

Insights

PART 4, PROCUREMENT ACT 2023: IMPLIED TERMS, CONTRACT PERFORMANCE AND TRANSPARENCY

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SUMMARY

An Insight, first published in PLC, on Part 4 of the Procurement Act 2023, in particular the new contract management requirements for public contracts and the increased focus on supplier performance and transparency.

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On 24 February 2025, the majority of the provisions of the Procurement Act 2023 (PA 2023) come into force, including (most of) Part 4 of the PA 2023.

The PA 2023, which consolidates the existing procurement rules under a single legal framework, introduces a greater focus on supplier performance, including new contract management requirements under Part 4 of the PA 2023.

In addition, Part 4 will be of particular interest to construction practitioners who advise on "public contracts" because it sets out rafts of terms, including some that will be implied into contracts that fall within its remit should such contracts fail to make provision for these terms. While many of these terms will be familiar, there are some new provisions to be aware of that will significantly increase the transparency of public procurement.

This article explores the new terms that parties need to take account of in their contracts to avoid falling foul of the PA 2023.

WHAT CONTRACTS FALL WITHIN PART 4?

Part 4 of the PA 2023 implies terms into "public contracts".

"Public contract" is defined in section 3 of the PA 2023 as:

"(2) Any contract for the supply, for pecuniary interest, of goods, services or works to a contracting authority which—

(a) has an estimated value of not less than the threshold amount for the type of contract, and

(b) is not an exempted contract.

(3) Any framework which—

(a) has an estimated value of not less than the threshold amount for the type of contract, and

(b) is not an exempted contract.

(4) Any concession contract which—

(a) has an estimated value of not less than the threshold amount for the type of contract, and

(b) is not an exempted contract..."

Schedule 1 of the PA 2023 then sets out the threshold amounts referred to in section 3, and Schedule 2 sets out further classes of exempted contracts. The individual provisions within Part 4 also include various exemptions for certain contracts. All these sources should be referred to when determining whether a contract is a "public contract" for the purposes of Part 4 of the PA 2023.

For more information on threshold amounts and exempted contracts, see Practice notes:

- [Procurement Act 2023: below-threshold contracts: Applicable thresholds.](#)
- [Procurement Act 2023: Exempted contracts.](#)

IS THE PA 2023 RETROSPECTIVE?

The PA 2023 does not have retrospective application so procurement processes commenced, and contracts awarded, under the current procurement regimes (that is, pre-24 February 2025) are not impacted.

IMPLIED TERMS

PAYMENT

Sections 67 and 68 of the PA 2023 set out the payment requirements for public contracts, with sections 72 and 73 mirroring such requirements for sub-contracts.

These implied terms are not new and are mainly consistent with the requirements under the existing procurement regime, for example the requirement to pay valid, undisputed invoices within 30 days.

Assuming the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) applies, care should be taken to expressly build such requirements into the contract (and related sub-contracts) payment regime, ensuring consistency with the requirements of the Construction Act 1996.

Sections 69 and 70, which will come into force on a date yet to be confirmed, concern publication of payment information. While such stringent requirements will be familiar to those involved with central government contracts, they do represent a change in what was previously required for other public contracts.

With an onus on transparency, the (new) provisions require the contracting authority to publish:

- Payment compliance notices confirming compliance with its payment obligations; and
- Information about payments of more than £30,000.

Parties should ensure that confidentiality provisions are wide enough to cover publication of such information.

For more information about payment under the old and new procurement regimes and under the Construction Act 1996, see Practice notes:

- [Public procurement in the UK: Prompt payment of undisputed invoices.](#)
- [Procurement Act 2023: Terms implied into all public contracts.](#)
- [Payment in construction contracts: Construction Act 1996.](#)

CONTRACT TERMINATION

The implied termination terms (sections 78 to 80 of the PA 2023) are not entirely new (contracting authorities have implied termination rights under the current statutory regime). However, the PA 2023 expands them considerably as they now go further than just focussing on the status of the supplier at the time of the contract award and look at what has happened since.

Section 78 implies a term into public contracts that a contracting authority may terminate a contract if a "termination ground" applies. Section 78(2) lists the termination grounds as follows (noting that these are subject to certain caveats):

"Each of the following circumstances is a termination ground—

(a) the contracting authority considers that the contract was awarded or modified in material breach of this Act or regulations made under it;

(b) a supplier has, since the award of the contract, become an excluded supplier or excludable supplier (including by reference to an associated person);

(c) a supplier (other than an associated person) to which the supplier is sub-contracting the performance of all or part of the public contract is an excluded or excludable supplier..."

Transparency plays a part in the new provisions again with a new contract termination notice publication obligation introduced by section 80 providing that such a notice must be published within 30 days of termination.

Parties should ensure that the contract termination provisions include the implied terms so that the parties are very clear on grounds and procedure for termination. Again, confidentiality provisions should be reviewed to ensure they are consistent with publication requirements.

For more information, see Practice notes:

- [Procurement Act 2023: Terminating public contracts.](#)
- [Procurement Act 2023: supplier exclusion and debarment.](#)

OTHER KEY TERMS

ASSESSMENT OF CONTRACT PERFORMANCE

The PA 2023 introduces a new requirement for certain public contracts to contain key performance indicators (KPIs).

In essence, subject to certain caveats and exemptions (for example, there is an exemption for contracts where the supplier's performance cannot be adequately judged by reference to KPIs), before entering into public contracts with an estimated value of more than £5 million, contracting authorities must set at least three KPIs, which must be published in the contract details notice (section 52).

With an emphasis on transparency (again), section 71 (which will also come into effect at some point after 24 February 2025) introduces a new requirement on the contracting authority to publish a contract performance notice which sets out performance against the KPIs. Such notice must be published annually and then on termination.

Parties should ensure that their contracts make express provision accordingly, including KPIs that not only set out how the standards are to be attained but also clarify how attainment will be judged and what rectification steps should be taken if found to be lacking. Such provisions should link appropriately to remedies and termination in line with the parties' agreement (and of course, in compliance with the PA 2023). As with payment, confidentiality provisions should be drafted to be consistent with publication requirements.

For more information, see [Practice note, Procurement Act 2023: KPIs and performance information](#).

CONTRACT MODIFICATIONS

Sections 74 to 77 and Schedule 8 of the PA 2023 set out the requirements in relation to contract modifications. The instances when a modification may be made are set out in section 74, and include light touch contracts, below threshold modifications, insubstantial modifications and Schedule 8 permitted modifications.

Parties will be familiar with many of the contract modification requirements, albeit that the PA 2023 introduces some key changes reflecting the new procurement regime's increased focus on flexibility and greater transparency.

A key change is the introduction of the "convertible contract". This is a contract that, because of modification, will become a public contract to which the modification rules apply.

While Schedule 8 includes the existing procurement regime's permitted modifications (for example, the existing safe harbour for transfer to a new supplier on insolvency remains), there are some new permitted modifications to be aware of, including:

- Where section 42 applies, that is where a Minister of the Crown (if they consider it "necessary" to protect human, animal or plant life or health, or public order or safety) allows a direct award of a public contract.
- Where a known risk has materialised.

Transparency again has been heightened with more stringent rules on notification and publication requirements at section 75 (which sets out the requirement for contract change notices where a modification occurs) and section 77 (which requires the publication of qualifying modifications after they have been implemented). A "qualifying modification" is a modification that requires a contract change notice under section 75 and modifies (or results in) a public contract with an estimated value over £5 million.

As with the implied terms, parties should ensure that their contracts are consistent with the rules on modification (particularly the standstill rules at section 76) and familiarise themselves with the new elements of the regime. Again, the contractual confidentiality provisions should be reviewed to ensure they are consistent with the contracting authority's statutory publication obligations.

For more information, see Practice notes:

- [Procurement Act 2023: direct award](#).
- [Procurement Act 2023: competitive tendering procedures: Standstill](#).

- [Procurement Act 2023: Varying public contracts.](#)

FINAL THOUGHTS

While many of the key provisions in the PA 2023 affecting contract terms are familiar from the current procurement regime, the PA 2023 in some instances goes further to expand the scope of these terms. It is important to be aware of these key changes.

In the interests of transparency and certainty, it would be prudent to make express contractual provision for the terms that the PA 2023 implies into public contracts, so parties are clear on what they need to do and by when.

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