

# 11KBW

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**How do the new supplier performance rules impact contract management and supplier selection for new procurement opportunities? Damp squibs or new and important innovations?**

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(IMO), AN IMPORTANT NEW INNOVATION

(HOW THE PROCUREMENT ACT 23' REGULATES THE PERFORMANCE (I.E. *POST SIGNATURE*) PHASE OF PUBLIC CONTRACTS IS PERHAPS THE MOST INTERESTING/NOVEL ASPECT OF THE NEW ACT)

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- PCR 2015 has very little to say in respect of performance phase:
  - Reg. 72, PCR 2015 permits *disappointed bidders* to bring challenges to allegedly unlawful modifications
  - Reg. 73 implied termination right for public authority in event of unlawful modification
  - Reg. 113 prompt payment obligations
  - Otherwise, no material substantive regulation of post-award conduct by PCR 2015 and generally no cause of action for successful bidder under the PCR 2015 (i.e. the party now performing the public contract): see, e.g. *IGT v Gambling Commission* [2023] EWHC 1961 (TCC) per Coulson LJ

- General principle is that the exercise of contractual powers/discretions are matters of **private** law which are not subject to challenge by way of judicial review because:
  - First, no sufficient ‘public law element’ to such decisions: see, e.g. *Hampshire County Council v Supportways Community Services Ltd* [2006] EWCA Civ 1035 at §45 (per Neuberger LJ); *State of Mauritius v The (Mauritius) CT Power Ltd* [2019] UKPC 27 at §66 (per Lord Sales)
  - Second, there should not be asymmetry of rights of action as between public bodies vs private sector contractors engaged in commercial relationships
- *nb* narrow exception for fraud, bad faith etc. (a handful of successful claims on such grounds in last hundred years or so)
- *Few* cases where a Court has accepted contractual decisions/acts are subject to JR (and limited examples generally explicable by fact that context meant impugned decision was not a ‘true’ (or mere) exercise of contractual power)

## **The PA 23 regulates, and imposes obligations, in respect of all aspects of the performance phase**

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- Section 1 of PA 23 provides, relevantly:

*“1 Procurement and covered procurement*

*(1) In this Act—*

*(a) “procurement” means the award, entry into and management of a contract;*

*(b) “covered procurement” means the...management of a public contract.*

*(2) In this Act, a reference to a procurement or covered procurement includes a reference to—*

*(a) any step taken for the purpose of...managing the contract” (emphasis added)*

- Interestingly, no substantive discussion of implications in consultation paper or Hansard

## Performance phase decisions – under the PA 23 – what are the grounds of challenge?

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- Performance phase decisions now subject to a range of express, specific, statutory duties, e.g:
  - s. 12(1) duties to have regard to (a) VfM; (b) maximising public benefit; (c) sharing information so suppliers can understand policies and decisions; (d) acting, and being seen to act, with integrity
  - s. 12(2) and (3) equal treatment
  - s. 12 (4) duty to have regard to removing barriers for SME
  - s. 90 non-discrimination
  - s.81-83 duty to address any conflicts of interest
  - Equally (or perhaps even more) importantly, also likely to common law public law duties of rationality, due inquiry, procedural fairness etc.

## **Performance phase decisions – under the PA 23 – what can be challenged?**

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- Pursuant to s. 1(2), *all* contract management decisions by a public body now subject to potential challenge under the PA 23
- Some illustrative examples:
  - application of KPI/service credits provisions
  - decisions in respect of extensions of time/waivers
  - Approval of rectification plans
  - exercise of unilateral contractual options
  - enforcement action
  - termination decisions

- PA 23/public law duties appear likely apply even to decisions/issues where Court has declined to apply the *Braganza* implied contractual duty of good faith/rationality because exercise of ‘absolute contractual right’, e.g. absolute termination rights, c.f. *UBS AG v Rose Capital Ventures Limited* [2018] EWHC 3137 (Ch)
- Pursuant to s. 100 of the PA 23, “suppliers” now have new claims in **statutory tort** for breach of statutory duty relating to performance phase decisions by public bodies
- Remedies include tortious damages and injunctive relief
- Claims subject to 30 day time limit, cf. 6 year contract limitation period
- Third parties may potentially also enforce by judicial review, e.g. public interest group concerned with decision not to enforce contractual termination rights against a supplier

- The management of supplier performance, enforcement, breach, termination/settlement are now all:
  - made matters of *public* record, and
  - subject to a detailed, extensive, scheme of statutory regulation

## 1. KPI review/publication regime

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- Duties of KPI *assessment* and *publication*
  - s. 52 for all public contracts with a value > £5 million CAs must establish and publish at least 3 Key Performance Indicators
  - s. 71(1)-(2) *duty* imposed on CAs to conduct an assessment of supplier performance against KPIs and publish outcome at least annually
  - Adverse assessment and publication would seem likely to trigger significant adverse reputational and commercial consequences for suppliers
  - Potentially a significant lever to help manage supplier performance
  - Conversely, adverse assessment and/or publication decision may be a target of a s. 100 challenge
  - Query what behaviours may drive, already indications some large suppliers are lobbying public bodies to ensure KPIs will be set at a threshold which is easily met

## 2. Duty to publish in respect of supplier default

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- s. 71(3)-(5) imposes new duty of publication, within 30 days, in all cases where:
  - There is a breach by the supplier that leads to remedies, termination (including partial) or settlement; or
  - “CA considers”:
    - (i) supplier not performing a public contract to its satisfaction,
    - (ii) supplier has been given an opportunity to improve performance, and
    - (iii) supplier has failed to improve (*NB* duty is not limited to cases where contract incorporates express rectification/remedial plan provisions)

## 2. Duty to publish in respect of supplier default

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- Some important points to note:
  - (i) Duty to publish applies where CA “*considers*” conditions met, i.e. whether there has been satisfactory performance etc. is a matter of *judgment* for the CA, not an objective test
  - (ii) No express ‘materiality’ threshold applied in respect of the gravity/nature/duration of the supplier non-performance (albeit may implicitly be subject to some *de minimis* principle as a matter of statutory construction, though nb that the application of such a principle of statutory construction is controversial)
  - (iii) Potentially significant adverse implications for supplier if subject to a s. 71(5) publication (see further below)

### 3. New authority implied termination rights arising from supplier default

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- Section 78(2)(b) provides for a new CA implied termination right in every public contract where the supplier has become an “*excludable supplier*”
- s. 57(2) a supplier is an “*excludable supplier*” if CA considers (1) “*discretionary grounds*” exist in relation to the supplier or any associated person, and (2) the circumstances are continuing or likely to occur again
- Sch 7, para 12(1)-(5) provides that “*discretionary grounds*” include (most relevantly):
  - (i) if a supplier failed perform to “*the CA’s satisfaction*” and performance is not improved following request; or
  - (ii) a s. 71(5) notice has been published in respect of the supplier
- Thus, the (combined) effects of s. 71(5) and s. 78(2)(b) are that:
  - CA has ability (in substance) to confer on itself a termination right *in any case* where it (rationally) considers supplier performance has been unsatisfactory and failed to improve
  - S. 71(5) publication creates potential for domino effect of termination/exclusion in respect of other public contracts

### 3. New authority implied termination rights arising from supplier default

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- s. 78(10) provides that any contractual provisions seeking to override or “*restrict*” the implied termination right is without effect
- What is the scope of s. 78(10)’s effect? e.g. does “*restrict*” include a requirement to pay (full) compensation on termination (e.g. typical PFI/PPP ‘AVT’ termination provisions etc.)?
- S. 78(9) (provision for restitution *is* permitted) and contrast with “*override*” suggests that it may well, at least in cases where compensation mechanism would constitute a significant impediment to exercise of the termination right e.g. requirement to pay out full contract value etc.
- s. 78(7) supplier must be afforded right to be heard before termination effected
- Section 78(2)(b) potentially a powerful new weapon for CAs in contractual disputes/potential termination scenarios
- Conversely, exercise of the right obvious/inevitable target for s. 100 challenge
- Also query whether potential impact on ability to access project finance fits with suggestions new Government ‘growth’ policy will place significant reliance on PFI-like structures

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