

Detailed Contents

<i>Acknowledgements</i>	xii
<i>Preface</i>	xiv
<i>Table of Cases</i>	xxiii
<i>Table of Statutes</i>	xxviii
<i>Abbreviations</i>	xxxi
1. Introduction	1
A Typology of Government Contracts	2
Employment	2
Contracts for the provision of goods and services	4
The Private Finance Initiative and Public/Private Partnerships	8
Licensing and franchising	10
‘Internal contracts’	13
Scope	16
Key Sectors of Government Contracting Activity	16
Defence	16
IT	19
Transport	20
<i>Rail franchising</i>	20
<i>London Underground</i>	23
Health	24
Housing	27
Social care	29
The Structure of this Book	31
2. Regulating Government Contracts	32
The Regulatory Framework in English Law	33
Government guidance	33
<i>Guidance and law</i>	33
<i>Values</i>	35
<i>Types of government guidance</i>	37
<i>Conclusion</i>	41
‘Domestic’ law	42
<i>The law of contract</i>	42
<i>Public law 1: common law</i>	42
<i>Public law 2: statute</i>	44
<i>Conclusion</i>	47
European and international law	48

<i>Values</i>	48
<i>Historical development</i>	49
<i>Current law</i>	51
International Comparisons	54
France	55
United States	58
Conclusion	61
 3. The Public Law Perspective	 63
What is Public Law?	64
What is different about governments?	64
Why should the law treat the government differently?	66
Government contracts and public law	67
Government contracts and private law	70
Critiques of Public Law	72
The problem of the public/private divide	73
The role of private law	76
Critiques from within Public Law	79
The 'overkill' argument	79
The 'choice of technique' argument	80
Conclusion	82
 4. The Decision to Use Contract	 84
Political Accountability	85
The Crown	86
<i>Capacity or prerogative?</i>	86
<i>Codification</i>	88
Secretaries of State	92
Local authorities	96
Other public bodies	97
Financial controls	98
Conclusion	101
Legal Accountability	102
Judicial control of non-statutory powers	102
Judicial control of statutory powers	104
The consequences of a finding that a contract is <i>ultra vires</i>	106
<i>The problem outlined</i>	107
<i>Possible reforms</i>	108
Conclusion	113
Public Accountability	113
Conclusion	118
 5. Awarding the Contract	 120
Awarding the Contract: A Theoretical Overview	121

The EU Public Procurement Regime	124
Public procurement and public law	124
A brief history	127
Treaty obligations	129
The Directives	132
<i>Scope</i>	133
<i>Procedures—general</i>	137
<i>The open procedure</i>	138
<i>The restricted procedure</i>	139
<i>Competitive dialogue</i>	140
<i>Negotiated procedure with a notice</i>	142
<i>Negotiated procedure without a notice</i>	143
Awarding the contract	144
Remedies	145
Conclusion	148
Domestic Rules on Procurement Procedures	148
Government guidance	149
Local government	152
‘Private’ law claims	155
Judicial review	157
Reform	164
Contract Award Challenges by ‘Third Parties’	165
Conclusion	168
 6. Dealing with Policy Changes	 169
Competing Public Law Principles	170
Changes to Primary Legislation	172
Conflicting Executive Discretion	176
The ‘no fettering’ rule	177
<i>Scenarios 1 and 2</i>	178
<i>Scenarios 3 and 4</i>	180
Remedies	183
Increased costs of performance	184
Conclusion	185
Contract Variations	186
Conclusion	196
 7. Contract Management	 197
Financial Risks	198
Cost overruns	198
‘Excessive’ profits	204
Performance Risks	208
Accountability of the Government as Purchaser	215

The concern about accountability	216
Contract management	218
Access to information	221
Alternative Dispute Resolution	224
Conclusion	228
Conclusion	228
 8. Government Contractors: Public or Private?	231
The Public Law Framework	232
Concurrent Liability—The Current Law	236
The public authority's liability	237
Judicial review	240
HRA cases—general	241
Using the HRA 1998 to challenge contracting out	243
Critique	244
Contract claims	246
Delegation	248
Delegation at common law	249
General statutory authority to delegate	253
Specific statutory powers to delegate	256
A proposal for reform	257
Conclusion	258
 9. Social and Environmental Goals	260
Linkages within a Public Law Framework	262
A taxonomy	262
Towards a public law framework	265
The History of Linkages	268
The history of linkages in central government	269
The history of linkages in local government	273
The Current Law on Linkages	275
Linkages in the EU public procurement regime	275
<i>Treaty provisions</i>	277
<i>The Directive</i>	279
Domestic law and guidance	284
<i>Statutory regulation of linkages in local government</i>	284
<i>Judicial review</i>	287
<i>Government guidance</i>	291
<i>Summary</i>	294
Conclusion	295
 10. Employment Matters	297
Employment Effects of Contracting Out	298
A Public Law Framework?	301
Transfer of Undertakings	305

Defining a relevant transfer	306
The effect of a transfer on individual employees	308
The effect of a transfer on collective labour relations	310
Government guidance	313
<i>Central and local government</i>	313
<i>The NHS</i>	315
Conclusion	316
Discrimination Law	316
Claims against the government	317
Claims against private firms	320
‘Positive’ duties	321
Conclusion	324
 11. Conclusions and Future Prospects	 325
 <i>Bibliography</i>	 332
<i>Index</i>	341