

A photograph of three business professionals (two men and one woman) sitting at a long table in a modern office or cafe at night. They are all looking at laptops. The woman is on the left, wearing a grey blazer. The man in the middle is wearing a light blue sweater. The man on the right is wearing a dark red shirt and is gesturing with his hand while talking. There are coffee cups and a small potted plant on the table. The background shows a large window with a view of city lights at night. The word 'geldards' is written in white lowercase letters in the top right corner.

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Procurement Act 2023: Implementation in practice and recent case law

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Agenda

- Introduction
- Reporting obligations
- Socially responsible procurement
- Automatic suspension – *Parkingeye Ltd v Velindre NHS Trust*
- General discussion

Reporting requirements – Payment compliance notices

- Section 69 Procurement Act 2023
- Reporting period of six months
- Notice required within 30 days of the end of a reporting period if payment made or became payable under a public contract

Payment compliance notices

- Must include:
 - i. Average number of days for payment
 - ii. Percentage paid within specified timeframe
 - iii. Percentage paid in accordance with section 68(2)

Payments under public contracts

- Section 70 Procurement Act 2023
- Contracting authority required to publish information about payments of more than £30,000 under a public contract

Social Partnership and Public Procurement (Wales) Act 2023 (1)

- Imposes obligations for socially responsible procurement
- Statutory guidance
 - i. Annually socially responsible procurement reports
 - ii. Contracts register
 - iii. Works and workforce clauses notifications
 - iv. Procurement investigations

Social Partnership and Public Procurement (Wales) Act 2023 (2)

- Statutory guidance
 - i. Procurement strategies
 - ii. Setting and meeting socially responsible procurement objectives
 - iii. Socially responsible procurement

UK Procurement Policy Note 24 and guidance note

- The Public Interest Test and Insourcing Strategy
- Applies to central government departments, executive agencies and non-departmental public bodies
- Requires application of public interest test before commencing project with estimated value of more than £1 million, including VAT

UK Procurement Policy Note 25 and guidance note

- Protecting the UK's national security through public procurement
- Applies to central government departments, executive agencies and non-departmental public bodies
- Considers application of national security exemption

Contract Management

Management of Public Contracts

- PCR – Other than challenges to modifications [PCR 72], **post award decisions are matters of private law**
- PA – Will the drive for greater accountability for the performance of public contract create fertile grounds for disputes?
- Significant (new) emphasis on the management of public contracts [s.1(b) – “*covered procurement*” means the award, entry into and management of a public contract]
- Post award management decisions are likely to be subject to challenge

Examples of decisions which might be challenged

- Application of KPIs
- Decisions in respect of extensions of time/waiver
- Exercise of unilateral contract options
- Termination decisions

The Performance Phase

- Performance phase decisions now subject to **express duties** (e.g. having regard to value for money, maximising public benefit, acting with integrity) as well as **public law duties** (e.g. rationality, due inquiry, procedural fairness)
- “Suppliers” could challenge performance phase decisions via a claim for breach of statutory duty [s.100 PA]
- Third parties could do so by way of judicial review

Loss of Confidentiality

- Decisions in relation to supplier performance (including assessment, termination or settlement) are now all:
 - i. Subject to a detailed scheme of statutory regulation
 - ii. Made matters of public record
- Publication of adverse assessments or decisions could have significant adverse reputational and commercial consequences for suppliers

Domino Effect (1)

Will the structure of KPI assessment and publication create a cascade of disputes?

- Duty to publish at least 3 KPIs for contracts above £5m and to report on an assessment of performance at least annually [s.52 and s.71 (1)-(2)]

Domino Effect (2)

Other publication duties [s.71(3)–(5)]

- Where meaningful breach or
- Where (in CA's view) continued poor performance
 - i. Supplier not performing to satisfaction
 - ii. Given an opportunity to improve
 - iii. A failure to improve

Domino Effect (3)

- Excludable supplier - Implied termination rights [s. 78(2)(b)]
 - i. Where CA considers that discretionary grounds exist
 - ii. The circumstances are continuing or are likely to occur again [s.57(2)]
- Risk of termination/exclusion in respect of other public contracts

MINIMISING RISK OF CHALLENGE (1)

- Incorporate appropriate performance mechanisms into contract
- Follow the contractual regime – assess performance and address poor performance
- Build a clear and well evidenced case based on objective measures (KPIs, Improvement or Rectification Plans)

MINIMISING RISK OF A CHALLENGE (2)

- Consider a range of relevant evidence and factors (are performance failures sufficiently serious to warrant exclusion?)
- Do not designate a supplier as “*excludable*” without carefully assessing (and recording) whether the poor performance is continuing or likely to occur again [see factors at s.58(1)]
- Keep in mind the “*have regard*” objectives and public law duties at each decision-making stage

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Parkingeye Ltd v Velindre University NHS Trust

Section 102 of the Procurement Act 2023

“(1) In proceedings under this Part, the court may make one or more of the following orders—

(a) an order lifting or modifying the restriction in section 101(1)

...

(2) In considering whether to make an order under subsection (1), the court must have regard to—

(a) the public interest in, among other things—

(i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law;

(ii) avoiding delay in the supply of the goods, services or works provided for in the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services);

(b) the interests of suppliers, including whether damages are an adequate remedy for the claimant;

(c) any other matters that the court considers appropriate.

...

(4) An order under subsection (1) may provide for undertakings or conditions.”

The Defendants' Case (1)

- Accepted legal test was different - adequacy of damages for claimant no longer knock out blow.
- Argued section 102 was same as *American Cyanamid* final stage: balance of convenience. Court must simply balance s.102(2) factors.
- Public interest in lawful award of contracts (s.102(2)(a)(i))?
 - Court cannot determine lawfulness of award - no “mini-trial”.
 - Lawfulness of award disputed in every case.
 - Public interest is vindicated by a damages claim. Adequacy of damages for claimant weighs heavily in balancing exercise.

The Defendants' Case (2)

- Sought to minimise delay in bringing application.
- Defendants' evidence:
 - Claimed benefits of new contract.
 - Criticised existing contract.
- Argued Court must defer to defendants' assessment of existing contract and new contract.
- Similar positioning to previous regime.

The Judgment

- A new test at [31]: “*the public interest will generally tend in favour of keeping the suspension in place*”.
- Summary of principles at [36].
- The clearest point of departure from reg.96 PCR: damages would have been an adequate remedy for the claimant.

Clarifications in the judgment

- Significance of damages not being claimed.
- Extensions of the existing contract during a suspension.
- Reputational harm.

Practical consequences

- Handling incumbents.
- Interested parties.
- Evidence to justify lifting a suspension vs. evidence to justify maintaining a suspension.
- Timing of application to lift.
- Expedition.
- Ancillary issues: notices and early disclosure.
- Summary judgment / strike out applications in future...



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