

What impact will the Procurement Act 2023 have on resolving contractual disputes?

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A key change brought in by the Procurement Act 2023 (the Act) is the focus on the entire lifecycle of a procurement, with contract management now within the very definition of "procurement" which means "the award, entry into and management of a contract" under the Act.

Reporting on breach of contract or poor performance

Contracting authorities will now have to report on contract performance and contract termination.

For public contracts procured from 28 October 2024 with a value of more than £5 million, at least three Key Performance Indicators (KPIs) must be included (section 52, excluding frameworks, concession contracts or light touch). Contracting authorities will have to assess and publish information on the supplier's performance against those KPIs on at least an annual basis (section 71(2)).

For all above threshold public contracts, contracting authorities must publish information about the circumstances of a breach of contract or failure to perform within 30 days of a supplier failing to improve poor performance despite being given the opportunity to do so or a breach of contract resulting in termination, damages or a settlement agreement (section 71(5)). When a contract is terminated for any reason, the contracting authority must publish a contract termination notice (section 80).

There are many good reasons for these requirements, including the Government's aim of "taking tougher action on underperforming suppliers", ensuring the public sector gets value for money which is "paramount in fulfilling [contracting authorities'] commitment to taxpayers and delivering public services efficiently" and preventing contracting authorities from being unduly timid in managing contracts and exercising their contractual rights as they will have to report on supplier non-performance and justify the decisions taken.

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What if it is not clear that a material breach has been made out?

A difficulty will arise where there is a dispute as to whether a supplier is in breach of contract or the extent of that breach. For example, a supplier may be delayed in the supply of goods but the contract may not specify that time is of the essence. A supplier may miss an implementation milestone but claim that the delay was caused by the contracting authority's failure to provide the necessary information to hit that milestone. If it were always clear that a party was in breach of contract, there would be fewer lawyers. Settlement agreements have always provided a useful means to resolve disputes where a contracting authority wishes to exercise the right to terminate but the supplier disputes that grounds for termination have arisen.

Further, a change in policy or resourcing constraints may mean that a contracting authority wishes to end a contract earlier than its terms permit. Settlement agreements allow contracts to be brought to an end with some compensation for the supplier's overheads or loss of profits where a contract is cut short.

Settlement agreements can lead to exclusion from public procurement processes or termination of other public contracts

Suppliers will be anxious to avoid being found to have breached a contract resulting in termination or a settlement agreement. Breach of contract and poor performance is a discretionary exclusion ground to exclude a supplier from a public procurement process. Section 57(2) provides that a supplier is an “excludable supplier” that can be excluded from a public procurement process if a discretionary exclusion ground applies to the supplier or an associated person, and the circumstances giving rise to the application of the exclusion ground are continuing or likely to occur again, or the supplier or an associated person is on the debarment list by virtue of a discretionary exclusion ground. A discretionary exclusion ground under Schedule 7, paragraph 12 arises where the supplier has breached a relevant contract or a court has ruled that the supplier breached a relevant contract, and the breach was sufficiently serious. A breach of a contract is “sufficiently serious” if it results in termination (or partial termination) of the contract, the award of damages, or a settlement agreement between the supplier and the regulated authority.

A discretionary exclusion ground under Schedule 7, paragraph 12 also arises if a supplier has not performed a relevant contract to the regulated authority's satisfaction, was given proper opportunity to improve performance, and failed to do so or if a contracting authority has published information under section 71(5) in respect of the supplier (information concerning either breach or poor performance).

Further, there is now an implied right to terminate public contracts where the supplier or subcontractor becomes an excluded or excludable supplier (section 78).

Ways forward

If it is unclear that a material breach of contract giving rise to a right to terminate the contract can be made out, it may not be in the public interest to use taxpayers' money defending a dispute with a supplier. However, suppliers may be less willing to resolve a contractual dispute in a settlement agreement for fear of consequences in other procurement processes and existing public contracts.

So, what should contracting authorities do to resolve the potential dispute?

Firstly, use the existing contract. Consider what remedies there under the contract such as service credits or liquidated damages. Is there a right to terminate for convenience? If there is poor performance or a breach of contract but it is not clear that a right to terminate has arisen, a contracting authority can treat the breach as a remedial breach and give the supplier an opportunity to remedy it.

Use the clout of the new provisions of the Act. A contracting authority can remind the supplier that they are being given proper opportunity to improve performance and that, if they fail to do so, they may become an excludable supplier, there may be an implied right to terminate other public contracts, and that information about the supplier failing to improve poor performance despite being given the opportunity to do so may need to be published within 30 days under section 71 or may become a material breach giving rise to a right to terminate.

If it is unclear that the supplier is in breach of contract or if the contracting authority wishes to shorten the term of a contract for other reasons such as budget, policy change, insourcing or a redelivery plan, the supplier may agree to vary the contract to include a right to terminate for convenience or a break point or to shorten the term. If the contracting authority is satisfied that this is a permitted or not substantial modification, the contract could be varied to allow the parties to bring it to an end without finding that the supplier has been in breach. Any settlement agreement necessary to provide for compensation in a negotiated exit could expressly provide that it is not a settlement resulting from any breach of contract or that the parties agree that the supplier was not in breach.

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