


Contract management and performance

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One of the key changes introduced by the Procurement Act 2023 (PA), when it comes into force on February 24, 2025, is that the entire contract lifecycle will be within scope. This is a change from the position in the current regime which focuses on the procurement stage but regulation during contract delivery is limited to rules regarding permissible contract modifications.

The Government, in introducing the new regime, emphasised the need for additional transparency and provision of data, on a central digital platform, regarding both procurement and contract spend. This update summarises the new requirements which public bodies and suppliers need to know about when managing contracts under the new regime.

KPI setting and annual reporting

As with the current regime, effective contract management will start in the procurement planning stage as there is a new requirement, where a contract has an estimated value above £5 million, to set and publish at least three KPIs.

This obligation does not end on contract award as authorities will also need to report on performance against these KPIs annually, in contract performance notices, as well as any information regarding breaches or a supplier's failure to perform to an authority's satisfaction.

Authorities will, consequently, need to ensure they have adequate resource to fulfil these increased contract management and administrative obligations. If this has not already been done, internal budget conversations and decisions should be made to ensure authorities are not over-burdened when the PA goes live.

As the information on contract performance will be publicly available on the central digital platform, suppliers will also have access to this information, so the importance of careful record keeping will be even greater under the new regime. We expect challenges of increased sophistication, as competitors have ready access to information which they would currently only be likely to discover if they issued proceedings against a public body in respect of a particular contract.

Authorities will also have to be live to the risk of inadvertently disclosing commercially sensitive information in notices but also in respect of the new obligation to publish copies of contracts which have a value exceeding £5 million.

Changes to contracts during delivery

As mentioned above, the current regime has detailed rules in respect of the type of changes which may be made to contracts during delivery. The PA contains broadly similar provisions, with the addition of new limbs allowing modifications in cases of urgency/protection of life and materialisation of known risks.

We always advise clients to consider potentially required modification from the outset so that clear review provisions may be included in contracts (and allow for lawful modification, if needed, during contract performance). This advice will continue during the PA and authorities should ensure that this is an integral part of procurement planning.

The importance of this is increased due to the new requirement under the PA for a modification notice to be published, and an eight-working day standstill period observed, **before** a contract modification is made. Under the current regime, most contract modifications go

un-announced to the market, but this position will end under the PA, giving would-be challengers the opportunity to query and prevent contract modifications in the event they do not fall within the “safe-harbours” set out in the PA.

Managing poor performance

As explained above, public bodies are required to report on a supplier’s contract performance against published KPIs annually. In addition, if a supplier:

has breached its contract and the breach results in either:

1) has breached its contract and the breach results in either:

a. termination (or partial termination); or

b. damages; or

c. a settlement agreement; or

2) is not performing to the public body’s satisfaction, has been given a proper opportunity to improve performance and has failed to do so, the authority must publish a contract performance notice within 30 days.

The impact of this is particularly onerous as it comprises one of the discretionary exclusion grounds which allows other public bodies to exclude the supplier from their procurement processes for a period of five years.

The PA does, therefore, give public bodies additional power to manage poor performance so contract managers (for both public bodies and suppliers) should be aware of these changes and the implications once the PA applies to procured contracts.

Other new requirements related to contract management

Whilst not strictly linked to the management of particular contracts, the PA also includes new requirement on public bodies to publish notices detailing their compliance with the requirement to pay suppliers within 30 days of receipt of undisputed invoices. This payment performance data will need to be published every six months and relates to payments with a value exceeding £30,000.

Invoice payment will involve different teams to those managing contracts, but authorities will need to make sure that all relevant departments are prepared for the incoming changes and able to ensure that the authority complies with its new legal obligations.

Concluding thoughts

February 24, 2025 will see the launch of the biggest change to public procurement in the UK in nearly a decade. With the aim of making procurement more transparent, simple and flexible, the PA introduces a wide range of reforms. Contract managers will need to ensure that they are aware of the new requirements under the PA but also the opportunities to use these changes to improve contract performance across their authority.

In addition to updates being published by our leading Government & Infrastructure team, readers should look out for forthcoming guidance from the Cabinet Office in respect of KPIs, notices and contract oversight. If you would like to discuss anything in this update, or any other aspect of public procurement law and the incoming changes, please contact Bradley Martin.

Key contact

Bradley Martin

Partner

bradley.martin@brownejacobson.com



+44 (0)330 045 2483

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