

## **Ownership rights in performance-based contracting: a case study of English law**

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### **Abstract**

Clients and contractors need to be aware of the project's legal environment because the viability of a procurement strategy can be vitiated by legal rules. This is particularly true regarding Performance-Based Contracting (PBC) whose viability may be threatened by rules of property law: while the PBC concept does not require that the contractor transfers the ownership in the building materials used to the client, the rules of property law often lead to an automatic transfer of ownership. But does the legal environment really render PBC unfeasible? In particular, is PBC unfeasible because contractors lose their materials as assets? These questions need to be answered with respect to the applicable property law. As a case study, English property law has been chosen. Under English law, the rule which governs the automatic transfer of ownership is called *quicquid plantatur solo, solo credit* (whatever is fixed to the soil belongs to the soil). An analysis of this rule reveals that not all materials which are affixed to land become part of the land. This fate only occurs in relation to materials which have been affixed with the intention of permanently improving the land. Five fictitious PBC cases have been considered in terms of the legal status of the materials involved, and several subsequent legal questions have been addressed. The results suggest that English law does actually threaten the feasibility of PBC in some cases. However, it is also shown that the law provides means to circumvent the unwanted results which flow from the rules of property law. In particular, contractors who are interested in keeping their materials as assets can insist on agreeing a property right in the client's land, i.e. a contractor's lien. Therefore, the outcome is that English property law does not render the implementation of the PBC concept unfeasible. At a broader level, the results contribute to the theoretical framework of PBC as an increasingly used procurement strategy.

**Keywords:** Procurement management, Performance-Based Contracting (PBC), ownership, contract drafting, contractor's lien.