# Outline of case law (European Court of Justice cases)

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- Framework agreements
- Ineffectiveness remedy
- Zero-priced and abnormally low tenders
- Definition of a public contract: donations
- Exclusions
- Selection criteria and performance conditions







# Covid contracts

Sue Arrowsmith, Luke Butler, Annamaria La Chimia  
and Christopher Yukins (eds),

*Public Procurement Regulation in (a) Crisis? Global  
Lessons from the COVID-19 Pandemic* (Hart; 2021)

- <https://www.bloomsburyprofessional.com/uk/public-procurement-regulation-in-a-crisis-9781509943036/>



# COVID CONTRACTS





# Covid contracts

## Negotiated procedure without prior publication allowed (PCR 2015 reg.32)



In so far as is strictly necessary



Where is extreme urgency



Where this is brought about by events unforeseeable by the contracting authority



Where because of this urgency the time limits for competitive procedures (included accelerated procedures) cannot be complied with.



Where the circumstances giving rise to urgency are not attributable to the contracting authority (eg its delay in starting a procedure)



# Covid contracts

## ***R on the application of the Good Law Project v Minister for the Cabinet Office [2021] EWHC 1569*** **– Public First case**



- Six month contract awarded directly to Public First to conduct focus groups to support government policy and messaging at the start of the pandemic
- No negotiations with any other supplier

Note: High Court decision is currently subject of appeal to Court of Appeal (being heard 23/24<sup>th</sup> November)



# Covid contracts

## Grounds for using reg.32 procedure

- Court in Public First case concluded that a 6 month contract did not exceed the scope of what is necessary
- Court held that contracts under the urgency provision may be for longer than it would take to conduct a procedure with a call for competition where there is a good reason
  - Here, continuity of service provision





## Covid contracts: procedure

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Use of reg. 32 procedure  
*does not necessarily  
mean negotiation with just  
one supplier*





# Covid contracts

## Procedure under reg. 32

- Do general principles on transparency, equal treatment and conflicts of interest impose any procedural requirements?
  - E.g. to negotiate with more than one supplier, where possible?





# Covid contracts

## EU level

- Commission COVID guidance suggests award without competition “exceptional” – but unclear if intended as “legal” view

*European Commission Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (1 April 2020)*

- Case C-515/18 (on Regulation 1370/2007) indicates (by analogy) not required?
- But as yet no clear case law on the requirements of the procurement Directives themselves



# Covid contracts

## Public First case

- Argued based on English law doctrine of **apparent bias**
  - Decision is unlawful when the circumstances of the decision would lead a fair minded and informed observer to conclude that there was a “real possibility” that the decision maker was biased





# Covid contracts

## Public First case

- The personal and professional relationships were not alone sufficient for apparent bias as common in specialist industry
- These relationships did not preclude Mr Cummings from judging suitability of Public First







# Covid contracts

## Public First case

- BUT as the relationships might be perceived to compromise impartiality and independence, Cabinet Office was required to:
  - Use objective criteria for choice
  - Keep a clear record of what these were
- Not done here – so award decision unlawful
- Records of reasons for decisions in the procedure are required anyway under PCR reg.84(7)-(9)





# Covid contracts

## Do any further procedural obligations exist?

- E.g. to hold a competition, or demonstrate fair process even when no relationships with the awardee company?
- Court of Appeal may touch on this
- Also being considered in “PestFix” PPE case: *The Queen On The Application Of The Good Law Project v Secretary Of State For Health And Social Care* [2020] EWHC 3609



# Covid contracts

## Key lesson

To reduce risk of successful challenge it is important to keep careful records of all decisions, with reasons, in a negotiated procedure without prior publication

Consider discussing with more than one supplier??

- However, can also increase risks of challenge



# Covid contracts

## Right to bring legal challenge

Available under procurement regs to suppliers who suffer or risk harm

Who else can challenge?

Right to challenge through judicial review may be available to persons not directly affected by a decision, taking into account:

- Gravity of breach
- Whether there are other ways to litigate the breach
- Motives of litigant



# Covid contracts

## Right to bring legal challenge

*Good Law Project Ltd v Secretary of State for Health and Social Care*  
[2021] EWHC 346

Failure to publish all notices and redacted contracts on time during the pandemic

High Court held Good Law Project had standing to challenge this failure:

- Gravity of breach– billions of £s worth of contracts
- Suppliers could not be expected to litigate this kind of breach
- Good Law Project was a suitable litigant





# Covid contracts

## Right to bring legal challenge

*Public First case*

High Court held Good Law Project had standing to challenge based on apparent bias in:

- Gravity of breach
- No competitor in the procedure to bring

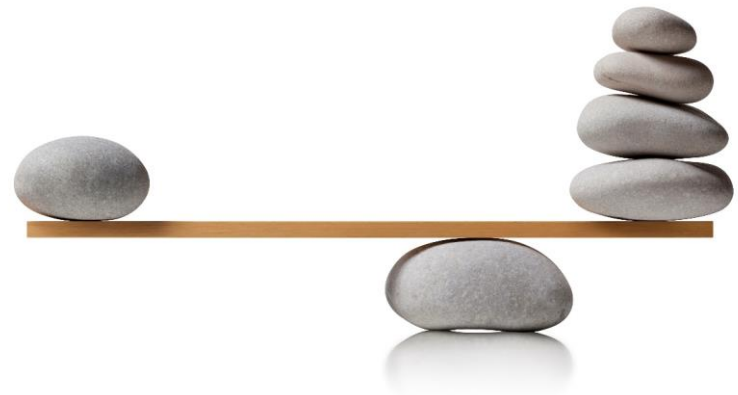


# Covid contracts

## Postscript: Green Paper 1

- Proposals for:
  - Explicit new ground for “limited tendering” in a “crisis” (as per the defence rules) – to be declared by Cabinet Office:

“an event which clearly exceeds the dimensions of harmful events in every day life and which substantially endangers or restricts the life or health of people”





# Covid contracts

## Postscript: Green Paper 2

- Proposals for:
  - Mandatory publication of an advance notice announcing a direct award procedure
  - Plus standstill, except in urgent cases





# Covid contracts

## Postscript: Green Paper 3

- Proposals for:
  - Guidance on considering competition between several suppliers
  - Specific requirement to keep a record on reasons for not using competition





# Covid contracts

## Legal effect of guidance

### *Secretary of State for Health and Social Care case*

- Court held unlawful not to publish redacted contracts within 20 days as required by policy in guidance
- Applied even though 20 days was stated to be advisory
- Policies must be followed *unless deliberate decision made that is good reason to depart from the policy*







# Covid contracts

## Legal effect of guidance

- Exact obligations will depend on how drafted
  - E.g. some will be drafted to give a clear choice
- Reasons for decisions for departing from advisory guidance will need to be recorded
- Government will need to give careful consideration to the wording of guidance relating to the proposed new procurement legislation
  - E.g. significance of templates for different procedural approaches



# Remote debriefing

## *Bromcom Computers v United Learning Trust (2021)*

- Procurement of cloud-based information management system for schools, run under Public Contracts Regulations 2015
- Challenge to bid evaluation based on breach of transparency and equal treatment obligations





# Remote debriefing

- Were proceedings brought within the 30 day time limit?
- Time starts when the economic operator first knew or ought to have known of grounds for starting proceedings i.e. of facts clearly indicating a possible breach
  - Can start even if the contracting authority has not complied with its obligations to give information

(*Sita case*)





# Remote debriefing

## *Bromcom: key conclusion*

- Claim concerned a *single duty* to treat tenderers fairly, equally and transparently in evaluation: thus knowledge of *one* violation was sufficient
- Is this correct?





# Remote debriefing

## *Bromcom*

- Standstill notice sent in writing as required by PCR 2015
- Some of the further debriefing had initially been done remotely
- Was information given in the remote debriefing sufficient to start time running?





# Remote debriefing

## *Bromcom: key conclusion*

- Substance and not form of knowledge is key and information need not be from documents.
- But form is *relevant*
- *Structured* information *in writing* more likely to be sufficient
- Conclusion: here no sufficient knowledge until receipt of letters after remote verbal debrief



# Remote debriefing

## Lesson

- Provide all key information in a structured, written form as promptly as possible to ensure time for challenge to begin to run
- Verbal debrief still very useful







# Late submission of documents

## Public Contracts Regulations 2015, reg. 56(4)

“Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.”



# Late submission of documents

## *Qmac Construction v Northern Ireland Housing Executive (2021)*

- Planned maintenance contract
- Tender rejected for late submission of Certificates needed to establish technical/professional capability
  - These Certificates were being provided by the Housing Executive itself
- Was the rejection lawful?





# Late submission of documents

## Key questions

- When is there a DUTY to accept late documents/allow completion or correction of documents?
  - Applies in exceptional cases based on proportionality
  - Court seemed to consider there was such a duty in *Qmac*
- Where is there no duty, when does the procuring entity have a DISCRETION to accept/allow completion or correction if it wishes?



# Late submission of documents

## Previous case law establishes DUTY when:

- Error is known to the procuring entity

AND

- The submitted documents themselves indicate the correct content of the documents should be

AND

- The correction does not concern price or other award criteria but just eligibility or compliance with conditions

*(Tideland Signal)*

- But fault of the procuring entity may also be relevant to create duty to accept in cases where usual conditions are not met

*(Leadbitter)*



# Late submission of documents

## Key factors in QMAC

- Certificates were in existence and objectively verifiable before the deadline (even though not part of the submission)
  - Already established as relevant to a *discretion* to accept (*Manova*) – as means no advantage from late submission
- Fault by the procuring entity (unnecessary delay in issuing the Certificates)



# Late submission of documents

But must *both* those factors be present for a duty to accept late submissions to arise – or just one?

Fault alone was sufficient to give rise to a DUTY to accept???

Even without fault there would have been a DISCRETION to accept?



# Late submission of documents

## Key lessons?

1. Advisable to accept late documents where due to procuring entity's fault as likely to be a duty to do so

- At least where documents relate only to eligibility
- Possibly also where documents relate to price etc (*Leadbitter*) – although more difficult balance here, and may be challenged

2. Can accept late documents where existence is verifiable, since even if there is no *duty* it is generally *permitted* to do so. (Whether advisable to do so always depends on facts.)





# Awarding contracts divided into lots

## *Department For Infrastructure v Northstone (NI; Court of Appeal) 2021*

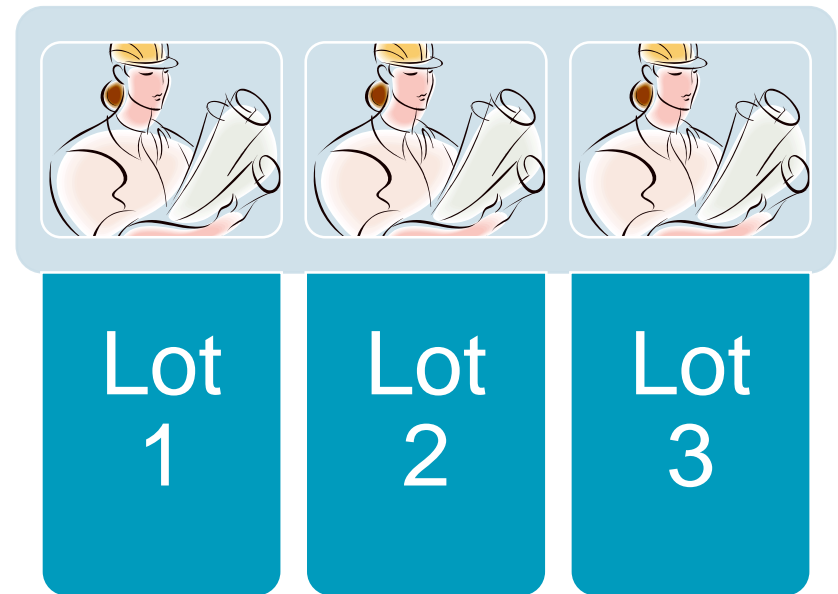
- Procurement for road resurfacing, divided into 8 lots
- Conducted under Public Contracts Regulations 2006 by restricted procedure





# Awarding contracts divided into lots

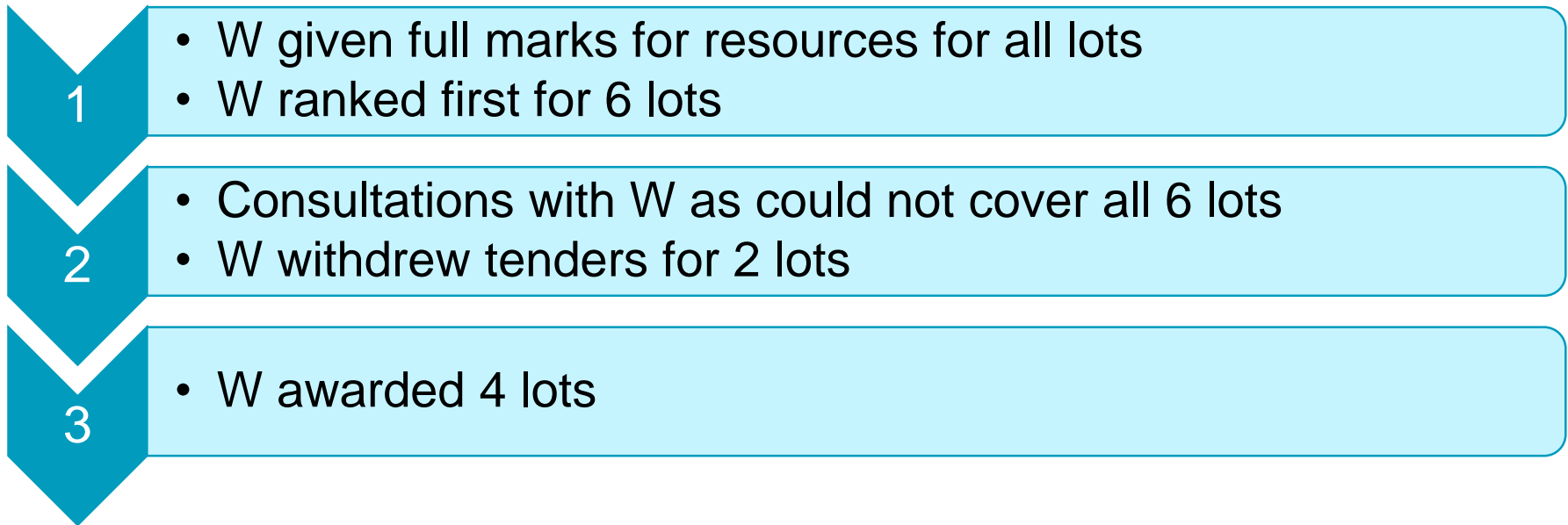
- Challenge based on award of full marks to winning tenderer (W) for available resources for all lots – even though W had specified same resources for each lot and could not complete all the lots with those resources
- Tender documents did not deal with explicitly with this situation





# Awarding contracts divided into lots

## Evaluation process





# Awarding contracts divided into lots

## *Northstone: findings*

- Failure to establish and disclose a detailed mechanism in the tender documents for dealing, which the RWINDTs would interpret in the same way, with duplication of resources was a breach of the transparency obligation (CA)
- Failure to minute the meeting with W also breached transparency (HC)





# Awarding contracts divided into lots

## *Northstone: findings*

- There was a “manifest error” in giving full marks for resources to W for all lots (CA)
- The “meaning” of the tender documents in the absence of explicit provisions was to require:
  - Allocation of W’s resources to the first evaluated lots
  - Ignoring those resources when scoring W’s bit for later lots



# Awarding contracts divided into lots

## *Northstone: findings*

- Discussion and then withdrawal of tenders for two lots after discussions was not a “clarification” as permitted in a restricted procedure after tendering (CA)





# Awarding contracts divided into lots

## *Northstone: findings*

- Where a tender offers staff with specific qualifications or experience, the contract must include a legal obligation to use the named staff or equivalents
  - Are equivalents allowed only for good reason?







# Below-threshold contracts after Brexit

*Adferiad Recovery Ltd v Aneurin Bevan  
University Health Board [2021] EWHC  
3049*

- Contract for “sanctuary” services for individuals suffering emotional distress
- Value £122 000





# Below-threshold contracts after Brexit

Do general principles of EU law still apply to below-threshold contracts of cross-border interest after Brexit?

No



# Below-threshold contracts after Brexit

Did the “Blackpool” implied contract doctrine impose a duty to follow the rules set out in the tender documents, and to evaluate fairly and in a manner free from manifest error?

**No, for two reasons**



# Below-threshold contracts after Brexit

1. Blackpool implied contract is limited to an obligation to consider in good faith all tenders submitted on time: [done here](#)

2. The implied contract can be negated by the explicit terms of the tender documents: [done here](#)



# Classification of services

- Although not necessary as contract was below all thresholds, court considered which threshold applied
- Concluded was under “light touch regime”
- Probably within category 85312 of CPV (“social work services without accommodation”)
  - probably as 85312300-2 (“Guidance and counselling services”)



# Classification of services

## Propositions governing classification of services

1. The tree structure informs the interpretation of the individual codes
2. The subject-matter of the groups within a division are not necessarily exhaustive of the contents of that division
3. The categorisations are EU-based and do not necessarily correspond to categorisations natural in the UK
4. A contract may involve different services covered by different codes
5. Service not mentioned in lower divisions might fall within higher level divisions (lower level providing an analogy) – assuming lower divisions do not cover everything (which court did not decide)



# Definition of procurement documents

- Defined in PCR regulation 2(1)
- Portal home page was within the concept of procurement documents – and relevant to interpreting the scope of the procurement
  - It was produced by the defendant as contracting authority; and
  - Describes elements of the procurement (estimated value of the contract, the type of contract and the contract duration)



# Definition of procurement documents

- However, presentations made at an “engagement day” were not part of the documents or relevant to informing their content







# Framework agreements

## Case C-23/20, *Simonsen*

- 4 year framework agreement with a single supplier
- For one Danish region with option for another to use
- Public Contracts Directive 2014/24





# Framework agreements

## Case C-23/20, *Simonsen*

- Must provide a maximum quantity *and/or* value for a framework agreement even if difficult
  - Confirms (Case C-216/17, which dealt with Directive 2004/14)





# Framework agreements

## Case C-23/20, *Simonsen*

Q. Where must this maximum be stated? (Unclear from Case C-216/17)

A. Contract notice

*or*

specification for the framework agreement (*if* available at the time of the notice without request, as generally required by Art.53)





# Framework agreements

## Case C-23/20, *Simonsen*

Q. Can the maximum stated quantity and/or value be modified? (Also unclear from Case C-216/17)

A. Yes, in accordance with the usual limits (under Art.72 and Art.33(2))





# Ineffectiveness remedy

- Remedies Directive  
Art.2(d)(1)(a) and PCR 2015  
require a contract awarded  
without a required contract  
notice to be rendered  
ineffective
- To what extent can *defects* in  
a contract notice give rise to  
ineffectiveness?





# Ineffectiveness remedy

## Case C-23/20, *Simonsen*

Q. Does failure to state both the estimated value in the notice or any maximum value anywhere (as in that case) give rise to ineffectiveness?

A. No

- Reasoning:
  - a severe sanction confined to the most serious violations
  - proportionality



# Ineffectiveness remedy

## Case C-23/20, *Simonsen*

- Once any stated maximum is reached “the agreement will no longer have any effect”
  - Confirms Case C-216/17
- Means call-offs will be treated at EU level as “new” contracts awarded without a contract notice, at risk of ineffectiveness?
  - At least if exceed maximum by substantial amount?
- Important to monitor use of multi-user frameworks



# Zero-priced and abnormally low tenders

## Case C-367/19, *Tax-Fin-Lex*

- Procurement of a legal information technology system







# Zero-priced and abnormally low tenders

## Case C-367/19, *Tax-Fin-Lex*

- Cannot reject a tender *just because* the price tendered is zero
- Should apply the procedure in Art.69 and seek explanations for the zero price; then may reject if the explanations do not adequately account for the low price





# Definition of a public contract: donations

## Case C-367/19, *Tax-Fin-Lex*

- Economic value to the tenderer by opening up a new market or enabling the tenderer to receive references is too uncertain and thus insufficient for “pecuniary interest”
- So *presumption* that donations of goods and services can be agreed without following the Directive?
  - *Even if legal obligation to permit/use the donation*



# Definition of a public contract:

## Case C-367/19, *Tax-Fin-Lex*

- But covered if significant undertakings on publicity etc in return for goods or service, or even just significant *de facto* benefits





# Exclusions

## C-395/18, *Tim SpA v Consip*

- Art.57(4)(a): may exclude economic operators for failure to comply with obligations under Art.18(2) (social, environmental and labour law)
  - Does not mentions sub-contractors
- Exclusion for the past acts of sub-contractors, as well as the economic operator itself, is *permitted*



## Case C-210/20, *RAD*

- Concerned exclusion of “ancillary entity” whose capacities were relied on by a consortium under Art. 63
  - For failing to declare a conviction (relating to health and safety legislation)
- Tenderers may have a *right to replace the undertaking concerned* in certain cases
  - Where no absence of diligence by the tenderer



## C-395/18 *Tim SpA v Consip*

- Can proportionality limits based on fault etc be excluded by the contracting authority by explicit provision in the tender documents?
  - Yes – Case C-71/15, *Connexion Taxi Services*
  - But *Tim* case para 45 states: “the rules laid down by the Member States **or contracting authorities** in implementing the provisions .....must not go beyond what is necessary” (emphasis added)



# Exclusions: self-cleaning

## Case C-387/19 RTS infra

- Contracting authority must give tenderer sufficient details of the allegations against it for it to defend itself, including with evidence of self-cleaning
  - The “right to be heard”
- Contributes to the difficulty of operating exclusions in practice without a centralised system



# Selection criteria and performance conditions

## Case C-295/20, *Sanresa*

- Contract for the shipment of hazardous waste
  - Tender rejected as no international shipment authorisation obtained
  - Was this a lawful ground for rejection?







# Selection criteria and performance conditions

## Case C-295/20, *Sanresa*

- Can only impose as condition of participation if relates to:
  - Suitability to pursue the activity (Art.58(1)(a))
  - Economic or financial standing (Art.58(1)(b))
  - Professional or technical ability (Art.58(1)(c))
- Court concluded here did not relate to technical or professional ability since that is judged by “in particular” past performance of contracts (para 48); and is sufficient from policy perspective
  - so cannot exclude because do not hold authorisations – or not likely to get them?



# Selection criteria and performance conditions

## Case C-295/20, *Sanresa*

- Cannot be required to satisfy all performance conditions at the start of the contract as excessive requirement
  - Here amount of hazardous waste not known at outset, and information needed for the licence
- But why should the contracting authority not be allowed to make an assessment of whether the condition is reasonably likely to be met?



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