

# **Risky Business: Does Debarring Poor Performers Mitigate Future Performance Risk?**

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## **I. Introduction**

It's the dreaded scenario: A bidder is selected after a lengthy and robust procurement process, but during the contract's execution the contractor fails to deliver what it promised. Despite a host of procedural safeguards—competitive bidding, review of qualifications, contract management and supervision—the contractor's non-performance means that the procurement has failed to achieve its purpose of ensuring the proper delivery of goods and services.<sup>2</sup> In this scenario, the government would likely be able to exercise its contractual remedies against the defaulting contractor, but contractual remedies may not be enough to protect the government from future performance issues.

Enter the concept of past performance. Procurement experts have long recognized that a contractor's ability to deliver goods and services can be predicted, in part, by the contractor's past performance.<sup>3</sup> One way to protect against unreliable contractors is to require bidders and offerors

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<sup>2</sup> *See, e.g.,* Clay Bernard Sys. Int'l, Ltd. v. United States, 22 Cl. Ct. 804, 809-810 (1991). Many jurisdictions today are increasingly working to ensure that their procurement systems achieve "best value" or "value for money," which Professor Steven L. Schooner broadly defines as the desire "to focus upon getting the best deal—or the best bargain—for the public's money." Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 2002 PUB. PROCUREMENT L. REV. 103, 108 [hereinafter Schooner, *Desiderata*].

<sup>3</sup> John S. Pachter & Jonathan D. Shaffer, *Past Performance as an Evaluation Factor—Opening Pandora's Box*, 38 GOV'T CONTRACTOR ¶ 280 (1996). *See also* CROWN COMMERCIAL SERVICE, ACTION NOTE 04/15, PROCUREMENT POLICY NOTE – TAKING ACCOUNT OF SUPPLIERS' PAST PERFORMANCE (Mar. 25, 2015),

to demonstrate that they have a satisfactory performance record. Taken further, bidders with a history of serious performance issues—like a contractual default—could risk being excluded from participating in future procurements altogether.

As procurement experts around the world continue to acknowledge the significant impacts that poor performing contractors can have on procurement outcomes,<sup>4</sup> many jurisdictions are using exclusions and “debarments” (also referred to as disqualification, suspension, or blacklisting) to protect their public funds from poor performers, in addition to wrongdoers. As an example of this trend, the European Union recognized for the first time, in its 2014 Procurement Directive, that contracting authorities should “be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements[.]”<sup>5</sup>

The increasing efforts by many jurisdictions to find ways to address poor performers is also forcing procurement experts to reassess the purpose and impact of using exclusions in procurement. The use of exclusions rose in prominence over the last decade primarily as an anti-corruption tool, and discussions about exclusions are often tinged with an anti-corruption focus.<sup>6</sup>

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<https://www.gov.uk/government/publications/procurement-policy-note-0415-taking-account-of-suppliers-past-performance> (“One aspect of a supplier’s technical and professional ability is its reliability as demonstrated by its performance of past contracts.”).

<sup>4</sup> See, e.g., Collin David Swan & Sati Harutyunyan, *Multilateral Development Banks in an Era of Procurement Reform: How Larger Development Goals Are Shaping Revamped Approaches to Procurement*, 58 GOV’T CONTRACTOR ¶ 111 (Apr. 6, 2016).

<sup>5</sup> Council Directive 2014/24/EU, Recital 101, 2014 O.J. (L 94/65) (Feb. 26, 2014). One commentator speculated that previous EU regulations did not allow for the exclusion of contractors for poor performance, in part, because “it risks introducing an element of *subjectivity* into the procurement process.” Peter Smith, *New Procurement Directives – Will Authorities Really Be Able to Exclude Bidders?*, PUBLIC SPEND FORUM EUROPE (Jan. 14, 2015), <http://publicspendforumeurope.com/2015/01/14/new-procurement-directives-will-authorities-really-be-able-to-exclude-bidders/> (“But how is that measured? Just how bad was the performance? Were there mitigating factors? Might the supplier itself argue that the authority was to blame for the poor performance?”).

<sup>6</sup> See, e.g., Sope Williams, *The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa*, 51 J. AFR. L. 4 (2007) [hereinafter Williams, *The Use of Exclusions*]; Pascale Helene Dubois, Paul Ezzeddin, & Collin David Swan, *Suspension and Debarment on the International Stage: Experiences in the World Bank’s Sanctions System*, 2016 PUB. PROCUREMENT L. REV. 61. Transparency International defines “debarment” as an exclusion mechanism used by “[g]overnments and multilateral agencies . . . to publicly punish businesses, NGOs, countries or individuals found guilty of unethical or unlawful behaviour.” *Debarment*, Transparency International Anti-Corruption Glossary, <https://www.transparency.org/glossary/term/debarment> (last visited Aug. 17, 2018).

But exclusions based on poor performance do not necessarily fit within the “deterrence” and “punishment” paradigms that often justify exclusions based on malfeasance. Performance failures are often highly contextual. Failing to perform a high-value complex construction contract may not necessarily imply that the contractor would be unable to perform a low-value supply contract, or that a previous contractor for construction works would be unable to deliver services.

This article provides a comparative analysis of several jurisdictions that consider a contractor’s poor performance as a basis for either disqualification or debarment. As noted below, although many jurisdictions include poor performance as a basis for exclusion, the available guidance, prevalence, and experiences of using this basis varies widely. To the extent possible, the article analyzes what constitutes sufficiently poor performance to justify exclusion in each jurisdiction and the types of factors that should ultimately be considered when determining if a potential contractor should be disqualified or publicly debarred for poor performance.

Part II of this article outlines the many policy rationales for using exclusions in a procurement system. Part III discusses the authors’ desk review of the legal procurement frameworks for 24 jurisdictions, 15 of which allow for the exclusion of a contractor based on some level of poor performance. This Part also provides a more detailed overview of how poor performance is addressed in six of these jurisdictions: New Zealand, the Philippines, South Africa, Tanzania, the United States, and the United Kingdom. Part IV draws on the experiences of these reviewed jurisdictions and provides a non-exhaustive list of considerations for how to address poor performance; specifically, (i) elevate to the policy level the objective of doing business only with reliable contractors; (ii) define, to the extent possible, the various degrees of non-performance or poor performance that the system considers to be unacceptable; and (iii) empower procurement officials to obtain and consider past performance information.

## II. Policy Rationales Behind Exclusion in a Procurement System

The objectives of public procurement are numerous and, at times, contradictory. Professor Steven Schooner articulated a list of “nine goals frequently identified for government procurement systems” in a seminal 2002 article and readily acknowledged that his list was neither exhaustive nor internally consistent.<sup>7</sup> It can therefore be challenging to articulate the purpose of any given procurement tool, and exclusions are no exception. Professor Schooner defines exclusions as “administrative remedies” designed to “disqualify contractors or individuals” from obtaining public contracts.<sup>8</sup> Professor Sarah Schoenmaekers similarly defines “exclusions” as “administrative remedies utilized by governments to disqualify contractors from obtaining public contracts or extensions to existing contracts.”<sup>9</sup> Professor Sope Williams-Elegbe notes, however, that this definition does not “take into account the fact that debarment in some jurisdictions is of a judicial and not administrative nature, being imposed by the courts as part of the sentence for corporate crime.”<sup>10</sup> Professor Williams-Elegbe thus defines exclusions as “any kind of public exclusionary measure” and includes measures that both “deny a contractor access to public contracts for a specified period” and “the one-off exclusion or disqualification of a contractor from a particular procurement process, without any implications beyond that process.”<sup>11</sup>

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<sup>7</sup> See Schooner, *Desiderata*, *supra* note 2.

<sup>8</sup> Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 2004 PUB. PROCUREMENT L. REV. 211, 212 [hereinafter Schooner, *Paper Tiger Stirs*].

<sup>9</sup> Sarah Schoenmaekers, *The EU Debarment Rules: Legal and Economic Rationale*, 2016 PUB. PROCUREMENT L. REV. 91, 94.

<sup>10</sup> Sope Williams-Elegbe, *Debarment in Africa: A Cross-Jurisdictional Evaluation*, 2016 PUB. PROCUREMENT L. REV. 71, 71 [hereinafter Williams-Elegbe, *Debarment in Africa*].

<sup>11</sup> *Id.* at 72.

This article adopts Professor Williams-Elegbe’s definition and uses the term “exclusions” to refer to both the government-wide disqualification of a contractor for a specific period of time (which this article refers to as “debarment”) and the disqualification of a bidder or potential contractor that is limited to an individual procurement process (which this article refers to as “disqualification”).<sup>12</sup> Of course, a debarment in many jurisdictions has the added consequence of a public notification. In these situations, the debarred contractor’s name is posted on a public debarment list indicating that this entity or individual is not eligible to do business with the government.<sup>13</sup> The public nature of such a posting increases the debarment’s reputational consequences and often places the contractor in a difficult position with respect to its other business partners.<sup>14</sup> Contract-specific disqualifications, on the other hand, are rarely disclosed publicly.

According to Caroline Nicholas, exclusion systems generally fall into one of two categories; the system’s main focus will either be to protect the government buyer or to punish the wrongdoer:

In the suspension and debarment context, and while all systems are designed to deter wrongdoing as well as to impose consequences, there is generally one of two discrete approaches. On the one hand, the primary objective may be to protect the government customer from individuals and organizations with which it should not do business or to which it should not entrust public funds, whether the risk arises in terms of performance, reputation or both. On the other, the system’s main focus may be on the punishment of suppliers that do engage in integrity violations.

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<sup>12</sup> Debarment is often viewed as an extension of the qualification process. *See, e.g.,* Schooner, *Paper Tiger Stirs*, *supra* note 8, at 213.

<sup>13</sup> *See* Williams, *The Use of Exclusions*, *supra* note 6, at 15.

<sup>14</sup> For a discussion of collateral consequences, see Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 586-587 (2009).

Systems are often termed “discretionary”, or “mandatory” or “punitive”, largely reflecting these differences in approach.<sup>15</sup>

Other potential objectives of an exclusion system include maintaining the public’s trust in, and promoting the legitimacy of, government and ensuring the integrity of the procurement process.<sup>16</sup> Deterrence is also a commonly-cited objective of exclusions. Professor Schoenmaekers notes that “the threat of debarment as well as the impact of negative publicity can deter contractors from committing wrongdoing” and argues that deterrence could be seen as “a tool to bring about cultural change in company behaviour and to increase cost-efficiency.”<sup>17</sup> But at least in the United States, deterrence is a concept firmly rooted in criminal law.<sup>18</sup> The U.S. Supreme Court, in addressing what governmental actions may constitute “punishment,” has stated that actions are not punishment if they are related to a legitimate governmental objective, while at the same time noting that “[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.”<sup>19</sup>

Of course, few jurisdictions expressly articulate their purposes for excluding firms and individuals from their procurement processes, although Professor Williams-Elegbe rightly notes that a system’s “purpose may be gleaned from various aspects of the measure[.]”<sup>20</sup> Tanzania, the World Bank, and the United States are three of the few jurisdictions that expressly state the goals of their exclusion systems. Tanzania provides that its “debarment process” is designed to ensure

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<sup>15</sup> Caroline Nicholas, *Enforcing the Requirements of the 2011 UNCITRAL Model Law on Public Procurement: Model Rules on Suspension and Debarment?* 2016 PUB. PROCUREMENT L. REV. NA81, N83.

<sup>16</sup> See Schooner, *The Paper Tiger Stirs*, *supra* note 8, at 217; Williams-Elegbe, *Debarment in Africa*, *supra* note 10, at 73.

<sup>17</sup> Schoenmaekers, *supra* note 9, at 100. See also Roman Majtan, *The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes*, 45 GEO. WASH. INT’L L. REV. 291, 293 (2013) (“In addition to excluding non-compliant firms and individuals, the threat of debarment as well as the impact of negative publicity deters contractors from committing wrongdoing.”); Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 GEO. WASH. INT’L L. REV. 219 (2013); Christopher R. Yukins, *Rethinking the World Bank’s Sanctions System*, 55 GOV’T CONTRACTOR ¶ 355 (Nov. 13, 2013).

<sup>18</sup> Edwin J. Tomko & Kathy C. Weinberg, *After the Fall: Conviction, Debarment, and Double Jeopardy*, 21 PUB. CONT. L.J. 355, 363 (1992).

<sup>19</sup> *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

<sup>20</sup> Williams-Elegbe, *Debarment in Africa*, *supra* note 10, at 73.

compliance with its procurement rules and regulations, deter firms and individuals from engaging in misconduct, and “punish” those firms and individuals that have engaged in misconduct or “breach[ed] [their] procurement contracts[.]”<sup>21</sup> The World Bank, on the other hand, uses sanctions “to deter but not to punish” and with the aim of “creat[ing] both negative incentives to discourage the sanctioned party and others from engaging in future [misconduct] and positive incentives to encourage prevention, remediation and rehabilitation.”<sup>22</sup> Similarly, the United States’ procurement system makes clear that a firm or individual should be excluded “only in the public interest for the Government’s protection and not for purposes of punishment.”<sup>23</sup>

Whatever the intended purpose of an exclusion, the effect is generally the removal of the contractor from the procurement system either for a specific procurement process or for a period of time. Identifying whether an exclusion is “punitive” or “protective” thus depends, in part, on why the exclusion was imposed. Several commentators have questioned the protective effect of an exclusion based solely on a contractor’s past acts without giving the contractor an opportunity to first remediate or “self-clean.”<sup>24</sup> Indeed, the U.S. Supreme Court has held that, at least in the context of contempt proceedings, an “unconditional penalty is criminal in nature because it is ‘solely and exclusively punitive in character,’” while a conditional penalty “is civil because it is specifically designed to compel the doing of some act.”<sup>25</sup> Hence, an exclusion system would be

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<sup>21</sup> Tanzania Public Procurement Regulatory Authority, Debarment Guidelines § 2.0 (Apr. 12, 2016), *available at* [https://www.ppra.go.tz/phocadownload/attachments/debarment\\_guidelines.pdf](https://www.ppra.go.tz/phocadownload/attachments/debarment_guidelines.pdf).

<sup>22</sup> WBG Policy: Sanctions for Fraud and Corruption §§ III.A.2-3 (June 13, 2016). Unlike many national jurisdictions, the World Bank does not sanction for poor performance. *Id.*

<sup>23</sup> 48 C.F.R. § 9.402(b) (2017).

<sup>24</sup> Edwin J. Tomko & Kathy C. Weinberg, *After the Fall: Conviction, Debarment, and Double Jeopardy*, 21 PUB. CONT. L.J. 355, 356 (1992) (noting that “[a] contractor’s past history may raise questions, but it cannot provide all the answers in regard to present ability to perform”); Schoenmaekers, *supra* note 9, at 100 (arguing that “[d]ebarment as such cannot be seen as a form of rehabilitation” because “no active measures are imposed on the contractor to help him make better judgements”).

<sup>25</sup> *Hicks v. Feiock*, 485 U.S. 624, 633 (1988).

primarily protective in nature if it allows contractors to avoid exclusion (or reduce their period of exclusion) by demonstrating that they have sufficiently remediated the misconduct and no longer present a risk to the government.<sup>26</sup>

### III. Poor Performance as a Basis for Exclusion: Examining Current Regimes

Whatever the theoretical underpinnings may be for excluding contractors, using poor performance as a basis for exclusion is undeniably prevalent across many procurement systems. The authors conducted a desk review of the procurement laws and exclusion provisions of 24 jurisdictions, including the European Commission and the five multilateral development banks (“MDBs”) that are party to the 2010 Agreement for the Mutual Enforcement of Debarment Decisions.<sup>27</sup> Of those 24 jurisdictions, 15 allow for the exclusion of a contractor based on some level of poor performance.<sup>28</sup> At least 10 of those jurisdictions have a public debarment list.<sup>29</sup> This review demonstrates the prevalence of poor performance as a basis to exclude contractors from receiving procurement contracts.

Most of the jurisdictions reviewed describe the ground for exclusion in terms of the contractor’s “failure” to perform its obligations under the contract.<sup>30</sup> But there does not appear to

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<sup>26</sup> See, e.g., 48 C.F.R. § 9.406-1(a) (2017) (“The existence of a cause for debarment . . . does not necessarily require that the contractor be debarred; the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.”); Canni, *supra* note 14, at 583.

<sup>27</sup> AGREEMENT ON MUTUAL ENFORCEMENT OF DEBARMENT DECISIONS (Apr. 9, 2010), *available at* <http://www.crossdebarment.org>.

<sup>28</sup> See *infra* Annex A. The jurisdictions whose laws do not appear to provide for exclusion based on poor performance include: Bangladesh, Canada, Nigeria, Tonga, and the five MDBs (the World Bank Group; the Inter-American Development Bank Group; the African Development Bank Group; the Asian Development Bank; and the European Bank of Reconstruction and Development). Note, however, that the World Bank Group does exclude poorly performing vendors in its corporate procurement operations. See World Bank Group Vendor Eligibility Policy, <http://pubdocs.worldbank.org/en/480001490190723639/Vendor-Elegibility-Policy.pdf> (last visited Sept. 24, 2018).

<sup>29</sup> These jurisdictions include: Brazil, Cameroon, the European Commission, Kenya, the Philippines, South Africa (but not for poor performance), Tanzania, Turkey, the United States, and Zimbabwe. See *infra* Annex A.

<sup>30</sup> E.g., Brazil (“total or partial non-performance of the contract”), China (“fails to fulfil . . . obligations”), South Africa (“failed to perform on any previous contract”), Tanzania (“fails to implement a procurement or disposal

be a consistent standard defining the level of non-performance that would justify an exclusion. The provisions of several jurisdictions could be interpreted as allowing for exclusion based on even minor failures, delays, or deviations, although it may be possible to interpret these provisions in the context of available commercial contract principles. Both commercial and civil law traditions contain doctrines requiring the non-breaching party to act reasonably in deciding whether to suspend its own performance or terminate the contract in response to the breach.<sup>31</sup> In the common law tradition, the concept of “substantial performance” was created to prevent the non-breaching party from withholding its own performance in its entirety when faced with minor or trivial breaches.<sup>32</sup> The Principles of European Contract Law similarly provide that a party may terminate a contract only if the other party’s non-performance was “fundamental” to the contract.<sup>33</sup> What is unclear is the extent to which these principles may be considered in any exclusion decision based on a contractor’s failure to perform.

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contract”), Turkey (“Failing, outside of force majeure, to perform its obligations”), and Uzbekistan (“guilty of default or improper performance of their obligations”). See *infra* Annex A.

<sup>31</sup> See, e.g., Damien Nyer, *Withholding Performance for Breach in International Transactions: An Exercise in Equations, Proportions or Coercion?*, 18 PACE INT’L L. REV. 29, 49 (2006) (“Where a party has performed, but only in a partial or defective fashion, some limits are put on the right of the aggrieved party to withhold performance. . . . In determining what should be regarded as reasonable, the Romano-German and Romano-French legal families apparently diverge as to the weight to be given to the extent or seriousness of the breach.”); John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT’L L. 329, 358-361 (2006); *Publicker Chemical Corp. v. Belcher Oil Co.*, 792 F.2d 482, 486-487 (5th Cir. 1986) (discussing the effect of a breach of contract under Louisiana contract law).

<sup>32</sup> See FARNSWORTH ON CONTRACTS 548 (4th ed. 2004). Farnsworth states that the “substantial performance” concept is designed to prevent forfeiture, noting that “[i]f strict performance by a builder were regarded as a condition of the owner’s duty to pay, the slightest breach by the builder would deprive the builder of any right to payment under the contract.” *Id.* at 547.

<sup>33</sup> Commission on European Contract Law, Principles of European Contract Law Art. 9:301 (Parts I and II rev. 1998, Part III rev. 2002), <https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>. The Principles provide that non-performance of an obligation is fundamental if: “(a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance.” *Id.* at art. 8:103.

Other jurisdictions provide more explicit limitations on when a contractor's non-performance would lead to exclusion. Two jurisdictions—Cameroon and the Philippines—explicitly require a termination of the contract due to the contract's non-performance before excluding the contractor.<sup>34</sup> Six other jurisdictions appear to require that the contractor's failure to perform be sufficiently serious or material to warrant exclusion. China's Law on Tenders and Bids, which applies to large construction and public works tendering, provides that a winning bidder will be excluded for two to five years if the bidder "fails to fulfil his obligations according to the contract signed with the bid inviter and the circumstances are serious."<sup>35</sup> In New Zealand, Rule 41 of the Government Rules of Sourcing provides that an agency may disqualify a supplier from bidding for a contract if the bidder had "a serious performance issue in a previous contract."<sup>36</sup> The United States' debarment regulations similarly provide that a contractor may be debarred for violating "the terms of a Government contract or subcontract so serious[ly] as to justify debarment," including "[w]illful failure to perform" and "[a] history of failure to perform."<sup>37</sup>

The exclusion provisions of the European Commission and the United Kingdom (which transposed the 2014 EU Procurement Directive) require a showing of "significant" or "persistent" deficiencies in the contractor's performance of the contract's "main obligations" or "substantive requirements."<sup>38</sup> Zimbabwe similarly requires a showing that the contractor failed "without good

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<sup>34</sup> Decree No. 2004/275, The Public Contracts Code, Arts. 100, 102 (Sept. 24, 2004) (Cameroon); The Government Procurement Reform Act, Rep. Act No. 9184, § 69(a)(6) (July 22, 2002) (Phil.).

<sup>35</sup> Law on Tenders and Bids (promulgated by the Standing Comm. Ninth Nat'l People's Cong., Aug. 30, 1999, effective Aug. 30, 1999), art. 60, [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383557.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383557.htm) (China).

<sup>36</sup> Government Rules of Sourcing, Rule 41 § 1(c) (3d ed. July 1, 2015), <https://www.procurement.govt.nz/assets/procurement-property/documents/government-rules-of-sourcing-procurement.pdf> (N.Z.).

<sup>37</sup> 48 C.F.R. § 9.406-2(b)(1)(i) (2017).

<sup>38</sup> Commission Regulation 2015/1929, 2015 O.J. 286 (1), art. 106 § 1(e) (Oct. 28, 2015) (EC); The Public Contracts Regulations 2015, SI 2015/102, art. 57 ¶ 8 (Eng.). *See also* Council Directive 2014/24/EU, 2014 O.J. 94 (65), art. 57 § 4(g) (Feb. 26, 2014) (EU).

cause to carry out a material provision” of the contract.<sup>39</sup> All three of these jurisdictions will also not exclude a contractor unless the contracting authority had previously terminated the contract for default or applied other contractual remedies, such as liquidated damages.<sup>40</sup>

What follows is a more detailed review of a select set of jurisdictions—New Zealand, the Philippines, South Africa, Tanzania, the United States, and the United Kingdom—whose legal frameworks provide some level of guidance on how poor performance should be assessed in their procurement systems. As discussed below, these jurisdictions exclude contractors for poor performance using different mechanisms and for various reasons, with several systems fitting squarely into the “protective” paradigm and others taking a more “punitive” approach.

#### *a. New Zealand*

“Getting the right supplier” is a core principle of the Government of New Zealand’s procurement system.<sup>41</sup> This principle aims, among others, to “choose the right supplier who can deliver what you need, at a fair price and on time,” and “identify relevant risks and get the right person to manage them.”<sup>42</sup> The principle represents one of the overarching values of New Zealand’s procurement system and is implemented through the Government Rules of Sourcing.<sup>43</sup>

Rule 41 (“Reasons to Exclude a Supplier”) provides that a contractor may be excluded from participating in a procurement if it had “a serious performance issue in a previous contract.”<sup>44</sup>

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<sup>39</sup> The Public Procurement and Disposal of Public Assets Act, Chapter 22:23, No. 5/2017, art. 72 § 3(c) (Zim.).

<sup>40</sup> Council Regulation 2015/1929, 2015 O.J. 286 (1), art. 106 § 1(e) (Oct. 28, 2015) (EU); The Public Contracts Regulations 2015, SI 2015/102, art. 57 ¶ 8 (Eng.); The Public Procurement and Disposal of Public Assets Act, Chapter 22:23, No. 5/2017, art. 72 § 3(c) (Zim.).

<sup>41</sup> NEW ZEALAND GOV’T PROCUREMENT: GOV’T PROPERTY GROUP, GOV’T PROCUREMENT PRINCIPLES, <https://www.procurement.govt.nz/procurement/principles-and-rules/government-procurement-principles/> (last visited Sept. 19, 2018).

<sup>42</sup> See *id.* at Principle 3 (“Get the right supplier”).

<sup>43</sup> NEW ZEALAND GOV’T PROCUREMENT, GOV’T RULES OF SOURCING (3d ed. July 1, 2015), <https://www.procurement.govt.nz/assets/procurement-property/documents/government-rules-of-sourcing-procurement.pdf>.

<sup>44</sup> *Id.* at Rule 41 § 1.c. The agency, however, “must not exclude a supplier before it has evidence supporting the reason for the exclusion.” *Id.* § 2.

Rule 43 (“Awarding the Contract”) further describes the process a government agency should follow to award a contract.<sup>45</sup> When considering whether to award a contract to a preferred supplier, the government agency must conduct due diligence “before entering into negotiations or awarding the contract.”<sup>46</sup> According to the Guide to Procurement, “due diligence” requires independently verifying that a supplier engages in appropriate health, safety, and employment practices and has the capacity, capability, and expertise to deliver.<sup>47</sup>

To increase clarity and to aid in the effective implementation of this due diligence requirement, the Government of New Zealand has developed a guidance note on Rule 43.<sup>48</sup> The note contemplates the agencies’ obligation to verify past performance by asking all suppliers to provide objective evidence of their past performance when bidding for government work and seeking objective evidence of the preferred supplier’s past performance as part of the final evaluation and negotiation process. Agencies are instructed to consider not awarding the contract where performance issues have been identified.<sup>49</sup>

In sum, the use of past performance in New Zealand appears to be a protective measure aimed at achieving value for money by doing business with reliable suppliers.

### ***b. The Philippines***

The 2002 Government Procurement Reform Act articulated the governing principles of the Philippines’ national procurement system, which include “[t]ransparency,” “[c]ompetitiveness,”

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<sup>45</sup> *Id.* at Rule 43.

<sup>46</sup> NEW ZEALAND GOV’T PROCUREMENT: GOV’T PROPERTY GROUP, GUIDE TO PROCUREMENT: SOURCE YOUR SUPPLIERS, CONDUCTING DUE DILIGENCE CHECKS, <https://www.procurement.govt.nz/procurement/guide-to-procurement/source-your-suppliers/> (last visited Sept. 19, 2018).

<sup>47</sup> *Id.*

<sup>48</sup> NEW ZEALAND GOV’T PROCUREMENT, GOVERNMENT RULES OF SOURCING: RULE 43 AWARDING THE CONTRACT, <https://www.procurement.govt.nz/assets/procurement-property/documents/rule-43-awarding-the-contract-guidance-note.pdf> (last visited Sept. 19, 2018).

“[s]tremlined procurement process,” a “[s]ystem of accountability,” and “[p]ublic monitoring of the procurement process and the implementation of awarded contracts” to ensure that “contracts are performed strictly according to specifications.”<sup>50</sup> Contracting authorities are thus required to conduct a post-qualification analysis in every procurement “to determine whether the [proposed awardee] complies with and is responsive to all the requirements and conditions as specified in the Bidding Documents.”<sup>51</sup> This analysis requires the contracting authority to check for any delays or performance issues in the proposed awardee’s “ongoing government and private contracts.”<sup>52</sup> If the contracting authority identifies any performance issues on the proposed awardee’s ongoing contracts, such as “[n]egative slippage of at least fifteen percent . . . in any one project or . . . of at least ten percent . . . in each of two (2) or more contracts,” the contracting authority “shall disqualify the contractor from the award[.]”<sup>53</sup>

On a government-wide basis, the Government Procurement Reform Act provides that contractors whose contracts have been terminated for default shall be excluded for a period of one to two years:

. . . [T]he Head of the Procuring Entity . . . shall impose on bidders or prospective bidders, the administrative penalty of suspension for one (1) year for the first offense, and suspension of two (2) years for the second offense from participating in the public bidding process, for the following violations: . . . 6. Termination of the contract due to the default of the bidder.<sup>54</sup>

This same provision is repeated as Section 69 of the 2016 Revised Implementing Rules and Regulations.<sup>55</sup> The Revised Implementing Rules also contain a set of “Guidelines on

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<sup>50</sup> The Government Procurement Reform Act, Rep. Act No. 9184, § 3 (July 22, 2002) (Phil.).

<sup>51</sup> The Philippines 2016 Revised Implementing Rules and Regulations of Republic Act No. 9184 § 34.1 (Oct. 28, 2016).

<sup>52</sup> *Id.* at § 34.3(b)(ii).

<sup>53</sup> *Id.*

<sup>54</sup> The Government Procurement Reform Act, Rep. Act No. 9184, § 69 (July 22, 2002) (Phil.).

<sup>55</sup> The Philippines 2016 Revised Implementing Rules and Regulations of Republic Act No. 9184 § 69 (Oct. 28, 2016).

Termination of Contracts” designed to “promote fairness in the termination of procurement contracts and to prescribe contract conditions and measures to enable government to protect its interests.”<sup>56</sup> These Guidelines provide that the government may terminate for default a contract for goods if the supplier, “[o]utside of force majeure,” failed to deliver or perform any part of the contract, and the value of the failure was at least ten percent of the contract price, or “[t]he [s]upplier fail[ed] to perform any other obligation under the Contract.”<sup>57</sup> For infrastructure projects, the government may terminate for default if the contractor is responsible for causing “negative slippage of fifteen percent . . . or more” while the contract is ongoing or “ten percent . . . or more in the completion of the work” after the contract time has expired.<sup>58</sup> The government may also terminate for default if the contractor engages in several other actions, such as “abandon[ing] the contract works, refus[ing] or fail[ing] to comply with a valid instruction,” or subcontracting without approval.<sup>59</sup> Finally, contracts for consulting services may be terminated for default if the contractor “fail[ed] to deliver or perform the Outputs and Deliverables within the period(s) specified in the contract” or “fail[ed] to perform any other obligation under the contract.”<sup>60</sup> Within seven days after the termination of any contract, the contractor may “show cause” to the government agency why the contract should not have been terminated and ask the agency to rescind its termination.<sup>61</sup>

Appendix 17 to the Revised Implementing Rules provides a set of “Uniform Guidelines for Blacklisting of Manufacturers, Suppliers, Distributors, Contractors and Consultants.”<sup>62</sup> The Uniform Guidelines provide additional information on exclusions, including those based on

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<sup>56</sup> *Id.* at Annex I.

<sup>57</sup> *Id.* at Annex I, § III.A.1.

<sup>58</sup> *Id.* at Annex I, § III.A.2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at Annex I, § III.A.3.

<sup>61</sup> *Id.* at Annex I, § IV.3.

<sup>62</sup> *Id.* at Appendix 17.

“violations committed during the contract implementation stage,” such as the contractor’s failure “to fully and faithfully comply with its contractual obligations without valid cause,” or its failure “to comply with any written lawful instruction[.]”<sup>63</sup> The Uniform Guidelines mandate the automatic exclusion of a contractor following its contractual default:

Upon termination of contract due to default of the contractor, the Head of the Procuring Entity shall immediately issue a Blacklisting Order disqualifying the erring contractor from participating in the bidding of all government projects. The performance security of said contractor shall also be forfeited.<sup>64</sup>

The legal framework in the Philippines thus does not appear to provide contractors with an opportunity to take remedial measures or otherwise demonstrate their reliability notwithstanding a default termination, which suggests that these exclusion provisions are punitive in nature.

### *c. South Africa*

South Africa’s public procurement principles are enshrined in Section 217 of the Constitution, which provides that procurements by government entities must be “fair, equitable, transparent, competitive and cost-effective.”<sup>65</sup> South Africa’s exclusion provisions are addressed in several different pieces of legislation, including the Prevention of Corruption Act of 2004, the Public Finance Management Act of 1999, and the Preferential Procurement Policy Framework Act of 2000.<sup>66</sup> As noted by Professor Williams-Elegbe, South Africa’s legal framework provides for a range of offenses to exclude firms and individuals from participating in procurements.<sup>67</sup> Several of these offenses result in mandatory exclusions, while others are discretionary.<sup>68</sup> Professor

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<sup>63</sup> *Id.* at Appendix 17, § 4.2.

<sup>64</sup> *Id.* at Appendix 17, § 6.0. Blacklisted contractors “shall be automatically delisted after the period for the penalty shall have elapsed,” unless there are justifiable reasons for extending the blacklisting period. *Id.* at Appendix 17, § 8.1.

<sup>65</sup> S. Afr. Const. § 217(1), 1996.

<sup>66</sup> Williams, *The Use of Exclusions*, *supra* note 6, at 9-12.

<sup>67</sup> Williams-Elegbe, *Debarment in Africa*, *supra* note 10, at 85.

<sup>68</sup> *Id.*

Williams-Elegbe also notes that, while “there has been no clear statement as to the purpose of debarment it is suggested that the South African debarment framework is intended to be punitive.”<sup>69</sup>

The implementing regulations to the Public Finance Management Act provide that “[t]he accounting officer or accounting authority . . . may disregard the bid of any bidder if that bidder, or any of its directors[,] . . . have failed to perform on any previous contract[.]”<sup>70</sup> Unlike in the Philippines, discussed above, the legal framework in South Africa does not provide further guidance on the types of acts that would constitute a contractor’s “fail[ure] to perform.” The discretionary nature of this exclusion provision—which does not extend beyond the specific procurement at issue—implies that contracting authorities would have wide latitude to decide not only what constitutes unacceptable past performance but also whether such performance merits disqualifying the bidder.<sup>71</sup> Professor Williams-Elegbe notes that these types of administrative exclusions “are not included in a publicly available list,”<sup>72</sup> which reduces the collateral impact of these disqualifications. Nevertheless, Williams-Elegbe further notes that “there is evidence to suggest that many contracting authorities (or organs of state) regularly debar erring contractors.”<sup>73</sup>

#### ***d. Tanzania***

Tanzania’s exclusion system is implemented by the Public Procurement Regulatory Authority (“PPRA”), which was established by the Public Procurement Act of 2011.<sup>74</sup> The Act

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<sup>69</sup> *Id.* at 86.

<sup>70</sup> Treasury Regulations to the Public Finance Management Act 2005, § 16A9.2, GG 27388 (15 Mar. 2005), [http://www.treasury.gov.za/legislation/pfma/regulations/gazette\\_27388.pdf](http://www.treasury.gov.za/legislation/pfma/regulations/gazette_27388.pdf) (S. Afr.).

<sup>71</sup> Williams, *The Use of Exclusions*, *supra* note 6, at 39-40. Excluded contractors may be able to challenge the procedures used under the Promotion of Administrative Justice Act (“PAJA”), as “the decision to exclude a contractor must accord with PAJA giving the contractor written reasons for the decision to exclude him and affording him remedies in judicial review proceedings where procedural standards have not been met.” *Id.* at 36.

<sup>72</sup> Williams-Elegbe, *Debarment in Africa*, *supra* note 10, at 88.

<sup>73</sup> *Id.*

<sup>74</sup> The Public Procurement Act of 2011, Part III, Gazette No. 52, Vol. 92 (Dec. 30, 2011) (Tanz.).

provides that “[a] tenderer shall be debarred and blacklisted from participating in public procurement or disposal proceedings if . . . the tenderer breaches a procurement contract[.]”<sup>75</sup> The Public Procurement Regulations of 2013 similarly make clear that a potential contractor “shall not be eligible for the award of [a] contract if” the contractor “is in breach of contract with the procuring entity or other procuring entities[.]”<sup>76</sup> Furthermore, a potential contractor “shall be debarred from participating in public procurement or disposal proceedings if . . . it is established that the tenderer fails to implement a procurement or disposal contract, in which case he shall be barred for a period of not less than one year and not exceeding five years[.]”<sup>77</sup>

The PPRA published a set of Debarment Guidelines in April 2016 that provides additional information on the purpose and mechanics of Tanzania’s exclusion system.<sup>78</sup> Unlike many other jurisdictions, Tanzania explicitly states that the objectives of its “debarment process” are, among other things, “[t]o punish tenderers and individuals for committing corrupt, collusive, coercive, obstructive and fraudulent acts, making false representations and for *breaching procurement contracts*.”<sup>79</sup> The Debarment Guidelines thus make clear that the termination of a procurement contract “for breach of the contract” by the contractor “shall warrant initiation of a debarment process[.]”<sup>80</sup> Contractors subject to debarment proceedings are given notice and opportunity to respond to the allegations.<sup>81</sup> However, like the Philippines, defaulting contractors do not appear to be able to take remedial measures or otherwise demonstrate their reliability notwithstanding their default. Debarment decisions are also published “in the Tanzania Procurement Journal and

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<sup>75</sup> *Id.* at § 62(3)(c).

<sup>76</sup> The Public Procurement Regulations of 2013 § 9(7)(f), Gazette No. 48, Vol. 94 (Nov. 29, 2013) (Tanz).

<sup>77</sup> *Id.* at § 93(3)(c).

<sup>78</sup> Public Procurement Regulatory Authority, Debarment Guidelines, Circ. Res. No. 11 (Apr. 12, 2016), <https://www.ppra.go.tz/index.php/enewsletters/2012-11-29-10-35-32/debarment-guidelines>.

<sup>79</sup> *Id.* at § 2.0(b) (emphasis added).

<sup>80</sup> *Id.* at § 3.0(c).

<sup>81</sup> *Id.* at §§ 7.0, 10.0

[PPRA's] Website[.]”<sup>82</sup> Public information on PPRA's website indicates that Tanzania has debarred non-performing contracts quite frequently over the past three years (25 out of 30 total debarments).<sup>83</sup>

*e. The United States*

The United States' procurement system makes clear that exclusions are to be imposed “only in the public interest for the Government's protection and not for purposes of punishment.”<sup>84</sup> Exclusions in the United States are thus “discretionary actions” taken by designated suspending and debaring officials against contractors found not to be presently “responsible” and thus pose too great a risk to the government.<sup>85</sup> Professor Schooner notes that the starting point for understanding exclusions in the United States is the concept of “responsibility,” which “plays an important role in protecting a number of core values of our public procurement system.”<sup>86</sup> The United States' procurement regulations require, before awarding any contract, that the contracting officer assess the proposed contractor's qualifications and make an affirmative finding that the contractor is likely to perform competently and successfully.<sup>87</sup>

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<sup>82</sup> *Id.* at § 14.3.

<sup>83</sup> PUBLIC PROCUREMENT REGULATORY AUTHORITY, ANNUAL PERFORMANCE EVALUATION REPORT FOR FINANCIAL YEAR 2014/15, at 53 (Sept. 29, 2015); PUBLIC PROCUREMENT REGULATORY AUTHORITY, ANNUAL PERFORMANCE EVALUATION REPORT FOR FINANCIAL YEAR 2015/16, at 14 (Sept. 28, 2016); PUBLIC PROCUREMENT REGULATORY AUTHORITY, ANNUAL PERFORMANCE EVALUATION REPORT FOR FINANCIAL YEAR 2016/17, at 13 (Sept. 29, 2017). PPRA also noted in its 2014-15 Annual Report that it had received several cases in which it did not find a basis for debarment because the procuring entity “contribute[d] to the breach of contract” that led to the termination. These reports can be accessed at <http://tenders.ppra.go.tz/tanzania-procurement-journal.php?id=2>.

<sup>84</sup> 48 C.F.R. § 9.402(b) (2017).

<sup>85</sup> 48 C.F.R. § 9.402(a) (2017).

<sup>86</sup> Schooner, *Paper Tiger Stirs*, *supra* note 8, at 212-13.

<sup>87</sup> 48 C.F.R. § 9.103 (2017).

To be judged “responsible,” a contractor must, among other things, “[h]ave a satisfactory performance record.”<sup>88</sup> The United States’ regulations elaborate on what constitutes a “satisfactory performance record”:

A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor’s control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination.<sup>89</sup>

The United States thus imposes a qualification standard on every contractor and requires the government to conclude, before awarding any contract, that the proposed contractor has a “satisfactory performance record.” To that end, the United States requires contractors to disclose whether they “had one or more contracts terminated for default by any Federal Agency” within the past three years, noting specifically that any such disclosures “will not necessarily result in withholding of an award[.]”<sup>90</sup>

The regulations further provide, however, that a contractor could be debarred (and publicly listed)<sup>91</sup> if there is a preponderance of the evidence that the contractor has “[v]iolat[ed] the terms of a Government contract or subcontract so serious[ly] as to justify debarment, such as . . . (A) Willful failure to perform in accordance with the terms of one or more contracts; or (B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.”<sup>92</sup> In practice,

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<sup>88</sup> 48 C.F.R. § 9.104-1(c) (2017) (noting, however, that “[a] prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history”).

<sup>89</sup> 48 C.F.R. § 9.104-3(b) (2017).

<sup>90</sup> 48 C.F.R. §§ 52.209-5(a)(1)(ii), (c) (2017). This certification requirement applies to all contracts above the Simplified Acquisition Threshold. 48 C.F.R. § 9.104-7(a) (2017).

<sup>91</sup> The United States’ public debarment list is called the System for Award Management and can be accessed here: <https://sam.gov/portal/SAM/##11>.

<sup>92</sup> 48 C.F.R. § 9.406-2(b)(1)(i) (2017).

debarments based on a history of poor performance happen somewhat infrequently in the United States.<sup>93</sup> Steven Shaw, the former suspending and debarring official for the United States Air Force, has stated that “[f]ew agencies consider contract performance issues as a basis for debarment, and many that do consider such issues view these causes too narrowly.”<sup>94</sup> Shaw notes that this provision does not prohibit a contractor from being “debarred for a history of even negligent performance[,]” and that “the government need not prove the existence of more than a single government contract.”<sup>95</sup> Shaw concedes, however, that “[i]n most cases, . . . when reviewing a single contract, proof of more than one negligent act should be required in order to establish the contractor’s ‘history’ of poor performance.”<sup>96</sup>

Perhaps the most important aspect of the United States’ debarment system is that debarment decisions are prospective in nature.<sup>97</sup> Just because a cause for debarment exists “does not necessarily require that the contractor be debarred.”<sup>98</sup> Suspending and debarring officials are thus required to consider a range of mitigating factors and “any remedial measures” taken by the contractor before deciding whether debarment is warranted.<sup>99</sup> Debarment decisions in the United States are thus designed to protect the government and mitigate the risk of doing business with irresponsible contractors.

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<sup>93</sup> See, e.g., INSPECTOR GENERAL OF THE U.S. DEP’T OF DEFENSE, REP. NO. D-2011-083, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS (July 14, 2011).

<sup>94</sup> Steven A. Shaw, *Access to Information: The Key Challenge to a Credible Suspension and Debarment Programme*, 2004 PUB. PROCUREMENT L. REV. 230, 232.

<sup>95</sup> *Id.*; *Schlesinger v. Gates*, 249 F.2d 111, 112 (D.C. Cir. 1957) (“The Secretary of the Navy is authorized to debar contractors for breach of contract . . . , [and] [w]e need not go beyond the statute and regulations to sustain the debarment in the instant case on the grounds of appellant’s default in performance.”).

<sup>96</sup> Shaw, *supra* note 94, at 232.

<sup>97</sup> See *id.* at 233 (“Regardless of the magnitude of the *past* misconduct, should the contractor *currently* remain eligible for new government contracts?”).

<sup>98</sup> 48 C.F.R. § 9.406-1(a) (2017).

<sup>99</sup> *Id.*

*f. The United Kingdom*

In contrast to the United States, the United Kingdom does not have a public debarment list. Contracting authorities are thus responsible for identifying and imposing exclusions as part of their individual procurement processes. The United Kingdom’s procurement system provides for the discretionary exclusion of contractors found to have “significant or persistent deficiencies” in their past performance of public contracts. This provision is contained in the Public Contract Regulations, which provides:

Contracting authorities may exclude from participation in a procurement procedure any economic operator . . . 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[.]<sup>100</sup>

The Public Contract Regulations were revised in 2015 as part of the United Kingdom’s efforts to transpose the EU’s 2014 Procurement Directive; the above provision is thus identical to the exclusion provision found in the EU Procurement Directive.<sup>101</sup> Although the Public Contract Regulations do not expand on how this provision should be implemented in practice, the recitals to the EU Procurement Directive shed some light on its intended scope (at least from the EU perspective). Recital 101 provides that this provision, which was not present in earlier versions of the Directive, is designed to allow contracting authorities to “exclude economic operators which have proven unreliable[.]”<sup>102</sup> In short, contracting authorities should be allowed “to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform,

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<sup>100</sup> The Public Contracts Regulations 2015, SI 2015/102, art. 57 ¶ 8(g) (Eng.).

<sup>101</sup> Compare *id.* with Council Directive 2014/24/EU, art. 57 § 4(g), 2014 O.J. (L 94/65) (Feb. 26, 2014).

<sup>102</sup> Council Directive 2014/24/EU, Recital 101, 2014 O.J. (L 94/65) (Feb. 26, 2014).

significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator.”<sup>103</sup>

The recital cautions, however, that “[m]inor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator.”<sup>104</sup>

The Public Contract Regulations also give economic operators that could be subject to an exclusion ground a “self-cleaning” opportunity. An economic operator may thus provide evidence that it has taken steps “sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.”<sup>105</sup> If the contracting authority concludes that this evidence is sufficient, “the economic operator . . . shall not be excluded from the procurement procedure.”<sup>106</sup> Hence, the United Kingdom’s exclusion provisions are similar to the United States’ debarment system in that both provide contractors an opportunity to remediate and continue participating in procurements notwithstanding the existence of a basis for exclusion.

The Crown Commercial Service also issued a Procurement Policy Note in 2015 that provides further guidance on how the relevant government agencies in the United Kingdom should evaluate a contractor’s past performance.<sup>107</sup> The Policy Note explicitly recognizes the importance of considering a contractor’s past performance, noting that “[o]ne aspect of a supplier’s technical and professional ability is its reliability as demonstrated by its performance of past contracts.”<sup>108</sup>

To that end, the Policy Note requires government agencies to collect past performance information

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> The Public Contracts Regulations 2015, SI 2015/102, art. 57 ¶ 13 (Eng.).

<sup>106</sup> *Id.* at § 14.

<sup>107</sup> CROWN COMMERCIAL SERVICE, ACTION NOTE 04/15, PROCUREMENT POLICY NOTE – TAKING ACCOUNT OF SUPPLIERS’ PAST PERFORMANCE (Mar. 25, 2015), <https://www.gov.uk/government/publications/procurement-policy-note-0415-taking-account-of-suppliers-past-performance>. The Policy Note applies to “all Central Government Departments, their Executive Agencies and Non Departmental Public Bodies.” *Id.* at para. 2.

<sup>108</sup> *Id.* at para. 1.

on potential contractors and “satisfy themselves . . . that suppliers’ principal relevant contracts in the last three years are being or have been satisfactorily performed in accordance with their terms; or . . . where there is evidence that this has not occurred in any case, that the reasons for any such failure will not recur if that supplier were to be awarded the relevant contract.”<sup>109</sup> The Policy Note allows for the reassessment of a contractor’s past performance at subsequent stages of the procurement and provides the contractor with an opportunity to submit any relevant information, “such as information explaining why any past performance problems are unlikely to recur.”<sup>110</sup> The Policy Note thus outlines a qualification mechanism that is similar to the “responsibility” determination mandated by the FAR in the United States.

#### **IV. Punishment versus Protection: What Makes the Most Sense?**

The jurisdictions detailed above all generally use exclusions to mitigate risks and ensure the integrity of their procurement systems. But these jurisdictions each take slightly different approaches to addressing poor performing contractors. Certain jurisdictions—like New Zealand and the United Kingdom—provide discretion to procurement officials to disqualify, on a contract-by-contract basis, contractors with an unsatisfactory performance record, and provides those contractors with an opportunity to demonstrate that they are presently reliable notwithstanding prior performance issues.<sup>111</sup> Other jurisdictions—like the Philippines and Tanzania—take a more

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<sup>109</sup> *Id.* at para. 8. This selection criteria applies to procurements of “goods and/or services in respect of information and communications technology, facilities management or business processing outsourcing with a total anticipated contract value of £20 million or greater (excluding VAT).” *Id.* at para. 5.

<sup>110</sup> *Id.* at paras. 9(g), 15.

<sup>111</sup> *See, e.g.*, NEW ZEALAND GOV’T PROCUREMENT, GOV’T RULES OF SOURCING (3d ed. July 1, 2015), <https://www.procurement.govt.nz/assets/procurement-property/documents/government-rules-of-sourcing-procurement.pdf>; CROWN COMMERCIAL SERVICE, ACTION NOTE 04/15, PROCUREMENT POLICY NOTE – TAKING ACCOUNT OF SUPPLIERS’ PAST PERFORMANCE (Mar. 25, 2015), <https://www.gov.uk/government/publications/procurement-policy-note-0415-taking-account-of-suppliers-past-performance>.

punitive approach and publicly debar poorly-performing contractors without giving them an opportunity to remediate.<sup>112</sup>

The jurisdictions reviewed demonstrate that there are numerous ways to address poor performance in a procurement system, each with its own benefits and drawbacks. In the authors' views, an ideal system would seek to, among other things: (i) elevate to the policy level the objective of doing business only with reliable contractors; (ii) define, to the extent possible, the various degrees of non-performance or poor performance the system considers to be unacceptable; and (iii) empower procurement officials by providing them with the tools necessary to obtain and consider past performance information.

Whatever the approach, it is important to consider a procurement system's stated objectives, and the costly consequences that exclusions often bring to errant contractors, before embarking on a complicated effort to evaluate past performance. As commentators have argued, a contractor's exclusion from procurements could be potentially devastating to the entity and may put the contractor out of business.<sup>113</sup> The consequences of an exclusion are even more significant when the debarment of a firm or individual is publicly listed.<sup>114</sup> Although public debarment is often viewed as an adequate and effective measure against firms and individuals found to have engaged in fraud, corruption, or other misconduct, it is not immediately evident that the same measures are warranted when it comes to poor performance. There may instead be other appropriate alternatives to public debarment, especially in a "protective" regime.

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<sup>112</sup> See, e.g., The Philippines 2016 Revised Implementing Rules and Regulations of Republic Act No. 9184 Appendix 17 (Oct. 28, 2016); Public Procurement Regulatory Authority, Debarment Guidelines, Circ. Res. No. 11 (Apr. 12, 2016), <https://www.ppra.go.tz/index.php/enewsletters/2012-11-29-10-35-32/debarment-guidelines>.

<sup>113</sup> Canni, *supra* note 14, at 586-87.

<sup>114</sup> These jurisdictions include: Brazil, Cameroon, the European Commission, Kenya, the Philippines, South Africa (but not for poor performance), Tanzania, Turkey, the United States, and Zimbabwe. See *infra* Annex A.

***a. Elevate the objective of doing business only with reliable contractors.***

To appropriately empower procurement officials to address performance issues, procurement systems should consider explicitly articulating, at the policy level, that a key element of obtaining value for money is by doing business with reliable contractors only. Jurisdictions are increasingly recognizing the importance of designing procurement systems with the goal of obtaining best value.<sup>115</sup> Announcing, through the legal framework's main policy document, that the government will not do business with unreliable contractors sends a clear message to all and empowers contracting authorities to consider past performance when making procurement decisions.<sup>116</sup> Such a policy statement would also force contracting authorities to consider how to best deal with contractors found to be unreliable, whether through some form of sanction or punishment, or through more protective measures designed to protect public funds and manage performance risk.

***b. Define, to the extent possible, the various degrees of non-performance or poor performance that are unacceptable.***

In addition to elevating the principle of doing business only with reliable contractors, it is also important that a procurement system defines what level of "poor" performance would be unacceptable and would warrant exclusion. As discussed above, there does not appear to be a consistent standard across jurisdictions. Certain jurisdictions, like the Philippines and the United

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<sup>115</sup> See, e.g., Swan & Harutyunyan, *supra* note 4.

<sup>116</sup> See, e.g., NEW ZEALAND GOV'T PROCUREMENT: GOV'T PROPERTY GROUP, GOV'T PROCUREMENT PRINCIPLES, <https://www.procurement.govt.nz/procurement/principles-and-rules/government-procurement-principles/> (last visited Sept. 19, 2018) ("Choose the right supplier who can deliver what you need, at a fair price and on time."); CROWN COMMERCIAL SERVICE, ACTION NOTE 04/15, PROCUREMENT POLICY NOTE – TAKING ACCOUNT OF SUPPLIERS' PAST PERFORMANCE ¶ 1 (Mar. 25, 2015), <https://www.gov.uk/government/publications/procurement-policy-note-0415-taking-account-of-suppliers-past-performance> ("One aspect of a supplier's technical and professional ability is its reliability as demonstrated by its performance of past contracts."); 48 C.F.R. § 9.103(a) (2017) ("Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.").

States, provide detailed guidance on what actions would justify an exclusion for poor performance.<sup>117</sup> Other jurisdictions, like South Africa, do not explicitly define the scope of the contractor’s “fail[ure] to perform” that would lead to exclusion.<sup>118</sup>

The varying definitions of what constitutes “poor” performance is likely due to the many different contexts, technical capacities, legal regimes, and experiences of procurement officials from around the world. While definitions of misconduct like “corruption” and “fraud” derive from criminal law and almost always signal a contractor’s malevolent intent, the quality of a contractor’s performance is highly dependent on the contract’s terms and the government’s specific needs, and an unsatisfactory outcome could be due to many different reasons beyond a willful refusal to perform, such as a lack of resources (human or financial), financial difficulties, multiple ongoing contracts, or the government’s own actions.

Presumably because of the many possible reasons for an unsatisfactory result, several jurisdictions require the exercise of certain contractual remedies against a contractor before excluding it from future procurements.<sup>119</sup> Indeed, exercising these contractual remedies, such as a termination for default or liquidated damages, is itself a useful tool to mitigate risk and prevent non-performance.<sup>120</sup> A government’s use of contractual remedies often results in serious consequences, not just for the contractor but also for the government.<sup>121</sup> For example, a

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<sup>117</sup> See 48 C.F.R. § 9.104-3(b) (2017); The Philippines 2016 Revised Implementing Rules and Regulations of Republic Act No. 9184, Annex I (Oct. 28, 2016).

<sup>118</sup> Treasury Regulations to the Public Finance Management Act 2005, § 16A9.2, GG 27388 (15 Mar. 2005), [http://www.treasury.gov.za/legislation/pfma/regulations/gazette\\_27388.pdf](http://www.treasury.gov.za/legislation/pfma/regulations/gazette_27388.pdf) (S. Afr.).

<sup>119</sup> See, e.g., Cameroon, the Philippines, The United Kingdom, the European Commission, Zimbabwe. See *infra* Annex A.

<sup>120</sup> P. J. Seidman & R. D. Banfield, *How to Avoid and Overturn Terminations for Default*, BRIEFING PAPERS, Nov. 1998, at 1 (citing sudden loss of work and overhead, lost opportunity to make profit, risk of being forced to return progress payments, risk of being imposed excess cost of re-procurement, recalling of performance and payment securities, get a negative past performance evaluation for future contracts, etc.).

<sup>121</sup> See *Clay Bernard Sys. Int’l, Ltd. v. United States*, 22 Cl. Ct. 804, 809-810 (1991).

termination for default usually means that the government agency will lose time and money engaging in reprocurement efforts and may get involved in lengthy and disruptive litigation.<sup>122</sup> But in addition to terminations, government agencies often have access to other available contractual remedies, like liquidated or delay damages, partial or full recalling of performance security, advance payment securities, and the filing of claims.<sup>123</sup> Exercising contractual remedies consistently and diligently can assist in deterring poor performance and can provide more objective indicators for when exclusions might be appropriate.

*c. Empower contracting officials to obtain and consider past performance information in evaluating bids and awarding contracts.*

Finally, and most importantly, the procurement framework should empower contracting authorities to obtain and consider past performance information. At its core, a bidder's history of performing similar contracts is used as a proxy for the likelihood that the bidder, if selected, will successfully perform the current contract.<sup>124</sup> As noted by Steven Kelman, former Administrator for the U.S. Office of Federal Procurement Policy, "Commercial buyers have long recognized that a contractor's track record is a good predictor of future performance and routinely consider it when

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<sup>122</sup> *Id.* In part, because of these reasons, government agencies will often work to avoid terminating for default and may either decide to continue with the same contractor (leading to an increase in supervision efforts and costs on the part of the agency) or amicably settle through some form of non-default termination.

<sup>123</sup> See, e.g., 48 C.F.R. § 11.501 (2017) (noting that "[l]iquidated damages are not punitive and are not negative performance incentives" but are instead "used to compensate the Government for probable damages" arising from the delay); The World Bank Procurement Regulations for Investment Project Financing Borrowers, Annex IX § 2.9 (July 2016, rev. Nov. 2017), <http://pubdocs.worldbank.org/en/178331533065871195/Procurement-Regulations.pdf> ("Provisions for liquidated damages or similar provisions . . . shall be included in the conditions of contract when delays . . . would result in extra cost or loss of revenue or other benefits to the Borrower.").

<sup>124</sup> Juan-Carlos Guerrero & Christopher J. Kirkpatrick, *Evaluating Contractor Past Performance in the United States*, 2001 PUB. PROCUREMENT L. REV. 243, 244 ("Arguably the biggest reason was the basic idea that it is more likely for contractors with a solid past performance record to be successful in future contracts than those with a weaker past performance record of no past performance record at all.").

awarding contracts.”<sup>125</sup> Even in the commercial marketplace, it makes sense to consider an entity’s past performance as a way to reduce risk and ensure best value.

Many jurisdictions already consider a bidder’s past performance solely as a minimum qualification standard—*i.e.*, a risk avoidance mechanism designed to “screen out” bidders who are likely to default based on previous instances of non-performance. In the United States, this takes the form of a “responsibility” determination, which “is used to filter out undesirable or incompetent contractors.”<sup>126</sup> The European Union’s 2014 Procurement Directive similarly provides that “[c]ontracting authorities may require . . . that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.”<sup>127</sup> And the UNCITRAL Model Law on Public Procurement provides that procuring entities may require that bidders “have the necessary professional, technical and environmental qualifications, . . . managerial capability, reliability, experience and personnel to perform the procurement contract[.]”<sup>128</sup>

At the same time, it is not uncommon for a procurement system to limit the analysis of a bidder’s past performance to a straightforward confirmation of the number of contracts the bidder has completed and the similarity of those contracts with the present procurement. Under the World Bank’s procurement rules,<sup>129</sup> past performance is normally assessed by borrowers as part of a

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<sup>125</sup> Steven Kelman, *Past Performance as an Evaluation Factor – Strengthening the Government’s Best Value Decision*, 38 GOV’T CONTRACTOR ¶ 463 (Oct. 2, 1996).

<sup>126</sup> Schooner, *Paper Tiger Stirs*, *supra* note 8, at 109. See also W.F. Goodrich, Jr., *Past Performance as an Evaluation Factor in Public Contract Source Selection*, 47 AM. U. L. REV. 1539, 1541 (1998); 48 C.F.R. §§ 9.104-1(c), 9.104-3(b) (2017). At the same time, “poor performance or even default on one or several prior contracts does not necessarily constitute adequate grounds for a nonresponsibility determination.” KATE M. MANUEL, CONG. RESEARCH SERV., R41562, EVALUATING THE “PAST PERFORMANCE” OF FEDERAL CONTRACTORS: LEGAL REQUIREMENTS AND ISSUES 17 (Feb. 5, 2015).

<sup>127</sup> Council Directive 2014/24/EU, art. 58, § 4, 2014 O.J. (L 94/65) (Feb. 26, 2014).

<sup>128</sup> UNCITRAL Model Law, Art. 9 § 2(a).

<sup>129</sup> The World Bank Procurement Regulations for Investment Project Financing Borrowers (July 2016, rev. Nov. 2017), <http://pubdocs.worldbank.org/en/178331533065871195/Procurement-Regulations.pdf>

bidder's technical capabilities.<sup>130</sup> For example, bidders in international competitive procurements are generally required to demonstrate their technical experience by showing that they have completed a minimum number of contracts of a similar value, nature, and complexity as the contract in question.<sup>131</sup> In procurements for works contracts, bidders are also required to disclose any history of non-performance of previous contracts that may have occurred in the last five years (or other period specified in the tender documents).<sup>132</sup>

Other procurement systems, like the United Kingdom, New Zealand, and the United States, provide a greater mandate to procurement officials to seek information on past performance, determine its acceptability, and evaluate any associated risks.<sup>133</sup> These procurement systems also provide bidders with an opportunity to respond to any instances of poor past performance by challenging the determinations, providing clarifications, outlining any actions they may have since taken to address the issue, or explaining why past performance problems are unlikely to recur. The United States takes its past performance assessments a step further and provides for a qualitative and comparative assessment of offerors' past performance history in negotiated procurements.<sup>134</sup>

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<sup>130</sup> The World Bank's procurement rules, however, do not provide for the exclusion of non-performing contractors.

<sup>131</sup> *See, e.g.*, World Bank Standard Procurement Document, Request for Bids: Goods § III, para. 3.1(a)(ii) (Oct. 2017); World Bank Standard Procurement Document, Prequalification Document: Works § III, para. 4 (Oct. 2017) (allowing bidders to submit information on contracts that have been "substantially completed," defined as "80% or more of the works completed under the contract").

<sup>132</sup> World Bank Standard Procurement Document, Prequalification Document: Works § III, para. 2.1 (Oct. 2017). Interestingly, the use of the term "non-performance" appears purposefully broad in that any type of non-performance should be disclosed by bidders. But in practice, this provision is rarely implicated without a prior termination for default, especially considering that not every non-performance leads to termination or is subject to final dispute resolution.

<sup>133</sup> CROWN COMMERCIAL SERVICE, ACTION NOTE 04/15, PROCUREMENT POLICY NOTE – TAKING ACCOUNT OF SUPPLIERS' PAST PERFORMANCE (Mar. 25, 2015), <https://www.gov.uk/government/publications/procurement-policy-note-0415-taking-account-of-suppliers-past-performance>; 48 C.F.R. §§ 9.104-1(c), 15.305(a)(2) (2017); NEW ZEALAND GOV'T PROCUREMENT, GOV'T RULES OF SOURCING (3d ed. July 1, 2015), <https://www.procurement.govt.nz/assets/procurement-property/documents/government-rules-of-sourcing-procurement.pdf>.

<sup>134</sup> 48 C.F.R. § 15.304(c) (2017). *See, e.g.*, Kelman, *supra* note 125 (encouraging agencies "to distinguish among various levels of performance, with more favorable consideration being given when performance is stronger"). *But*

Jurisdictions could consider adopting similar practices as a tool to achieve value for money and ensure delivery of quality goods, works, and services. At the same time, the authors recognize that ensuring the successful, fair, and transparent evaluation of a subjective criterion like past performance<sup>135</sup> would first require the development of: (i) adequate capacity and professionalism of contracting officials, and (ii) a sufficiently robust procurement governance environment. Among the various aspects of the procurement process, the evaluation of past performance entails subjectivity and exercise of good professional judgment, which are gained through experience and training. In many countries, “the public officials responsible for procurement need to be adequately trained and empowered to exercise discretion and professional judgement as necessary to ensure the successful outcome of the project, while ensuring that all such decisions are transparent, fully documented and justified[.]”<sup>136</sup> The European Commission recognized in its recommendations to its member states on the professionalization of the procurement workforce that “[t]he most efficient use of public funds needs to be ensured and public buyers need to be in a position to procure according to the highest standards of professionalism. Enhancing and supporting professionalism among public procurement practitioners can help foster the impact of public procurement in the whole economy.”<sup>137</sup> The OECD further maintains that “[a]n efficient public procurement system is founded on the availability of a professional, value-driven and integrity-conscious management function within contracting authorities and entities that delivers

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*see* Pachter & Shaffer, *supra* note 3 (arguing that there is “a significant danger that overemphasizing past performance will cause agencies to *de facto* debar a company that has a poor performance record”).

<sup>135</sup> *See, e.g.,* Smith, *supra* note 10 (noting that evaluating past performance “risks introducing an element of subjectivity into the procurement process”).

<sup>136</sup> Devesh Mishra & Belita Manka, *How to Reduce Fear of Discretion*, paper presented at Global Revolution Conference (2017), [http://www.procurementinet.org/how-to-reduce-fear-of-discretion-in-public-procurement/?doing\\_wp\\_cron=1536283411.6798520088195800781250](http://www.procurementinet.org/how-to-reduce-fear-of-discretion-in-public-procurement/?doing_wp_cron=1536283411.6798520088195800781250).

<sup>137</sup> Commission Recommendation 2017/1805 of 3 October 2017, Professionalization of Public Procurement Building an Architecture for the Professionalization of Public Procurement, 2017 O.J. (L 259) 28, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017H1805&from=EN>.

value for money by conducting all the key aspects of the procurement processes professionally and cost-effectively.”<sup>138</sup>

A jurisdiction’s procurement governance system is also a critical factor in evaluating the potential success of implementing a more nuanced evaluation of past performance information by procuring agencies. Public procurement is one of the government activities most vulnerable to corruption, which explains the reluctance of many jurisdictions to allow for discretion in procurement decisions.<sup>139</sup> A public service system subject to limited regulation and a lack of transparency is more likely to suffer from higher incidences of fraud and corruption, and providing procurement authorities with greater discretion to consider subjective factors would likely increase integrity and performance risks.<sup>140</sup> Thus, while it might make the most sense, in an ideal situation, to take a more nuanced disqualification approach over public debarment to address poor performers, the mandatory debarment of non-performers may be appropriate in environments that lack sufficient procurement capacities and governance systems.

## V. Conclusion

Excluding poorly performing contractors from participating in future procurements can be an effective way to mitigate risk, protect public funds, and obtain value for money. Many procurement systems already exclude contractors for poor performance. But the available guidance as to the level of non-performance justifying an exclusion varies across jurisdictions. The authors’ review of several different procurement systems reveals that there are many different

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<sup>138</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SIGMA PAPERS, THE PRINCIPLES OF PUBLIC ADMINISTRATION (2017), [http://www.sigmaxweb.org/publications/Principles-of-Public-Administration\\_Edition-2017\\_ENG.pdf](http://www.sigmaxweb.org/publications/Principles-of-Public-Administration_Edition-2017_ENG.pdf).

<sup>139</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PREVENTING CORRUPTION IN PUBLIC PROCUREMENT (2016), <http://www.oecd.org/governance/ethics/Corruption-Public-Procurement-Brochure.pdf>.

<sup>140</sup> Williams, *The Use of Exclusions*, *supra* note 6, at 14. See also Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 630-31 (2001).

approaches to addressing poor performers, with certain approaches taking a more “protective” focus while others are designed to be more “punitive.” In the authors’ views, any approach to addressing poor performance should, in an ideal environment, clearly articulate obtaining reliable contractors as one of the procurement system’s policy objectives, provide sufficient guidance as to when non-performance justifies exclusionary measures, and empower procurement authorities to obtain and consider past performance information. Of course, an effective approach should also adequately consider the overarching procurement objectives and understand the existing procurement environment. Procurement experts should continue to examine commonalities and distinctions in the many uses of exclusions against poor performers to further identify best practices and assist procurement systems in obtaining value for money.

## Annex A – Table of Exclusion Provisions for Poor Performance

Jurisdiction	Exclusion Provision
Brazil	<p>Art. 87 – “<u>For the total or partial non-performance of the contract</u>, the Administration may, upon prior defense, apply to the contractor the following sanctions:</p> <ul style="list-style-type: none"> <li>I. warning;</li> <li>II. fine, as provided for in the instrument of convocation or contract;</li> <li>III. temporary suspension of participation in bidding . . . for a term not exceeding two (2) years;</li> <li>IV. declaration of inability to bid or contract . . . for as long as the reasons for the punishment continue or until rehabilitation is promoted[.]”</li> </ul> <p><i>Law No. 8,666 Instituting Regulations for Bidding and Contracts of the Public Administration (June 21, 1993, as amended), available at <a href="http://www.planalto.gov.br/ccivil_03/leis/L8666cons.htm">http://www.planalto.gov.br/ccivil_03/leis/L8666cons.htm</a> (in Portugese)</i></p>
Cameroon	<p>Art. 100 – “The Contracting Authority . . . shall automatically . . . terminate a contract in one of the following cases: . . . (e) <u>Default by the Administration’s contracting partner duly noted and notified by the Contracting Authority[.]</u>”</p> <p>Art. 102(1) – “The Administration’s contracting partner whose contract is terminated for the reasons referred to in article 100 . . . may not . . . tender for a new public contract for a period of two (2) years from the date of notification of the termination.”</p> <p><i>Decree No. 2004/275, The Public Contracts Code (Sept. 24, 2004)</i></p>
China	<p>Art. 60 – “If a winning bidder <u>fails to fulfil his obligations according to the contract signed with the tenderer and the circumstance is serious</u>, his qualifications to take part in bidding for projects subject to tender according to law shall be cancelled for two to five years and the cancellation shall be announced, or even the administrative department for industry and commerce shall revoke his business license.”</p> <p><i>Law of the People’s Republic of China on Tenders and Bids (Jan. 1, 2000) (applies to large construction and public works tendering)</i></p>

Jurisdiction	Exclusion Provision
European Commission	<p>Art. 106(1) – “The contracting authority shall exclude an economic operator from participating in procurement procedures governed by this Regulation where: . . . (e) <u>the economic operator has shown significant deficiencies in complying with main obligations in the performance of a contract financed by the budget, which has led to its early termination or to the application of liquidated damages or other contractual penalties, or which has been discovered following checks, audits or investigations[.]</u>”</p> <p>Art. 106(14)(c) – “The duration of exclusion shall not exceed . . . three years” for an exclusion based on the above provision.</p> <p><i>EU Financial Regulation No. 2015/1929 (Oct. 28, 2015)</i></p>
Kenya	<p>Art. 41(1) – “The [Public Procurement Regulatory Board] shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person . . . (c) <u>has breached a contract for a procurement by a public entity including poor performance[.]</u>”</p> <p>Art. 41(2) – The Board may also “debar a person from participating in any procurement process if that person . . . (b) <u>has not performed according to professionally regulated procedures.</u>”</p> <p>Art. 41(4) – “A debarment under this section shall be for a specified period of time of not less than three years.”</p> <p><i>The Public Procurement and Asset Disposal Act, No. 33 (Dec. 18, 2015)</i></p>
Korea	<p>Art. 76(1) – When “[a] <u>person whose performance of a contract is poor, disorderly, or unreasonable or a person that commits misconduct</u>” submits a bid, “the head of the competent central government agency shall immediately place restrictions on the [person’s] qualification . . . for participation in tendering for the period of at least one month, but not exceeding two years[.]”</p> <p><i>Enforcement Decree of the Act on Contracts To Which The State is a Party, Presidential Decree No. 26321 (June 22, 2015), available at <a href="https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&amp;hseq=35161">https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&amp;hseq=35161</a></i></p>
New Zealand	<p>Rule 41 – “(1). An agency may exclude a supplier from participating in a contract opportunity if there is a good reason for exclusion. Reasons for exclusion include: . . . (c) <u>a serious performance issue in a previous contract.</u> . . . (2) An agency must not exclude a supplier before it has evidence supporting the reason for the exclusion.”</p> <p><i>Government Rules of Sourcing (3d ed. July 1, 2015), available at <a href="https://www.procurement.govt.nz/assets/procurement-property/documents/government-rules-of-sourcing-procurement.pdf">https://www.procurement.govt.nz/assets/procurement-property/documents/government-rules-of-sourcing-procurement.pdf</a></i></p>

Jurisdiction	Exclusion Provision
Philippines	<p>Section 69(a) – “. . . [T]he Head of the Procuring Entity . . . shall impose on bidders or prospective bidders, the administrative penalty of suspension for one (1) year for the first offense, and suspension of two (2) years for the second offense from participating in the public bidding process, for the following violations: (6) <u>Termination of the contract due to the default of the bidder.</u>”</p> <p><i>Republic Act No. 9184, The Government Procurement Reform Act (July 22, 2002)</i></p>
South Africa	<p>Regulation 16A9.2 – “The accounting officer or accounting authority (a) may disregard the bid of any bidder if that bidder, or any of its directors . . . (iii) <u>have failed to perform on any previous contract;</u> and (b) must inform the relevant treasury of any action taken in terms of paragraph (a).”</p> <p><i>Treasury Regulations to the Public Finance Management Act of 1999 (Nov. 15, 2013)</i></p>
Tanzania	<p>Art. 93(3) – “Subject to the provisions of the [Public Procurement Act of 2011], a tenderer shall be debarred from participating in public procurement or disposal proceedings if . . . (c) <u>it is established that the tenderer fails to implement a procurement or disposal contract,</u> in which case he shall be barred for a period of not less than one year and not exceeding five years[.]”</p> <p><i>The Public Procurement Regulations (Nov. 29, 2013)</i></p>
Turkey	<p>Art. 25 – “During the course of implementing a contract, prohibited shall be . . . (f) <u>Failing, outside of force majeure, to perform its obligations in accordance with provisions of contract and tender documents.</u>”</p> <p>Art. 26 – “Those who are determined to have engaged in deeds or behaviors as specified in Article 25[] shall be prohibited from participating in tender processes . . . for a period of up to two years, not being less than one year, depending on the nature of the said deeds and behaviors.”</p> <p><i>Law on Public Procurement Contracts, Law No. 4735 as amended by Law No. 4964 (July 30, 2003)</i></p>

Jurisdiction	Exclusion Provision
United Kingdom	<p>Art. 57(8) – “Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations: . . . (g) <u>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[.]</u>”</p> <p><i>The Public Contracts Regulations, 2015 No. 12 (Feb. 5, 2015) (having transposed EU Directive 2014/24/EU)</i></p>
United States	<p>FAR 9.104-1 – “To be determined responsible, a prospective contractor must . . . (c) <u>Have a satisfactory performance record[.]</u>”</p> <p>FAR 9.406-2 – “The debarring official may debar . . . (b)(1) A contractor, based upon a preponderance of the evidence, for any of the following . . . (i) <u>Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as . . . (A) Willful failure to perform in accordance with the terms of one or more contracts; or (B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.</u>”</p> <p><i>The Federal Acquisition Regulation (“FAR”), Title 48 of the Code of Federal Regulations</i></p>
Uzbekistan	<p>Art. 42 – “The Blacklist of contractors is a list compiled by the Authorized Agency that include[s] the following information: . . . <u>Contractors found, in accordance with established procedure, to be guilty of default or improper performance of their obligations, except for cases of non-performance (improper performance) of the obligations due to force majeure.</u> . . . The blacklisted Contractor shall not participate in the public procurement for three years.”</p> <p><i>Law of the Republic of Uzbekistan on Public Procurement (May 15, 2018), available at <a href="https://www.un.int/uzbekistan/news/law-republic-uzbekistan-public-procurement">https://www.un.int/uzbekistan/news/law-republic-uzbekistan-public-procurement</a></i></p>

<b>Jurisdiction</b>	<b>Exclusion Provision</b>
Zimbabwe	<p data-bbox="483 281 1417 533">Art. 72(3) – “Where a procuring entity ascertains that a bidder or potential bidder . . . (c) <u>has neglected or failed without good cause to carry out a material provision of a contract, with the result that the other contracting party terminated the contract and additionally, or alternatively, became entitled to liquidated damages or some other contractual remedy;</u> . . . the procuring entity may reject the bidder’s bid or refuse to consider any bid he or she may submit.”</p> <p data-bbox="483 554 1417 659">Art. 72(6) – “Regulations . . . may provide for debarring persons from participating in future procurements where they have been guilty of conduct referred to in subsection (3).”</p> <p data-bbox="483 680 1417 743"><i>The Public Procurement and Disposal of Public Assets Act, Chapter 22:23, No. 5 (2017)</i></p>