

# 11KBW

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## **Performing and enforcing the “have regard” duties under the Procurement Act 2023**

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“In carrying out a covered procurement, a contracting authority must have regard to the importance of –

- (a) delivering value for money;
  - (b) maximising public benefit;
  - (c) sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions;
  - (d) acting, and being seen to act, with integrity.”
- There is intended to be Cabinet Office guidance on “covered procurement objectives”, but at the time of writing it had not yet been published

## Other “have regard” obligations

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- Section 12(4) –

“ . . . must –

- (a) have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and
- (b) consider whether such barriers can be removed or reduced.”

- Section 13(9) (also section 14(8) for Wales statement) -

“ . . . must have regard to the national procurement policy statement.”

## The nature of statutory “have regard” obligations (1)

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- A duty (usually upon a public body) to “have regard” to certain considerations is a familiar technique in statutory drafting – there are many examples, and a significant body of judicial review caselaw about them
- The one which has attracted most attention, and led to most litigation, in recent years is the public sector equality duty (PSED), currently in s 149 of the Equality Act 2010 and originally contained in specific anti-discrimination statutes
- For a recent appellate discussion of the general nature of such duties outside the PSED context, see *R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health* [2019] PTSR 885 at [76] et seq, about a statutory duty to have regard to “the need to reduce inequalities” in benefiting from the NHS, in the context of fees paid to pharmacies

## The nature of statutory “have regard” obligations (2)

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Key points from *Pharmaceutical Services*:

- The court is reviewing the decision-making process, not the merits of the decision reached
- It is for the decision-maker to decide on the manner and intensity of the inquiry – a relatively broad brush approach can suffice
- Citing *R (Hurley) v Secretary of State for Business, Innovation & Skills* [2012] EqLR 447, the decision-maker must have a proper appreciation of the potential impact of the decision on the relevant objectives, and must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors (which need not be limited to the specified statutory factors)
- It is important not to impose too high a burden on decision-makers – “the courts must ensure that they do not micro-manage the exercise” (*R (Greenwich Community Law Centre) v Greenwich LBC* [2012] EqLR 572)
- Where the decision-maker has a number of different high level duties, and has to balance different factors and aims, and objectives which may be in tension, it must be allowed substantial room for the exercise of discretion and judgment

## The importance of “the importance”?

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- The s 12(1) duty is not just to have regard to the four objectives, but to have regard to “the importance” of them
- In the case of the PSED (where the duty is to have “due” regard) the courts have countenanced the possibility that this language may require a greater intensity of consideration by the decision-maker, or more intense scrutiny by the court, than in the case of a duty merely to have regard – see the cases cited in *Pharmaceutical Services* at [86] – it could be argued that the express reference to “importance” in s 12(1) is a further rung up the ladder
- But none of the PSED cases make a definitive ruling to this effect, and it is hard to identify any case in which the word “due” seems really to have made a difference to the end result
- “Have regard to the importance of” is not an unprecedented statutory phrase – see e.g. Human Rights Act 1998 s 12(4) on the importance of the right to freedom of expression where an issue before the court may affect that right; and s 10(3) of the Children Act 2004 amongst other examples – but again there is not much in caselaw to suggest that it makes a critical difference to the nature of a “have regard” duty (see e.g. the discussion in *G (AP) v Scottish Ministers* 2014 SLT 247, and in *R (Care England) v Essex CC* [2017] EWHC 3035 (Admin); see also *Ashdown v Telegraph Group Ltd* [2002] Ch 149)
- Perhaps in the end “importance” simply means that is not open to contracting authorities to attach nil or minimal weight to the specified objectives

## Can one read across the PSED caselaw?

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- At least some language in the caselaw on the PSED suggests that the due regard duty is quite a rigorous one, although in practice the later authorities show the courts reacting somewhat against a proliferation of PSED challenges: see e.g. *R (Sheakh) v Lambeth LBC* [2022] PTSR 1315
- An important recent authority, in considering how the courts might apply s 12(1) of the Procurement Act, and indeed s 13, is *R (Rights Community Action Ltd) v Secretary of State for Levelling Up, Housing & Communities* [2024] EWHC 1693 (Admin) [“RCAL”]
- The statutory duty in *RCAL* was to have due regard to the Environmental Principles Policy Statement (“EPPS”) published under the Environment Act 2021, which explains how the “environmental principles” under s 17 of the Act should be interpreted and proportionately applied by ministers in making policy – the five principles, set out in s 17(5), are high level ones whose nature is not unreminiscent of the procurement objectives in s 12(1) of the Act
- *RCAL* at [28-29] usefully summarises some of the key PSED caselaw – Lieven J accepted at [43] that the requirement, identified in that caselaw, to consider “with substance, rigour and an open mind”, applied to the EPPS due regard duty
- But Lieven J also emphasised at [42] that the PSED and EPPS duties and aims were very different: “Whereas the impact on those with protected characteristics may generally be relatively straightforward to set out, the environmental issues as set out in the EPPS will often be very multifaceted and complex.”
- Compare also *R (Enfield LBC) v SoS for Transport* [2015] EWHC 3758 (Admin) at [99] (and on appeal at [2016] EWCA Civ 480)

## Is section 12(4) different in nature?

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- As set out above, s 12(4)(a) is a requirement to have regard not so much to an objective as to an assumed risk, i.e. that SMEs “may face particular barriers to participation” – there is an implicit assumption that for smaller undertakings to be excluded from procurements is, all other things being equal, undesirable
- It may be significant that s 12(4)(b) requires the authority to “consider whether such barriers can be removed or reduced”
- It seems unlikely that anything in s 12(4) changes the fact that it is for the authority to balance the desirability of SME participation against other facts (e.g. insolvency risk, contractor experience)
- But in the light of s 12(4)(b) it is doubtful that compliance here will be achieved by anything other than explicit consideration of – (a) what might be an obstacle to SME participation in the procurement; and (b) what, if anything, could and should be done about it
- Note also the express s 18 duty to consider division into lots, and the s 22(5) duty when considering conditions of participation to have regard to the contract’s nature, complexity and cost

- This is in effect a duty to have regard to statutory guidance, which once again is a familiar concept in public law, and is the subject of a further line of caselaw
- The essential position is usefully summarised in *R (Britwell Parish Council) v Slough BC* [2019] PTSR 1904 at [33] – the authority must:
  - Take the guidance into account
  - Proceed on a proper understanding of the Guidance
  - Act in accordance with the Guidance unless the authority give clear reasons for departing from it
- The commencement of the Act has of course been postponed at least in part so that the content of the NPPS can be further considered – what ultimately appears in the NPPS will be critical in assessing what the s 13 have regard duty entails

## When to have regard to the s 12 objectives?

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- The s 12(1) duty applies “in carrying out a covered procurement” - in the light of s 1 of the Act, this seems to cover not only the whole of the procurement process, but decisions about contract management as well – so, potentially, decisions about varying (and perhaps terminating) the contract, or about how to exercise contractual discretions
- But there will no doubt be a particular focus on the design of the procurement – deciding on what is to be procured, the terms of the contract (to the extent that they are to be laid down in advance), the form of the procurement process (e.g. open versus competitive flexible, whether to establish a framework agreement, how to deal with a direct award), the particular structure and rules of a competitive flexible process, and the choice of evaluation criteria
- Once the competition rules have been set, it will usually be mandatory to apply them, so for example the s 12(1) objectives should not usually need distinct consideration when it comes to the evaluation of bids – but if the authority has reserved particular discretions to itself, the objectives might be relevant in deciding whether or how to exercise those discretions
- Query whether decisions about which framework or contract to use, in the case of overlapping possibilities, are also caught – possible need to revisit *James Waste Management LLP v Essex CC* [2023] PTSR 1843 at [253]

## How to have regard to the s 12 objectives?

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- At least 2½ of the four objectives in s 12(1) are rather in the “motherhood and apple pie” category – it is hard to imagine a contracting authority *not* agreeing that VfM, public benefit and integrity are important, or failing in substance to pay any regard to them, even if the Act did not exist
- But sharing information to allow procurement policies and procedures to be understood, and the “being seen to act” limb of the integrity objective, might not always have been recognised as important objectives – in short, authorities are told in effect that they have to think about and to value transparency
- Note also that, by analogy with the PSED caselaw, it is the decision-maker itself which must have regard to the objectives – so if (say) a local authority Cabinet takes a decision about how to conduct a procurement, and pays no heed to value for money, or to removing barriers to SME participation, it will not suffice that officers who produced proposals for consideration took account of those matters – see *Hunt v North Somerset Council* [2013] EWCA Civ 1820 at [73-87]

# Evidencing performance of the duty

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- It may well be that in the case of the s 12(1) objectives, there is in theory no need to refer to them explicitly (still less to s 12 itself) in order to discharge the duty – it should be enough if it can be seen that they have in substance been considered – cf. *Trail Riders Fellowship v Hampshire CC* [2020] PTSR 194 at [33-35]
- But it will usually be safer, and often more satisfactory, if the decision-maker is reminded of the s 12(1) duty and of the relevant objectives (cf. *R (DAT) v West Berkshire Council* (2016) 19 CCLR 362), and the record of the decision and/or the report on which that decision is based shows that they have been considered
- In addition, there will as noted above be some things which very probably do need to be considered explicitly when designing the procurement (e.g. SME barriers, division into lots – and perhaps, depending on the facts and on its ultimate content, certain aspects of the NPPS) – bear in mind also the express requirements of s 1 of the Public Services (Social Value) Act 2012 to consider specified matters before starting the process of procurement
- Authorities might therefore feel that there is little to be lost, and something to be gained, if decision-makers or those reporting to them address specifically at the procurement design stage questions such as “How are we ensuring value for money?”, “What can we do to maximise public benefit from this contract?”, “Are we being as transparent as we could be about the process?”, and “Is there anything about this which might cause legitimate doubts about integrity, and what can we do about that?”

## Statutory record-keeping duties

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- Under s 98(1) of the Act, the authority “must keep such records as [it] considers sufficient to explain a material decision made for the purpose of awarding or entering into a public contract”
- A “material decision” under s 98(2) is one in relation to which there is a requirement to publish or provide a notice, document or other information or a decision which the Act requires the authority to make
- It seems unlikely that performance of a “have regard” duty is *in itself* a material decision – but where the duty falls to be performed in the context of a material decision, one might expect the s 98(1) recorded explanation to evidence performance of the duty
- Material decisions to which the s 12(1) duty could be relevant include e.g. decisions about conditions of participation and award criteria, and decisions to make a qualifying modification (see s 77)

## Will anyone want to challenge for breach of s 12?

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- All experience to date suggests that challenges to the *design* of procurements by (potential) bidders are rare – usually, they want to participate and win the contract, and will not want to spend money on legal advice or sour relations with the authority until they are excluded from the process or the award decision is made (by which time it will often be too late to challenge the design) – the commercial return on simply forcing the authority to reconsider, or conduct a differently designed procurement, will typically be too limited to make the costs investment in a challenge attractive – there is no reason to think the Act will change this basic truth
- But well-informed undertakings who could see that a process was stacked against them from the start (e.g. by requiring a greater turnover to participate than they could demonstrate) might want to think about the duties under ss 12, 13 and 18
- Also, if the breadth of the concept of “carrying out a covered procurement” comes to be appreciated, there might be undertakings which would wish to look closely at how (for example) a decision to make a direct award to a competitor, or to modify a competitor’s contract, had come to be taken
- Finally, the s 12(1) objectives are very clearly for the most part public interest objectives – they are not, or not primarily, about open market access or fairness to competing bidders – that might suggest that local or national pressure groups or kindred persons might be amongst the most obvious potential challengers

## Challenges under the Act - standing

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- The relevant duties under the Act are owed (only) to “suppliers”, and the right of action under the Act is limited accordingly: see ss 100(2) and 100(3)(a) – “supplier” is not defined, but it may be interpreted in the same, fairly tightly defined way as was “economic operator” in *International Game Technology plc v Gambling Commission* [2024] PTSR 65, i.e. limited in effect to bidders, candidates, and those who were effectively precluded from bidding by the terms of the procurement (or the absence of a procurement process)
- Note that s 100(5) specifically precludes Part 9 proceedings for a failure to comply with ss 12(4) (the SME duty) and 13(9) and 14(8) (the procurement policy statement duties)
- One problem for any supplier wishing to challenge a decision on the basis of failure to have regard to the s 12(1) objectives may be to show, under s 100(3)(b), that it has suffered or is at risk of suffering loss or damage in consequence of the breach – this is much the same test as the current PCR r.91(1), but even allowing for the fairly liberal “real and not merely fanciful possibility” approach exemplified by *James Waste* at [258-265], it may not be easy to show a real prospect that an undertaking’s chances of winning a contract would have been better if the authority had thought properly about issues of value for money, or had made its processes more transparent
- There might be exceptions to this – for example, a contract extension decision taken without regard to whether a new procurement would offer better value for money – but it does not seem likely that claims under the Act for a breach of s 12(1) will become commonplace

- Suppose that the difficulties with standing can be overcome, and a challenge establishes breach of the s 12(1) duty
- In a post-contractual situation, it seems doubtful that many claimants will be able to show that breach of that duty has caused them financial loss so as to entitle them to s 104(2)(b) damages – even if something about the design of the procurement can be shown to have caused loss, it will also have to be shown that having due regard to the s 12(1) objectives would have led to a different design
- In a pre-contractual situation, whether the court decides to set aside the decisions reached without due regard to the relevant matters would no doubt be heavily influenced by its assessment of the likelihood that the failure has made any difference (see below for the approach in judicial review)
- Does the almost intrinsic inappropriateness of damages mean that the court should lean towards maintaining the suspension in the case of an apparently strong challenge?

# Judicial review challenges - standing

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- By contrast to the PCR and now the Act, the test of standing in judicial review has never concerned itself with whether the claimant has suffered any financial or economic harm as a result of the allegedly unlawful decision – it is simply a question of whether the claimant has a “sufficient interest”
- In fact, the s 12 and s 13 “have regard” duties (where breach of them can be shown at all) look like the classic subject-matter of a judicial review claim – as already noted, they are essentially public interest objectives
- Can non-compliance with the Act found a claim for judicial review as a matter of principle, given that the s 100(2) duty is owed specifically to suppliers? The answer given to that question under the PCR has been “yes”, ever since *R (Chandler) v SoS for Children Schools & Families* [2010] PTSR 749, and there seems no good reason why the answer should change now – the Cabinet Office guidance on the NPPS specifically envisages judicial review as the remedy for breach of the duties excluded from the Part 9 remedy by s 100(5)
- But the courts have, in and since *Chandler*, taken a narrow view of who has a sufficient interest to challenge by judicial review for breach of the PCR: see *R (Good Law Project) v Minister for the Cabinet Office* [2022] PTSR 933 at [6] (“ripe for review”); *R (Good Law Project and Runnymede Trust) v Prime Minister* [2022] EWHC 298 (Admin)
- One view is that the Act will call for a nuanced approach to standing – perhaps a PCR-type approach will remain appropriate when it comes to the statutory duties concerned with the “nuts and bolts” of a procurement process, but a broader and more conventional JR-type approach might be appropriate where the claimant is seeking to enforce the s 12(1) public interest-based duty – this would be consistent with the fact-sensitive approach encouraged by *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [498] et seq

- There are no special rules about judicial review remedy in the case of procurement challenges (other than CPR r.54.5(6) on timing – query how this will be amended when the Act replaces the PCR)
- Remedies in judicial review are always discretionary, but any refusal of relief has to be on a principled basis
- It seems likely that contracts will not be set aside in judicial review, for breach of obligations under the Act, where they could not be set aside in a claim under the Act itself
- Otherwise a key issue in a “have regard” challenge is likely to be whether s 31(2A) of the Senior Courts Act 1981 applies, i.e. whether it is “highly likely that the outcome for the applicant would not have been substantially different” – in which case relief must be refused save in cases of exceptional public interest – see the summary of principles in *R (Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin)

## Other avenues and remedies (1)?

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- In many ways, given the high level nature of the s 12(1) objectives, and the issues about standing and remedy, the most obvious way of giving them teeth is through a Part 10 procurement investigation, potentially leading to a s 109 recommendation to the authority
- However, it very much remains to be seen whether central government as the “appropriate authority” (see s 123) for such investigations will have the appetite or resources to insist on meaningful compliance with s 12(1)
- What the appropriate authorities do in practice under Part 10, including the extent to which any formal procedure for making complaints is established, may ultimately govern the extent to which this is regarded by the courts as an alternative remedy for judicial review purposes – usual test is that permission for judicial review should be refused if there is an alternative remedy which is “convenient and effective”
- There is published Cabinet Office guidance on “Procurement oversight”. It envisages (para 8) supplier complaint to the Procurement Review Unit. Nothing is said about complaints by non-suppliers

## Other avenues and remedies (2)?

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- It is clear that the s 12(1) duty is owed by a contracting authority, and does not rest upon the court itself
- Nonetheless, it seems plausible that the courts will themselves obtain some value from this statement of objectives when it comes to matters of assessment and discretion in dealing with procurement litigation (e.g. disclosure, interim relief, decisions about final remedy)

## Other avenues and remedies (3)?

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- As a final thought, the author of this talk finds himself wondering why so little attention seems to have been paid to s 78 of the Act, the contracting authority's implied right to terminate, which is substantially wider than the corresponding (but also under-discussed) provision under r.73 of the PCR
- The authority has a (non-excludable – see s 78(10)) right to terminate a public contract if it considers “that the contract was awarded or modified in material breach of this Act or regulations made under it”
- “Material breach” is defined by s 78(12) as a breach that the authority “considers could reasonably result in a successful legal challenge under Part 9 or otherwise”
- This is a low threshold, and expressed in subjective terms. It therefore becomes very important to know whether “could reasonably result in a successful challenge” means that such challenge must still be possible at the time of termination (thus effectively bringing in time bars), and whether the avoidance of challenge risk is the only proper purpose for which the power may be exercised
- Probably “yes” and “yes” are the answers to those questions, making the issue less significant, but those advising contracting counterparties might want to think hard about s 78(9) discharge terms