

Procurement reform: Making poor performance a thing of the past

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Welcome to the next article in our [Ready for Reform Campaign](#). In this article we explore the impact that the [Procurement Act](#) will have on contract performance and the important rules that the public and private sector alike must consider ensuring compliance with the new Act's requirement to measure and report on suppliers' performance. We also look at the introduction of a 'debarment list' that will prevent suppliers on the list from supplying [public sector bodies](#).

Measuring and reporting on contract performance to achieve higher standards

It is clear that central government is committed to improving the performance of suppliers to the [public sector](#). This is evident in how the Procurement Act includes a requirement whereby a contracting authority must set and publish a minimum of three key performance indicators (**KPIs**) in their [procurement contracts](#), unless the contract is for a value of less than £5m, the contracting authority cannot appropriately assess performance by reference to KPIs, or if one of a small number of exceptions applies (such as where the contract is a framework or a light touch contract, among others).

For contracts where KPIs are in place, the contracting authority is required to assess and publicly report on the performance of the supplier against these KPIs at least once a year (including if the supplier is not performing satisfactorily and/or if the contract has been breached resulting in termination or settlement). This places a new burden on the contracting authority to monitor performance to enable it to comply with its reporting duty.

The Procurement Act provides minimal detail on what the KPIs are supposed to cover. We suspect guidance will be published at a later date but what is for certain at this moment is that setting and monitoring KPIs is likely to require [public authorities](#) to commit additional resources to contract management, whether that be time, money, or expertise. This comes at a time, of course, when resources within the public sector are already stretched.

It will be critical then for the KPIs to be carefully considered to ensure they are appropriate, measurable, and not burdensome on either party. To achieve this, contracting authorities will need collaboration and joined up thinking by the team responsible for procurement and contracting and the team responsible for contract management. They must agree how to measure the service provision in the most efficient and cost-effective manner, and then prepare the procurement documents accordingly.

There is also a risk to suppliers, since agreeing to be monitored in accordance with what might be inappropriate KPIs could result in measurement and reporting that does not reflect the level of service it is providing and, therefore, could be detrimental to the supplier in both a commercial and reputational sense. The bids/tender team and the delivery team within suppliers must question the KPIs if necessary and consider whether they pose a risk before entering into any contract. If the KPIs are not drafted in a proportionate way that is acceptable to the market in question then this could lead to delays in the procurement process (push back from bidders during clarifications or prolonged contract completion exercises) and potentially even an increase in non-compliant bids if the acceptance of contract terms is a pass/ fail requirement.

As we move through the implementation stage, now is the time to focus on gaps in resource and training around setting and managing suitable KPIs to ensure authorities are ready to meet these new obligations within the Procurement Act.

Debarment: a public list of suppliers barred from supplying public authorities is coming

Under the Procurement Bill, a 'debarment list' of excluded and excludable suppliers will be created to enable public authorities to more easily identify unfit suppliers that should not be included in participating in the procurement process and, as a result, cannot be awarded a public contract.

We expect the process whereby a supplier is added to the debarment list to follow this process:

1. An investigation by a Minister of the Crown is conducted into the supplier. The supplier will be given notice of this and will have the opportunity to make representations.
2. If the Minister establishes that an exclusion ground applies and is satisfied the supplier should be debarred, the supplier will be given notice of the debarment decision and they will be added to the debarment list.
3. The findings of the Minister's investigation will be published in a public report. A copy of this report will also be provided to the supplier who has been added to the debarment list.

The benefit of this list for public authorities is clear: there is an added safeguard against contracting with unfit suppliers. For suppliers, however, the prospect of being included on the debarment list creates a significant commercial and reputational risk.

With the Procurement Act now in the implementation stage, suppliers do not have much time to address any weaknesses in their operations and improve performance, but they must do so, or they face the very real prospect of being added to the list.

Can suppliers challenge the decision to place them on the debarment list?

Suppliers will be able to challenge a debarment decision, albeit solely based on a perceived material mistake of law made by the investigating Minister during the decision-making process. Suppliers must note that any compensation is restricted to the expenses incurred in the tendering process for the contract from which they were excluded and, crucially, their challenge must be submitted within a 30-day window. Where a supplier is on the debarment list and there has been a significant alteration in circumstances or a supplier can provide substantial information that had not been previously considered when being debarred, suppliers can submit applications for their removal from the debarment list.

As we stand on the precipice of the [Procurement Act](#) coming into force, there is understandably concern among both the public and private sector as to the rule changes and how these will play out in practice. Browne Jacobson will continue to be publishing free-to-access content and events that guide public authorities and private enterprises – you can access all content and event details [here](#). For any bespoke support, please contact Tim Williams in the Birmingham office.

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