

# PROCUREMENT BILL [HL]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Procurement Bill as brought from the House of Lords on 14 December 2022 (Bill 218).

- These Explanatory Notes have been provided by the Cabinet Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The purpose of the Procurement Bill is to reform the United Kingdom's public procurement regime following its exit from the European Union (EU), to create a simpler and more transparent system not based on transposed EU Directives.
- 2 The reforms were announced in the Queen's Speech in May 2022. The Bill will give effect to the policies that were set out in the Government's Green Paper 'Transforming Public Procurement' published in December 2020, and the Government's response to the consultation published in December 2021.
- 3 The reforms are guided by the following "principles of public procurement" set out in the Green Paper: value for money, public good, transparency, integrity, equal treatment and non-discrimination.
- 4 Streamlined new procedures are intended to save time for public bodies and suppliers and mean better commercial outcomes that deliver more value for money for taxpayers.
- 5 The new regime will provide a number of sector-specific features, including tailored rules for defence and security procurement.
- 6 The Bill will also amend Part 2 of the Defence Reform Act 2014 which regulates single source contracts (contracts for goods, works or services for defence purposes awarded other than through competition) to ensure that the Government continues to pay fair prices on single source defence contracts while providing value for money.
- 7 The Bill contains 13 parts with 11 Schedules addressing a range of issues relating to public procurement. The Bill will replace a number of existing statutory instruments, most notably the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011, which are largely drawn from EU Directives.

## Policy background

- 8 At around £300 billion every year, public procurement accounts for a third of all public expenditure. By improving the way public procurement is regulated, the Government can not only save the taxpayer money, but spread opportunity and improve public services, across every region of the country.
- 9 The procurement of goods, services and works by public bodies and some private utilities is an area of law previously governed by EU Directives. The Procurement Bill repeals the Regulations which implemented this regime and replaces these with a single new public procurement regime with a number of sector specific features.
- 10 The Government's policy objectives for these reforms are to speed up and simplify public procurement processes, place value for money at their heart and create greater opportunities for small businesses and social enterprises to innovate public service delivery.
- 11 The Government believes that the current regimes for awarding public contracts are too restrictive and complex for buyers and suppliers alike. The Government's objective is that the new regime should be simpler and more flexible, to make it better able to adapt to the fast-moving environment in which businesses operate. Markets and commercial practices are constantly evolving and it is the Government's aim that the new regulatory framework will drive a culture of continuous improvement to support more resilient, diverse and innovative supply chains.

- 12 The United Kingdom, in its own right following its exit from the EU, joined the World Trade Organisation's Agreement on Government Procurement (GPA) on 1 January 2021. This guarantees access to £1.3 trillion in overseas public procurement markets providing major export opportunities for British businesses. In designing the new regulatory framework, the Government is committed to compliance with the GPA and its principles of fairness, impartiality, transparency and non-discrimination. The Government will continue to maintain and build on the UK's existing international relationships and new bilateral trade agreements.
- 13 The Bill will regulate public procurements from inception throughout the duration of the contract - from the point at which a covered public body (contracting authority) is considering how and what to procure, through the process of procurement and contract award, up to the point at which the resulting contract ends. It also provides remedies for breach of statutory duty.
- 14 In developing the new regime, the Government has engaged with over 500 stakeholders and organisations through many hundreds of hours of discussions and workshops. This has included stakeholders from central and local government, the education and health sectors, small, medium and large businesses, charities, social enterprises, academics and procurement lawyers.

## A simpler regulatory framework

- 15 The Bill will repeal over 350 individual regulations derived from EU Directives (contained in the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011) and create a single, uniform framework for public procurement in the UK.

## Public contracts

- 16 The Public Contracts Regulations 2015 will be repealed and new rules on procurement will be set out in the new regime. Most central government departments, their arms-length bodies and the wider public sector including local government, health authorities and schools will have to follow the procedures set out in the Bill in awarding a contract with a value above set thresholds, to suppliers.

## Utilities contracts

- 17 The Utilities Contracts Regulations 2016 will be repealed and new rules applicable to utilities procurement will be set out in the new regime. The single framework for procurement set out in the Bill will generally apply to the award of utilities contracts, with some limited differences, for example, in relation to "utilities dynamic markets" and the duration of "closed frameworks". The Bill applies to the award of contracts by utilities operating in the water, energy and transport sectors. Utilities can be: contracting authorities; public undertakings (bodies that operate commercially but are subject to public authority oversight); or private entities authorised to carry out the utility activity, due to being granted "special and exclusive rights" by a competent authority.
- 18 The Government does not wish to regulate where utility activities are exposed to competition. The Bill therefore includes a power, where it is satisfied that this is the case, for an appropriate authority (defined in clause 119(1) to make regulations exempting a particular utility activity from regulation in the future. The Bill also includes a power to further reduce the regulatory burden for private utilities wherever possible and consistent with the UK's international procurement obligations.

## Concession contracts

- 19 The Concession Contracts Regulations 2016 will be repealed and the single framework for procurement set out in the Bill will generally apply to the award of concession contracts, with some limited differences. A concession contract is a contract for the supply, for pecuniary interest, of works or services to a contracting authority where at least part of the consideration is the right to exploit the works or services and under which the supplier is exposed to a real operating risk such as a car park or a hospital shop. There are specific provisions covering the definition of a concession contract, how a concession contract is to be valued, as well as some specific exemptions from the regime of certain types of concession contracts.

## Defence and security contracts

- 20 The Defence and Security Public Contracts Regulations 2011 (“DSPCR”) will be repealed and rules on defence and security procurement will be set out in the new regime. The separation between defence and security and other procurements will largely disappear but the Bill provides for particular derogations for defence to deal with the differences in the defence and security sector and to aid the delivery of the Defence and Security Industrial Strategy. These include the duration of “closed frameworks”, greater flexibility to amend contracts to take into account updates to technology as well as to ensure there are no gaps in the provision of goods, works or services which would have unacceptable operational impacts. There is greater flexibility to award contracts directly to specific suppliers to allow transportation of the armed forces where procurement timescales cannot be met and to deal with the interaction between the procurement rules on contract modifications and having the ability to enter into new contracts when needed under the Single Source Contract Regulations 2014. Direct award is also possible where necessary to enhance or maintain the operational capability, effectiveness and safety of the armed forces.

## Single Source Contract Regulations

- 21 Part 2 of the Defence Reform Act 2014 (DRA) creates a framework for regulating defence contracts and sub-contracts which have not been the subject of a competition. These are known as single source contracts (SSCs). Such contracts account for about half of MOD procurement spend, which is equivalent to over £8 billion per year. The Single Source Contract Regulations 2014 (S.I. 2014/3337) (SSCRs), made under the DRA, are engaged when a defence contract is awarded with a value over £5 million without any competition, unless one or more of the specific exclusions set out in the SSCRs apply. These are known as qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs). There is a general power under section 14(7) of the DRA for the Secretary of State to direct that a particular contract which would otherwise meet the requirements should not be subject to the SSCRs. The DRA does not specify whether a contract should be competed. Where the DRA and SSCRs are engaged they make provision for the pricing of SSCs. They also make provision for transparency and record-keeping requirements, from the beginning of an SSC to its completion. The DRA also creates an arm’s length body, the Single Source Contracts Office (the SSRO) which issues guidance on the application of the regime and adjudicates on disputes between the Secretary of State and contractors.
- 22 The Government set out its broad policy objectives for reform of the regulatory regime in the DRA and SSCRs in a Command Paper published on 4 April 2022 (Defence and Security Industrial Strategy: Reform of the Single Source Contract Regulations). This set out changes centred around three main themes: providing greater choice and flexibility in procurement; speeding-up and simplifying the procurement process and promoting innovation. It also included several technical changes designed to address problems that have been identified

during the eight years over which the regime has been operating. Delivery of the reform will require amending the DRA (which is achieved by way of a Schedule to the Bill), amending existing or creating new secondary legislation, and changes to Statutory Guidance issued by the SSRO.

## Key components of the Bill

- 23 Procurement is covered by a number of the UK's international trade agreements including the GPA. The regime in the Bill is compliant with these obligations and will allow a degree of future-proofing through targeted delegated powers to update the regime in the event that new agreements are signed.
- 24 The Bill embeds a number of key principles (non-discrimination and equal treatment) and objectives (value for money, maximising public benefit, transparency and integrity) for public procurement.
- 25 Reforms have been introduced to support small and medium-sized enterprises (SMEs), including a duty for contracting authorities to have regard to reducing and removing barriers to SME participation in procurement, and removing unnecessary obstacles relating to audited accounts and insurance in the conditions of participation.
- 26 The Bill requires the evaluation of tenders to be based on criteria that identify the 'Most Advantageous Tender' and will require contracting authorities to have regard to delivering value for money and maximising the public benefit from the contract.
- 27 The Bill sets out new procedures for awarding public contracts which allow for more negotiation with suppliers to deliver innovative solutions in partnership with the public sector.
- 28 Powers in the Bill will allow Regulations to require all contracting authorities to use a single digital platform for supplier registration, ensuring businesses will only have to submit certain types of information to demonstrate their credentials once to be considered for a public sector procurement. There is a duty on a Minister of the Crown to establish and operate such an online system for this purpose and for the purpose of publishing notices, documents and other information.
- 29 To support prompt payment, 30 day payment terms will be passed down through public sector supply chains and private and public sector payment reporting will be aligned to allow comparison of how quickly different organisations pay their suppliers.
- 30 The Bill aims to make it easier for buyers to take account of previous poor performance by suppliers. There are clearer and broader grounds to allow for the exclusion of suppliers who pose unacceptable performance risks. The Bill also includes provision for a centralised debarment list of suppliers which the Government considers must or may be excluded from procurements.
- 31 The Bill introduces new arrangements for how procurement should be conducted in an emergency such as the Covid-19 pandemic. There is a new power for Ministers to make provision in regulations allowing the direct award of contracts when necessary to protect life so that contracting authorities can procure at pace.
- 32 Currently information on public procurement is published in multiple different locations. The Bill will ensure greater transparency of data to make it easier to scrutinise procurement decisions. Notices will need to be published at each stage of the commercial lifecycle in an open, accessible format.

- 33 The Bill integrates the existing “Light Touch Regime” for social, health, education and certain other services into the broader provisions but with a series of exceptions to recognise that “Light Touch Contracts” may require different treatment.
- 34 Ministers of the Crown, Welsh Ministers and Northern Ireland Departments will have new powers to investigate cases of non-compliance with procurement law and make recommendations to contracting authorities to ensure future compliance.

## Legal background

- 35 The UK has a complex body of public procurement legislation, much of which was derived from EU law. The principal legislation on public procurement in England, Wales and Northern Ireland is as set out above. These regulations will be repealed by this Bill, subject to transitional provisions for ongoing procurements and contracts.
- 36 There is a narrow delegated power to make secondary legislation for domestic public procurement matters in the Small Business, Enterprise and Employment Act 2015, Part 3 sections 39 and 40. Additional legislation relating to the pre-procurement activity carried out by contracting authorities is found in the Public Services (Social Value) Act 2012 (the Social Value Act), National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013, Part II of the Local Government Act 1988, the Local Government (Transparency Requirements) (England) Regulations 2015, and the Late Payment of Commercial Debts Regulations 2013.
- 37 The Bill will not cover procurements by the Security Service, the Secret Intelligence Service, the Government Communications Headquarters or the Advanced Research and Invention Agency

## Territorial extent and application

- 38 Clause 122 (extent) sets out that the Bill extends to England and Wales, Scotland and Northern Ireland. The majority of provisions in the bill apply equally to English, Welsh and Northern Ireland contracting authorities.
- 39 There are a small number of clauses where separate provision is made for procurements undertaken by authorities to be treated as “devolved Welsh authorities” or “transferred Northern Ireland authorities”. These are set out in the relevant parts of these explanatory notes and in the table at Annex A.
- 40 The Bill does not make provision for all public procurement in Scotland, but does apply to contracting authorities in Scotland which are either cross-border bodies or exercise wholly reserved functions. The exceptions to this are in clauses 90 (treaty state suppliers: non-discrimination in Scotland) and 111 (powers relating to procurement arrangements). These make provision respectively for making regulations to ensure that suppliers that are “treaty state suppliers” (those which benefit from an international agreement relating to procurement) are not discriminated against by devolved Scottish authorities and for regulating cross-border procurements involving devolved Scottish authorities which would not otherwise be regulated by the core provisions in the Bill.
- 41 Under the terms of the Sewel Convention, the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned.
- 42 In the view of the UK Government, the general application of the Bill will engage the Sewel Convention in Scotland, Wales and Northern Ireland. Legislative consent has therefore been sought. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for those amendments.

# Commentary on provisions of Bill

## Part 1: Key definitions

### Clause 1: Procurement and covered procurement

- 43 This clause defines “procurement” and “covered procurement”, concepts which are relied on extensively in other parts of the Bill. The former is a broad concept designed to capture procurements of any nature. The latter is a subset of procurements and is the concept that shapes the application of the majority of the provisions in the Bill.
- 44 Subsection (2) makes clear that “procurement” (and by extension, “covered procurement”) includes steps taken for the purpose of awarding a contract. This might include preparatory steps like preliminary market engagement. This subsection also clarifies that these concepts extend to the management of a contract, up to and including termination.
- 45 Subsections (3) and (4) clarify that those concepts also apply to joint procurement and procurement by a centralised procurement authority. A centralised procurement authority is a contracting authority that carries out procurements for the benefit of other contracting authorities. Contracting authorities can delegate their obligations to run lawful procurements to a centralised procurement authority, for example where a centralised procurement authority establishes a framework for use by one or more other contracting authorities. Where contracting authorities are acting on a more ad hoc basis to undertake procurement under subsection (3)(a), they do not delegate their responsibilities to undertake lawful procurement and remain liable for any unlawful award made by them as part of the joint arrangement.

### Clause 2: Contracting authorities

- 46 This clause sets out a definition of a “contracting authority”. The clause sets out which entities are covered and which entities are specifically excluded from the definition. All entities that are contracting authorities will be subject to the rules set out in the legislation.
- 47 Subsection (1) sets out that a contracting authority is either a “public authority”; or in relation to a utilities contract, it may be a public authority, “public undertaking” or “private utility”. “Excluded authorities” will not be contracting authorities. These terms are defined in subsections that follow.
- 48 Subsection (2) defines ‘public authorities’ as a ‘person’ (a term further described in Schedule 1 to the Interpretation Act 1978) that is wholly or mainly publicly-funded, or subject to public authority oversight.
- 49 If that person operates on a “commercial basis” then it will not be a contracting authority (regardless of whether it is wholly or mainly publicly funded or subject to oversight). Subsection (2) also defines ‘public undertakings’ as a person that is subject to public authority oversight, and operates on a “commercial basis”; and ‘private utilities’ as a person that carries out a ‘utility activity’ and is not a public authority or public undertaking.
- 50 Subsection (3) explains the meaning of ‘contracting authority oversight’ as being where a person is subject to management or control by one or more public authorities, or where more than half its board members are appointed by public authorities. Under normal circumstances simple oversight by a regulator would not meet the “management or control” test.

- 51 Subsection (4) clarifies what is meant by “operating on a commercial basis” by providing examples of matters to be considered in determining whether the test is met. If the person relies directly or indirectly on a public authority to ensure its ongoing operation, or is unable to bear its own losses, then this might be a factor which indicates that it is not operating on a commercial basis. If the person benefits by contracting on terms that would not be available to another because of their connection with a public authority, then that might indicate that it is not operating on a commercial basis. If the person operates on a market that is subject to fair and effective competition (for example, there are no market access restrictions and contract opportunities are available via competitive procurement), then that might indicate that it is operating on a commercial basis.
- 52 Subsection (5) lists the “excluded authorities”. These are public authorities excluded from the definition of “contracting authority”. This allows the intelligence agencies and Advanced Research and Invention Agency (ARIA) to carry out their procurement activity outside the regime established in this Bill. Devolved Scottish authorities are also excluded but are regulated under other legislation. Any person that is subject only to the oversight of one of these organisations will also be excluded from this procurement regime.
- 53 Subsection (6) defines the term “devolved Scottish authority” as any authority which exercises functions only in Scotland, where none or some of those functions relate to “reserved matters” (defined in subsection (11)).
- 54 Subsections (7) and (8) describe circumstances in which certain bodies are to be treated as devolved Scottish authorities.
- 55 Subsection (9) serves as an anti-avoidance mechanism, which requires that where a contract is awarded in reliance on the vertical exemption (paragraph 2 of Schedule 2), any subcontract substantially for, or contributing to, the performance of that contract must be awarded subject to the procurement regime.
- 56 Subsection (10) makes it clear that the Act does not apply to His Majesty in his private capacity.
- 57 Subsection (11) provides definitions for terms not already defined in the clause.

### Clause 3: Public contracts

- 58 This clause defines the three types of contracts which are “public contracts” covered by the legislation. The Bill primarily deals with the award and management of such “public contracts”.
- 59 Subsection (2) provides that contracts for the supply, for pecuniary interest, of goods, services and works to a contracting authority are “public contracts” provided they are not exempt and have an estimated value above an applicable threshold, set out in Schedule 1 (see subsection (5)).
- 60 Subsection (3) provides that frameworks, which are contracts providing for the future award of other contracts (see clause 45) are in-scope of the legislation provided they are not exempt and have an estimated value above an applicable threshold, set out in Schedule 1 (see subsection (5)).
- 61 Subsection (4) provides that concession contracts (which are defined in clause 8) are in-scope of the legislation provided they are not exempt and have an estimated value above an applicable threshold, set out in Schedule 1 (see subsection (5)).
- 62 Subsection (6) points to Schedule 2 (exempted contracts), which sets out which contracts are exempt from the concept of “public contract”.

#### Clause 4: Valuation of contracts

- 63 Contracting authorities will need to estimate the value of contracts, in particular to determine whether the value of those contracts are above applicable thresholds and whether the contracts are therefore in scope of this legislation. Subsection (1) sets out that the “estimated value” of a contract is its value for the time being estimated by a contracting authority.
- 64 Subsection (2) sets out that, when estimating the value of a contract, the contracting authority must follow the valuation rules set out in Schedule 3 (estimating the value of a contract).
- 65 Subsection (3) provides that a contracting authority must not manipulate the estimated value of a contract in order to exclude that contract from the scope of requirements in this legislation.

#### Clause 5: Mixed procurement: above and below threshold

- 66 Thresholds determine whether or not a contract is a public contract. Different thresholds apply to goods, works or services contracts. These are set out in Schedule 1. Where a contract contains a mixture of these elements (a mixed contract), contracting authorities will need to determine which threshold to apply. When making this determination they will need to consider whether a mixed contract should have those elements separated into different contracts. If the contract is separated out, thresholds can be calculated separately for each separate contract (each of which will only fall within one such type).
- 67 If a mixed contract can reasonably be separated out, but a contracting authority chooses not to do so, the mixed contract will, where one element is above its corresponding threshold, be treated as above-threshold (and therefore, unless an exemption applies, a public contract to which this legislation applies). This is provided for in subsection (3), which requires the mixed contracts in subsection (1) and (2) to be treated as above threshold where the conditions in subsection (1) or (2) are met.
- 68 Subsection (1) applies the above test to mixed contracts that are not framework agreements which contain above and below threshold elements that are reasonably capable of being procured separately.
- 69 Subsection (2) applies the above test to mixed contracts which are framework agreements and contain above and below threshold elements that are reasonably capable of being procured outside the framework.
- 70 Subsection (4) sets out factors contracting authorities may have regard to when determining whether elements of a mixed contract can reasonably be procured separately.
- 71 Subsection (5) makes clear the meaning of a below-threshold contract.
- 72 Subsection (6) makes clear that subsection (3) does not apply to mixed contracts awarded under a framework agreement.

#### Clause 6: Utilities contracts

- 73 Subsection (1) sets out the definition of a “utilities contract”, being a contract for the supply of goods, services or works wholly or mainly for the purpose of a “utility activity”.
- 74 Subsection (2) defines a “utility activity” by reference to a number of things. Firstly, whether the activity is included in Parts 1 or 2 of Schedule 4 (utility activities); if it is included in Part 1, it is a utility activity (for example, electricity transmission networks) and if it is included in Part 2 it is not (for example, electricity generation, wholesale or retail sale of gas) It also provides that utility activities carried out wholly outside of the UK (for example, not involving the use of a network or geographical area within the UK) are not utility activities and that for private utilities, utility activities are only those for which the utility has been granted a special or

exclusive right (i.e. procurements for which a private utility has not been granted such a right would not be covered by the Act).

- 75 Subsection (3) defines a “special or exclusive right” as a right to carry out utility activities granted by statutory, regulatory or administrative provision where that right also substantially prevents other utilities from carrying out those activities. A current example would be the private utilities that supply water and sewerage services to the public through fixed infrastructure in separate defined geographical areas.
- 76 Subsection (4) provides that a right is not a “special or exclusive right” if it has been granted following a competitive tendering procedure under this Act or where the opportunity was adequately publicised and the grant of the right was based on non-discriminatory criteria. This would include those competitive processes in place before this legislation comes into force (such as the processes under the Public Contracts Regulations 2015).
- 77 Subsections (5) and (6) work together and provide that an appropriate authority may amend Part 2 of Schedule 4, which sets out activities that are not utility activities, to specify or remove activities. An appropriate authority may only specify an activity in Part 2 where it is satisfied that the test at subsection (6) has been met - i.e. that the market for the activity specified is subject to fair and effective competition and entry to that market is unrestricted.
- 78 Subsection (7) makes clear that a reference to a framework agreement where that framework is for the future award of utility contracts is a reference to a utility contract.

#### Clause 7: Defence and security contracts

- 79 Subsection (1) defines a “defence and security contract” for the purposes of the Bill. Subsection (1) (a) to (g) sets out the categories of contract which fall within the definition (by reference to what is supplied under the contract).
- 80 Subsection (2) provides that a framework will be a defence and security contract where it only permits for the award of contracts which are defence and security contracts. If it permits the award of some defence and security contracts and some other types of public contracts, it will not be a defence and security contract.
- 81 Subsection (3) ensures the thresholds in Schedule 1 specific to defence and security contracts are applied only in respect of procurements falling within subsection (1) (a) to (f). This is in order to ensure compliance with the GPA.
- 82 Subsection (4) defines “defence authority contract”. This is a subset of defence and security contracts to which the direct award justification in paragraph 20 of Schedule 5 and the permitted contract modifications in paragraphs 10 and 11 of Schedule 8 apply.
- 83 Subsection (5) provides a power for a Minister of the Crown to specify contracting authorities which are defence authorities for the purposes of the Bill (and in particular for the definition of “defence authority contract”).
- 84 Subsection (6) places a restriction on the Minister to specify in regulations under subsection (5) only those contracting authorities whose function is wholly or mainly for the purposes of defence or national security.
- 85 Subsection (7) provides further definitions for terms used in subsection (1).

#### Clause 8: Concession contracts

- 86 Subsection (1) defines a concession contract as a contract for the supply, for pecuniary interest, of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services that are the subject of the contract and where under

the contract the supplier is exposed to a real operating risk. A contract for the provision of goods cannot be a concession contract, as goods contracts do not involve the supplier being exposed to a real operating risk.

- 87 Subsection (2) defines an “operating risk” for the purpose of subsection (1). An operating risk is the risk that the supplier is not able to recover its costs relating to the supply and operation of the works or services during the contract, and the factors creating the risks were not reasonably foreseeable at the time of award and arise from issues outside the control of the contracting authority and the supplier.

#### Clause 9: Light touch contracts

- 88 Subsection (1) introduces the term “light touch contract” i.e. contracts for the supply of certain services which will be identified by regulations made under subsection (2). Throughout the Bill this term is used to distinguish light touch contracts (which benefit from less regulation and some special rules).
- 89 Subsection (2) states an appropriate authority may by regulations determine which contracts should be deemed light touch contracts.
- 90 Subsections (3)-(4) bind the power at subsection (2) by requiring an appropriate authority to have regard to the nature of the services and consider whether it is appropriate for them to be light touch contracts; taking into account cross border interest by suppliers, whether the benefit is for an individual or a community and whether proximity of the supplier and recipient is required for effective or efficient supply of the service.
- 91 Subsection (5) makes clear that a reference to a light touch contract includes a reference to a framework for the award of light touch contracts.

#### Clause 10: Mixed procurement: special regime contracts

- 92 Some mixed contracts will contain elements which, if procured separately, would be subject to special rules, such as light touch contracts. This clause provides for when those contracts are to be handled according to the rules that reflect the special nature of one element (when they are to be treated as a “special regime contract” as defined in this clause), or where they are to be treated as subject to the general rules in this legislation.
- 93 When placing a mixed contract containing one or more elements that would, if procured separately, be subject to a “special regime”, together with other above-threshold elements that would not be subject to that special regime, subsection (3) provides that a contracting authority cannot take advantage of such special regime rules where it would be reasonable to split out the requirement.
- 94 Subsection (1) applies the above test to mixed contracts for goods, services or works that contain a “special regime” element but that are not framework agreements.
- 95 Subsection (2) applies the above test to mixed contracts for goods, services or works that contain a “special regime” element but are framework agreements.
- 96 Subsection (3) prohibits treating a contract as a special regime contract if either of the tests in subsections (1) or (2) are met.
- 97 Subsection (4) permits mixed special regime contracts that are defence and security contracts to be treated as a special regime contract even where the conditions in subsection (1) or (2) apply, where there are good reasons for procuring the elements together.
- 98 Subsection (5) sets out factors contracting authorities may have regard to when determining whether elements of a mixed contract can reasonably be procured separately.

- 99 Subsection (6) lists the different types of special regime contract: concessions, defence and security, light touch, and utilities.
- 100 Subsection (7) ensures that, where the analysis above means the mixed contract cannot be treated as a special regime contract, the contract is still to be treated as a public contract subject to the legislation.
- 101 Subsection (8) makes clear that subsection (3) does not apply to mixed contracts awarded under a framework.

## Part 2: Principles and objectives

### Clause 11: Covered procurement only in accordance with this Act

- 102 Subsection (1) sets out that a covered procurement must not be carried out by a contracting authority except in accordance with this Act. Subsection (2) sets out the different methods by which a contracting authority may enter into a public contract in a covered procurement. These are by competitive award, direct award or award under a framework.

### Clause 12: Covered procurement: objectives

- 103 Subsection (1) requires that contracting authorities have regard to the objectives listed when carrying out a covered procurement.
- 104 Subsection (2) imposes on contracting authorities an obligation to treat suppliers the same in carrying out a covered procurement, unless differences between the suppliers justify different treatment.
- 105 Subsection (3) clarifies that, even if different treatment for suppliers is justified, contracting authorities must take all reasonable steps to make sure the different treatment does not put a supplier at an unfair advantage or disadvantage.
- 106 Subsection (4) requires contracting authorities, in carrying out a covered procurement, to have regard to the particular barriers to participation in public procurement that small and medium-sized enterprises may have, and whether they can be removed or reduced. Clause 119 (Interpretation) defines what “small and medium-sized enterprises” means.

### Clause 13: The national procurement policy statement

- 107 Subsections (1) and (2) establish that a Minister of the Crown may publish a statement under this clause which sets out the Government’s strategic priorities in relation to procurement, and that this is known as the national procurement policy statement.
- 108 Subsections (3) and (5) to (7) make provision for how a national procurement policy statement must be made, including requirements relating to consultation, principles to which regard must be given and laying the statement before Parliament.
- 109 Subsection (4) sets out a non-exhaustive list of matters that must be included in the NPPS.
- 110 Subsections (8) and (9) set out that the Minister must keep the national procurement policy statement under review and that the statement may be amended or replaced. Subsection (9) confirms that the provisions of this clause apply to all future national procurement policy statements (any amended or replacement statements), not just the first one made under these provisions.
- 111 Subsection (10) requires contracting authorities to have regard to the national procurement policy statement when they carry out a procurement or exercise functions relating to procurement generally.

112 Subsection (11) sets out those contracting authorities and contracts to which the obligation in subsection (10) does not apply.

### Clause 14: The Wales procurement policy statement

113 Subsections (1) and (2) establish that the Welsh Ministers may publish a statement under this clause which sets out the Welsh Government's strategic priorities in relation to procurement, and that this is known as the Wales procurement policy statement.

114 Subsections (3) to (5) make provision for how a Wales procurement policy statement must be made, including requirements relating to consultation and laying the statement before the Senedd.

115 Subsections (6) and (7) set out that the Welsh Ministers must keep the Wales procurement policy statement under review and that the statement may be amended or replaced. Subsection (7) also confirms that the clause applies to all future Wales procurement policy statements, not just the first one made under these provisions.

116 Subsections (8) and (9) establish that a devolved Welsh authority or body other than a private utility or an authority or body awarding a contract in accordance with a framework or by reference to a "dynamic market" must have regard to a Wales procurement policy statement in relation to a devolved Welsh procurement arrangement.

117 Subsection (10) defines the Senedd for the purpose of this Part.

## Part 3: Award of public contracts and procedures

### Chapter 1: Preliminary steps

#### Clause 15: Planned procurement notices

118 Subsection (1) gives contracting authorities an option to publish a planned procurement notice. The benefit of this would be for them to take advantage of the reduction of time periods that apply to the award procedure set out further in clause 54 (time limits).

119 Subsection (2) sets out the minimum information that must be contained within the notice. Further details of what the notice will contain will be set out in regulations.

120 Subsection (3) sets out the time periods for when the notice must have been published in order for the reduced time limits to apply. This is referred to as a "qualifying planned procurement notice".

121 Subsection (4) directs the reader to clause 54(4) where time reductions are outlined if a qualifying planned procurement notice is published.

#### Clause 16: Preliminary market engagement

122 Subsection (1) permits contracting authorities to engage with suppliers and other persons before commencing a procurement and lists the ways in which it may engage, such as developing its requirements or designing a procurement process.

123 Subsection (2) explains that the engagement described in subsection (1) is called preliminary market engagement.

124 Subsection (3) requires contracting authorities to ensure that suppliers involved in the preliminary market engagement do not later receive an unfair advantage over those suppliers not involved, and that the competition that follows the preliminary market engagement is not distorted by the engagement.

125 Subsection (4) sets out the circumstances in which a supplier is to be treated as an “excluded supplier” (requiring the contracting authority to exclude them from the procurement) under subsection (5). This applies where they have an unfair advantage in the procurement, due to taking part in preliminary market engagement and that advantage cannot be avoided (for example, by taking measures later to correct any advantage, such as giving all suppliers the same information).

126 Subsection (5) requires contracting authorities to treat a supplier that has been given an unfair advantage through their participation in preliminary market engagement as an “excluded supplier”. This does not mean that the supplier is an excluded supplier for all procurements (unlike in other circumstances set out in clause 57 and Schedule 6) but only for this procurement, with the result that the other provisions relating to “excluded suppliers” do not apply to the supplier. This means that “self-cleaning” is not relevant, the look back periods applied to exclusions are not applicable and the supplier cannot be considered for “debarment” on the basis of this clause.

### Clause 17: Preliminary market engagement notices

127 Subsection (1) requires that if a contracting authority carries out preliminary market engagement (defined in clause 16) it must publish a preliminary market engagement notice before it publishes a tender notice or, when it does publish a tender notice, explain why it did not publish a preliminary market engagement notice.

128 Subsection (2) sets out the minimum information that must be contained within the notice. Further details of what the notice will contain will be set out in regulations.

### Clause 18: Duty to consider lots

129 Subsection (1) requires that before publishing a tender notice in respect of a public contract, a contracting authority must consider whether breaking a contract into smaller chunks, known as lots, is appropriate.

130 Subsection (2) requires the contracting authority to then either arrange for the award of the contract(s) by reference to lots, or provide reasons for not doing so.

## Chapter 2: Competitive award

### Terms of a procurement

### Clause 19: Award of public contracts following a competitive tendering procedure

131 Clause 19 sets out the principles of awarding public contracts that apply following a competitive tendering procedure. The clause does not apply in other circumstances in which a public contract is awarded.

132 Subsection (1) provides that in a competitive tendering procedure, a contracting authority may only award a contract to the supplier that submits the “most advantageous tender”.

133 Subsection (2) explains how the most advantageous tender is identified. This is determined by the contracting authority, following its assessment of the tenders submitted, and is the tender that both satisfies the authority’s requirements and best meets the award criteria. It provides that when assessing tenders against the award criteria, contracting authorities must base that assessment on the assessment methodology as defined in clause 23(3)(a) and (where there is more than one award criterion) the relative importance of the award criteria - if there is only one criterion, tenders will be assessed against that single criterion. The possibility for there to be only one award criterion or a number allows contracting authorities to, for example, award the contract to the supplier submitting the lowest priced tender (where price

is the sole criterion) or to the supplier submitting the tender that scores best across a range of price and quality criteria. The options available to contracting authorities to indicate the relative importance of the award criteria are set out in clause 23(3) (award criteria).

134 Subsection (3) sets out the circumstances where a contracting authority must or may disregard a tender. Subsection (3)(a) requires contracting authorities to disregard a tender where the supplier does not satisfy the conditions of participation (which are set out in clause 22). Subsection (3)(b) gives contracting authorities discretion as to whether they disregard a tender where the supplier is not a United Kingdom or “treaty state supplier” or where the supplier intends to sub-contract the delivery of the contract or part of the contract to a supplier that is not a United Kingdom supplier or treaty state supplier. (A treaty state supplier is defined in clause 88 (treaty state suppliers).) Subsection (3)(c) gives contracting authorities discretion as to whether they disregard a tender that breaches a procedural requirement set out in the tender notice or associated tender documents.

135 Subsection (4) clarifies that a breach of a procedural requirement includes in relation to the tender. This would include, for example, where there are material omissions in the tender.

136 Subsection (5) clarifies that a reference to a contracting authority’s requirements is a reference to the requirements described in either the tender notice or associated tender documents. Further details in this regard are set out in clause 21(5) and (6).

137 Subsection (6) refers to clause 26 (excluding suppliers from a competitive award) and clause 28 (excluding suppliers by reference to sub-contractors), which make provision for disregarding tenders from suppliers that are excluded or excludable suppliers or that are intending to subcontract to excluded or excludable suppliers. (Excluded and excludable suppliers are defined in clause 57 (meaning of excludable suppliers).

138 Subsection (7) refers to clause 32 (reserving contracts to supported employment providers) and clause 33 (reserving contracts to public service mutuals), which make provision for reserving public contracts to supported employment providers and qualifying public service mutuals. (Supported employment providers and qualifying public service mutuals are defined in clause 32(4) and clause 33(6) respectively.)

139 Subsection (8) refers to clause 34 (competitive award by reference to dynamic markets) which makes provision for disregarding tenders from suppliers that are not members of a dynamic market, when the contract is being awarded under a dynamic market.

140 Subsection (9) provides that “procedural requirement” includes a requirement that a supplier provide information.

## Clause 20: Competitive tendering procedures

141 Subsection (1) requires that before awarding a public contract under clause 19 (award of public contracts following a competitive tendering procedure), a contracting authority must carry out a competitive tendering procedure in accordance with a tender notice (like an advert) and associated (supporting) tender documents. This ensures potential bidders know what to expect from the procedure.

142 Subsection (2) sets out that a competitive tendering procedure can take two forms. The first is an “open procedure”, which is a single stage procedure whereby the opportunity for the public contract is advertised and any interested party can submit a tender (and the authority will decide who to award the contract to solely on the basis of that single tender, in accordance with clause 19). The second is a “competitive flexible procedure” which is any other competitive tendering procedure which the contracting authority deems appropriate for the purpose of awarding the public contract. Any competitive flexible procedure designed by

- the contracting authority will need to operate within the bounds of the provisions of the Bill (such as the covered procurement objectives, publication of required notices and other requirements applicable to a competitive tendering procedure); but otherwise can be designed around what would work best for the specific procurement.
- 143 Subsection (3) requires contracting authorities to ensure that the procedure is a proportionate means of awarding the contract, taking into account the nature, complexity and cost of the contract. This is to avoid procedures being designed in a manner that is unnecessarily complex or burdensome.
- 144 Subsection (4) further differentiates the two types of competitive procedure by reference to some of the actions that could be taken in a competitive flexible procedure. In contrast to an open procedure, a competitive flexible procedure will probably be multi-staged and therefore may (under subsection (4)(a)) limit the number of suppliers participating in a procurement (or progressing to the next stage). For example, a competitive flexible procedure may have a first stage that invites tenders from all interested parties and a second price negotiation stage with those suppliers successful at first stage. Alternatively, the first stage could be a request to participate which outlines the essential requirements that must be met in order for suppliers to tender (the conditions of participation- see clause 22), and thereafter only those suppliers who can meet those conditions are invited to bid.
- 145 Subsection (4)(b) identifies that award criteria can be refined in the course of the procedure, within the parameters set out in clause 24. Subsection (4)(c) prohibits contracting authorities from allowing participation of suppliers not previously involved and/or suppliers excluded in an earlier stage.
- 146 Subsection (5) sets out other ways a contracting authority can remove suppliers from the competition in a multi-staged procedure. Under subsection 5(a), if the supplier has not complied with the necessary conditions of participation set for the procurement (pursuant to clause 22) they would be excluded from further stages of the competition. Subsection 5(b) states that a supplier would not be invited to continue when they have failed to meet any interim assessment. Subsection 5(c) provides that contracting authorities may also exclude a supplier that is not a United Kingdom supplier (as defined in clause 89) or treaty state supplier (as defined in clause 88). Subsection 5(d) provides that a contracting authority may exclude a supplier that intends to sub-contract the performance of all or part of the contract to a supplier that is not a United Kingdom supplier or treaty state supplier.
- 147 Subsection (6) explains that the reference to intermediate assessment of tenders in subsection (5)(b) must satisfy the contracting authority's requirements and be assessed by reference to certain assessment requirements relating to award criteria (which are dealt within clause 23).
- 148 Subsection (7) allows a competitive tendering procedure to have a limit to the number of lots any one supplier can tender for.
- 149 Subsection (8) refers to clause 27 (excluding suppliers from a competitive flexible procedure) clause 28 (excluding suppliers by reference to sub-contractors) and clause 30 (excluding suppliers for improper behaviour), which make provision for excluding suppliers that are excluded or excludable suppliers or that are intending to subcontract to excluded or excludable suppliers (Excluded and excludable suppliers are defined in clause 57 (meaning of excludable suppliers).)
- 150 Subsection (9) refers to clauses 32 (reserving contracts to supported employment providers) and 33 (reserving contracts to public service mutuals) about reserving contracts to certain suppliers.

151 Subsection (10) refers to clause 34 (competitive award by reference to dynamic markets), which allows the exclusion of suppliers that are not members of a dynamic market.

## Clause 21: Tender notices and associated tender documents

152 Subsection (1) sets out when a tender notice must be published. When using the open procedure a contracting authority must publish a tender notice to invite suppliers to submit their tenders. For a competitive flexible procedure (defined in clause 20), a contracting authority must publish a tender notice to invite suppliers to participate or to invite them to submit the first, or only tender. Whether there is an initial stage to invite suppliers to participate will depend on the design of the multi-stage procurement.

153 Subsection (2) states that a tender notice is a notice which sets out that a contracting authority intends to award a public contract under clause 19 (award of public contracts following a competitive tendering procedure). It also requires that the tender notice must contain other information specified in regulations, which will be made under clause 93 (notices, documents and information: regulations and online system).

154 Subsection (3) allows for associated tender documents to be produced separately from the tender notice and that they must be provided in accordance with a process established in the tender notice.

155 Subsection (4) explains that associated tender documents must supplement matters in the tender notice. It also makes provision for more detail as to the information to be contained in associated tender documents to be set out in regulations that will be made under clause 93 (notices, documents and information: regulations and online system).

156 Subsections (5) and (6) require the tender notice or associated tender documents to detail the goods, services or works to be provided and when detailing the requirements to be satisfied they are sufficiently clear and specific and do not break the rules on technical specifications. The contracting authority must be satisfied that the tender notice or associated tender documents contain information sufficient to prepare tenders before inviting tenders from suppliers.

157 Subsection (7) refers to clause 40 (Qualifying utilities dynamic market notices: no duty to publish a tender notice) which provides an exception to the obligation to publish a tender notice at subsection (1) when contracts are awarded under a utilities dynamic market established by reference to a qualifying utilities dynamic market notice.

## Clause 22: Conditions of participation

158 Subsection (1) enables contracting authorities to set conditions relating to suppliers' participation in a procurement process, prior to the award of a public contract under clause 19 (award of public contracts following a competitive tendering procedure). These conditions must be limited to those that are essential to ensure that a supplier has the legal and financial capacity, and the technical ability to fulfil the requirements of the contract. The conditions should not be unnecessarily onerous for the supplier.

159 Subsection (2) defines the term "condition of participation".

160 Subsection (3) prohibits contracting authorities from requiring as a condition of participation (a) the provision of audited annual accounts from suppliers that are not otherwise required by the Companies Act 2006 or an overseas equivalent to have their accounts audited and (b) insurance relating to the performance of the contract to be in place before award. This ensures that suppliers that are not required to have their accounts audited (such as small companies) can provide alternative evidence of financial capacity and allows suppliers to commit to having insurance in place at award, rather than before which may incur

unnecessary cost if they do not win the contract.

- 161 Subsection (4) makes it clear that whilst conditions can include qualifications, experience or technical ability, to ensure fair treatment of suppliers and equality of opportunity, they cannot relate to a particular prior award of a public contract (so for example public sector experience may be requested but experience with a specific public sector organisation cannot). In addition, conditions may not contravene the rules on technical specifications in clause 56 (technical specifications) or require particular qualifications without allowing for their equivalents.
- 162 Subsection (5) requires contracting authorities to consider whether conditions of participation are appropriate and relevant to the nature, cost and level of complexity of the contract requirements.
- 163 Subsection (6) permits a contracting authority to require evidence that is verifiable by a third party to satisfy a condition of participation.
- 164 Subsection (7) allows a contracting authority to remove a supplier from the competition when the supplier has not satisfied the conditions of participation. This means that whilst a supplier must satisfy the conditions of participation in order to be awarded the ensuing public contract (see subsection (2)), a contracting authority may choose the timing at which exclusion from the procedure takes place (for example, the authority may allow for suppliers to confirm they have met the conditions at a later stage).
- 165 Subsection (8) refers to situations where a supplier has relied on another supplier (an associated supplier) in order to satisfy the conditions of participation. Where this occurs the contracting authority is to treat the supplier as having passed the conditions if the other supplier has passed the conditions. Further rules on sub-contracting can be found in clause 28 (excluding suppliers by reference to sub-contractors) and clause 71 (sub-contracting: directions).
- 166 Subsection (9) explains the different relationships that can occur between a supplier and an associated supplier. The suppliers could submit a tender together, as a consortium, or with one supplier sub-contracting aspects of the contract to another. The contracting authority should be satisfied that the suppliers will enter into a legally binding arrangement to cover the relationship, before the contract is concluded. Clause 71 (sub-contracting: directions) includes more detail on sub-contracting arrangements.

### Clause 23: Award criteria

- 167 This clause deals with the rules that apply to award criteria.
- 168 Subsection (1) explains that the “award criteria” means criteria against which suppliers are assessed during a competitive tendering procedure, which must be set in accordance with this section.
- 169 Subsection (2) sets out specific rules that contracting authorities must follow when setting the award criteria. The criteria must relate to the subject matter of the contract, be sufficiently clear, measurable and specific; comply with the rules on technical specifications and be proportionate taking into account the nature, complexity and costs of the contract.
- 170 Subsection (3) requires that the award process is transparent and defines and sets out what must be included in the “assessment methodology”. Contracting authorities are required to describe how the award criteria will be applied and, if there is more than one criterion, to set out their relative importance, which may be by weighting or ranking them, or through an alternative approach.

171 Subsection (4) provides that when procurements are divided into separate lots, a contracting authority may limit the number of lots an individual supplier may be awarded provided it applies an objective mechanism to do so.

172 Subsection (5) provides a non-exhaustive list of what may constitute the “subject matter of a contract” (referred to at subsection (2)).

173 Subsection (6) provides an additional (non-exhaustive) list of what may constitute the ‘subject matter of a contract’ for light touch contracts. This includes the views of an individual or their carer and the varied needs of different service recipients. It may also include where proximity of the supplier and service recipient(s) is important for the effective and efficient supply of the services. This additional flexibility recognises the special nature of these contracts and provides wide discretion to encourage competition wherever possible.

#### Clause 24: Refining award criteria

174 Subsection (1) provides that, as part of a competitive flexible procedure, a contracting authority can refine the award criteria provided its intention to do so is set out in the tender notice or associated tender documents. As such, refinements are allowed only where they are anticipated, for example, after a negotiation stage in a multi-staged procedure. Refinements cannot be made after the contracting authority has invited suppliers to submit final tenders under clause 19 (to conclude the procedure).

175 Subsection (2) provides that as a consequence of refining an award criterion, the relative importance of the award criteria under section 23(3)(b) may also be refined.

176 Subsection (3) prevents refinements that mean the award criteria change so significantly that one or more suppliers who did not make it through in an earlier round would have done so.

177 Subsection (4) provides that if a refinement affects the tender notice and any associated tender documents, these must be modified and provided again.

#### Clause 25: Sub-contracting specifications

178 This clause sets out a specific provision whereby a contracting authority can either permit, or direct, a supplier to sub-contract the supply of goods, services or works to another supplier.

179 Subsection (1) provides that subsection (2) applies where a contracting authority could justify a direct award to a particular supplier in line with the criteria set out in clause 41 (direct award in special cases), such as for technical reasons or when a supplier has exclusive rights.

180 Subsection (2) sets out that where a contracting authority awards a contract for the supply of goods, services or works under clause 19 (award of public contracts following a competitive tendering procedure), the contracting authority may require a supplier to sub-contract the supply of goods, works or services to a particular supplier where the conditions for a direct award of the supply of goods, works or services to that supplier are met.

#### Clause 26: Excluding suppliers from a competitive award

181 Subsection (1) requires a contracting authority to disregard tenders from a supplier that is an “excluded supplier” when assessing which tender is the most advantageous tender. This means that contracting authorities must consider whether each supplier meets any of the mandatory grounds for exclusion, and if so whether the issue in question is likely to occur again; as well as checking whether the supplier is on the debarment list.

182 Subsection (2) places an obligation on a contracting authority to consider whether a supplier is an “excludable supplier” before assessing tenders for the most advantageous tender and allows a contracting authority to disregard a tender submitted by such a supplier. This

means that contracting authorities must consider whether each supplier meets any of the discretionary grounds for exclusion, and if so whether the issue in question is likely to occur again; as well as checking whether the supplier is on the debarment list.

183 Subsection (3) states that, where a supplier is an excluded or excludable supplier by virtue of an “associated person” of the supplier being an excluded or excludable supplier, before disregarding a tender, contracting authorities must notify the supplier of their intention to do so and give the supplier the opportunity to replace the associated person with a suitable alternative, that is one who is not an excluded or excludable supplier. A supplier’s tender must or may be disregarded under this provision only if the supplier fails to replace the associated person.

184 Subsection (4) defines an “associated person” as any entity which the supplier in question is relying upon to meet the conditions of participation in the procurement (under clause 22(7)) with the exception of guarantors such as banks. Associated persons could be individuals, companies, partnerships or any entity with legal personality. An associated person might include subcontractors or consultants who are essential to ensure the supplier has the technical ability to perform the contract or other consortium members if the supplier is relying on them to ensure it has the legal and financial capacity to perform the contract.

185 The basis on which a supplier is an excluded supplier (subject to mandatory exclusion) or an excludable supplier (subject to discretionary exclusion) is set out in clauses 57 (meaning of excluded and excludable supplier) and 58 (considering whether a supplier is excluded or excludable) and the grounds on which a supplier is an excluded or excludable supplier are set out in Schedule 6 (mandatory exclusion grounds) and 7 (discretionary exclusion grounds).

## Clause 27: Excluding suppliers from a competitive flexible procedure

186 Subsection (1) requires a contracting authority to determine for all competitive flexible procedures whether a supplier is an excluded or excludable supplier before allowing them to participate. This means that contracting authorities must consider whether each supplier meets any of the mandatory or discretionary grounds for exclusion, and if so whether the issue in question is likely to occur again; as well as checking whether the supplier is on the debarment list. This check must happen before allowing the supplier to participate in the procedure. This obligation does not apply to open procedures as these are single stage procedures where exclusions are only required to be considered prior to award - see clause 26 (excluding suppliers from a competitive award).

187 Subsection (2) places an obligation on a contracting authority to exclude a supplier from participating or progressing in a competitive flexible procedure if it determines that the supplier is an excluded supplier. Subsection (3) allows a contracting authority to exclude a supplier from participating or progressing in a competitive flexible procedure if it determines that the supplier is an excludable supplier. Reference in these subsections to a supplier progressing in a competitive flexible procedure ensures that contracting authorities must consider exclusions at each stage of the procedure.

188 Subsection (4) requires a contracting authority, where it is excluding a supplier by virtue of one of its associated persons, to first notify the supplier of its intention to exclude them and give the supplier the opportunity to replace the associated person with a suitable alternative. A supplier must or may be excluded under this provision only if the supplier fails to replace the associated person.

189 Subsection (5) says that a supplier participating in a competitive flexible procedure refers to a supplier progressing beyond requests to participate in the procurement or beyond

submission of tenders (depending on the process chosen by the contracting authority).

## Clause 28: Excluding suppliers by reference to sub-contractors

- 190 Subsection (1) requires a contracting authority to ask for details of intended sub-contractors and to check whether any intended sub-contractors are on the debarment list, as part of determining whether the supplier is an excluded or excludable supplier.
- 191 Subsection (2) permits a contracting authority to ask a supplier for information to determine if any sub-contractor it intends to sub-contract to is an excluded or excludable supplier. Whilst details of all intended sub-contractors must be asked for under subsection (1), this subsection (2) allows, but does not require, consideration of the exclusion grounds in relation to intended sub-contractors.
- 192 Subsection (3) says that, where a contracting authority has decided to ask for information about a sub-contractor to determine if they are subject to exclusion under subsection (2), if a sub-contractor is an excluded supplier, the contracting authority must treat the supplier itself as an excluded supplier and disregard a tender from that supplier or exclude them from participating or progressing in a competitive tendering procedure.
- 193 Subsection (4) says that, where a contracting authority has decided to ask for information about a sub-contractor to determine if they are subject to exclusion under subsection (2), if a sub-contractor is an excludable supplier, the contracting authority may treat the supplier itself as an excludable supplier and may disregard a tender from that supplier or excluding them from participating or progressing in a competitive tendering procedure.
- 194 Subsection (5) requires a contracting authority to notify the supplier of its intention to disregard their tender or exclude the supplier and provide the supplier with the opportunity to find a suitable replacement sub-contractor before their tender is disregarded or the supplier is excluded under subsections (3) or (4).
- 195 Subsection (6) says that a supplier participating in a competitive tendering procedure refers to a supplier progressing beyond requests to participate in the procurement or beyond submission of tenders.
- 196 Subsection (7) states that the requirements in subsection (3) and (4) regarding disregarding tenders and excluding suppliers from competitive tendering procedures where an intended sub-contractor is an excluded or excludable supplier do not apply if the intended sub-contractor is an associated person, in other words a sub-contractor that is being relied on by the supplier to meet a condition of participation (see clause 26(4)). This is because a supplier is an excluded or excludable supplier under clause 57 (meaning of excluded and excludable supplier) where an associated person is an excluded or excludable supplier. A sub-contractor that is an associated person is covered in clause 26 (excluding suppliers from a competitive award) and clause 27 (excluding suppliers from a competitive flexible procedure). The effect of this is that contracting authorities must always consider exclusions with regard to sub-contractors that are associated persons but have flexibility under clause 28 (excluding suppliers by reference to sub-contractors) to consider exclusions with regard to other intended sub-contractors if they wish to do so.

## Clause 29: Excluding a supplier that is a threat to national security

- 197 Subsection (1) sets out that subsection (2) applies to a relevant contracting authority if it intends to disregard a tender or exclude a supplier on the basis of the national security discretionary exclusion ground in paragraph 14 of Schedule 7.
- 198 Subsection (2) allows for exclusion on this basis only where the contracting authority has notified a Minister of the Crown and the Minister considers that the exclusion ground

applies and the supplier's tender should be disregarded or the supplier should be excluded.

199 Subsection (3) cross refers to provisions in clauses 26, 27 and 28 which provide for notification to a supplier that an associated supplier or sub-contractor is considered by the contracting authority to be a threat to national security. This is consistent with the rest of this clause, which requires ministerial consideration and approval prior to a supplier being excluded or their tender disregarded where the national security exclusion ground applies.

200 Subsection (4) defines a "relevant contracting authority" as any contracting authority other than a Minister of the Crown, a Government department, the Corporate Officer of the House of Commons or the Corporate Officer of the House of Lords.

### Clause 30: Excluding suppliers for improper behaviour

201 Subsection (1) says that subsection (2) applies where a supplier has acted improperly in the procurement. The improper behaviour must have resulted in the supplier having an unfair advantage in the competition which cannot be avoided other than by exclusion.

202 Subsection (2) says that, in these circumstances, the contracting authority must treat the supplier as an excluded supplier in relation to the award of the public contract, disregard a tender from the suppliers and prevent the supplier from participating in, or progressing as part of, any competitive tendering procedure.

203 Subsection (3) requires the contracting authority to allow representations to be made and evidence to be put forward by the supplier before determining whether a supplier has acted improperly.

204 Subsection (4) sets out an exhaustive list of the circumstances in which a supplier has acted improperly in a procurement.

205 Subsection (5) says subsection (6) applies where a supplier has failed to provide information about connected persons or associated persons to assess whether the supplier is subject to exclusion or has provided incomplete, inaccurate or misleading information.

206 Subsection (6) says that, in these circumstances, the contracting authority must treat the supplier as an excluded supplier in relation to the award of the public contract, disregard a tender from the supplier and prevent the supplier from participating in, or progressing as part of, any competitive tendering procedure.

207 An excluded supplier under this clause is not treated as an excluded supplier other than in the procurement where the improper behaviour occurred. As a result, self-cleaning is not relevant, the look back periods for exclusions are not applicable and the supplier cannot be considered for debarment. The behaviour of a supplier described in this clause may also be a basis for discretionary exclusion on future procurements, where self-cleaning, look back periods and debarment are all relevant (see paragraph 13 of schedule 7).

### Clause 31: Modifying a section 19 procurement

208 There will be times when changes need to be made to the 'terms of a covered procurement' (defined at clause 31(7)). Subsection (1) sets out when it is permitted to make changes to the terms of a covered procurement during an open procedure (i.e. prior to tenders being received), and during a competitive flexible procedure (i.e. before the deadline for submitting a request to participate or before the deadline for submitting the first or only tender). This aims to strike an appropriate balance between permitting changes to the terms of a covered procurement without allowing contracting authorities to change the goal posts after suppliers have already relied on that information.

209 As such, subsection (2) provides more limited scope for 'non-substantial' modifications

after requests to participate or initial tenders are received in a (multi-staged) competitive flexible procedure, provided this is before the deadline for submitting final tenders.

- 210 For light touch contract procurements where contracting authorities benefit from greater freedoms, modifications of any type are allowed before the submission of tenders.
- 211 Subsection (3) defines ‘substantial’ modification as any change that would likely a) permit suppliers not participating to submit a tender or b) change the composition of participants had the modification be contained in the tender notice or tender documents. In essence, the clause mandates that a substantial change is one that would likely impact the market response to the procurement.
- 212 If a modification is made then subsection (4) requires contracting authorities to consider revising the time given to suppliers to modify their tenders before they are submitted.
- 213 Subsection (5) requires transparency of the modifications made under subsection (1) through the revision and reissue of the tender notice and any associated tender documents that were affected by the changes.
- 214 Similarly, if the modification was made under subsection (2), subsection (6) requires a contracting authority to notify those remaining in the procedure (since it is only those remaining in the competition who need to be aware).
- 215 Subsection (7) defines ‘terms of a covered procurement’ and ‘participating supplier’.
- 216 Subsection (8) cross refers to clause 43 (switching to direct award).

### **Reserving contracts to certain suppliers**

#### **Clause 32: Reserving contracts to supported employment providers**

- 217 Subsection (1) allows the exclusion of suppliers that are not “supported employment providers” from a competitive flexible procedure. The contract will accordingly be reserved to supported employment providers.
- 218 Subsections (2) and (3) set out the process for this. Under subsection (2) the procedure must provide for the exclusion. If it does, then, under subsection (3), tenders from suppliers other than supported employment providers must be disregarded.
- 219 Subsection (4) defines a “supported employment provider” as a supplier that specifically aims to provide employment to disabled or disadvantaged persons, or provide employment related support to those persons, and where at least 30% of their workforce is disabled or disadvantaged.

#### **Clause 33: Reserving contracts to public service mutuals**

- 220 Subsection (1) sets out that this clause applies if the procurement is for a contract for “reservable light touch services” (as defined in subsection (7)) for a maximum term of five years or less. The contract may accordingly be reserved for “qualifying public service mutuals” under this clause.
- 221 Subsections (2) to (4) set out the procedure for this. Under subsection (2), in a competitive flexible procedure, the contracting authority may provide that the procedure excludes suppliers that are not qualifying public service mutuals. Subsections (3) and (4) then provide that in these circumstances the authority must disregard any tender from a supplier that is not a qualifying public service mutual.
- 222 Subsection (5) defines a “qualifying public service mutual” as a “public service mutual” that has not entered into a comparable contract.

223 Subsection (6) defines a “public service mutual”.

224 Subsection (7) defines “reservable light touch services” and “comparable contract”.

225 Subsection (8) allows an appropriate authority to, by regulations, specify which of the light touch services (that have been specified as such via regulations made under clause 9 (light touch contracts)) are “reservable light touch services”, and so reservable under this clause.

### **Awarding contracts by reference to dynamic markets**

#### **Clause 34: Competitive award by reference to dynamic markets**

226 Subsection (1) says a competitive flexible procedure may provide for the exclusion of suppliers that are not members of an appropriate dynamic market and are not members of an appropriate part of an appropriate dynamic market. This means that the award of a contract under a dynamic market must be by way of a competitive flexible procedure and cannot be by way of an open procedure or direct award.

227 Subsection (2) states that subsection (3) applies to such a competitive flexible procedure restricted to suppliers who are members of a dynamic market or part of a dynamic market, as provided for in subsection (1).

228 Subsection (3) requires a contracting authority to disregard tenders from suppliers who are not members of the relevant dynamic market or a relevant part of it, to ensure that the procedure is limited to suppliers who are members of the dynamic market, or relevant part of it.

229 Subsection (4) says that, before a contracting authority excludes a supplier or disregards a tender from such a competitive flexible procedure, if the supplier has submitted an application for membership of the dynamic market, it must consider their application. This allows suppliers who are not on the dynamic market to still bid for contracts under it if they have applied to be a member of that dynamic market.

230 Subsection (5) states that the requirements in subsection (4) do not apply if, due to exceptional circumstances relating to the complexity of the particular procurement, the contracting authority has insufficient time to consider the supplier’s application for membership before the deadline for submitting a request to participate in the procedure or the deadline for submission of tenders. This should not be relied upon other than in exceptional circumstances and those circumstances must relate to the complexity of that procurement, such as short timescales driven by an urgent operational requirement.

231 Subsection (6) says that an “appropriate” dynamic market or part of a dynamic market means a dynamic market or part thereof which allows for the award of the contract by the contracting authority. Awards cannot be made under dynamic markets which do not allow for the award of the particular contract by the particular contracting authority.

232 Subsection (7) states that this section does not apply to concession contracts unless that concession contract is also a utilities contract. This means that concession contracts (other than those which are utilities contracts) cannot be awarded under dynamic markets.

233 Subsection (8) says that a dynamic market is one set up in accordance with clause 35. This subsection also clarifies what is meant by references to a contract being awarded by reference to suppliers’ membership of a dynamic market and to suppliers’ membership of a dynamic market.

#### **Clause 35: Dynamic markets: establishment**

234 Subsection (1) allows a contracting authority to establish arrangements, known as

dynamic markets, in order that a contracting authority may subsequently award contracts by reference to suppliers' participation in such dynamic markets.

- 235 Subsection (2) defines a utilities dynamic market as a dynamic market set up only for the purpose of the award of utilities contracts.
- 236 Subsection (3) sets out that, if any person sets up a utilities dynamic market which complies with the provisions of the Bill applicable to utilities dynamic markets established by private utilities, they are treated as a utilities dynamic market established by a private utility for the purpose of the Bill and utilities can use them to award utilities contracts.
- 237 Subsection (4) defines a "utility" for the purpose of the Bill.
- 238 Subsection (5) clarifies that documents establishing or modifying a dynamic market are not a public contract. This is to distinguish dynamic markets from frameworks and to reflect the fact that a dynamic market is a list of pre-qualified suppliers rather than a public contract.

### Clause 36: Dynamic markets: membership

- 239 Subsection (1) allows a contracting authority to set conditions of membership of a dynamic market as long as these are a proportionate way of assessing legal and financial capacity or technical ability to perform contracts.
- 240 Subsection (2) prohibits contracting authorities from requiring certain conditions of membership of a dynamic market when seeking to ensure that suppliers have the legal and financial capacity to perform contracts awarded by reference to the dynamic market: in subsection (2)(a), the provision of audited annual accounts from suppliers that are not otherwise required by the Companies Act 2006 or an overseas equivalent to have their accounts audited (for example small companies) and, in subsection (2)(b), insurance relating to the performance of the contract to be in place before award. This ensures that suppliers that are not required to have their accounts audited can provide alternative evidence of financial capacity and allows suppliers to commit to having insurance in place at award.
- 241 Subsection (3) makes it clear that whilst restrictions to the conditions of membership of a dynamic market can include qualifications, experience or technical ability, to ensure fair treatment of suppliers and equality of opportunity, they cannot relate to a particular prior award of a public contract such as with specific public sector organisation, contravene the rules on technical specifications in clause 56 (technical specifications) or require qualifications without allowing for equivalents.
- 242 Subsection (4) requires contracting authorities to consider whether conditions of membership of a dynamic market are appropriate and relevant to the nature, cost and level of complexity of contracts to be awarded by reference to the dynamic market.
- 243 Subsection (5) permits a contracting authority to require evidence that is verifiable by a third party to satisfy a condition of membership of a dynamic market.
- 244 Subsection (6) sets out contracting authorities' responsibilities in relation to the membership of the dynamic market. These include accepting applications at any time, considering applications in a reasonable period of time, admitting suppliers to the dynamic market (as long as they are not excluded suppliers and), they meet the conditions for membership), considering whether to admit suppliers that are excludable suppliers and that meet the conditions for membership and informing suppliers of the outcome of their applications.

245 Subsection (7) sets out that the number of suppliers on a dynamic market cannot be limited and that the conditions for membership of a dynamic market, or part thereof, may not be modified during the life of the dynamic market. The conditions for membership must remain consistent throughout the life of the dynamic market to ensure fairness to all suppliers.

### Clause 37: Dynamic markets: removing members from the market

246 Subsection (1) requires the removal of a supplier from a dynamic market where they are on the debarment list for a mandatory exclusion ground. Suppliers that are subject to mandatory exclusion should not be entitled to remain on a dynamic market.

247 Subsection (2) allows for the removal of a supplier that is otherwise an excluded supplier (i.e. the supplier is not on the debarment list for a mandatory exclusion ground but is an excluded supplier), or that does not meet the conditions for membership of the dynamic market. It also allows for the removal of a supplier that has become an excludable supplier since joining the dynamic market or that the contracting authority has become aware was an excludable supplier when they were admitted. Subsection (2) therefore applies both where the supplier was an excludable supplier when it became a member of the dynamic market but the contracting authority was not aware of this and where the supplier subsequently becomes an excludable supplier.

248 Subsection (3) clarifies that the circumstances in which a supplier becomes an excludable supplier for the purposes of subsection (2). This includes where a discretionary exclusion ground did not apply to the supplier before they became a member of the dynamic market and where a discretionary exclusion ground applied to a supplier before they became a member but related to different circumstances.

249 Subsection (4) sets out that, before removing a supplier from a dynamic market, the contracting authority must inform the supplier that it is being removed, and the reasons for its removal.

### Clause 38: Dynamic markets: fees

250 Subsection (1) sets out that fees can be charged to suppliers under a dynamic market other than a utilities dynamic market only when a supplier is awarded a contract under the dynamic market.

251 Subsection (2) says fees must be by reference to a fixed percentage of the estimated value of the contract to be awarded under the dynamic market.

252 Subsection (3) sets out that fees can be charged to suppliers under a utilities dynamic market where those fees are connected to obtaining and maintaining membership of the market where specified in the documents establishing the market.

### Clause 39: Dynamic market notices

253 This clause requires the publication of various notices in relation to dynamic markets. Updating the first notice with all required information will satisfy the requirement to publish subsequent notices.

254 Subsection (1) states that all notices under the clause are called a “dynamic market notice”.

255 Subsections (2) to (4) say that a contracting authority must publish notices before establishing a dynamic market, once the dynamic market is established and after modifying a dynamic market. These notices must contain the information required in the clause and any other information specified in regulations made under clause 93 (notices,

documents and information: regulations and online system).

256 Subsection (5) states that the contracting authority that established a dynamic market must publish a notice when that dynamic market ceases to operate and any other information required as part of clause 93 (notices, documents and information: regulations and online system).

257 Subsection (6) states that subsection (5) does not apply to private utilities (but the other requirements of this clause do).

#### Clause 40: Qualifying utilities dynamic market notices: no duty to publish a tender notice

258 Subsection (1) provides that a contracting authority that establishes a dynamic market by reference to a qualifying utilities dynamic market notice is not required, as part of a competitive flexible procedure under that market, to publish a tender notice for the purpose of inviting suppliers to submit a request to participate or, where relevant, tenders (see clause 21(1)).

259 Subsection (2) provides that where subsection (1) applies, a contracting authority must, instead of publishing a tender notice, provide a tender notice to members of the market or appropriate part of the market.

260 Subsection (3) allows a contracting authority the discretion to provide a tender notice to suppliers that are still being considered for membership of the market, or part of the market, by the contracting authority.

261 Subsection (4) incorporates a qualifying utilities dynamic market notice into clause 21(5). This means that, in the case of a utilities dynamic market established by reference to a qualifying utilities dynamic market notice, the tender notice, associated tender documents or qualifying utilities dynamic market notice must contain the information required by clause 21(5) in order to invite suppliers to submit a tender under the market.

262 Subsection (5) disapplies the duty in clause 34(4) on contracting authorities to consider applications for membership of a utilities dynamic market, or part of such a market, established by reference to a qualifying utilities dynamic market notice.

263 Subsection (6) defines a “qualifying utilities dynamic market notice”.

264 Subsection (7) provides that any references to “publication of a tender notice” in this Bill include references to provision of a tender notice as described in subsections (2) or (3).

### Chapter 3: Direct award

#### Clause 41: Direct award in special cases

265 There are certain circumstances where the contracting authority may award a contract to a supplier without first running a competitive procedure. This clause makes provision for when such direct awards is permitted.

266 Subsection (1) allows a contract to be awarded directly to a supplier (as long as they are not an excluded supplier as defined in clause 57) where one of the justifications for direct award applies (set out in Schedule 5 (direct award justifications)).

267 Subsection (2) permits a direct award to an excluded supplier where there is an overriding public interest to do so.

268 Subsection (3) allows for selection processes or preliminary steps to be taken prior to any

direct award. This is because direct award may still allow for some informal competition or selection process.

269 Subsection (4) requires a contracting authority to consider whether the supplier is an excludable supplier (as defined in clause 57) before awarding the contract.

270 Subsection (5) explains when there is an overriding public interest for the purpose of direct award to an excluded supplier. There will be an overriding public interest, firstly, where the procurement is essential for the construction or maintenance of critical national infrastructure, for example as defined in the Government's National Cyber Security Strategy; secondly, where the procurement is in a strategically important sector for the UK, i.e. those that are vital to the defence and security of the UK's national interests; thirdly, where excluding the supplier would prejudice the conduct of military or security operations; and finally, where the justification for direct award is extreme and unavoidable urgency.

271 Subsection (6) refers to the justifications for direct award set out in Schedule 5 (direct award justifications).

272 Subsection (7) defines the term 'intelligence services' for the purpose of this clause, as the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.

#### Clause 42: Direct award to protect life, etc.

273 Subsection (1) permits a Minister where necessary to make regulations to provide that specified public contracts may be made via direct award. The purpose of this clause is to ensure procurements during an emergency event (like the Covid-19 pandemic) can be conducted as quickly and transparently as possible, even if the circumstances leading to the event are foreseeable (which may rule out the extreme urgency justification for direct award contained in Schedule 5). Regulations made under this power would in accordance with clause 118 be subject to the made affirmative procedure, this means that they will be effective immediately but must obtain Parliamentary approval within 28 days or the regulations will lapse at that point.

274 Subsection (2) provides a definition of what would be deemed "necessary" (i.e. to protect life or public safety). This intentionally limits the discretion afforded to the Minister in subsection (1). Additionally any regulations made under this section would need to be compliant with the United Kingdom's international obligations, which will in practice ensure that the interpretation of 'necessary' is not too broad.

275 Subsection (3) provides a list of specific provisions that the Minister can set out in the regulations envisaged in subsection (1).

276 Subsection (4) places an obligation on the Minister of the Crown to keep under review any regulations made under this clause. If the Minister considers that direct award under clause 41 (Direct award in special cases) is no longer necessary they must revoke the regulations.

#### Clause 43: Switching to direct award

277 This clause allows a contracting authority to switch from a competitive tendering procedure to the direct award of a contract in circumstances where no suitable tenders or requests to participate have been received in that competitive procedure. Subsection (1) provides the conditions that must apply. In addition, the direct award cannot be to an excluded supplier (as defined in clause 57).

278 Subsection (2) sets out when a tender or request would not be considered 'suitable'. There are five categories, firstly those where the supplier's tender was rejected in line with clause 19(3) (Award of public contracts following a competitive tendering procedure), secondly when the assessed tender did not satisfy the contracting authorities requirements or award criterion, thirdly where the price of the tender is abnormally low, fourthly where there is evidence of corruption and finally where the tender breaches a requirement set out for all suppliers to comply with in the tender notice as elaborated further in subsections (3) and (4).

279 Subsection (5) allows for selection or preliminary steps to be taken prior to any direct award (in the same way as in clause 41(3)).

280 Subsection (6) says that before making any direct award under this clause, the contracting authority must consider whether the proposed supplier is an excludable supplier (as defined under clause 57(2)) or whether it submitted an unsuitable tender or request to participate in the earlier competition. This is because it may not be appropriate in these situations for such a supplier to benefit from a direct award, although it is not an absolute prohibition as it would depend on the overall context. For instance, if the supplier's previous tender was unsuitable on account of collusion, a subsequent direct award for the same contract would clearly be inappropriate; if it were due to a failure to meet the criteria that supplier may be better placed for a direct award than a wholly unknown supplier who had no prior involvement.

#### Clause 44: Transparency notices

281 The role of the transparency notice is to highlight early in the process that direct award is being used, increasing transparency. It does not initiate standstill (for which provision is made in clause 51) and is in addition to the award notice (for which provision is made in clause 50).

282 Subsection (1) requires that before a contract is awarded by a direct award under clause 41 (direct award in special cases) or 43 (switching to direct award), the contracting authority must publish a transparency notice.

283 Subsection (2) contains more information about what a transparency notice is, namely that it must set out that the contracting authority intends to place a direct award. Further detail about what needs to be in the notice will be set out in regulations under clause 93 (notices, documents and information: regulations and online system).

284 Subsection (3) sets out that transparency notices do not apply to contracts directly awarded under the user choice provision in paragraph 16 of Schedule 5 (direct award justifications).

## Chapter 4: Award under frameworks

#### Clause 45: Frameworks

285 A framework itself is a public contract (see clause 3(3)) and, as such, must be awarded in accordance with the legislation. This clause sets out the basis on which the award of future public contracts can be made under a framework.

286 Subsection (1) allows for public contracts to be awarded in accordance with the terms of a framework. This enables contracting authorities to award public contracts under frameworks which are themselves awarded in accordance with the legislation, without having to undertake a competitive tendering procedure or justify direct award.

- 287 Subsection (2) defines a “framework” as a contract between a contracting authority and one or more suppliers which provides for the opportunity for the award of future contracts by the contracting authority to the supplier or suppliers. This definition does not restrict the use of frameworks to the future award of public contracts: they can be used for the award of contracts which do not fall within the definition of a “public contract”, such as below threshold contracts, but the remainder of the clause regulates only the award of public contracts under frameworks.
- 288 Subsection (3) states that, unless subsection (4) applies, a framework can only provide for the award of a public contract following a competitive selection process.
- 289 Subsection (4) sets out the circumstances in which a public contract can be awarded under a framework without a competitive selection process. These are where there is only one supplier on the framework or where the framework sets out the core terms of contract to be awarded, as well as an objective mechanism to determine which supplier the contract should be awarded to. The phrase “core terms” is not defined but this is intended to cover key terms such as deliverables, standards, charges and pricing mechanism and basic terms such as warranties, indemnities, termination rights, confidentiality, disputes, variations, etc. This does not preclude the inclusion in the contract to be awarded additional terms on matters which are specific to that contract, for example a detailed specification, prices and detailed performance requirements.
- 290 Subsection (5) sets out the required information that must be contained within the framework to ensure it is set up correctly and that there is adequate transparency when the framework is awarded. Importantly, these matters determine the scope of the framework and, as a result, the nature, type and value of future public contracts that can be awarded under it.
- 291 Subsection (6) sets out that a framework must not allow the award of a public contract under it to a supplier that is an excluded supplier. It also provides that contracting authorities must be allowed to request additional information from suppliers under the framework, for example as part of the process for awarding future contracts.
- 292 Subsection (7) sets out that fees can be charged to suppliers that are party to a framework but only when they are awarded contracts under that framework. Those fees must be set as a percentage of the value of the contract to be awarded under the framework. This enables contracting authorities to charge a supplier a fee each time they are awarded a contract under the framework, by reference to a percentage of the value of that contract.
- 293 Subsection (8) makes it clear that this clause does not apply to the award of concession contracts or to the award of a framework. This effectively prohibits the award of a framework under a framework.
- 294 Subsection (9) sets out that subsections (3) to (5) do not apply when the light touch regime (see clause 9) has been used to set up a framework.

#### Clause 46: Frameworks: competitive selection process

- 295 Subsection (1) allows a contracting authority to set conditions of participation as long as these are a proportionate way of assessing legal and financial capacity or technical ability to perform the contract.
- 296 Subsection (2) defines a “condition of participation” in this clause as a condition that a supplier must meet in order to be awarded a public contract under a framework.
- 297 Subsection (3) prohibits contracting authorities from requiring certain conditions of participation when seeking to ensure that suppliers have the legal and financial capacity

to perform contracts awarded under a framework: in subsection (3)(a), the provision of audited annual accounts from suppliers that are not otherwise required by the Companies Act 2006 or an overseas equivalent to have their accounts audited (for example small companies); and, in subsection (3)(b), insurance relating to the performance of the contract to be in place before award. This ensures that suppliers that are not required to have their accounts audited can provide alternative evidence of financial capacity and allows suppliers to commit to having insurance in place at award.

298 Subsection (4) makes it clear that whilst conditions of participation can include qualifications, experience or technical ability, to ensure fair treatment of suppliers and equality of opportunity, they cannot relate to a particular prior award of a public contract such as requiring experience with a specific public sector organisation, contravene the rules on technical specifications in clause 56 (technical specifications) or require qualifications without allowing for equivalents. These include limiting the conditions to those which are a proportionate means of ensuring suppliers have the relevant qualifications, experience and technical ability to perform the contract.

299 Subsection (5) requires contracting authorities to consider whether conditions of participation are appropriate and relevant to the nature, cost and level of complexity of the contract.

300 Subsection (6) permits a contracting authority to require evidence that is verifiable by a third party to satisfy a condition of participation.

301 Subsection (7) allows a contracting authority to exclude a supplier from participating in, or progressing as part of, the competitive selection process under the framework if it does not satisfy a condition of participation.

302 Subsection (8) states that a competitive selection process under a framework can provide for the assessment of proposals, but that this must only be by reference to the award criteria against which tenders were assessed when the framework was awarded.

303 Subsection (9) allows for the award criteria to be refined. Alongside subsection (8), this ensures that proposals can be assessed against some or all of the award criteria that were used when awarding the framework and allows for those award criteria to be refined, but prevents the use of new or different award criteria or substantially altered award criteria

304 Subsection (10) defines a “competitive selection process” as a competitive selection process for the award of a public contract in accordance with a framework.

305 Subsection (11) states that this clause does not apply where the framework is a light touch contract (see clause 9).

#### Clause 47: Frameworks: maximum term

306 Subsection (1) states the maximum term for a framework is 4 years (generally longer periods than this reduce market competition) or 8 years if it is a defence and security framework or a utilities framework set up by a public utility.

307 Subsection (2) sets out that it is permissible to have a longer term than set out in subsection (1) where the contracting authority decides that the nature of the goods, services or works to be provided means that a longer term is required.

308 Subsection (3) states that, when deciding that a framework will have a longer term, the contracting authority must set out the reasons in its tender or transparency notice.

309 Subsection (4) provides definitions of a ‘defence and security framework’ and a “utilities

framework”.

310 Subsection (5) says this clause does not apply to the award of a framework under an open framework (the maximum term requirements of 4 years or 8 years do not apply to each framework which forms part of the open framework), frameworks established by private utilities and frameworks which are light touch contracts. Open frameworks are addressed in clause 49 (open frameworks). Therefore, there is no limit on the term of utilities frameworks established by private utilities or frameworks that are light touch contracts.

#### Clause 48: Frameworks: implied terms

311 Subsection (1) says that a term is implied into all frameworks that a contracting authority can exclude a supplier from participating in a competitive process for the award of a contract under a framework where the supplier is an excluded supplier or has become an excludable supplier. A term is also implied into all frameworks (as public contracts) allowing a supplier to terminate the framework in these circumstances under clause 77(2).

312 Subsection (2) clarifies that the circumstances in which a supplier becomes an excludable supplier for the purposes of subsection (1) include where a discretionary exclusion ground did not apply before the supplier was awarded the framework or applied before the supplier was awarded the framework but by reference to different circumstances. Subsection (3) says that, before excluding a supplier on the basis that an associated person is an excluded or excludable supplier, the contracting authority must give the supplier reasonable opportunity to replace the associated person.

313 Subsection (4) says any term in the framework which attempts to restrict or override the implied term is of no effect.

#### Clause 49: Open frameworks

314 Subsection (1) outlines that an open framework is a scheme under which new suppliers can be added at set times during its lifetime. Unlike a closed framework, an open framework is not closed to new suppliers, but it is also not permanently open to new suppliers like a dynamic market. The subsection also makes it clear that the terms of the open framework must be substantially the same throughout.

315 Subsection (2) sets out the minimum frequency of when an open framework must be reopened. This is after the first 3 years and at least every 5 years thereafter, up to a maximum term of 8 years. This allows for the open framework to be re-opened on a more frequent basis – for example, annually - if desired. As the maximum term of an open framework is 8 years, the minimum point at which an 8 year open framework must be re-opened is after the first 3 years.

316 Subsection (3) sets out that there may be an overlap in the duration of the frameworks that form the open framework scheme to ensure that any live procurements may be concluded before the earlier framework is formally closed. No new procurements may be started once the next framework in the scheme has begun.

317 Subsection (4) states how a supplier can be re-admitted to the open framework on its re-opening in circumstances where there is no limit on the number of suppliers. This allows for a supplier which is already party to the open framework to remain party without the contracting authority having to reconsider the supplier’s tender submitted when it first applied or inviting a new tender.

318 Subsection (5) states how a supplier can be re-admitted to the open framework if there is a limit on the number of suppliers. This can only be on the basis of the supplier’s tender submitted when it first applied or inviting a new tender.

- 319 Subsection (6) states that, if a single supplier is awarded an open framework the maximum term is 4 years in line with the maximum term for a closed framework. This means that the minimum number of suppliers required for an open framework to operate is two.
- 320 Subsection (7) states that the maximum term of 4 years for a single supplier open framework in subsection (6) applies notwithstanding the fact that in all other cases the maximum term of an open framework is 8 years.
- 321 Subsection (8) defines an “existing supplier” as a supplier that is on a framework under an open framework.
- 322 Subsection (9) states that references to award on substantially the same terms refers to an award that could be made without a new tender or transparency notice in line with the provisions for modifications in clause 31. If award on substantially different terms is needed, to ensure open competition, a new framework must be awarded in accordance with the legislation rather than re-opening the open framework.
- 323 Subsection (10) states that an open framework may never be awarded by direct award.

## Chapter 5: After award, standstill periods and notices

### Clause 50: Contract award notices and assessment summaries

- 324 Subsection (1) requires a contracting authority to publish a contract award notice before entering into a public contract, awarded under Part 3.
- 325 Subsection (2) establishes that an ‘award notice’ is a notice setting out that the contracting authority intends to enter a contract following a procedure under Part 3. It must also contain any other information required by regulations made under clause 93 (notices, documents and information: regulations and online system).
- 326 Subsection (3) requires that before issuing an award notice, contracting authorities that awarded a contract following a competitive procedure set out in clause 19 (award of public contracts following a competitive tendering procedure) must provide certain suppliers with an assessment summary. Those suppliers are suppliers that submitted an “assessed tender”.
- 327 Subsection (4) defines an assessment summary to mean an assessment of the supplier's tender and if that supplier did not win, also an assessment of the winning (most advantageous) tender.
- 328 Subsection (5) defines an assessed tender as a tender which was assessed against the award criteria applicable to the procurement and not one that was disregarded. A tender may be disregarded if, for example, it was removed from the competition in accordance with clause 19(3) (award of public contracts following a competitive tendering procedure). Further, in the case of a competitive flexible procedure, as per clause 20(5)(b), the supplier may be excluded if it is assessed against the award criteria in an interim stage and as a result did not progress to the final stage of assessment.
- 329 Subsection (6) removes the requirement to publish award notices for defence and security contracts awarded under defence and security frameworks. It also removes the requirement to publish a contract award notice in the case of user choice contracts when directly awarded under paragraph 16 of Schedule 5 (direct award justifications). It does not remove the requirement to provide assessment summaries in these cases.
- 330 It should be noted that a contract award notice may still be published in relation to

contracts awarded under defence and security frameworks and user choice contracts, if the contracting authority wants to enter into a voluntary standstill period (see clause 51).

### Clause 51: Standstill periods on the award of contracts

331 The standstill period is a short pause between notification to bidders of the contract award decision and the contract conclusion. Subsection (1) states a public contract must not be entered into before the end of the mandatory standstill period defined in subsection (2). Contracting authorities may specify a longer standstill period in the contract award notice - if they do so, that longer standstill period must be complied with.

332 Subsection (2) defines the mandatory standstill period as 8 working days which begins on the day the contract award notice is published. This period follows the announcement of the decision to award the contract to a particular supplier (via the contract award notice, clause 50) and allows unsuccessful suppliers a reasonable amount of time to consider the evaluation feedback and commence a claim under Part 9 if there are grounds to do so (allowing a claim to be filed prior to the contract being entered into).

333 Subsection (3) explains that certain types of contract do not require a mandatory standstill period. These are: direct award on the grounds of extreme and unavoidable urgency and to protect life etc. under clauses 41 and 42, contracts awarded under a framework or dynamic market and light touch contracts. Additionally, any direct award by a private utility is also excluded from mandatory standstill. This means these types of contracts can be entered into immediately following the contract award notice.

334 Subsection (4) permits contracting authorities awarding the type of contracts listed in subsection (3) to voluntarily specify a standstill period in a contract award notice and states that if such a standstill is provided for, it must be complied with.

335 Subsection (5) clarifies that a voluntary standstill period under subsection (4) must be for no less than 8 working days from the day the contract award notice is published (the same period of time as the mandatory standstill period).

### Clause 52: Key performance indicators

336 Subsection (1) requires a contracting authority, before it enters into a public contract worth £5 million or more, to set and publish at least three key performance indicators in respect of the contract.

337 Subsection (2) disapplies the obligation in subsection (1) to set and publish such indicators where the contracting authority considers that the supplier's performance cannot appropriately be assessed through such indicators.

338 Subsection (3) defines a 'key performance indicator' as a factor or measure against which a supplier's performance of a contract can be assessed during the life-cycle of the contract.

339 Subsection (4) creates a power for an appropriate authority to amend the £5 million threshold by regulations.

340 Subsection (5) sets out that the obligation to set and publish at least three key performance indicators does not apply in relation to certain types of public contracts.

341 Subsection (6) directs the reader to clause 70 (assessment of contract performance) for further provision about assessing contract performance against, and publishing information about, these indicators.

### Clause 53: Contract details notices and publication of contracts

342 Subsection (1) requires that once a contracting authority has entered into a public contract

(as defined in clause 3), it must publish a contract details notice in relation to that contract within a specified time period after the contract is entered into.

- 343 Subsection (2) establishes that a “contract details notice” is a notice setting out that the contracting authority has entered into a contract. It also requires that the notice must contain such other information as is set out in regulations made under clause 93 (notices, documents and information: regulations and online system).
- 344 Subsection (3) requires a contracting authority to publish a copy of a public contract within a specified time period of the date that it is entered into, if the estimated value exceeds £5 million.
- 345 Subsection (4) disappplies the obligation to publish contracts, established in subsection (3), to contracts within the regulatory ambit of Welsh Ministers and Northern Ireland departments.
- 346 Subsection (5) allows either a Minister of the Crown to change the financial thresholds that are contained within subsection (3).
- 347 Subsection (6) sets out that neither the obligation to publish a contract details notice, nor the obligation to publish a contract, established in this clause, apply to private utilities. It also exempts user choice contracts, directly awarded under paragraph 16 of schedule 5 (direct award justifications), from these obligations.

## Chapter 6: General provision about award and procedures

### **Time limits and termination**

#### Clause 54: Time limits

- 348 This clause establishes the minimum periods that contracting authorities must allow for the submission of tenders (and/or requests to participate) in relation to procurements under Part 3. Subsection (1) requires that when setting time limits contracting authorities must have regard to a number of factors, established in paragraphs (a)-(e).
- 349 Subsection (2) requires that the same time limits must apply to all suppliers.
- 350 Subsections (3) and (4) set out in tables the mandatory time limits that must be met or exceeded in different circumstances. These are in line with the requirements of the GPA. Broadly, suppliers have less time for certain procurements, if there is a state of urgency, or if suppliers are already on notice of the impending procurement via a planned procurement notice; and more time if tenders cannot be submitted electronically or if supporting information is changed or not fully provided with the tender notice.
- 351 Subsection (5) sets out definitions used in this clause and explains a qualifying planned procurement notice, participation period and tendering period.

#### Clause 55: Procurement termination notices

- 352 Subsection (1) requires a contracting authority which has published a tender or transparency notice to confirm (by way of a further notice) if it decides not to award any contracts, i.e. if it terminates a procurement process.
- 353 Subsection (2) sets out that once the contracting authority has decided to terminate a procurement, it must issue the notice as soon as reasonably practical.
- 354 Subsection (3) stipulates that this clause does not apply to private utilities.

## **Technical specifications**

### **Clause 56: Technical specifications**

- 355 Subsection (1) sets out the areas in which this clause is applicable.
- 356 Subsection (2) requires that procurement documents may not refer to a particular characteristic when they could refer more generically to performance or functional requirements. For example, developing technical specifications for a procurement that are linked to a specific design is not permitted if it would be possible to instead include a description of how the goods or services should perform. This is needed to avoid contracting authorities creating unnecessary barriers to suppliers' participation in a tender process.
- 357 Subsection (3) sets out that the procurement documents can only refer to a United Kingdom technical standard if there is no internationally recognised equivalent, otherwise they must allow equivalents to be acceptable.
- 358 The purpose of subsection (4) is to ensure the procurement documents do not limit a competition, or set out discriminatory conditions by referring to particular trademarks, trade names, patent, design or type, place of origin, producer or supplier unless using these terms is required to make the requirements of the contract understood.
- 359 If specifying these terms is unavoidable, subsection (5) states that the procurement documents must also allow for the demonstration of equivalent quality and performance with no disadvantage if such demonstrations are provided.
- 360 Subsection (6) sets out what is meant by "procurement documents". It also explains that a United Kingdom technical standard is set by the British Standards Institute (BSI) or is one that applies in the United Kingdom and not elsewhere. As standards is a broad term this subsection explains that standards include references to regulations, rules, codes of practice and guidance.

## **Excluding suppliers**

### **Clause 57: Meaning of excluded and excludable supplier**

- 361 This clause creates the concepts of 'excluded' and 'excludable' suppliers. Reference to these concepts is made throughout the legislation, typically *requiring* contracting authorities to prevent excluded suppliers from participating in procurements and being awarded public contracts and *allowing* contracting authorities to prevent excludable suppliers from participating in procurements and being awarded public contracts (see clauses 26, 27 and 29). Excluded and excludable suppliers must or may be removed from dynamic markets (see clause 37), must or may not be awarded public contracts under frameworks and may not be permitted to participate in selection processes under frameworks (see clauses 45 and 48) and may have public contracts terminated (see clause 77). Aside from the core definitions in this clause, there are other provisions in clauses 16, 28, 30 and 80 which require contracting authorities to treat suppliers as if they were excluded or excludable in certain circumstances.
- 362 Subsection (1) defines 'excluded suppliers' as suppliers which meet a mandatory ground for exclusion and where the contracting authority considers it likely that the circumstances giving rise to the ground will reoccur. Suppliers which are on the debarment list in respect of the same factors must also be considered as excluded. A supplier may also be an excluded supplier by virtue of a mandatory exclusion ground applying to its associated persons, which are defined in clause 26 as meaning any entity

that the supplier is relying on in order to satisfy the conditions of participation, with the exception of a guarantor.

- 363 Subsection (2) defines ‘excludable suppliers’ as suppliers which meet a discretionary ground for exclusion and where the contracting authority considers it likely that the circumstances giving rise to the ground will reoccur. Suppliers which are on the debarment list in respect of the same factors must also be considered as excludable. A supplier may also be an excludable supplier by virtue of a discretionary exclusion ground applying to its associated persons.
- 364 Subsection (3) affords flexibility to contracting authorities which are private utilities to treat excluded suppliers as if they were excludable.
- 365 Subsection (4) defines the debarment list.
- 366 Subsections (5) and (6) refer to the mandatory and discretionary exclusion grounds in schedules 6 and 7.

### Clause 58: Considering whether a supplier is excluded or excludable

- 367 Subsection (1) sets out the factors that contracting authorities may take into account when evaluating the risk that the circumstances giving rise to an exclusion ground will recur. This is not intended to be limited to the specific event that constitutes the ground, but includes the underlying behaviour or other factors which led to the ground being met.
- 368 Subsection (2) imposes a duty on contracting authorities, in applying the exclusions regime, to give suppliers an opportunity to make representations as to whether grounds apply and to submit evidence that the circumstances are not likely to recur (a so-called ‘self-cleaning’ process).
- 369 Subsection (3) requires that contracting authorities must not make disproportionate requests for information regarding the exclusion grounds. This includes disproportionate requests for proof of the absence of grounds for exclusion, or disproportionate requests for particular remedial action to be taken where grounds are met.

## Debarment

### Clause 59: Notification of exclusion of supplier

- 370 Clauses 59-65 provide for the creation and maintenance of a centralised debarment list. This list will sit alongside the exclusions regime as an additional protection against contracts being awarded to unfit suppliers. As set out in clause 57, suppliers which are on the debarment list must be considered as either excluded or excludable by contracting authorities, depending on whether the exclusion ground they meet is mandatory or discretionary.
- 371 Clause 59 imposes a duty on contracting authorities to notify the relevant appropriate authority whenever they come to the decision that a supplier is excluded or excludable and take the relevant action to prevent them from participating in a procurement (whether that is disregarding their tender, proposing their replacement as a sub-contractor or associated person, rejecting their application for membership of a dynamic market, or removing them from a dynamic market). This is intended to provide information to an appropriate authority to consider whether to undertake an investigation of the supplier under clause 60 and then, in the case of a Minister of the Crown, to consider whether to add the supplier to the ‘debarment list’.
- 372 Subsection (1) lists the scenarios in which the notification duty applies. These are when a

contracting authority considers a supplier to be excluded or excludable on the basis of a relevant exclusion ground; and has excluded the supplier, rejected its tender, rejected its application for or removed it from a dynamic market, or when the supplier is an intended sub-contractor or associated person and has been replaced or removed at the suggestion of the contracting authority.

373 Subsection (2) places an obligation on contracting authorities to notify the appropriate authority within 30 days of the relevant event occurring.

374 Subsection (3) sets out what the notice must contain. This includes the exclusion ground that the contracting authority has applied and any other information to be specified in regulations made under clause 93 (notices, documents and information: regulations and online system).

375 Subsections (4) and (5) place an additional obligation on the contracting authority to notify if the supplier has challenged in proceedings under Part 9 an exclusion decision which was notified under this clause and to notify the outcome of the challenge within 30 days of commencement or determination of proceedings. This is because the decision on whether to investigate a supplier may be influenced by whether the supplier is challenging its exclusion.

376 Subsection (6) defines the terms “exclusion grounds”, “relevant exclusion grounds” and “relevant appropriate authority”. The appropriate authority is a Minister of the Crown unless the contracting authority is a devolved Welsh authority or a transferred Northern Ireland authority, in which case it is the respective devolved administrations.

## Clause 60: Investigations of supplier: exclusion grounds

377 Subsection (1) provides powers for appropriate authorities (a Minister of the Crown or Welsh Government or Northern Ireland department) to investigate whether an exclusion ground applies to a supplier and whether the circumstances giving rise to the ground are likely to recur. Any supplier may be investigated, including overseas suppliers, sub-contractors, and suppliers which have never bid for or been awarded a public contract. This includes, but is not limited to, suppliers brought to the attention of an appropriate authority by a contracting authority via a notification under clause 59 (notification of exclusion of supplier).

378 Subsection (2) provides that an investigation may be initiated at any time, including following an application by a supplier already on the debarment list for removal from the list.

379 Subsection (3) provides an obligation on the appropriate authority to tell the supplier of any relevant exclusion grounds for which they are under investigation, how and when the supplier can respond to the authority and any other information specified in regulations made under clause 93 (notices, documents and information: regulations and online system).

380 Subsection (4) allows for the appropriate authority to require information or assistance from a contracting authority to support the investigation by issuing a notice to the authority.

381 Subsection (5) provides that contracting authorities must comply with the notice within whatever deadline is set in the notice.

382 Subsections (6) and (7) allow for the appropriate authority to request information or assistance from the supplier or connected persons to support the investigation by issuing a notice. The notice must set out the potential consequences for the supplier of not

complying with the request - which are that the supplier may be subject to the mandatory ground at Schedule 6, paragraph 42 in relation to 'failure to cooperate with investigation'.

383 Subsection (8) defines the terms "relevant documents" and "relevant exclusion grounds".

### Clause 61: Investigations under section 60: reports

384 Subsection (1) says this clause applies where an appropriate authority has conducted an investigation into a supplier under clause 60 (investigations of supplier: exclusion grounds).

385 Subsection (2) allows for the Welsh Ministers or a Northern Ireland department to refer a case to the Minister for consideration and, where they do, requires them to provide all relevant information.

386 Subsection (3) requires the Minister to prepare a report on any investigation undertaken by the Minister or by another appropriate authority and considered by the Minister, provide an advance copy of the report to the supplier and publish the report.

387 Subsection (4) sets out what the report must contain. These include the Minister's decision on whether any relevant exclusion ground applies to the supplier and if so whether the circumstances giving rise to the ground are likely to reoccur, whether the Minister intends to enter the supplier's name (or maintain an existing entry) on the debarment list and the reasons.

388 Subsections (5) and (6) allow for the report not to be published, to be provided on limited circulation or for information to be withheld from the report in certain circumstances.

389 Subsection (7) provides relevant definitions.

### Clause 62: Debarment list

390 This clause as per subsections (1) to (3) provides a power for a Minister of the Crown to add a supplier to the debarment list where the Minister has conducted an investigation or considered an investigation by another appropriate authority and has concluded that a relevant exclusion ground applies to the supplier and that the supplier has failed to demonstrate that the circumstances giving rise to the ground are not likely to recur. This also applies where the Minister has determined the supplier is subject to mandatory exclusion for failing to provide information or assistance in an investigation.

391 Subsection (4) sets out what the report for entry of a supplier on the debarment list must contain. This includes the relevant mandatory or discretionary exclusion grounds that apply and the date the supplier is expected to be removed from the debarment list.

392 Subsection (5) provides that the Minister must give advance notice to a supplier before adding it to the debarment list.

393 Subsections (6) and (7) require the Minister to keep the debarment list under review and allows the Minister to amend or remove suppliers from the debarment list. They also require the Minister to remove a supplier from the list if the Minister is satisfied that the supplier is not an excluded or excludable supplier.

394 Subsection (8) provides that the debarment list must be published.

395 Subsection (9) requires the Minister to consult with the Welsh Ministers and most appropriate Northern Ireland department prior to entering or removing a supplier's name from the debarment list.

396 Subsection (10) refers to the definition of 'relevant exclusion ground'.

## Clause 63: Debarment list: application for removal

397 This clause under subsection (1) allows for a supplier named on the debarment list to apply for their removal from the list.

398 Subsection (2) provides that the Minister need only consider an application for removal if there has been significant new information or a material change of circumstances.

## Clause 64: Debarment decisions: appeals

399 Subsection (1) provides for a right of appeal for suppliers against a decision to put their name on, or not remove their name from, the debarment list.

400 Subsection (2) makes provision for a Minister of the Crown to make regulations in respect of the right of appeal.

## Clause 65: Timeline for removal of suppliers

401 Subsection (1) requires the Secretary of State to publish a timetable for the removal of physical technology or surveillance equipment from the Government's supply chain where the Secretary of State is satisfied the supplier has been involved in modern slavery, genocide or crimes against humanity. The timetable must be published within 6 months of the legislation being passed.

402 Subsection (2) requires the Secretary of State to lay the timetable before Parliament.

# Part 4: Management of public contracts

## Terms implied into public contracts

### Clause 66: Electronic invoicing: implied term

403 Subsection (1) provides that the term in Subsection (2) is to be implied in all public contracts.

404 Subsection (2) describes the implied term, being an obligation on contracting authorities to accept (and therefore process for payment) an undisputed e-invoice issued in compliance with the e-invoice standard.

405 Subsection (3) defines an electronic invoice as an invoice that is issued, transmitted and received in an approved structured electronic format that allows for automatic and electronic processing. An approved electronic format refers to an e-invoice standard that is issued by the British Standards Institution. The standard has two parts: the semantic model (the computer language to be used), and the syntax (the structure). As the e-invoice standard may be amended, to reflect corrections or additions, this subsection allows for the reference to the standard published by the British Standards Institution in this legislation to be automatically updated.

406 Subsection (4) clarifies that the relevant standard will be that which is current on the day the contract is entered into or, if agreed between the parties, the day the invoice is issued.

407 Subsection (5) sets out that the implied contract term cannot be restricted or overridden.

408 Subsection (6) provides a power for an appropriate authority to amend the e-invoicing standard.

409 Subsection (7) requires a consultation with such persons as the appropriate authority considers appropriate.

## Clause 67: Implied payment terms in public contracts

- 410 This clause sets out terms to be implied into all public contracts concerning the prompt payment of valid, undisputed invoices.
- 411 Subsection (1) provides that concession contracts, utilities contracts let by private utilities, and contracts awarded by schools are exempt from the obligations in this clause, which imply payment terms into public contracts.
- 412 Subsection (2) describes the implied term that payments due to be made under a public contract by a contracting authority must be paid within 30 days from either the day the invoice is received by the authority or a specified payment date).
- 413 Subsection (3) pauses the obligation to pay within 30 days where the invoice is invalid or in dispute.
- 414 Subsection (4) requires the contracting authority to notify the payee promptly if it considers that the invoice is invalid or disputed.
- 415 Subsection (5) permits payment to be accepted by a contracting authority where it is made by a third party, but only if such an arrangement is agreed by the payee.
- 416 Subsection (6) sets out that these terms cannot be restricted or overridden by express contractual terms.
- 417 Subsection (7) clarifies that public contracts may contain shorter payment terms where agreed between the parties or where required by statute.
- 418 Subsection (8) defines a valid invoice as one issued in a required electronic format and containing a minimum level of required information.
- 419 Subsection (9) sets out the minimum level of information required for an invoice to be valid.
- 420 Subsection (10) provides a power for an appropriate authority to change the payment days under subsection (2), providing the payment period does not exceed 30 days.
- 421 Subsection (11) defines payee and equates a contracting authority receiving an invoice with delivery of that invoice to the address set out for that purpose in the contract.

## **Notices about payments and performance**

### Clause 68: Payments compliance notices

- 422 Subsection (1) obliges the contracting authority to prepare and publish a payments compliance notice within 30 days of the last day of a reporting period, where it has either made a payment under a public contract or a sum owed by it under such a contract is payable.
- 423 Subsections (2) and (5) defines a payments compliance notice as a notice setting out information (to be specified in regulations to be made under clause 93) about the authority's compliance with the obligation to make payments under public contracts within 30 days of such payments falling due (see clause 67(2) (implied payment terms in public contracts)). It must also include any other information specified in regulations under clause 93 (notices, documents and information: regulations and online system).
- 424 Subsection (3) defines the reporting periods as being each 6 month period up until 31st March and 30 September in each year.
- 425 Subsection (4) provides a power for a Minister of the Crown or the Welsh Ministers to

make regulations relating to the preparation and approval of the notice.

426 Subsection (5) clarifies the meaning of “specified information” for the purposes of this provision.

427 Subsection (6) disapplies the obligations in this section from a transferred Northern Ireland Authority, a school or private utilities.

### Clause 69: Information about payments under public contracts

428 Subsection (1) requires a contracting authority to publish specified information (see subsection (5)) whenever it makes a payment of £30,000 or more under a public contract.

429 Subsection (2) requires such information to be published within 30 days of the end of the quarter in which the payment was made.

430 Subsection (3) creates a power for a Minister of the Crown or the Welsh Ministers to make regulations changing the financial threshold at which, or the time limit during which publication is required.

431 Subsection (4) provides an exemption from the provision of the clause for utilities contracts awarded by a private utility, concessions contracts and public contracts awarded by a school, as defined in clause 119. The clause also doesn’t apply to public contracts awarded by a transferred Northern Ireland authority, unless they are awarded under a reserved procurement arrangement or devolved Welsh procurement arrangement, or public contracts awarded under a transferred Northern Ireland procurement arrangement.

432 Subsection (5) defines a “quarter” and also provides that regulations made under clause 93 will set out what “specified information” must be published under this clause.

### Clause 70: Assessment of contract performance

433 Subsection (1) provides that subsection (2) applies where a contracting authority has set key performance indicators under clause 52(1) (key performance indicators).

434 Subsection (2) requires that at least annually during the lifetime of the contract and termination of the contract, the contracting authority must assess the suppliers’ performance against the established key performance indicators and publish certain information in relation to that assessment. That information is to be specified in regulations made under clause 93 (notices, documents and information: regulations and online system).

435 Subsections (3) and (4) set out the circumstances in which subsection (5) applies. These are the same circumstances which trigger the discretionary exclusion ground for breach of contract and poor performance, as set out in Schedule 7. These are firstly when a supplier has breached a public contract, resulting in any of the following: the termination or partial termination of the contract; the award of damages; or a settlement agreement. Secondly, where a contracting authority considers that a supplier is not performing a public contract to the authority’s satisfaction and has been given an opportunity to improve performance, but has failed to do so.

436 Subsection (5) sets out the consequences of the occurrence of any of the events in subsections (3) or (4). Where any of these take place a contracting authority must publish a notice stating that this subsection applies, as well as the circumstances giving rise to that fact, and any other information specified in regulations made under clause 93 (notices, documents and information: regulations and online system). This notice must be published within 30 days of the day on which this subsection first applied.

437 Subsection (6) exempts light touch contracts from the obligations in subsection (5).

438 Subsection (7) states that the entire section does not apply to private utilities.

## **Sub-contracting**

### **Clause 71: Sub-contracting: directions**

439 Subsection (1) explains that this section will apply where a supplier has indicated that they intended to sub-contract the whole or part of the contract to a sub-contractor, and where that supplier has relied on its proposed subcontractor to pass the conditions of participation (see clause 22(8) (conditions of participation)). The section will also apply where the contracting authority has designated that part of the requirement of goods, works or services will be subcontracted to another supplier.

440 Where one of the circumstances set out at subsection (1) is met, subsection (2) permits the contracting authority to require its supplier enter into legally binding agreements with the proposed sub-contractor.

441 Subsection (3) sets out that if the supplier does not enter into a legally binding arrangement with a sub-contractor as directed by the contracting authority, the contracting authority can choose not to enter into the contract with the supplier, can (where the supplier has relied on the fact of the subcontracting arrangement) require that the supplier enter into a subcontracting arrangement with an appropriate supplier, or (if the contract has already been awarded) terminate the contract.

442 Subsection (4) explains that the term 'appropriate supplier' to which a contracting authority could direct a supplier to subcontract under subsection (3)(b) means a supplier that is not excluded, and also has the same qualifying credentials to pass the conditions of participation as the sub-contractor that was initially relied upon by the supplier.

443 Subsection (5) explains that where a contracting authority has directly awarded a contract, that contract may contain conditions pertaining to the award of sub-contracts.

444 Subsection (6) sets out that if a supplier's own credentials were sufficient to pass the conditions of participation, their nominated sub-contractor is not to have been deemed as being relied on to pass the conditions of participation.

### **Clause 72: Implied payment terms in sub-contracts**

445 Subsection (1) sets out that payment terms (set out in clause 67(2)-(5) (implied payment terms in public contracts) are implied in every public sub-contract (defined in subsection (5)).

446 Subsection (2) clarifies that in those terms that are to be implied into public sub-contracts, references to contracting authority will instead mean the party to whom goods, services or works are supplied under the contract. It also clarifies that the meaning of clause 67(8)(a) (relating to electronic invoices) is not implied into public sub-contracts by reference.

447 Subsection (3) ensures that the implied payment terms cannot be restricted or overridden by express contractual terms.

448 Subsection (4) clarifies that the parties can however agree shorter payment terms under the contract.

449 Subsection (5) defines 'public sub-contract'.

450 Subsection (6) sets out those contracts which will not have these terms implied into them, being concession contracts, private utilities' contracts and contracts awarded by schools.

## **Modifying public contracts**

### **Clause 73: Modifying a public contract**

- 451 This clause sets out the circumstances under which public contracts may be modified during their term without running a full procurement process under Part 3 for either that modification or indeed for the entire contract. If the modification is to a public contract or turns a contract which was not a public contract into a public contract (a concept captured here by the term “convertible contract”), a full procurement process under Part 3 will need to be followed (to the extent set out in that Part), unless subsection (1) applies.
- 452 Subsection (1) sets out that a contracting authority may modify a public contract or a convertible contract (a below-threshold contract that as a result of the modification will become a public contract), when a modification is permitted. That is to say, when modification is: expressly permitted under the grounds set out in Schedule 8; is not substantial; or is a below-threshold modification.
- 453 Subsection (2) sets out that a contracting authority may modify a public contract or a convertible contract if the contract is a light touch contract.
- 454 Subsection (3) sets out that a substantial modification is one that would increase or decrease the term of the contract by more than 10 per cent, or materially change the scope of the contract, or materially change the economic balance of the contract in favour of the supplier.
- 455 Subsection (4) sets out that a modification is below-threshold where the circumstances in Schedule 8 do not apply to the modification and it is not substantial within the meaning of subsection (3), and does not increase or decrease the value of a goods or services contract by greater than 10 per cent, or a works contract by greater than 15 per cent. These thresholds must not be breached by the aggregated value of below-threshold modifications. In addition, a below threshold contract modification must not materially change the scope of a contract.
- 456 Subsection (5) sets out that a reference to a modification materially changing the scope of the contract, means making a modification that provides for the supply of goods, services or works of a kind that are not already provided for in the contract.
- 457 Subsection (6) provides a ceiling above which below threshold-modifications are no longer below-threshold. This ceiling is set at the threshold that would be applied to a contract of that type. Where the combined value of below-threshold modifications reaches the threshold applied to a contract of that type, any further modification will not be designated a below-threshold modification, and the permission applying to below-threshold modifications in subsection (1)(c) will not apply.
- 458 Subsection (7) and (8) set out that if modifications could reasonably have been made together, and the resulting single modification would not be permitted under subsection (1), the modification is to be treated as not within subsection (1).
- 459 Subsection (9) sets out that a contracting authority may not modify a public contract so as to change the supplier except as provided for by paragraph 9 of Schedule 8 (transfer on corporate restructuring).
- 460 Subsection (10) makes it clear that Part 3 does not apply in relation to the modification of a contract under this section. Contracting authorities do not have to run a new procurement procedure if they are modifying a contract in accordance with this section.

### **Clause 74: Contract change notices**

- 461 Subsection (1) requires a contracting authority to publish a contract change notice before modifying a public contract or convertible contract.
- 462 Subsection (2) sets out where subsection (1) does not apply, which is when: the modification (a) increases or decreases the value of the contract by 10 per cent or less for goods or services, or 15 per cent or less for works; or (b) increases or decreases the term of the contract by less than 10 percent of the maximum term provided for on award; or (c) the contract is a light touch contract. If however, the modification is permitted under paragraph 9 of Schedule 8, these exceptions do not apply and consequently a contract change notice must be published.
- 463 Subsection (3) states what a ‘contract change notice’ is and that it must contain any information required by regulations made under clause 93 (notices, documents and information: regulations and online system).
- 464 Subsections (4) and (5) have the effect that if separate modifications made using the rationale in subsections (2)(a) or (b) could have been made together but were not, and, if they were combined would exceed one or more of relevant percentages in subsections (2)(a) or (b), a contract change notice must still be published.
- 465 Subsection (6) sets out that this section does not apply in relation to a modification of a contract that: (a) is a defence and security contract, (b) is a light touch contract, (c) was awarded by a private utility, (d) was awarded by a transferred Northern Ireland authority, unless it was awarded as part of a procurement under a reserved procurement arrangement or a devolved Welsh procurement arrangement, or (e) was awarded as part of a procurement under a transferred Northern Ireland procurement arrangement.
- 466 Subsection (7) grants a power allowing a Minister of the Crown or the Welsh Ministers to amend the percentage thresholds in subsections (2)(a) and (b).

#### Clause 75: Voluntary standstill period on the modification of contracts

- 467 Subsection (1) sets out that if a contracting authority elects to enter a period of standstill when it publishes a contract change notice, it may not modify the public contract or convertible contract before the end of the standstill period provided for in the contract change notice.
- 468 Subsection (2) stipulates that a voluntary standstill period must not be less than eight working days, beginning with the day on which the contract change notice is published.

#### Clause 76: Publication of modifications

- 469 Subsection (1) sets out that if a contracting authority publishes a “qualifying modification” under clause 73(1) (Modifying a public contract), the contracting authority must within 90 days publish either a copy of the contract as modified or the modification itself.
- 470 Subsection (2) sets out that a “qualifying modification” is a modification which modifies, or results in, a public contract with an estimated value of more than £5 million.
- 471 Subsection (3) exempts from this section the modification of defence and security contracts, light touch contracts, contracts awarded by a private utility, contracts awarded by a devolved Welsh authority or transferred Northern Ireland Authority (unless awarded under a reserved procurement arrangement) and contracts awarded under a devolved Welsh procurement arrangement or a transferred Northern Ireland procurement arrangement.
- 472 Subsection (4) grants a Minister of the Crown the power to amend the financial threshold

in subsection (2).

## **Terminating public contracts**

### **Clause 77: Implied right to terminate public contracts**

- 473 Subsection (1) sets out that in every public contract, it is an implied term that the contracting authority can terminate the contract if a termination ground applies.
- 474 Subsection (2) sets out the termination grounds. Those grounds being where: (a) the contract was awarded in material breach of the Bill or any regulations made under it; (b) the supplier has, since the award of the contract, become an excluded supplier or an excludable supplier, including due to a person that the supplier is relying on in order to satisfy the conditions of participation); (c) another subcontractor has, since the award of the contract, become an excluded supplier or an excludable supplier.
- 475 Subsection (3) sets out that the termination ground in (2)(c) cannot be used unless the contracting authority requested information under clause 28(1)(a) of the Bill in relation to contract award and subsection (4), (5) or (6) applies.
- 476 Subsection (4) applies if, before awarding the contract, the contracting authority did not know that the supplier intended to sub-contract all or part of the contract.
- 477 Section (5) applies if the sub-contractor is an excluded or excludable supplier (under clause 57(1)(b) or (2)(b)) and before awarding the contracting authority sought to determine if the sub-contractor was an excluded or excludable supplier on the debarment list, but did not know that it was.
- 478 Subsection (6) applies if the sub-contractor is an excluded or excludable supplier (under 57(1)(a) or (2)(a)) and the contracting authority requested information about the sub-contractor as part of the competitive tendering procedure but before awarding the contract did not know if the sub-contractor was an excluded or excludable supplier.
- 479 Subsection (7) sets out that before terminating a contract by reference to the implied term a contracting authority must notify the supplier of its intention to terminate, specify which termination ground applies and set out why the authority has decided to terminate the contract. Contracting authorities must also give the supplier the opportunity to make representations about whether a termination ground applies, and the authority's reasons for its decision to terminate.
- 480 Subsection (8) sets out that before terminating a contract under subsection (2) (b) or (c), the contracting authority must give the supplier an opportunity to bring the sub-contract with the relevant sub-contractor to an end and, if necessary, replace them with an alternative suitable sub-contractor.
- 481 Subsection (9) permits a public contract to contain provision about restitution and other matters ancillary to the termination of the contract by reference to the implied termination grounds.
- 482 Subsection (10) prohibits the parties from using contractual terms to restrict or override the implied term.
- 483 Subsection (11) clarifies that references to a supplier becoming an excludable supplier in the clause includes where the relevant exclusion ground did not apply when the contract was awarded or, if it did apply, it applied by reference to a different circumstance and the supplier has since become subject to the ground as a result of new circumstances (such as a different episode of poor performance or professional misconduct). This reference also

includes situations where the contracting authority found out after awarding the contract that the supplier was an excludable supplier before the contract was awarded.

484 Subsection (12) provides a definition of “material breach”.

### Clause 78: Terminating public contracts: national security

485 Subsection (1) sets out that a relevant contracting authority may not terminate a contract by reference to the implied term in clause 77, on the ground of the ‘threat to national security’ (Schedule 7, paragraph 15) unless the following requirements are met. Firstly, that the authority has notified a Minister of the Crown of its intention and secondly, that the Minister agrees that the supplier or sub-contractor is excludable on the ground set out in Schedule 7, paragraph 15 and that the contract should be terminated.

486 Subsection (2) sets out that a ‘relevant contracting authority’ is a contracting authority that is not a Minister of the Crown, a government department, or a Corporate Officer of the House of Commons or House of Lords.

### Clause 79: Contract termination notices

487 Subsection (1) requires contracting authorities to publish a contract termination notice before the end of the period of 30 days beginning with the day on which a public contract is terminated.

488 Subsection (2) sets out what a ‘contract termination notice’ is and that it must include any information required in regulations made under clause 93 (notices, documents and information: regulations and online system).

489 Subsection (3) sets out a non-exhaustive list of the possible meanings of “termination” leading to this notice being published.

490 Subsection (4) disapplies the obligation from private utilities or user choice contracts that were directly awarded (see paragraph 16 of schedule 5).

## Part 5: Conflicts of interest

### Clause 80: Conflicts of interest: duty to identify

491 Subsection (1) sets out the obligations on a contracting authority to take all reasonable steps to identify, and keep under review, potential conflicts of interest and any actual conflicts of interest in relation to a covered procurement.

492 Subsections (2) to (4) provide details on when, in respect of an individual acting for or on behalf of a contracting authority, or a Minister, a conflict of interest arises in respect of a specific covered procurement. They set out that a conflict of interest arises when the individual or Minister is in a position to have an influence over a decision on a covered procurement, and has a direct or indirect interest in, or connection with, a supplier, or another interest in the procurement. That interest could be personal, professional or financial.

### Clause 81: Conflicts of interest: duty to mitigate

493 Subsection (1) places a duty on the contracting authority to take all reasonable steps to mitigate conflicts of interest, so that a supplier is not placed at an unfair advantage or disadvantage compared to other suppliers in relation to the specific covered procurement.

494 Subsection (2) sets out that taking reasonable steps may also include requiring a supplier to take steps as well.

495 Subsections (3) and (4) set out that where a conflict of interest puts a supplier at an advantage in respect of a specific covered procurement that cannot be avoided, or the supplier will not take necessary steps to ensure that it is not afforded an unfair advantage, then the supplier is to be treated as being an excluded supplier in the context of that specific procurement.

496 Subsection (5) refers back to the meaning of conflict of interest provided in clause 80 (conflicts of interest: duty to identify). Whilst “conflict of interest” is not a defined term, by inference, a conflict of interest is where a personal, professional or financial interest of a relevant person, as set out in clause 80, could conflict with the integrity of the procurement.

## Clause 82: Conflicts assessments

497 Subsections (1) and (2) place a duty on the contracting authority to prepare an assessment of conflicts of interest for the specific covered procurement before the tender notice, transparency notice or notice establishing a dynamic market is published.

498 Subsection (3) sets out that a conflicts assessment must include the conflicts or potential conflicts of interest identified in accordance with clause 80 (conflicts of interest: duty to identify) and detail the steps taken, or that will be taken, by the contracting authority to mitigate conflicts of interest, as per clause 81 (conflicts of interest: duty to mitigate).

499 Subsection (4) adds that a conflicts assessment is also to include steps taken, or will take, to demonstrate that circumstances which a contracting authority considers are likely to be perceived as conflicts of interest, will not turn into actual or potential conflicts of interest.

500 Subsection (5) obliges contracting authorities to keep the conflicts assessment under review, revising as necessary and to confirm when publishing a relevant notice throughout the procurement lifecycle that an assessment has been prepared and revised.

501 Subsection (6) provides that the obligation to review and update the conflicts assessment as per subsection (5) continues through the life of the procurement and contract and only ceases after the publication of the procurement or contract termination notice, or notice that a dynamic market has ceased operation.

502 Subsection (7) sets out how the previous subsections apply to private utilities to take account of the fact that private utilities are not required to publish notices to terminate a dynamic market (see clause 39 - dynamic market notices), terminate procurements (see clause 55 - procurement termination notices) or terminate contracts (clause 79 - contract termination notices).

503 Subsection (8) provides relevant definitions, including details of the relevant notices that will require a contracting authority to confirm that a conflicts assessment has been prepared and revised in accordance with the provisions of this clause.

## Part 6: Below-threshold contracts

504 Part 6 of the Bill sets out rules for the conduct of procurement below the thresholds laid out in Schedule 1. As these contracts are lower value, the rules are simpler and less onerous for contracting authorities, while maintaining some basic standards in procurement.

### Clause 83: Regulated below-threshold contracts

505 Subsection (1) defines a ‘regulated below-threshold contract’ for the purposes of Part 6 as being a below-threshold contract that does not fall into one of three categories: an exempt

contract as per the rules in Schedule 2 (exempted contracts); a concession contract; or a utilities contract.

506 Subsection (2) explains that Part 6 does not apply to procurement by a school (as defined in clause 119) or to Northern Ireland devolved authorities, unless the procurement takes place under a reserved procurement arrangement or a devolved Welsh procurement arrangement.

#### Clause 84: Regulated below-threshold contracts: procedure

507 Subsection (1) states that contracting authorities conducting a regulated below-threshold procurement may not restrict the submission of tenders by reference to a supplier's suitability. This has the effect of preventing the operation of a separate suitability stage before tendering as a way of reducing the number of bidders who are invited to tender.

508 Subsection (2) establishes that assessing a supplier's suitability includes checking its legal or financial capacity or its technical ability.

509 Subsection (3) disapplies the prohibition in subsection (1) in relation to works contracts that are above the thresholds set out therein. These are the same as the GPA-related thresholds for goods and services established in Schedule 1 (threshold amounts). This is because the GPA-related works threshold is much higher, and it is appropriate that some higher value, but still below-threshold, works contracts should be able to conduct a suitability stage pre-tendering if desired.

510 Subsection (4) allows a Minister of the Crown to make regulations amending the financial thresholds in subsection (3).

511 Subsection (5) excludes from the application of this clause contracts awarded by devolved Welsh authorities or the award of a contract under devolved Welsh procurement arrangements, and contracts under frameworks.

#### Clause 85: Regulated below-threshold contracts: duty to consider small and medium-sized enterprises

512 Subsection (1) requires contracting authorities, before inviting the submission of tenders in relation to the award of a regulated below threshold contract (defined in clause 83), to have regard to the particular barriers to participation in public procurement that small and medium-sized enterprises may face, and whether those barriers can be removed or reduced. Clause 119 (Interpretation) defines what "small and medium-sized enterprises" means.

513 Subsection (2) disapplies this obligation in relation to awards made under a framework.

#### Clause 86: Regulated below-threshold contracts: notices

514 A contracting authority conducting a below-threshold procurement is not required to advertise the contract in question, but may choose to do so. Subsection (1) requires that if a contracting authority intends to advertise a procurement publicly, it must first publish a "below-threshold tender notice", as defined in subsection (5).

515 Subsection (2) disapplies the obligation in subsection (1) where the contracting authority is advertising only to a closed or restricted group of suppliers. This might include those who are part of a framework or dynamic market.

516 Subsection (3) requires that after entering into a notifiable below-threshold contract, a contracting authority must publish a contract details notice, the requirements for which will be set out in regulations made under clause 93 (Notices, documents and information:

regulations and online system) as specified in subsection (5). This must be done as soon as reasonably possible after entering into the contract.

517 Subsection (4) sets out the lower thresholds over which a contract becomes a ‘notifiable below-threshold contract’, namely £12,000 for central government authorities and £30,000 for all others. As elsewhere in the Act, these figures are inclusive of VAT.

518 Subsection (5) describes a below-threshold tender notice. This notice must state that the contracting authority intends to award a contract, and include any other information specified in regulations made under clause 93 (Notices, documents and information: regulations and online system).

519 Subsection (6) says that if the contracting authority imposes any time limits for the purposes of the procurement process the time limits must be both reasonable and the same for all suppliers.

520 Subsection (7) allows a Minister of the Crown or the Welsh Ministers to make regulations amending the “lower” thresholds specified in subsection (4), for example to take account of inflation.

### Clause 87: Regulated below-threshold contracts: implied payment terms

521 The rules in this section mirror the prompt payment rules for the main, above-threshold regime found in clauses 67 (Implied payment terms in public contracts) and 72 (Implied payment terms in sub-contracts), but adapted for the below-threshold context.

522 Subsection (1) provides that the terms set out in subsections (2) to (5) are implied into below threshold public contracts.

523 Subsection (2) sets out the requirement that a payment due to be made under a regulated below-threshold contract by the contracting authority must be paid within 30 days from the day the invoice is received or becomes due (whichever is later).

524 Subsection (3) clarifies that subsection (2) does not apply if the contracting authority considers that the invoice is invalid or disputes it.

525 Subsection (4) requires the contracting authority to notify the payee without undue delay if the invoice is considered to be invalid or is disputed.

526 Subsection (5) clarifies that payment can only be made by a third party if agreed by the payee.

527 Subsection (6) specifies that an invoice is valid if it sets out minimum required information required by subsection (7) and meets any other requirement set out in the contract. Subsection (7) provides that, in order to be valid, an invoice must contain the name of the invoicing party, a description of the goods, services or works supplied, the sum requested and a unique identification number.

528 Subsection (8) sets out that the terms in subsections (2) to (5) are implied into any contract made wholly or substantially for the purpose of performing the below threshold contract.

529 Subsection (9) clarifies that references to ‘the contracting authority’ for the purpose of subsection (8) includes bodies other than the contracting authority. For these purposes the term also includes persons who are the recipients of goods, services or works for the purposes of a contract covered by this section.

530 Subsection (10) ensures that the implied payment terms cannot be contractually restricted or overridden in below threshold contracts.

- 531 Subsection (11) clarifies that parties may agree to shorter payment terms.
- 532 Subsection (12) allows a Minister of the Crown or the Welsh Ministers to amend this clause to reduce (but not increase) the term in which payment must be made.
- 533 Subsection (13) defines payee and sets out that receipt of an invoice at an address specified in the contract is sufficient to amount to the contracting authority having received that invoice.

## Part 7: Implementation of international obligations

### Clause 88: Treaty state suppliers

- 534 Some of the international agreements to which the UK is a party include obligations on the UK to ensure that certain of its contracting authorities extend entitlements to access the UK procurement regime to the goods, services and suppliers of other States.
- 535 Subsection (1) defines a “treaty state supplier” as a supplier that benefits from an international agreement listed in Schedule 9 (treaty state suppliers (specified international agreements)). This definition applies throughout the Bill.
- 536 Subsection (2) clarifies that a supplier only meets the definition of “treaty state supplier” where the individual procurement being carried out or challenged is one for which provision is made in the relevant Schedule 9 agreement.
- 537 Subsection (3) ensures that Schedule 9 (treaty state suppliers) can be updated by secondary legislation to reflect the addition of new international agreements or amendments to existing international agreements to which the UK is a signatory. The power is exercisable by any appropriate authority.
- 538 Subsection (4) makes specific provision for the point at which the UK may be considered to be a signatory to an agreement, which is a concept used in subsection (3)(a).
- 539 Subsection (5) ensures that entitlements to benefit from an international agreement may derive from the place of origin of goods, services or works.
- 540 Subsection (6)(a) clarifies that the term treaty state suppliers does not include United Kingdom suppliers who only have rights arising from the UK being party to an international agreement.
- 541 Subsection (6)(b) clarifies any reference to a state or territory includes not only the states and territories with which an agreement may have been signed but also states and territories within an organisation of states or territories with which an agreement may have been signed. For example in respect of an agreement signed between the UK and the European Union, it would include all of the Member States of the European Union.

### Clause 89: Treaty state suppliers: non-discrimination

- 542 Subsection (1) prohibits a contracting authority from discriminating against a treaty state supplier when it carries out a procurement.
- 543 Subsection (2) explains the meaning of discrimination against a treaty state supplier. It is discrimination if the contracting authority treats a treaty state supplier less favourably than it would a UK supplier, due to the supplier’s association with its treaty state or lack of association with the UK or another treaty state.
- 544 Subsection (3) clarifies that the test of discrimination set out in subsection (2) relies on the fact that there must be no material difference in treatment between a UK supplier and

treaty state supplier.

545 Subsection (4) clarifies that a supplier may have an association with a State (being the concept used in subsection (2)) where that State is the place of origin of the goods, services or works being supplied by that supplier.

546 Subsection (5) defines a “treaty state”. It is a state, territory or group of states or territories that is party to an international agreement specified in Schedule 9 (treaty state suppliers (specified international agreements)).

547 Subsection (6) clarifies that in respect of subsection (2)(a) a treaty state is a supplier’s treaty state if the supplier is entitled to the benefits of such an international agreement by virtue of that treaty state being a party to the agreement.

548 Subsection (7) defines “United Kingdom supplier”, which includes suppliers from the British Overseas Territories and the Crown Dependencies.

### Clause 90: Treaty state suppliers: non-discrimination in Scotland

549 Subsection (1) confers on Ministers of the Crown or Scottish Ministers the power to make regulations in the future to ensure that treaty suppliers are not discriminated against in carrying out devolved procurements.

550 Subsection (2) defines “devolved procurement” as procurement carried out by a devolved Scottish authority. That term is defined in clause 2.

551 Subsection (3) ensures that the power in subsection (1) can be used to amend primary legislation, including primary legislation that is yet to be made.

## Part 8: Information and notices: general provision

### Clause 91: Pipeline notices

552 Subsection (1) establishes that this section applies to any contracting authority that considers that in the next financial year it will spend more than £100 million on certain types of contracts (defined in subsection (4)).

553 Subsection (2) requires contracting authorities that meet the threshold set out in subsection (1) to publish a notice, referred to as a pipeline notice, before the end of the period of 56 days beginning with the first day of the financial year.

554 Subsection (3) sets out that a ‘pipeline notice’ must contain certain information about any public contract with an estimated value of more than £2 million for which the contracting authority is expecting to publish a tender notice or a transparency notice, within the reporting period.

555 Subsection (4) sets out definitions of ‘financial year’, ‘relevant contracts’, ‘reporting period’ and ‘specified information’.

556 Subsection (5) allows a Minister of the Crown or the Welsh Ministers to amend the section for the purpose of changing the financial thresholds.

557 Subsection (6) stipulates that this section does not apply to private utilities or a transferred Northern Ireland authority (a concept defined in clause 110).

### Clause 92: General exemptions from duties to publish or disclose information

558 Subsection (1) sets out that when contracting authorities are obliged by any provision of the Bill (or regulations made under it) to publish or disclose information, there are two

circumstances in which they may withhold information from publication. The two permissible grounds are: (a) for the purpose of safeguarding national security; and (b) where the information concerned is sensitive commercial information. The latter exemption is only available where there is an overriding public interest in it being withheld for this reason.

559 Subsection (2) defines the phrase “sensitive commercial information”, used in subsection (1), as meaning either information which constitutes a trade secret or something that, if published or disclosed, would prejudice the commercial interests of any person (which includes legal persons such as companies, partnerships and so on).

560 Subsection (3) requires contracting authorities that withhold or redact information under this section to notify the person to whom the information would otherwise have been provided that it is being withheld or redacted and which of the two justifications is being relied upon.

561 Subsection (4) establishes that the obligation in subsection (3) does not apply in the event that the contracting authority considers that doing so would be contrary to the interests of national security.

### Clause 93: Notices, documents and information: regulations and online system

562 Subsection (1) sets out that an appropriate authority can make regulations about the form and content of notices, documents and other information that this Bill requires them to communicate and how they are published, provided or revised.

563 Subsection (2) sets out specific examples of requirements that can be included in regulations that may be made under subsection (1). These examples relate to specifying the information contained in notices and specifying the online system they are published on.

564 Subsection (3) stipulates that different rules can be made for different types of notice and for the same type of notice for different purposes.

565 Subsection (4) requires a Minister of the Crown to make arrangements to establish an online system capable of being used to publish information required to be published under this Act.

566 Subsection (5) requires that the system described in subsection (4) must make information required to be published under the Act available free of charge and accessible to people with disabilities.

### Clause 94: Electronic communications

567 This clause sets out how communications relating to a covered procurement undertaken by this legislation must be undertaken.

568 Subsection (1) requires contracting authorities to, so far as is practicable, communicate with suppliers electronically and take steps to ensure that suppliers participating in a covered procurement communicate electronically. Subsection (3) sets out an exemption from this requirement if a contracting authority is satisfied that electronic communication poses a particular security risk in the circumstances.

569 Subsection (2) requires that electronic communication systems used or required by a contracting authority must be free of charge; readily accessible to suppliers; and accessible to people with disabilities.

570 Subsection (4) sets out the definition of “electronic communication system” which for

these purposes includes any electronic systems used for the purpose of communication.

### Clause 95: Information relating to a procurement

571 Subsection (1) confers on an appropriate authority the power to make regulations requiring certain information to be shared in a particular way, including through a specified online system. This provision would allow for regulations to support the creation of a register of suppliers for the sharing of procurement information.

572 Subsection (2) ensures that regulations made under this clause may regulate how contracting authorities share information and the steps they must take to ensure that suppliers participating in a procurement share information in a particular way.

573 Subsection (3) requires contracting authorities to keep records of any communication with a supplier that is made for the purposes of or in connection with a procurement under this Bill. It does not specify how this record must be kept.

574 Subsection (4) sets out that, for the purposes of this clause, “information” means information shared under, or for a purpose relating to, this legislation.

### Clause 96: Data protection

575 Subsection (1) provides that this Bill does not authorise or require a disclosure of information that would contravene data protection legislation, as defined in subsection (2).

576 Subsection (2) defines “the data protection legislation” as being the same as the meaning set out in the Data Protection Act 2018.

## Part 9: Remedies for breach of statutory duty

### Clause 97: Duties under this Act enforceable in civil proceedings

577 Subsection (1) establishes that a contracting authority can be challenged through civil proceedings if it fails to comply with Parts 1-5 and 7 and 8 of the Act.

578 Subsection (2) says that this duty is owed to a UK supplier or a treaty state supplier (as defined in clause 88).

579 Subsection (3) sets out the requirements for a challenger to have standing to bring a claim for breach of statutory duty under Part 9. Firstly, the challenger must be a UK or treaty state supplier. Secondly, the duty is only enforceable where the supplier has suffered or is at risk of suffering loss or damage in consequence of breach of the duty (to require the claimant to demonstrate they could have been successful had the rules been followed).

580 Subsection (4) cross refers to clause 103 (Time limits on claims) which sets time limits (statutory limitation periods) that apply to claims under this Part.

581 Subsection (5) states that a contracting authority’s duty to have regard to barriers facing small and medium-sized enterprises (clause 12(4)), the National Procurement Policy Statement (clause 13(9)) and the Wales Procurement Policy Statement (clause 14(8)) fall outside the scope of Part 9. Instead, judicial review may be available where a breach of statutory duty falls outside the scope of Part 9.

582 Subsection (6) clarifies that treaty state suppliers cannot bring a claim under Part 9 for breach of statutory duty in relation to a procurement that isn’t a covered procurement (for example, below-threshold procurements).

583 Subsection (7) notes that, by way of derogation to section 2(2) and 21 the Crown

Proceedings Act 1947, injunctions can be placed on the Crown by the court, as provided for by this Part of the Act.

584 Subsection (8) defines “claimant” and “the court” for the different parts of the UK.

### Clause 98: Automatic suspension of the entry into or modification of contracts

585 Subsection (1) states that if a contracting authority has been notified that a claim has commenced during any applicable standstill period, the contracting authority is not permitted to enter into that contract/modification. This is known as the automatic suspension.

586 Subsection (2) indicates that clause 99 (interim remedies) allows the court (via court order) to lift or modify the automatic suspension.

587 Subsection (3) provides that the automatic suspension does not apply if first instance proceedings have concluded and there is no order to extend the restriction (for example, to take account of an appeal).

588 Subsection (4) makes it clear “convertible contract” in this section has a meaning given in clause 73 (modifying a public contract).

589 Subsection (5) cross refers to the standstill provisions in clauses 51 and 75.

### Clause 99: Interim remedies

590 Subsection (1) allows the court to make interim orders in relation to any claims and details the types of order that can be made. These include lifting (or modifying) the automatic suspension that prevents a contracting authority from entering into or modifying a contract, but also suspending a contracting authority’s decision or action (so that it must proceed as though it had not taken place), suspending progress of a procurement, or, after a contract has been entered into, suspending performance of the contract (or part thereof).

591 Subsection (2) sets out a test that the court must apply when determining whether to make an interim order under subsection (1). This will replace application of the common law test in the 1975 *American Cyanamid* case and will notably apply to any decision to lift the automatic suspension. The court must consider:

- a. the public interest - including both the public interest in ensuring the contract is awarded in accordance with the law and avoiding adverse consequences caused by delay in performing the contract in question (for example, to defence or security interests);
- b. the interests of suppliers - which will include the winning bidder and claimant and specifically require consideration of whether damages are an adequate remedy for the claimant;
- c. Any other issues the court may wish to consider.

592 Subsection (3) prevents the court from permitting a contract to be entered into before the end of any applicable standstill period.

593 Subsection (4) allows the court to provide for undertakings or conditions in support of any interim order made under subsection (1) (for example, a cross undertaking in damages for losses incurred by an interim measure later discharged if the claim is unsuccessful).

### Clause 100: Pre-contractual remedies

594 Subsection (1) explains that the remedies under this clause for breaches of the relevant

Parts of this legislation are only available prior to the contract/modification being entered into (they are pre-contractual remedies).

595 Subsection (2) details the types of court order that can be made at the pre-contractual stage. These include setting aside a decision or action of the contracting authority (such as an award decision); requiring the contracting authority to take a certain action (such as to reinstate a supplier or to repeat evaluation); requiring payment of damages; or anything else the court determines to be appropriate.

### Clause 101: Post-contractual remedies

596 Subsection (1) explains that the remedies under this clause for breach of statutory duty under clause 97(1) are available only where the public contract (or contract modification) has already been entered into (i.e. they are post-contractual remedies).

597 If the subsection (1) requirements are fulfilled, subsection (2) obliges the court to set aside a public contract (or a contract modification) if the specified conditions in clause 102 (post contractual remedies: set aside conditions) are also met. It also allows the court to award damages to the claimant at the post contractual stage.

598 Subsection (3) states that even where a set aside condition is met under clause 102, the court does not need to set aside the public contract (or contract modification) if it determines there is an overriding public interest in allowing the contract to continue (including defence and security interests).

599 If there is an overriding public interest preventing the public contract (or contract modification) from being set aside (notwithstanding the criteria for set aside under the Act having been satisfied), subsection (4) permits the court to reduce the duration or the scope of the contract (including as modified) instead of rendering it entirely ineffective.

600 In determining what constitutes an overriding public interest, subsection (5) only allows the court to take into account financial consequences of setting the contract aside in exceptional circumstances. The court must disregard the financial costs directly associated with i) re-procurement and any differences in price between the contract in question and any replacement, ii) the cost of delays in performance or iii) any legal obligations relating to setting aside the contract (such as sunk costs and compensation to the supplier who holds the contract).

601 Subsection (6) clarifies that a court order to set aside a public contract or contract modification means that the contract is void from the date of the order; no delay is permitted.

602 Subsection (7) establishes that a court order to set aside a framework contract does not render void any contracts which have been called off under that framework (although separate claims may be filed in relation to those contracts).

603 Subsection (8) allows the court to make further orders as may be necessary in setting aside the contract, such as determining payments due to the current supplier and making orders relating to goods already procured under the contract (for example, that they must return to the supplier).

### Clause 102: Post-contractual remedies: set aside conditions

604 This clause establishes the criteria which must be satisfied in order for the court to set aside a contract or modification (in the absence of an overriding public interest) under clause 101.

605 Subsection (1) says a set aside condition is met if the claimant was denied a proper

opportunity to seek a pre-contractual remedy (because the claimant did not have a proper opportunity to challenge the breach that led to the faulty award decision prior to the contract or modification being entered into) because:

- a. The contracting authority did not publish a contract award notice where they are obliged to do so by the legislation (and therefore the breach went undiscovered and could not be challenged). This set aside condition includes circumstances where the contracting authority wrongly classified the procurement and followed a subset of rules which do not require the notice, such as a contract wrongly classified as exempt.
- b. The contracting authority did not comply with the terms of an applicable standstill period. This includes where a contracting authority failed to apply a mandated standstill, or applied a standstill period (whether mandated or voluntary) but failed to comply with it, meaning the supplier was not given adequate time to challenge the award decision before the contract was signed. This includes where the contracting authority had wrongly determined that the contract was of a type that did not require a mandatory standstill period (for example, wrongly classifying a contract as subject to the light touch regime).
- c. The contracting authority entered into the contract where an automatic suspension or court order preventing that action was in place.
- d. The claimant first became aware of the breach when the contract award notice was published but was prevented from bringing a claim prior to the contract being signed because no standstill period applied, such as a contract under a framework, dynamic markets, light touch contracts etc.
- e. The claimant first became aware of the breach when the contract change notice was published but was prevented from bringing a claim before the modification was signed because no standstill period applied.
- f. The breach which led to the wrong supplier receiving the contract could only be discoverable after the contract/modification had been entered into (for example, because the award notice or contract change notice did not correspond with the contract or modification that was entered into, meaning that the claimant had not been aware earlier that the contract would cause them to suffer, or risk suffering, loss or damage).

606 Subsections (2) and (3) provide protection against the contract or modification being set aside if the contracting authority adopted and adhered to a voluntary standstill period, which serves to provide the claimant opportunity to raise the claim prior to the contract/amendment being entered into.

607 Subsection (4) states that for a notice to be considered published for the purposes of this section, it must have been complete and accurate, and representative of the contract/modification as awarded i.e. a contracting authority cannot claim that they did in fact publish a notice where that notice did not provide the required information.

### Clause 103: Time limits on claims

608 Subsection (1) sets out that 'specified set aside proceedings' (i.e. certain claims looking to set aside a contract or modification pursuant to Part 9) must be commenced within 30 days of when the supplier knew, or ought to have known about the alleged breach (and in any event within 6 months of the contract/modification being entered into). This means a claimant may in some instances have less than 30 days for specified set aside proceedings; for example, if the contract was signed on 1st January and the breach comes to light on

11th June, the supplier only has 20 days) as it needs to bring a challenge prior to the end of the six month period.

609 Sub-section (5) defines ‘specified set aside proceedings’ for the application of the limitation period in sub-section (1) as proceedings under clause 101(2) where a) the contract details notice was not published or b) in respect of a modification. The significance of the contract details notice is that it is usually the last point in the procurement that information is publicly provided that may inform a claim, so its absence means the threat of a set aside claim exists until the six month cut-off (to provide certainty to the parties of the contract (and the end customer) that after this point the contract cannot be made void).

610 Subsection (2) stipulates that for all other claims under Part 9, whether pre-contractual or post-contractual (and including for set aside of a contract for which a contract details notice was published), proceedings must commence within 30 days of the alleged breach being discovered (or when it should have been discovered).

611 Subsections (3) and (4) permits the court to extend the 30 days limitation period to a maximum of three months if it considers there is a good reason for doing so (but not to extend the six-month cut off for set aside).

## Part 10: Procurement oversight

612 Part 10 of the Bill provides powers for the investigation into the procurement activities of contracting authorities and allows for the issuing of recommendations and guidance. It replaces and builds on existing powers for investigation held by the Minister for the Cabinet Office or Secretary of State under the Small Business, Enterprise and Employment Act 2015. Government departments are specifically excluded from the investigatory powers as Ministers already have non-statutory powers that allow them oversight of contracting activities of government departments and additional powers under the Bill are not required.

### Clause 104: Procurement investigations

613 Subsection (1) gives an appropriate authority the power to investigate whether a contracting authority is complying with the requirements of this legislation (and any regulations made under it).

614 Subsection (2) provides that the appropriate authority may require the contracting authority to provide documents (which includes information, see subsection (5)) or give other assistance. The appropriate authority must issue the contracting authority with a notice which specifies or describes the documents or assistance required and can only request those documents reasonably required for the investigation or such assistance as is reasonable in the circumstances.

615 Subsection (3) sets out that the contracting authority must comply with the notice requirements by the deadline specified in the notice. The deadline must be at least 30 days, but can be longer if the appropriate authority agrees.

616 Subsection (4) sets out that the investigating authority can choose to publish the results of a procurement investigation including any recommendation subsequently made.

617 Subsection (5) provides that such investigations are to be called “procurement investigations” and may be carried out with regard to any contracting authority other than (a) a Minister of the Crown or a government department; (b) the Welsh Ministers; (c) a Northern Ireland department; (d) the Corporate Officer for the House of Commons; (e)

the Corporate Officer for the House of Lords; (f) the Senedd Commission; (g) the Northern Ireland Assembly or (h) a private utility. The subsection also specifies that only documents within the possession or control of the contracting authority can be requested.

### Clause 105: Recommendations following procurement investigations

618 Subsection (1) sets out the circumstances in which a statutory recommendation, known as a “section 105 recommendation”, can be made. A section 105 recommendation can only follow a procurement investigation by an appropriate authority (under clause 104 (procurement investigations)), and can only be made to a contracting authority that was the subject of a procurement investigation where the appropriate authority considers, in light of the results of that investigation, that the contracting authority has breached the requirements of the Bill, or is likely to do so. The appropriate authority can draw on results of more than one procurement investigation in coming to this conclusion.

619 Subsection (2) and (3) set out the content of a section 105 recommendation. A section 105 recommendation details the action the contracting authority should take so that it complies with the requirements of the Bill, and the timeframe in which such action should take place. A section 105 recommendation must not relate to how the contracting authority has regard to procurement objectives (set out in clause 12 (procurement objectives)), the national procurement policy statement (as per clause 13 (the national procurement policy statement)) or the Wales procurement policy statement (as per clause 14 (the Wales procurement policy statement)), or specific decisions in relation to a particular procurement.

620 Subsection (4) provides that contracting authorities who received a section 105 recommendation must have regard to it.

621 Subsection (5) sets out that where a section 105 recommendation specifies, the contracting authority must provide a progress report to the appropriate authority, at specified intervals.

622 Subsection (6) states that a progress report must set out the action the contracting authority has taken as a result of the section 105 recommendation, whether that is the action specified by the appropriate authority or otherwise. Where the contracting authority has taken no action the progress report must include a statement to that effect.

623 Subsection (7) provides that if a contracting authority has not taken any action after the receipt of a section 105 recommendation, or has taken different action to that recommended, it must provide its reasons for doing so in the progress report.

624 Subsection (8) confirms that the appropriate authority may publish the progress report submitted by the contracting authority, or notice that the contracting authority has failed to provide a progress report if that is the case.

625 Subsection (9) provides relevant definitions.

### Clause 106: Guidance following procurement investigations

626 Subsection (1) states that an appropriate authority may decide to publish guidance for contracting authorities following a procurement investigation under clause 104 (procurement investigations). Such guidance will relate to lessons learned from investigations to assist in compliance with the Bill by contracting authorities generally.

627 Subsection (2) states that contracting authorities must have regard to this published guidance when carrying out their procurement obligations under the Bill.

628 Subsection (3) ensures that contracting authorities are only obliged to have regard to

guidance issued in accordance with the limitations on Ministers' exercise of powers provided in Part 11. For example, a devolved Welsh contracting authority need not have regard to guidance issued by a Northern Ireland Department.

## Part 11: Appropriate authorities and cross-border procurement

### Clause 107: Welsh Ministers: restrictions on the exercise of powers

629 This clause places restrictions on the Welsh Ministers when exercising powers under this Bill.

630 Subsection (1) sets out that the powers granted to Welsh Ministers under the Bill only apply to certain contracting authorities and procurement under a devolved Welsh procurement arrangement. The contracting authorities to which the powers apply are devolved Welsh authorities (within the meaning given in section 157A of the Government of Wales Act 2006) and other authorities which the Bill requires are to be treated as devolved Welsh authorities despite falling outside the definition in the Government of Wales Act (see subsection (2)).

631 Subsection (2) sets out that contracting authorities that are public undertakings or private utilities operating solely in Wales, and whose activities are wholly or mainly activities that do not relate to reserved matters, are to be treated as a devolved Welsh authority.

632 Subsection (3) relates to contracting authorities other than public undertakings or private utilities whose functions are both exercisable wholly or mainly in relation to Wales and are not wholly or mainly reserved. This will therefore include contracting authorities which operate, to some extent, outside Wales. These authorities are to be treated as devolved Welsh authorities when carrying out procurement for the purpose of exercising a function wholly in relation to Wales. In respect of a contract that relates to more than just functions in Wales, the authority would not be a devolved Welsh authority.

633 Subsection (4) sets out that any reference to devolved Welsh authorities in the Bill also includes the authorities which this clause states should be treated as such.

634 Subsection (5) defines certain concepts used in this clause.

### Clause 108: Northern Ireland department: restrictions on the exercise of powers

635 This clause places restrictions on Northern Ireland departments when exercising powers under this Bill.

636 Subsection (1) sets out that the powers granted to a Northern Ireland Department under the Bill only apply to certain contracting authorities and procurement under a transferred Northern Ireland procurement arrangement. The contracting authorities in relation to which the powers may be exercised are transferred Northern Ireland authorities and public undertakings or private utilities which are not transferred Northern Ireland authorities but are to be treated as such (see subsection (2)).

637 Subsection (2) determines that an authority is to be treated as a transferred Northern Ireland authority if its functions are exercisable only in or as regards Northern Ireland and are wholly or mainly functions that do not relate to reserved or excepted matters within the meaning given by the Northern Ireland Act 1998.

638 Subsection (3) establishes that a public undertaking or private utility is to be treated as a transferred Northern Ireland authority where it operates only in or as regards Northern

Ireland and its activities are wholly or mainly activities that do not relate to excepted or reserved matters.

639 Subsection (4) sets out that any reference to a transferred Northern Ireland authority in the Bill also includes the authorities which this clause states should be treated as such.

### Clause 109: Minister of the Crown: restrictions on the exercise of powers

640 This clause sets out areas where a Minister of the Crown may not exercise functions because they fall within the regulatory ambit of the Welsh Ministers or a Northern Ireland Department. It also sets out how, where two bodies can both exercise powers, those concurrent powers are to be exercised.

641 Subsection (1) establishes that a Minister of the Crown may only exercise functions for the purposes of regulating a devolved Welsh authority in relation to procurement under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement (but see subsections (2) and (6)). Those concepts are defined in clause 110 (definitions relating to procurement arrangements).

642 Subsection (2) disapplies the limitation on a Minister of the Crown set out in subsection (1) in relation to powers exercised under clause 66 (electronic invoicing: implied term) and clause 106 (guidance following procurement investigations).

643 Subsection (3) provides that a Minister of the Crown requires the consent of Welsh Ministers to make regulations under clause 66 or publish guidance under clause 106 for the purpose of regulating a Welsh devolved authority. Consent is not required when the regulations or guidance relates to a reserved procurement arrangement or a devolved Northern Ireland procurement arrangement. Both of these concepts are defined in clause 110 (definitions relating to procurement arrangements).

644 Subsection (4) requires that a Minister of the Crown may only make regulations under this Bill that regulate a transferred Northern Ireland authority, with the consent of a Northern Ireland Department, unless the regulations relate to a reserved procurement arrangement or a devolved Welsh procurement arrangement. Both of these concepts are defined in clause 110 (definitions relating to procurement arrangements).

645 Subsection (5) requires that a Minister of the Crown may only publish guidance under clause 106 for the purposes of regulating a Northern Ireland department with the consent of a Northern Ireland Department. This consent is not required when the guidance relates to a reserved procurement arrangement or a devolved Welsh procurement arrangement.

646 Subsection (6) sets out that the restrictions on a Minister of the Crown in subsections (1) and (4) do not apply in relation to any power under clauses 88 (treaty-state suppliers), 90 (treaty-state suppliers: non-discrimination in Scotland), 121 (power to make consequential provision) and 123 (commencement).

### Clause 110: Definitions relating to procurement arrangements

647 Subsection (1) defines what is meant by a contract being awarded under a procurement arrangement. This covers the award of contracts under frameworks and dynamic markets, procurements undertaken jointly by contracting authorities and the award of contracts under arrangements set up by centralised procurement authorities.

648 Subsections (2), (3) and (4) define when a procurement arrangement is a devolved Welsh procurement arrangement, a transferred Northern Ireland procurement arrangement or a devolved Scottish procurement arrangement. This is primarily determined by whether the arrangement was established by a devolved Welsh authority, a transferred Northern

Ireland authority or a devolved Scottish authority or, for joint procurements, where one of those is designated as the lead authority.

649 Subsection (5) defines when a procurement arrangement is a reserved procurement arrangement.

650 Subsection (6) provides a number of definitions relevant to this provision.

### Clause 111: Powers relating to procurement arrangements

651 Subsection (1) provides powers for a Minister of the Crown to make provision for Scottish devolved authorities to access procurement arrangements established under the Bill and to undertake joint procurements with contracting authorities within the scope of the Bill. This provision can extend to amendment of the Act.

652 Subsection (2) provides powers for a Minister of the Crown to disapply provisions of the Bill in respect of devolved Scottish procurement arrangements.

653 Subsection (3) provides powers for a Minister of the Crown and Scottish Ministers to amend Scottish procurement legislation to allow contracting authorities within the scope of the Bill to access devolved Scottish procurement arrangements.

654 Subsection (4) defines “Scottish procurement legislation”.

## Part 12: Amendments and repeals

### Clause 112: Disapplication of duty in section 17 of the Local Government Act 1988

655 Section 17 of the Local Government Act 1988 places a duty on certain public authorities not to take into account non-commercial considerations when awarding and managing certain contracts.

656 Subsection (1) amends section 17(11) of the Local Government Act 1988 to ensure that authorities that are subject to section 17 are not prevented by that section from complying with their obligations under this legislation.

657 Subsection (2) provides that a Minister of the Crown or the Welsh Ministers may via regulations disapply duties under section 17 of the Local Government Act 1988. An example of when a Minister of the Crown may use this power includes regulations allowing relevant authorities to reserve below-threshold procurements by location and/or to SMEs or VCSEs.

658 Subsection (3) outlines that the duty may be disappplied as it relates to: all relevant authorities, all functions, all contracts and all non-commercial matters that are regulated by section 17 of the 1988 Act or those that are specified.

659 Subsection (4) explains that “relevant authority” means an authority to which section 17 of the 1988 Act applies, other than a devolved Scottish authority, and that “specified” means specified, or of a description specified, in the regulations made under this clause.

### Clause 113: Single source defence contracts

660 This clause points to Schedule 10, which makes amendments to the Defence Reform Act 2014.

### Clause 114: Concurrent powers and the Government of Wales Act 2006

661 This clause amends provision in the Government of Wales Act 2006 relating to general restrictions on devolved competence. This provision removes, in respect of the

Procurement Act 2022, the prohibitions in Schedule 7B of the Government of Wales Act 2006 on the Senedd legislating for reserved authorities and amending functions of a Minister of the Crown that relate to qualified devolved functions.

### Clause 115: Repeals etc.

662 Subsection (1) of this clause refers to Schedule 11, which lists the primary and secondary legislation which will be repealed or revoked by this bill. Subsection (2) limits the scope of certain Scottish secondary legislation such that it only applies in relation to devolved Scottish authorities.

## Part 13: General

### Clause 116: Application of this Act to procurement by NHS England

663 This clause disapplies sections 79 and 80 of the Health and Care Act 2002, removing the power to make regulations under that act in respect of healthcare procurement. The clause reiterates that the Bill will apply to procurement by NHS England.

### Clause 117: Power to amend this Act in relation to private utilities

664 Subsection (1) provides a power for an appropriate authority to make regulations to reduce the regulation of private utilities under the Act.

665 Subsection (2) provides a non-exhaustive list of how regulations may be used, for example to disapply requirements or modify them so as to reduce a particular burden or the overall burden.

666 Subsection (3) sets out who the appropriate authority must consult with before making regulations under this power.

667 Subsection (4) sets out some things that might be considered to be a “burden”, such as those that result in financial cost, administrative inconvenience or obstacles to profitability, productivity or efficiency. This is not an exhaustive list.

### Clause 118: Regulations

668 This clause sets out the procedure that applies where regulations are made under this legislation.

669 Subsection (1) sets out that any power to make regulations by a Minister of the Crown or the Welsh Ministers, is exercisable by statutory instrument, and any power to make regulations by a Northern Ireland department is exercisable by statutory rule.

670 Subsection (2) refers to how regulations may be made by the Scottish Ministers under the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

671 Subsection (3) clarifies the scope of regulation making powers under this legislation, including that they may make different provision for different circumstances, general or specific provision, incidental, supplementary or consequential provision or transitional, transitory and saving provision.

672 Subsection (4) lists the regulation making powers in this legislation that are exercisable by a Minister of the Crown, subject to the affirmative procedure.

673 Subsections (5) and (6) establish that, with the exception of regulations made under clauses 42 (direct award to protect life, etc.) and 123 (commencement), all other regulation-making powers in this legislation that are exercisable by a Minister of the Crown are subject to the negative procedure.

674 Subsections (7)-(9) set out the procedure for making Regulations under clause 42 (direct award to protect life, etc.). Subsection (7) requires that unless preserved by the approval of a resolution in each House of Parliament, such regulations cease to have effect after 28 days.

675 Subsections (8) and (9) make provision for how that period is to be calculated and the consequences of a failure to make such approvals.

676 Subsection (10) lists the regulation-making powers in this legislation that are exercisable by Welsh Ministers, subject to the affirmative procedure.

677 Subsection (11) establishes that all other regulation-making powers in this legislation that are exercisable by Welsh Ministers are subject to the negative procedure.

678 Subsection (12) lists the regulation-making powers in this legislation that are exercisable by a Northern Ireland department, subject to the affirmative procedure.

679 Subsection (13) establishes that all other regulation-making powers in this legislation that are exercisable by a Northern Ireland department are subject to the negative procedure.

680 Subsection (14) sets out that regulations made by the Scottish Ministers are subject to the affirmative procedure.

### Clause 119: Interpretation

681 This clause defines certain terms used (but not defined elsewhere) in the Bill.

### Clause 120: Index of defined expressions

682 This clause provides a table which cross-references expressions used elsewhere in the Bill to the relevant provisions where they are defined.

### Clause 121: Power to make consequential, etc., provision

683 Subsection (1) provides for an appropriate authority to make regulations that make provision that is consequential, supplementary or incidental to any provision in this legislation.

684 Subsection (2) confirms that these regulations may modify primary legislation.

### Clause 122: Extent

685 This clause confirms that the legislation extends to England and Wales, Scotland and Northern Ireland.

### Clause 123: Commencement

686 This clause provides when and how the provisions of this legislation are to come into force. In accordance with subsection (1), Part 13 will come into force on the day on which the Act is passed. Subsection (2) provides the power for other provisions to be brought into force by regulations which may allow for different dates for different purposes and which may also make transitional, transitory or saving provision.

### Clause 124: Short title

687 This clause confirms that the short title of the legislation will be the Procurement Act 2022.

## Schedule 1: Threshold amounts

688 Paragraph 1 contains a table setting out the various thresholds applicable to the different categories of contract. Whether the estimated value of a contract is above or below the relevant threshold determines whether it is subject to the main regime for public contracts

set out in the Bill, or the below-threshold regime contained in Part 6.

- 689 Paragraph 2 gives an appropriate authority the power to make regulations changing those thresholds in paragraph 1 that are linked to the thresholds in the World Trade Organisation's Agreement on Government Procurement ('GPA'). The UK is a signatory to the GPA and as such is required to give access to its public procurement markets to suppliers from other GPA parties, above the thresholds set out in the relevant rows of paragraph 1. The GPA thresholds are updated every two years, meaning the thresholds in paragraph 1 must also be updated.
- 690 Furthermore, it has been standard practice to update the defence and security thresholds in paragraph 1 to keep pace with the GPA thresholds (although there is no GPA obligation to do so). If that policy is maintained, the power in paragraph 2 may be used to update the defence and security thresholds similarly.
- 691 Meanwhile paragraph 3 provides a separate power to update the 'light touch' thresholds listed in the relevant rows of the table in paragraph 1. These thresholds are not determined by international obligations and as such will be updated for different purposes, for example to allow for inflation or reflect changing priorities for this category of contract. This power may also be used to update defence and security thresholds where a decision is made for them not to track the GPA thresholds.
- 692 Paragraph 4 contains a definition of the term 'works contract'. It is defined as being a contract whose main purpose is either the carrying out of "works", which is itself defined in paragraph 5, or one that leads to the carrying out of works under a separate contract but complying with specifications set out in the main contract. This might, for example, capture a situation where a local authority enters into a contract for the sale of land to a developer (which would not be a public contract), but stipulates that the resulting private development must also contain a public library for the benefit of the community.
- 693 Paragraph 5(1) defines other important terms used in this Schedule. It also contains two regulation-making powers permitting an appropriate authority to list: (a) those contracting authorities that are 'central government authorities' for the purposes of this Schedule; and (b) those categories of activity that are to count as 'works' for the purposes of defining a 'works contract'. Paragraph 5(2) clarifies that references to contracts for goods, services or works and works contracts include references to frameworks for the future award of such contracts. The relevant threshold for a framework therefore depends on the types of contracts to be awarded under the framework.

## Schedule 2: Exempted contracts

### General

- 694 Paragraph 1 explains that this Schedule lists what is an exempted contract. The exemptions are not mutually exclusive and a contract can be an exempted contract if it falls under multiple paragraphs of this Schedule. If a contract is exempted, its award and management will not be subject to any of the legislation (unless it is an "international organisation procurement", where some obligations apply).
- 695 Sub-paragraph (2) makes provision about contracts that partly fall within an exemption to determine when an exemption applies in those cases. This provision is intended to prevent situations where contracts are inappropriately amalgamated in order to take advantage of an exemption to bring the contract outside the scope of the procurement rules. The effect of this clause is that where the main purpose of the contract does not fall within an exemption listed in Schedule 2 (but another element of the contract may fall

within one of the exemptions), the whole of that contract will not be an exempted contract.

### **Vertical arrangements**

696 Paragraph 2 exempts “quasi in-house awards”, arising between a contracting authority and an organisation that is connected “vertically” with the contracting authority, i.e. with a body which has a separate legal personality but is under its control, called a “controlled person”. A typical example may be between a trading company set up by a local authority (or its subsidiary authority), or a group of local authorities (or their subsidiary authority) to fulfil a specific task, such as carrying out waste treatment and collection for the authority.

697 Sub-paragraph (2) sets out the tests to ascertain whether a body is a “controlled person”. These tests include calculations of how much of the activities are for or in the control of the contracting authority.

698 Sub-paragraph (3) confirms the body must be owned wholly within the public sector.

699 Sub-paragraph (4) clarifies the meaning of ‘parent undertaking’ and refers to definition within the Companies Act 2006 amended to include any ‘person’ which is a reference to the definition of ‘person’ within the Interpretation Act 1978.

700 Sub-paragraph (5) explains that being a director, member or officer alone does not constitute ‘decisive influence’; for the purpose of the tests. Other factors must exist in order to confirm there is ‘decisive influence’.

701 Sub-paragraph (6) provides for an appropriate authority to make the regulations that set out the calculation for how much of the activities are for or in the control of the contracting authority within sub-paragraph (2).

702 Sub-paragraph (7) explains that for joint control, one representative may represent more than one contracting authority on the controlled person’s board, or equivalent decision-making body.

703 Sub-paragraph (8) explains that the term “contracting authority” in this paragraph does not include references to a public undertaking or a private utility. (A public undertaking or private utility may instead use the exemption at paragraph 32 of this Schedule).

### **Horizontal arrangements**

704 Paragraph 3 exempts awards where two or more contracting authorities cooperate to deliver a service, i.e. where the association between the contracting authorities is “horizontal”. An example may be a contractual arrangement between the parties aimed at the joint performance of a common task related to their public functions, such as waste disposal across several contracting authority areas.

705 Sub-paragraph (2) sets out the tests to ascertain whether there is a ‘horizontal arrangement’. These tests include a calculation of how much of the proposed activities are intended to be associated with the authorities’ public functions. The purpose being to limit the use of the exemption to activities that are substantially within the public interest and public functions of the authority.

706 Sub-paragraph (3) provides for an appropriate authority to make the regulations that set out the calculation for how much of the proposed activities are intended to be associated with the authorities’ public functions.

707 Sub-paragraph (4) explains that the term “contracting authority” in this paragraph does

not include references to a public undertaking or a private utility. (A public undertaking or private utility may instead use the exemption at paragraph 31 of this Schedule).

### **Land and buildings etc.**

708 Paragraph 4 exempts the acquisition by a contracting authority of land, buildings, any interest in land or buildings, or 'complete works'. This includes ownership rights or non-ownership rights.

709 Sub-paragraph (2) refers to Schedule 1 for the definition of 'complete works'.

### **Broadcasting**

710 Paragraph 5 exempts contracts by a contracting authority associated with broadcasting to the general public (including the acquisition, development, production or co-production of programme material), regardless of the means by which that may be broadcast. Examples where this may be applied are by contracting authorities in the media industry to commission public contracts for broadcast content through creative competition, or to support for example encouraging regional development or production of minority language content.

711 Paragraph 6 exempts contracts for broadcast media services and on-demand services, and contracts for broadcasting time. The reference to "broadcasting time" relates to publicly-owned broadcasters commissioning programming or selling broadcasting time.

### **Electronic communications services**

712 Paragraphs 7 and 8 exempt contracts which facilitate or permit a contracting authority to provide the general public with electronic communications service or to provide or maintain an electronic communications network (that services the public).

### **Alternative dispute resolution**

713 Paragraph 9 exempts contracts for various forms of dispute resolution purchased by a contracting authority. These contracts are generally agreed on or selected by the participating parties and so not suitable for competition.

### **Legal services**

714 Paragraph 10 exempts contracts for 'exempt legal services' purchased by a contracting authority in specific circumstances where the nature of the legal services is unsuitable for competition (for example where the court or statute directs for a particular legal adviser to be appointed). The exemption does not cover service contracts for other legal services, which are covered by the Act.

715 Sub-paragraph (2) lists the circumstances for what is meant by 'exempt legal services', including: legal representation in judicial proceedings (such as a court) or in a dispute resolution process; pre-litigation advice by a lawyer; services provided by a notary to certify or authenticate documents where that is required legally; or any other legal service where that service is required to be performed by a court or tribunal or by law.

716 Sub-paragraphs (3) provides definitions or directions to definitions of terms used in this paragraph.

### **Financial services**

717 Paragraph 11 exempts contracts for loans to a contracting authority.

718 Paragraph 12 exempts contracts awarded to an investment firm (or equivalent) where that firm is providing an investment or associated financial service (such as relating to the issue, sale, transfer of securities).

719 Paragraph 13 exempts contracts for services by the Bank of England.

### **Employment**

720 Paragraphs 14 and 15 exempt employment contracts, including workers' contracts, and other public appointments which may not be construed as an employment or workers' contract (such as the appointment of non-executive directors, or chairpersons of public enquiries). The exemption does not cover service contracts for personnel placement and supply services, which are covered by the Bill.

### **Emergency services**

721 Paragraph 16 exempts contracts for various categories of emergency services (including nuclear safety services, rescue services, civil defence services, ambulance or fire brigade related service) performed by non-profit organisations or associations whose purpose is to undertake social tasks.

### **Public passenger transport services**

722 Paragraph 17 exempts contracts that are awarded under the "public service obligations regulations" which are defined in section 136(11) of the Railways Act 1993. This provision operates to exempt from the Act certain public passenger transport services.

### **Research and development services**

723 Paragraph 18 exempts contracts for 'research and development services' funded by contracting authorities that are intended for general public benefit provided the contract does not generate goods or works that might otherwise flow from the research and development activity (i.e. pure research and development with no commercial or commercialisation element).

724 Sub-paragraph (2) sets out activities meant by 'research and development services'; while sub-paragraph (3) sets out what a contract may involve that means the contract is no longer considered a purely research and development contract, where there are elements that would allow commercialisation of the research (for example, tools or industrial processes to enable manufacture).

725 There is a degree of overlap between this exemption and the direct award justifications for research and development. Direct award would need to be used where the research and development programme also involved goods or works or developing a prototype to test industrial processes to manufacture goods or works arising from the research and development.

### **International agreements and organisations**

726 Paragraph 19 exempts contracts which the contracting authority is obliged to award in accordance with procurement rules of an international organisation (when the UK is a member), or following a process set out in an international agreement (of which the UK is a signatory) to enable cooperation with international partners.

727 Paragraph 20 also provides that the contracting authority may award a contract under international obligations even where the award rules would be different to those otherwise set out in the Act. While contracts awarded relating to stationing military personnel are covered under this exemption, defence and security contracts are dealt with separately (in accordance with limits for this exemption set out in the GPA).

### **National security**

728 Paragraph 21 exempts contracts that a contracting authority considers should not, in the interests of national security, be subject to at least some of the requirements of this

legislation. Although the contracting authority need only identify some of this legislation that the contract should not be subject to for this exemption to apply, the exemption is from all obligations under this legislation, as with the other exemptions.

### **Intelligence activities**

729 Paragraph 22 exempts contracts for the purposes of intelligence activities. While the intelligence services (SIS, Security Service and GCHQ) are excluded separately from this legislation overall, this provides an exemption for contracting authorities who are not intelligence organisations, but who have security functions or are supporting intelligence activities.

### **Defence and security contracts**

730 Paragraph 23 exempts defence and security contracts placed with suppliers located outside of the United Kingdom where the armed forces are deployed and the operational needs of the armed forces require the contract to be placed with such a supplier.

731 Paragraph 24 exempts a defence and security contract placed with a supplier located outside of the United Kingdom where the armed forces have a military presence and where the state or territory in which they are located requires a contract to be placed with a particular supplier.

732 Paragraph 25 exempts defence and security contracts where the supplier is another government.

733 Paragraph 26 exempts defence and security contracts which are awarded under a procedure of an international organisation of which the UK is a member.

734 Paragraph 27 exempts defence and security contracts awarded under an arrangement between the United Kingdom and another state or territory where the purpose of the arrangement is for the joint development of a new product or the exploitation of that product once developed.

### **Utilities contracts**

735 Paragraph 28 exempts utilities contracts made for the purpose of resale or lease to third parties, provided the utility enjoys no special or exclusive right (as defined in clause 6(4)) to sell or lease the subject-matter of such contracts and other entities are free to sell or lease it under the same conditions as the utility. This is because it is considered that in such scenarios the utility will be operating in a competitive market. This exemption is not available to utilities acting as centralised purchasing authorities.

736 Paragraph 29 exempts utilities contracts where water is supplied to a utility that is carrying out a water related utility activity (described in Schedule 4, paragraph 3(1)(a) or (b)).

737 Paragraph 30 exempts utilities contracts where energy or fuels for the production of energy is supplied to a utility that is carrying out a utility activity relating to gas and heat, electricity and oil and gas extraction and exploration for or extraction of coal or other solid fuels. These utility activities are set out in paragraphs 1, 2, or 6 of Schedule 4. The exemption applies only to purchases of energy or fuel for the production of energy, and not to purchases made for other reasons, for example, purchases of fuel for transport.

738 Paragraph 31(1) exempts utilities contracts between utilities and relevant joint ventures to which they are a party. The joint venture must have been formed for the purpose of carrying out a utility activity and be committed to doing so for a period of at least three years. In addition, the utilities forming the joint venture must remain members of the joint

venture for a minimum of three years after the date of the agreement. Paragraph 31(2) defines a “relevant joint venture”, which is used in paragraphs 31(1) and 32(2) of this Schedule. A relevant joint venture is a joint venture that was formed for the purpose of carrying out a utility activity and is comprised only of utilities.

739 Paragraph 32(1) exempts utilities contracts awarded:

- a) by a utility to a person affiliated with the utility; and
- b) by a utility that is a relevant joint venture to a person affiliated with any of the members of the relevant joint venture, provided the turnover test is met when considering the affiliated person.

740 Paragraph 32(2) explains, by reference to the Companies Act 2006, what it means if a person is “affiliated” with another. A person is affiliated with another if the person is in a “group undertaking”, as defined in section 1161(5) of that Act, with that person. Paragraph 32(2) provides that this would be the case even where one of them is not an “undertaking” as defined in section 1161(1) of that Act - for example, where one is not a company.

741 Paragraphs 32(3) to (5) explain the turnover test to be met, with further details to be set out in regulations.

742 Paragraph 33 ensures the exemptions at Part 2 of Schedule 4 apply to exempt those contracts from the Bill. Public undertakings and private utilities are exempt by the operation of Schedule 4, but this amendment is required to ensure public authorities are exempt from the Bill entirely where the exemption applies.

### **Concession contracts**

743 Paragraph 34 exempts concession contracts for utility activities relating to water services described in Schedule 4 paragraph 3(1) or (2).

744 Paragraph 35 exempts concession contracts for scheduled air services for up to 4 years within the UK or the UK and Gibraltar and which are operated under an exclusive licence and subject to minimum service requirements. The Secretary of State must consider that the air services are needed to maintain sufficient transport links between the areas serviced. This exemption is intended to cover the situation where an exclusive public service obligation is put in place by the Secretary of State under Article 16 of Regulation (EC) No. 1008/2008 where there is a need for air services for public interest reasons where availability of other modes of transport / other air services is insufficient to serve the transport needs of the region. Whilst the Secretary of State imposes the obligation, once it is imposed, contracts to deliver the air services can be awarded by any contracting authority.

745 Paragraph 36 exempts concession contracts for the provision of public passenger transport services.

## **Schedule 3: Estimating the value of a contract**

746 This Schedule is referred to in clause 4 (valuation of contracts) and sets out how contracting authorities must estimate the value of a contract for the purposes of determining whether it is subject to the main regime for public contracts set out in this Bill or the below-threshold regime in Part 6.

### **General Rule**

747 Paragraph 1(1) states that a contracting authority must estimate the value of a contract as

the maximum amount it could pay under the contract. Paragraph 1(2) sets out a list of matters to be included when estimating the maximum amount payable, such as VAT, payments in kind, options to renew, fees, interest and so on. Paragraph 1(3) provides that a contracting authority must take into account all of the facts that are material to the estimate and available to the authority at the time it makes the estimate.

### **Frameworks**

748 Paragraph 2(1) provides that a contracting authority must estimate the value of a framework as the sum of the estimated values of all the contracts that may be awarded in accordance with that framework. Paragraph 2(2) states that, where an open framework is re-opened, as per clause 49, the estimated value of the re-opened framework must include the value of all of the contracts already awarded under the framework. Paragraph 2(3) provides that ‘framework’ has the meaning given in clause 45(2) (frameworks).

### **Concession contracts**

749 Paragraph 3(1) makes it clear that the valuation rules in paragraph 1 do not apply to the valuation of a concession contract.

750 Paragraph 3(2) obliges the contracting authority to estimate the value of a concession contract as the maximum amount the supplier could expect to receive as a result of the contract, thereby recognising that some revenues may come from sources other than payments by the contracting authority.

751 Paragraph 3(3) sets out a list of the amounts a supplier could expect to receive. This includes income received from any party from the ability to exploit the works or services; this income could be monetary or non-monetary. The value of any goods, services or works provided by the contracting authority under the contract are also to be included in the valuation. VAT payable on the supply of services or works, any value of options included in the contract for additional services or works or for extension of the contract are all to be valued, plus any premiums, fees, commission or interest that the supplier could receive in delivering the contract and amounts received on the sale of assets held by the supplier.

### **Anti-avoidance**

752 Paragraph 4 provides an anti-avoidance mechanism to prevent contracting authorities from artificially subdividing contracts for the purposes of arriving at a below-threshold valuation. The effect of subparagraphs (1) and (2) is that contracts that can be reasonably supplied under a single contract should be aggregated for the purposes of the valuation, unless the authority has good reasons for not doing so.

### **Cases where estimate not possible**

753 Paragraph 5 provides that where a contracting authority is unable to estimate the value of a contract, it should be treated as being above threshold.

## **Schedule 4: Utility activities**

### **Part 1: Activities that are utility activities**

754 Part 1 of Schedule 4 defines the utility activities that are covered by the Act.

### **Gas and heat**

755 Paragraph 1 sets out when activities associated with gas and heat are utility activities.

756 Subparagraph (1) specifies that the provision or operation of fixed networks intended to

provide a service to the public in connection with the production, transport or distribution of gas or heat and the supply of gas or heat to such networks are utility activities.

757 Sub-paragraph (2) sets out circumstances where the supply of gas and heat to a network is not considered a utility activity, all of which must be met for the exemption to apply. These are: that the operator (the supplier of gas or heat) is a private utility or public undertaking; that the operator produces the gas or heat as an unavoidable by-product when carrying out an activity that is not a “specified activity”; and the amount of gas or heat supplied to the network represents not more than 20% of the operator’s turnover amount. The specified activities (which are referred to in this paragraph and paragraphs 2 and 3) are set out in paragraph 9 of this Schedule.

758 Sub-paragraphs (3) and (4) provide that an appropriate authority may make regulations setting out how to calculate the amount referred to in sub-paragraph (2)(c) and set out a non-exhaustive list of provisions that may be included in those regulations.

### **Electricity**

759 Paragraph 2 sets out when activities associated with electricity are utility activities.

760 Sub-paragraph (1) specifies that the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity and the supply of electricity to such networks are utility activities.

761 Sub-paragraph (2) sets out circumstances where the supply of electricity to a network is not considered a utility activity, all of which must be met for the exemption to apply. These are: that the operator (the supplier of electricity) is a private utility or public undertaking; the operator produces electricity because it needs the electricity to do something other than a specified activity; the electricity supplied is only the excess from such production that the operator has not used itself; and the electricity supplied represents not more than 30% of all the energy produced by the operator.

762 Sub-paragraphs (3) and (4) provide that an appropriate authority may make regulations setting out how to calculate the amount referred to in sub-paragraph (2)(d) and set out a non-exhaustive list of provisions that may be included in those regulations.

### **Water**

763 Paragraph 3 sets out when activities associated with water are utility activities.

764 Sub-paragraph (1) specifies that the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water and the supply of drinking water to such networks are utility activities.

765 Sub-paragraph (2) sets out further activities which, to the extent that they are carried out by a person that also carries out the activities referred to in sub-paragraph (1), are also utility activities. These are: any activity connected with a hydraulic engineering project, irrigation or land drainage, provided the condition in sub-paragraph (3) is met; and any activity connected with the disposal or treatment of sewage.

766 Sub-paragraph (3) sets out the condition referred to in sub-paragraph (2), which is that a person carrying out the activity must reasonably expect that more than 20% of the total water made available under sub-paragraph (2) is to be supplied as drinking water to a network.

767 Sub-paragraph (4) sets out situations where the supply of drinking water is not considered a utility activity, all of which must be met in order for the exemption to apply. These are: that the operator (the supplier of drinking water) is a private utility or public undertaking; the operator produces drinking water because it needs the drinking water to do something other than a specified activity; the drinking water supplied is only the excess from such production that the operator has not used itself; and the drinking water supplied represents not more than 30% of all the drinking water produced by the operator.

768 Sub-paragraphs (5) and (6) provide that an appropriate authority may make regulations setting out how to calculate the amount referred to in paragraph 4(d) and set out a non-exhaustive list of provisions that may be included in those regulations.

### **Transport**

769 Paragraph 4 sets out when activities associated with transport are utility activities and specifies that the provision or operation of a network providing a service to the general public for transport is a utility activity. Such a network may be provided by any means, such as by rail, tram or bus.

### **Ports and airports**

770 Paragraph 5 sets out when activities associated with ports and airports are utility activities.

771 Sub-paragraph (1) specifies that an activity relating to the exploitation of a geographic area for particular purposes is a utility activity. Those purposes are: to provide an airport to carriers of passengers or goods by air; and to provide a port or other terminal facilities to carriers of passengers by sea or inland waterway.

772 Sub-paragraph (2) defines “airport” by reference to section 66 of the Civil Aviation Act 2012.

### **Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels**

773 Paragraph 6 provides that extraction of oil or gas and exploration for, or extraction of, coal or other solid fuels are utility activities.

### **Interpretation of Schedule**

774 Paragraph 7 is self-explanatory.

### **Part 2: Activities that are not utility activities**

775 Part 2 of Schedule 4 specifies the utility activities which are exempt from the Act. These exemptions reflect the exemptions set out in three EU Commission Decisions (2006/211/EC, 2007/141/EC and 2010/192/EU). The power in clause 6(5) allows an appropriate authority to bring forward regulations to amend Part 2.

## **Schedule 5: Direct award justifications**

776 Paragraph 1 explains that this Schedule sets out circumstances in which a public contract may be awarded directly to a supplier without competition in accordance with this Bill.

### **Prototypes and development**

777 Paragraph 2 allows for direct awards for prototypes or novel goods or services to a limited scale of production.

778 Paragraph 3 defines novel goods or services.

### **Single suppliers**

779 Paragraph 4 allows for direct award where the contract is for the creation or acquisition of a unique work of art or artistic performance which is based on preference rather than objective criteria.

780 Paragraph 5 accounts for when only one supplier can provide the contract due to an exclusive right, this could be for example intellectual property rights, contractual rights, owning particular property or having statutory rights.

781 Paragraph 6 covers the circumstance where for technical reasons only a particular supplier can deliver the contract, this may be for example due to technical know how, changes to existing goods that they are the original supplier for or providing a support service for a good they have provided.

782 For paragraphs 5 and 6 to apply there will also need to be no reasonable alternative to the goods, services or works to be provided.

### **Additional or repeat goods, services or works**

783 Paragraph 7 allows for the direct award of a contract for further goods, services or works being provided in addition to or a replacement of the existing provisions. This is only where interoperability is an issue which means the items must be compatible.

784 Paragraph 8 allows a contracting authority when it is awarding a contract on a competitive basis, to state in its tender notice or tender documents that it may within five years procure similar goods, works or services by relying on this justification. If it does so, this justification applies.

785 Paragraph 9 defines 'existing goods, services or works' and 'existing supplier' for the purposes of paragraphs 7 and 8.

### **Commodities**

786 In a commodity market, the price and availability are generally driven by demand in the market which means tendering in the usual manner is not appropriate and may not drive the best outcome for the contracting authority. Paragraph 10 allows for direct award in this scenario.

### **Advantageous terms on insolvency**

787 Paragraph 11 allows a contracting authority to directly award a contract where it will ensure particularly advantageous terms due to the supplier undergoing insolvency proceedings.

788 Paragraph 12 defines 'undergoing insolvency proceedings'.

### **Urgency**

789 Paragraph 13 allows a contracting authority to directly award a contract where the goods, services or works are strictly necessary for reasons of extreme and unavoidable urgency which means a competitive procedure is not possible.

790 Paragraph 14 defines unavoidable.

### **User choice contracts**

791 Paragraph 15 means that public contracts for the supply of "user choice services" may be awarded directly.

792 It is important that where a contract is not suitable for a competitive procedure due to the needs of a specific user, a contracting authority can allow for this. Paragraph 16 defines

'user choice services' as "light touch services" specified under regulations in clause 9 which must be for the benefit of a particular individual and where, by another enactment, i.e. another legislative means, for example the Care Act 2014, the contracting authority must take into account the view of the individual or their carer as to who should supply the service.

793 Paragraph 17 requires that the individual or their carer has expressed a preference as to who should provide the service or the nature of the service to be provided means only one supplier can provide it. Secondly the contracting authority must consider that it is the best interest of the individual that the contract is not awarded competitively.

### **Defence and security**

794 Paragraph 18 provides for direct awards for defence and security contracts relating to the supply of air or maritime transport services to the armed forces or security services to be deployed, or while deployed, outside the United Kingdom where the suppliers of such services cannot guarantee that the terms of any tender would remain in effect for 10 days from the date of tender submission.

795 Paragraph 19 permits contracting authorities which could rely on the contract modification grounds in sub paragraphs (2) and (3) to modify a contract without award under Part 3 to instead directly award a new contract covering the same matters as a modification would. This is only the case for a new defence and security contract for the additional goods, works or services which constitutes a qualifying defence contract within the meaning of section 14(2) of the Defence Reform Act 2014.

796 Paragraph 20 permits the direct award of a defence authority contract falling within the categories of contract within clause 7(1) (a) to (f) where it is necessary to enhance or maintain the operational capability, effectiveness, readiness for action, safety or security of the armed forces.

## **Schedule 6: Mandatory exclusion grounds**

### **Part 1 - Offences**

797 Paragraph 1 sets out that this Part of the Schedule lists various criminal offences, conviction for which constitutes a mandatory ground for exclusion from procurements. This is subject to the look-back periods and other features of the mandatory exclusions regime set out elsewhere in this Schedule.

### **Corporate manslaughter or corporate homicide**

798 Paragraph 2 states that conviction for corporate manslaughter is a mandatory ground for exclusion.

### **Terrorism**

799 Paragraph 3 designates conviction for various terrorism offences as mandatory grounds for exclusion.

### **Theft, fraud, bribery etc.**

800 Paragraphs 4 to 18 designate conviction for various offences related to theft, fraud and bribery – and their equivalents in Scottish and Northern Irish law where relevant – as mandatory grounds for exclusion.

### **Labour market, slavery and human trafficking offences**

801 Paragraphs 19 to 26 designate conviction for various offences related to serious labour misconduct – and their equivalents in Scottish and Northern Irish law where relevant – as

mandatory grounds for exclusion. These offences are largely based on the set of offences within the purview of the Director for Labour Market Enforcement.

### **Organised crime**

802 Paragraphs 27 and 28 designate conviction for participating in organised crime – and the Scottish and Northern Irish equivalents of this offence – as mandatory grounds for exclusion.

### **Tax offences**

803 Paragraphs 29 to 31 designate offences involving tax evasion as mandatory grounds for exclusion.

### **Cartel offence**

804 Paragraph 32 designates the offence of an individual running a cartel as a mandatory ground for exclusion from procurements. Involvement in cartels by corporate entities, as opposed to individuals, is covered by the mandatory exclusion grounds arising from infringements of the Competition Act 1998.

### **Ancillary offences**

805 Paragraph 33 states that aiding, abetting, counselling or procuring the commission, inciting, attempting or conspiring to commit any of the mandatory ground offences is itself a mandatory ground for exclusion (other ancillary offences are also described).

### **Offences committed outside the United Kingdom**

806 Paragraph 34 sets out that equivalent overseas convictions constitute mandatory grounds for exclusion if this would have resulted in conviction in the UK.

## **Part 2 - Other mandatory exclusion grounds**

### **Misconduct in relation to tax**

807 Paragraphs 35 to 39 set out that certain civil penalties relating to tax evasion and HMRC decisions relating to abusive tax practices constitute mandatory grounds for exclusion.

### **Competition law infringements**

808 Paragraph 40 states that suppliers meet a mandatory ground for exclusion where the Competition and Markets Authority has found that they were involved in a cartel, unless the CMA has granted them immunity from prosecution under its leniency scheme.

### **Equivalents outside the United Kingdom**

809 Paragraph 41 sets out that situations which occur overseas and are equivalent to the tax and cartel-related grounds in this Part also constitute mandatory grounds for exclusion.

### **Failure to cooperate with investigation**

810 Paragraph 42 sets out that failure to comply with a request for information or assistance as part of a debarment investigation under clause 60 is a mandatory ground for exclusion, providing the Minister has determined that the failure to do so was sufficiently serious.

## **Part 3 - General**

### **Excluded matters**

811 Paragraph 43 sets out the look-back periods which apply to the mandatory grounds for exclusion. This means that only convictions (or other events where relevant) within the

relevant periods count for the purposes of applying the grounds.

### **Definitions**

812 Paragraph 44 sets out definitions for various terms in this Schedule.

## **Schedule 7: Discretionary exclusion grounds**

### **Labour market misconduct**

813 Paragraph 1 sets out that being subject to a Slavery and Trafficking Prevention Order, a Slavery and Trafficking Risk Order or interim versions of these orders, or Scottish or Northern Irish equivalents, or a Labour Market Enforcement Order constitutes a discretionary ground for exclusion.

814 Paragraph 2 sets out that engaging in conduct overseas which would result in an Order specified in paragraph (1) if it occurred in the UK constitutes a discretionary ground for exclusion.

815 Paragraph 3 sets out that a discretionary ground for exclusion applies where there is sufficient evidence that the supplier or a connected person has engaged in behaviour that would constitute certain offences under the Modern Slavery Act 2015 (or the Scottish or Northern Irish equivalent offences). This ground applies even where the supplier has not been convicted of an offence. The offences referred to in the Modern Slavery Act are slavery, servitude and forced or compulsory labour, human trafficking, and failure to comply with certain orders and requirements under the Act. The intention behind this ground is to ensure that where there is sufficient evidence, suppliers involved in modern slavery can be excluded even if they operate in jurisdictions where conviction for these offences may be unlikely.

### **Environmental misconduct**

816 Paragraph 4 states that conviction of any offence involving significant harm to the environment constitutes a discretionary ground for exclusion.

### **Insolvency, bankruptcy, etc.**

817 Paragraphs 5 and 6 set out discretionary exclusion grounds related to insolvency and bankruptcy.

### **Potential competition infringements**

818 Paragraphs 7 to 10 set out that violations of the Competition Act 1998 through making agreements preventing, restricting or distorting competition (the Chapter I prohibition), or through abuse of a dominant position (the Chapter II prohibition) constitute discretionary grounds for exclusion. This applies even where there has been no decision by the Competition and Markets Authority or an equivalent regulator. The grounds do not apply where the CMA has granted immunity under its leniency scheme. Paragraph 11 applies in a similar way to involvement in a cartel under section 188 of the Enterprise Act 2002. The intention behind these grounds is to allow for exclusion where the contracting authority is confident that violations of the Competition Act have occurred even where there has been no decision by the CMA, which only investigates a small fraction of cases referred to it.

### **Professional misconduct**

819 Paragraph 11 designates professional misconduct as a discretionary ground for exclusion. In order to meet the ground, the misconduct must be sufficiently serious as to bring the supplier's integrity into question, even where the misconduct was committed by a

connected person. Examples of professional misconduct are given including dishonesty, impropriety (such as improper performance of a public function as defined in the Bribery Act 2010) and serious breaches of ethical or professional standards applicable to the supplier. These standards might be set out by a regulator for the supplier's profession, or in a voluntary code of conduct to which the supplier has signed up.

### **Breach of contract and poor performance**

820 Paragraph 12 sets out a discretionary ground for exclusion for poor performance or sufficiently serious breaches of prior public contracts.

821 Sub-paragraph (3) defines poor performance as where the supplier did not perform a public contract satisfactorily and failed to improve performance despite being given opportunity to do so. This opportunity might be for example a performance improvement plan imposed on the supplier according to the terms of the contract.

822 Sub-paragraph (4) provides that the ground is met where a contracting authority has published a notice following an event which would otherwise meet this ground.

823 Sub-paragraph (5) defines sufficiently serious breaches as those that led to termination or partial termination of the contract by the authority, the award of damages by a court or a settlement agreement.

824 Sub-paragraph (6) sets out other definitions used in this paragraph.

### **Acting improperly in a procurement**

825 Paragraph 13 sets out that acting improperly in a procurement so as to undermine fair and open competition constitutes a discretionary ground for exclusion from procurements.

### **National security**

826 Paragraph 14 sets out that a discretionary exclusion ground applies if the supplier or a connected person poses a threat to the national security of the United Kingdom.

### **Involvement in forced organ harvesting**

827 Paragraph 15 sets out that a discretionary exclusion ground applies where a supplier or connected person has been or is involved in forced organ harvesting or unethical activities relating to human tissue.

### **Excluded matters**

828 Paragraph 16 sets out the look-back periods which apply to the discretionary grounds for exclusion. This means that only events which were known about or which ought to have been known about (or the date of a ruling in certain circumstances) count for the purposes of applying the grounds.

### **Definitions**

829 Paragraph 17 states that "information" includes evidence verifying that information.

830 Paragraph 18 states that the definitions set out in Schedule 6 (mandatory grounds for exclusion) also apply to this Schedule.

## **Schedule 8: Permitted contract modifications**

831 This Schedule lists the 'permitted modifications' referred to at clause 73 (modifying a public contract), allowing modification of a contract without triggering the requirement to follow a further full procurement procedure.

### **Provided for in the contract**

832 Paragraph 1 provides that a modification is permitted if it was unambiguously provided for in the contract, when it was awarded. It must also have been provided for in the tender or transparency notice for the award of the contract and not change the overall nature of the contract.

### **Urgency and the protection of life, etc.**

833 Paragraph 2 provides that a modification is permitted if its purpose could be justified under the direct award of a contract in special cases (clause 41). The purpose must also be for “extreme and unavoidable urgency” in accordance with paragraph 13 of Schedule 5 or “to protect life etc.”, following regulations made under clause 42. The contracting authority must be able to conclude that, for reasons of extreme and unavoidable urgency, the public contract cannot be awarded on the basis of a competitive tendering procedure or when rules on direct award to protect life etc. apply.

### **Unforeseeable circumstances**

834 Paragraph 4 provides that a modification is permitted if the circumstances giving rise to the modification could not reasonably have been foreseen by the contracting authority before the award of the contract. The modification must also not change the overall nature of the contract. The modification must not increase the estimated value of the contract by more than 50 percent. Paragraph 4(2) provides that this 50 percent threshold does not apply if the contract is a utilities contract.

### **Materialisation of a known risk**

835 Paragraph 5 states an amendment to a public contract is allowed if it is required to manage a known risk which has materialised through no fault of the contracting authority or supplier, and which means the contract may not be delivered to the contracting authority’s satisfaction, as long as it is in the public interest to amend the contract (rather than award a new contract under Part 3). The Contracting Authority must not use the amendment to change anything in the contract which is not impacted by the risk and the amendment must not increase the value of the contract by more than 50% (unless it is a utilities contract, in which case the 50% cap does not apply). The amendment must also go no further than addressing the known risk.

836 Paragraph 6 defines a known risk as a risk which the Contracting Authority considers could jeopardise the satisfactory performance of the contract but could not, due to its nature, be addressed in the contract from the outset. The tender/transparency notice must have indicated that the contract may require amendment due to the risk.

837 Paragraph 7 explains that the public interest in relation to this type of contract amendment must include a consideration of value for money and may include technical and operational considerations.

### **Additional goods, services or works**

838 Paragraph 8 provides that a modification is permitted for additional goods, services or works if the following four statements apply. Firstly, the modification must be for goods, services or works that are additional to (or a repetition of) goods services or works already provided for in the contract. Secondly, using a different supplier would result in the supply of goods, services or works that are different from, or incompatible with, those already provided for in the contract. Thirdly, the contracting authority considers that the difference or incompatibility would result in disproportionate technical differences in operation or maintenance or other significant inconvenience, or the substantial duplication of costs for the authority. Fourthly, the modification would not increase the estimated value of the contract by more than 50 per cent. This threshold of 50 percent

does not apply if the contract being modified is a utilities contract.

### **Transfer on corporate restructuring**

839 Paragraph 9 provides that a novation or assignment of a public contract to a supplier that is not an excluded supplier or to another contracting authority is a permitted modification if it is required following a corporate restructuring or similar circumstance. A corporate restructuring could include sale of a business as part of a planned strategy, or one that has been required following the insolvency of the supplier.

### **Defence authority contracts**

840 Paragraph 10 permits defence authority contracts to be modified to ensure they keep up with developments in technology and to prevent or mitigate any adverse effect of such developments.

841 Paragraph 11 permits a defence authority contract to be modified to ensure the continuous provision of goods, works and services where that is necessary to ensure the armed forces maintain their operational capabilities, effectiveness, readiness, safety, security or logistical capabilities.

## **Schedule 9: Treaty state suppliers (specified international agreements)**

842 This Schedule, relied on for clauses 88 (treaty state suppliers), 89 (treaty state suppliers: non-discrimination) and 90 (treaty state suppliers: non-discrimination in Scotland), lists international agreements to which the UK is a party and which contain procurement obligations to which effect must be given in the UK.

## **Schedule 10: Single source defence contracts**

### **Definition of qualifying defence contract**

843 Schedule 10 of the Bill amends Part 2 of the Defence Reform Act 2014 (the "DRA"). Part 2 of the DRA creates a framework for regulating single source contracts, with the detail being set out in regulations (single source contract regulations or SSCRs) made under that Act. The SSCRs are engaged when a defence contract is awarded with a value above a threshold specified in the SSCRs (currently £5 million) without any competition, unless one or more of the specific exclusions set out in the SSCRs apply. These contracts are known as qualifying defence contracts (QDCs), with non-competitive sub-contracts made in connection with them and above a specified value threshold known as qualifying sub-contracts (QSCs). The DRA does not specify whether a contract should be competed. Where the DRA and SSCRs are engaged they make provision for the pricing of QDCs and QSCs. They also make provision for transparency and record-keeping requirements, from the beginning of a qualifying contract to its completion. The DRA also creates the Single Source Regulations Office (the SSRO) which issues guidance on the application of the regime and adjudicates between the Secretary of State and contractors.

844 At present, for a contract to be a QDC section 14(2)(a) of the DRA provides that it must be a contract under which the Secretary of State procures goods, works or services for defence purposes from another person. Paragraph 2(2) amends section 14(2)(a) of the DRA to provide that a contract would be a QDC if it is a contract under which the Secretary of State procures goods, works or services wholly or substantially for defence purposes from another person. This amendment would permit cross Government contracts which are substantially for defence purposes to be QDCs. The whole contract will then be subject to the SSCRs. This is necessary because it would usually not be practicable to price the defence component using a different method from the wider

contract.

845 Paragraph 2(4) amends section 14 of the DRA by inserting subsection (8A) which provides the Secretary of State with a power to make SSCRs to specify when a contract is to be treated as substantially for defence purposes. Whether a contract is “substantially for defence purposes” might be based on a percentage value of the contract and/or whether the defence part of the contract is more than a specified monetary value.

846 An issue which has practical significance to the operation of Part 2 of the DRA is whether entering into an agreement to perform new work by amending an existing contract is a new contract for the purposes of the DRA. Under the DRA, where an amendment to an existing contract which is not already a QDC is agreed, the new work will not come under Part 2 of the DRA and the SSCRs unless there is an agreement between the Secretary of State and the contractor to convert the whole of the existing contract to be a QDC. See in particular sections 14(4)(d) and (5)(d) of the DRA. Conversely, if the new work that is being contracted for is a new contract, and meets the criteria required by the legislation, such consent is not required. Whether or not an agreement for additional goods, works or services is to be regarded as an amendment to an existing contract or a new contract in its own right can be a matter of some uncertainty. Currently, it would be a matter for the SSRO (upon referral) and ultimately the Court (if an SSRO decision was challenged) to decide whether an agreement was a new contract or an amendment to an existing contract. The practical effect is that it is not possible to know if a purported amendment to an existing contract will be a QDC.

847 Paragraph 2(3) amends section 14 of the DRA by inserting subsection (5A) to provide the Secretary of State with a power to specify in the SSCRs the circumstances in which an agreement to enter into new work is or is not to be treated as a new contract for the purposes of Part 2 of the DRA and the SSCRs. The amendment does not have wider significance beyond Part 2 of the DRA and the SSCRs. It is anticipated that the SSCRs may specify that an agreement would be a new contract by reference to such criteria as the relationship between the new work and the scope of work under the existing contract, and in particular whether it would be possible to contract for the new work through a standalone contract without necessitating change to the existing contract.

### **Pricing of qualifying defence contracts**

848 Section 15(1) of the DRA requires that SSCRs must make provision about the price payable to the contractor under a QDC (“the price”). Section 15(2) and (4) require that the SSCRs must provide for the price to be determined in accordance with the formula:

$(CPR \times AC) + AC$  (“the pricing formula”)

849 In the pricing formula, “CPR” is the contract profit rate for the QDC and “AC” is the contractor’s allowable costs under the QDC. The DRA and SSCRs make provision for establishing the contract profit rate and the contractor’s allowable costs.

850 Paragraph 3(3) amends section 15 of the DRA by substituting subsection (2) and inserting subsections (2A) and (2B) to provide the Secretary of State with a power to make SSCRs to permit QDCs to be priced other than in accordance with the pricing formula set out in subsection 15(4) in certain specified circumstances.

851 The types of circumstances where it is envisaged that pricing might be different include:

- a. items that are priced by reference to market prices;
- b. prices that are regulated by other means (such as utilities);

- c. where a requirement has been recently competed and the Secretary of State wants to enter into a new contract to procure additional goods, works or services from the same contractor, using pricing which is in line with the competitively obtained priced previously secured;
- d. where a contract has been converted from a non-QDC to a QDC and it may be impracticable to re-price the existing scope in accordance with section 15(3)(a) because of the duration of the contract, or there may be little value in reopening parts of the contract where the work has already been done and the agreed price paid;
- e. where a QDC is novated to another contractor to perform the remainder of the contractual requirement. Such novations often arise through the restructuring of a corporate group, with the result being that contracts are novated from one company to a different company in the same corporate group;
- f. where one or more elements of the price are obtained through competition (such as an hourly rate) but at least one element is not obtained through competition (such as the estimated volume of hours to which the competitive rate is applied);
- g. where a contract is split into components, and it is necessary to specify means of determining an overall price for the contract; and
- h. where the parties wish to make changes to the contract profit rate without changing the work to be performed under the contract, for instance where the Secretary of State decides not to use the incentive adjustment when the contract profit rate was agreed but subsequently decides that it would be appropriate to use the incentive adjustment to help to achieve the commercial objectives.

852 Paragraph 3 also amends section 15 of the DRA to permit the parties to agree that different parts of a contract may be treated distinctly (i.e. split into components). Paragraph 3(8) amends section 15 of the DRA by inserting new subsections (6) and (7) to provide the Secretary of State with a power to make SSCRs to specify circumstances in which certain parts of a QDC may or may not be treated differently from each other, for example, in relation to pricing.

853 Amendments in paragraph 3(2) to section 15(1) make clear that SSCRs may be made to determine the price payable for each component (where the contract is divided into components) and for the contract as a whole.

854 Paragraph 4(3) amends section 16 of the DRA by inserting subsections (4) and (5) to provide the Secretary of State with a power to make SSCRs giving the SSRO powers in relation to an alternative pricing method for a QDC or a component to:

- a. determine whether the method used was appropriate; and
- b. in consequence of such a determination, determine that the price payable under the contract is to be adjusted by an amount which the SSRO specifies.

### **Contract profit rate**

855 Section 17(1) and (2) of the DRA provides that SSCRs must make provision for determining the contract profit rate (CPR) for a QDC, and that such a determination must be made by taking six sequential steps. In broad terms, those six steps are as follows:

- a. Step 1: take the baseline profit rate set by the Secretary of State which is in force at the time the QDC is entered into;

- b. Step 2: adjust that rate by an agreed amount within parameters specified in the SSCRs above or below the baseline profit rate to reflect the risk that the contractor's actual allowable costs will differ from those estimated when the contract was agreed;
- c. Step 3: deduct from the amount resulting from step 2 an agreed amount so as to ensure that profit arises only once in relation to those allowable costs that relate to the price payable under certain sub-contracts (this is referred to as the "profit on cost once" ("POCO") adjustment);
- d. Step 4: deduct from the amount resulting from step 3 the SSRO funding adjustment which is in force at the time the QDC is entered into (the purpose of the SSRO funding adjustment is to allow the MOD to recoup some of the SSRO's running costs);
- e. Step 5: increase the amount resulting from step 4 by such amount specified by the Secretary of State, not exceeding an amount specified in the SSCRs, as it considers appropriate to give the contractor a particular financial incentive in relation to specified provisions of the contract; and
- f. Step 6: increase or decrease the amount resulting from step 5 an agreed amount to ensure that the contractor receives an appropriate and reasonable return on the fixed and working capital employed by it to perform the QDC (regulation 11(7) to (9)).

856 Step 2 only allows for "the risks of the primary contractor's actual allowable costs under the contract differing from its estimated allowable costs". This limited definition of risk excludes financial risks that would not be allowable as costs of the contract, such as the risk of incurring a liability to pay liquidated damages, or reputational risks, for which the contractor's shareholders could legitimately expect to be compensated. It also does not specify that the adjustment should be made specifically for risks borne by the contractor. While it is reasonable to infer that this is the case, it needs to be made explicit.

857 The risk to the contractor (and hence the expected reward by way of profit) associated with a particular contract differs substantially for different activity types. For example, contracts to develop and make equipment are considered to be riskier than contracts for works. Therefore, the type of activity to which the contract relates needs to be taken into account when assessing risk.

858 Paragraph 9(3)(a) amends section 17 of the DRA to widen the definition of "risk" described in Step 2 in section 17(2) to include financial risks that would not be allowable as costs of the contract, for which the contractor's shareholders could legitimately expect to be compensated. The amendment also clarifies the definition of "risk" to provide that activity type may be taken into account when assessing financial risk to reflect that some activities are financially riskier for contractors than others.

859 Paragraph 9(3)(b) also amends section 17(2) of the DRA to remove step 3, the profits on cost once (POCO) adjustment and step 4 the SSRO funding adjustment from the profit setting process. Paragraph 9 also makes consequential amendments to renumber the steps in what is now a four-step process where reference is made to other steps. Both of these steps are intended to speed up and simplify the agreement of profit rates for individual contracts.

860 Paragraph 9(3)(e) amends section 17(2) of the DRA to provide the Secretary of State with a power to make SSCRs to set out how and when the incentive fee in new step 3 would be applied.

861 Paragraph 10(5) amends section 18 of the DRA by substituting subsection (3)(a) to provide the Secretary of State with a power to make SSCRs that permit, on the

application of either party to a QDC or an authorised person, the SSRO to make a determination in relation to all the contract profit steps set out in section 17(2) as amended. In relation to step 1, whilst the Baseline Profit Rate (BPR) is fixed for a particular year, disputes arise as to which BPR should be applied, particularly to amendments. Disputes may also arise over the correct application of new step 3, the incentive adjustment.

### **Allowable costs**

862 Section 20 of the DRA deals with allowable costs under a QDC. Section 20(1) provides that the SSRO must issue guidance about whether costs are allowable under a QDC. Section 20(2) provides that in determining whether a particular cost is allowable under a QDC, the Secretary of State, or an authorised person, and the primary contractor must be satisfied that the cost is appropriate, attributable to the contract and reasonable in the circumstances. Section 20(5) provides that the SSRO may, on the application of the Secretary of State, or an authorised person or the primary contractor, determine if a cost is allowable under QDC and may make an appropriate price adjustment as a result of such a determination (section 20(6)).

863 Paragraph 12(3) amends section 20 of the DRA by inserting subsection (2A) to provide the Secretary of State with a power to make SSCRs that provide that the POCO adjustment can be made as an appropriate adjustment to allowable costs, if the profit has been incurred by a person which has a relevant connection with the primary contractor. This amendment moves the POCO adjustment from the profit setting process to the allowable costs process.

864 Paragraph 12(3) also amends section 20 of the DRA by inserting subsection (2B) to provide the Secretary of State with a power to make SSCRs to define the relevant connection between a primary contractor and a person for the purposes of a POCO adjustment and what adjustment should be made to allowable costs.

865 Paragraph 12(5) amends section 20 of the DRA by substituting subsection (5) and inserting subsection (5A) to require the SSRO to make a determination on the allowability of a specified cost. The amendment clarifies that a person listed in subsection (5A) may apply to the SSRO for a determination on whether a cost would be allowed without such an application necessarily being linked to a specific QDC.

### **Reports**

866 Section 25(1) of the DRA provides that the SSCRs must require a “designated person” to provide reports referred to in section 25(2) to the Secretary of State and the SSRO on overhead costs and forward planning issues, as well as matters specified in the SSCRs. In relation to groups of companies, the designated person is the “ultimate parent undertaking” (subsection 25(3)(a)). Otherwise, the designated person is “P”, who is a party to one or more QDCs. The purpose of such reports is to provide the Secretary of State with a long-term view of key suppliers’ capacity, and overheads relevant to the MOD’s current and future single source requirements.

867 The obligation to provide reports under section 25 applies for a financial year where the designated person, or any person with whom the designated person is associated, has one or more ongoing QDCs above a specified value in which there are outstanding obligations to provide goods, works or services (section 25(1) and (5)).

868 Paragraph 13(2) amends section 25 of the DRA by substituting subsection (3)(a). This amendment will provide the Secretary of State with a power to make SSCRs to allow the Secretary of State to agree with the party which would otherwise be required to provide

the report mentioned in section 25(2) that the report may instead be provided by another undertaking within the group. If such agreement cannot be reached the default position is that the report is to be provided by the ultimate parent undertaking.

869 Paragraph 13(3) amends section 25 of the DRA to insert subsection (8A). Subsection (8A) amends the definition of “financial year” for the purposes of section 25 to enable the Secretary of State to agree with a contractor that the reports required by SSCRs made under section 25 may be related to the designated person’s financial year rather than the financial year as defined in the Act as unamended.

### **Qualifying sub-contracts**

870 Section 29(1) of the DRA provides that SSCRs may require primary contractors to assess whether proposed sub-contracts would be a QSC, and therefore subject to Part 2 of the DRA and the SSCRs. Section 29(2) makes provision for what SSCRs may contain in relation to the records and reporting of an assessment by a primary contractor that a proposed sub-contract, if entered into, would be a QSC. When the contractor makes a positive assessment (i.e. that the prospective sub-contract meets the conditions to be a QSC) then, under subsection (2)(b), the contractor must notify the Secretary of State, an authorised person and the prospective sub-contractor of that assessment. Section 29(3) and (4) make equivalent provision in respect of prospective QSCs.

871 Paragraphs 15(2) and (3) amends section 29 of the DRA by inserting new subsections (2)(c) and (4)(c) to provide the Secretary of State with a power to make SSCRs to provide that if a primary contractor or a prospective primary contractor makes a negative assessment (i.e. that the prospective sub-contract does not meet the conditions to be a QSC) then the contractor must notify the Secretary of State, an authorised person and the prospective sub-contractor of that assessment and give reasons for that assessment.

872 Section 30(4) of the DRA provides that SSCRs may make provision for “the sub-contractor to give notice to the SSRO that, in the sub-contractor’s opinion, this Part and the regulations should cease to apply to the qualifying sub-contract”.

873 There is no provision for the primary contractor to give equivalent notice that in its opinion the contract has ceased to be a QSC. The sub-contractor may be unaware of a change in circumstances that render the sub-contract a non-QSC, because of relevant information that may only be known to the contracting authority, so it may be necessary for the primary contractor to give such notice.

874 Paragraph 16 amends section 30(4)(a) of the DRA. This amendment will provide the Secretary of State with a power to make SSCRs to provide that the primary contractor may give notice to the SSRO that in its opinion Part 2 of the DRA and the SSCRs should cease to apply to the QSC.

### **Powers of the Single Source Regulations Office (“SSRO”)**

875 Section 35(1) of the DRA provides that the SSRO must give opinions and make determinations on particular matters specified in the SSCRs. The SSRO may give an opinion on other matters relating to a QDC (subsection (3)), but only if the Secretary of State and the contractor or proposed contractor refer the matter jointly.

876 Paragraph 18(5) amends section 35 of the DRA by substituting subsection (3) so that the SSRO may give an opinion on any question relating to Part 2 of the DRA or the SSCRs on the application of either Secretary of State, an authorised person or the contractor or proposed contractor. The effect of the amendment is that if the matter is specified in SSCRs the SSRO must opine on or determine it, and if the matter is not specified the

SSRO may opine on or determine it provided it relates to Part 2 of the DRA or the SSCRs.

877 Paragraph 19 inserts section 35A into the DRA enabling the SSRO to issue such guidance as it considers appropriate in relation to the application or interpretation of Part 2 of the DRA where it considers that such guidance would be useful to industry and the Secretary of State.

## **Schedule 11: Repeals and revocations**

878 This schedule lists the primary and secondary legislation which will be repealed or revoked by this bill.

## Financial implications of the Bill

879 While there are implementation costs to the government and the public sector, these reforms are expected to deliver significant benefits in a range of areas. This includes time-savings to contracting authorities and bidders from adoption of new procedures and processes; increased competition with a more diverse range of suppliers; as well as improved accountability and transparency from more open procurement data. Over the ten year appraisal period (2021/22 - 2030/31) the reforms are expected to result in a positive net present value of £205m. The quantifiable, monetised benefits are expected to be far outweighed by the value for money benefits to the public sector in terms of improved commercial outcomes. Further detail is available in the Impact Assessment that has been published.

## Parliamentary approval for financial costs or for charges imposed

880 A money resolution is required for the Bill as the Bill authorises or requires new heads of public expenditure and increases in existing heads of public expenditure, both directly under the provisions of the Bill and indirectly by leading to expenditure under other Acts.

881 Compliance with Parts 2 to 9 of the Bill would require contracting authorities (which include public authorities in England, Wales and Northern Ireland) to incur expenditure. This expenditure will largely mirror expenditure by those authorities under the existing legislation that would be repealed by the Bill. Although new transparency requirements will add to certain costs, overall expenditure is expected to be lower than under that legislation. Nevertheless, as the Bill materially changes the procurement regime rather than re-enacting it, expenditure in compliance with the Bill requires separate approval by way of a money resolution.

882 The Bill would also authorise or require expenditure by Ministers of the Crown in connection with the “debarment” regime (clauses 59 to 64), a new online system for publishing information (clause 93), and investigations into compliance with the Bill (clauses 104 to 106).

883 It is expected that there will be transitional costs associated with moving from the existing procurement regime to the new regime in the Bill. In particular, both contracting authorities and Ministers of the Crown are expected to incur costs in learning and development activities following the passage of the Bill. These costs are expected to be materially outweighed by the savings accruing to contracting authorities under the new regime as compared with the existing regime.

884 A ways and means resolution is not required for the Bill as the Bill would not impose or increase taxation or any charges akin to taxation.

## Compatibility with the European Convention on Human Rights

885 The Rt Hon Jeremy Quin MP, Minister for the Cabinet Office, has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR), on

introduction of the Bill.

## Compatibility with Environment Act 2021

886 The Rt Hon Jeremy Quin MP, Minister for the Cabinet Office, is of the view that the Bill as introduced into the House of Commons does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

## Related documents

887 The following documents are relevant to the Bill and can be read at the stated locations:

- [Transforming Public Procurement Green Paper](#)
- [Transforming Public Procurement - Government response to consultation](#)
- [The Public Contracts Regulations 2015](#)
- [The Concessions Contracts Regulations 2016](#)
- [The Utilities Contracts Regulations 2016](#)
- [The Defence and Security Contracts Regulations 2011](#)

## Annex A - Territorial extent and application in the United Kingdom

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
<b>Part 1: Key definitions</b>							
Clause 1	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 2	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 3	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 4	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 5	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 6	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 7	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 8	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 9	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 10	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Part 2: Principles and objectives</b>							
Clause 11	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 12	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 13	Yes	Yes	No	Yes	Yes	Yes	No
Clause 14	No	Yes	Yes	No	No	No	No
<b>Part 3: Award of public contracts and procedures</b>							
Clause 15	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 16	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 17	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 18	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 19	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 20	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 21	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 22	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 23	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 24	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 25	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 26	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 27	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 28	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 29	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 30	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 31	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 32	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 33	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 34	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 35	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 36	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 37	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 38	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 39	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 40	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 41	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 42	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 43	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 44	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 45	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 46	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 47	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 48	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 49	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 50	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 51	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 52	Yes	Yes	No	Yes	Yes	Yes	No
Clause 53	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 54	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 55	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 56	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 57	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 58	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 59	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 60	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 61	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 62	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 63	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 64	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 65	Yes	Yes	No	Yes	Yes	Yes	No
<b>Part 4: Management of public contracts</b>							
Clause 66	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 67	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 68	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 69	Yes	Yes	Yes	Yes	Yes	Yes	Yes

*These Explanatory Notes relate to the Procurement Bill brought from the House of Lords on 14 December 2022 (Bill 218)*

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 70	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 71	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 72	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 73	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 74	Yes	Yes	Yes	Yes	Yes	Yes	No
Clause 75	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 76	Yes	Yes	No	Yes	Yes	Yes	No
Clause 77	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 78	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 79	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Part 5: Conflicts of interest</b>							
Clause 80	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 81	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 82	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Part 6: Below-threshold contracts</b>							
Clause 83	Yes	Yes	Yes	Yes	Yes	Yes	No
Clause 84	Yes	Yes	No	Yes	Yes	Yes	No
Clause 85	Yes	Yes	Yes	Yes	Yes	Yes	No
Clause 86	Yes	Yes	Yes	Yes	Yes	Yes	No
Clause 87	Yes	Yes	Yes	Yes	Yes	Yes	No
<b>Part 7: Implementation of international obligations</b>							
Clause 88	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 89	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 90	No	No	No	Yes	Yes	No	No
<b>Part 8: Information and notices: general provision</b>							
Clause 91	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 92	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 93	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 94	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 95	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 96	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Part 9: Remedies for breach of statutory duty</b>							
Clause 97	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 98	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 99	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 100	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 101	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 102	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 103	Yes	Yes	Yes	Yes	Yes	Yes	Yes

*These Explanatory Notes relate to the Procurement Bill brought from the House of Lords on 14 December 2022 (Bill 218)*

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
<b>Part 10: Procurement oversight</b>							
Clause 104	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 105	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 106	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Part 11: Appropriate authorities and cross-border procurement</b>							
Clause 107	No	Yes	Yes	No	No	No	No
Clause 108	No	No	No	No	No	Yes	Yes
Clause 109	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 110	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 111	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Part 12: Amendments and repeals</b>							
Clause 112	Yes	Yes	Yes	No	No	No	No
Clause 113	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 114	No	Yes	Yes	No	No	No	No
Clause 115	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Part 13: General</b>							
Clause 116	Yes	No	No	No	No	No	No
Clause 117	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 118	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 119	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 120	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 121	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 122	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 123	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 124	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Schedules</b>							
Schedule 1	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 2	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 3	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 4	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 5	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 6	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 7	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 8	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 9	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 10	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 11	Yes	Yes	Yes	Yes	Yes	Yes	Yes

## Subject matter and legislative competence of devolved legislatures

888 The core provisions of the Bill extend and apply across England, Wales, Scotland and Northern Ireland. The provisions which do not are as follows:

1. Clause 14 (The Wales procurement policy statement) applies only to certain Welsh contracting authorities and therefore does not apply in England, Northern Ireland or Scotland.
2. Clause 90 (Treaty state suppliers: non-discrimination in Scotland) applies only to certain Scottish contracting authorities and does not apply in England, Wales or Northern Ireland.
3. Clause 107 (Welsh Ministers: restrictions on the exercise of powers) applies only to certain Welsh contracting authorities and does not apply in England, Northern Ireland or Scotland.
4. Clause 108 (Northern Ireland department: restrictions on the exercise of powers) applies only to certain Northern Ireland authorities and does not apply in England, Wales or Scotland.
5. Clause 112 (Disapplication of duty in section 17 of the Local Government Act 1988) applies only in England and Wales because the Local Government Act 1988 does not apply in Northern Ireland or Scotland.
6. Clause 114 (Concurrent powers and the Government of Wales Act 2006) applies only in Wales because the Government of Wales Act 2006 provisions being amended only apply in that way.
7. Clause 116 (Application of this Act to procurement by NHS in England) applies only in England and does not apply in Scotland, Wales or Northern Ireland.

889 The legislative competence of the Senedd is engaged in legislating for procurements undertaken by devolved Welsh authorities and certain private utilities.

890 The legislative competence of the Northern Ireland Assembly is engaged in legislating for procurements undertaken by transferred Northern Ireland authorities and certain private utilities.

891 The legislative competence of the Scottish Parliament is engaged in legislating for procurements undertaken in Scotland.



# PROCUREMENT BILL [HL]

## EXPLANATORY NOTES

These Explanatory Notes relate to the Procurement Bill as brought from the House of Lords on 14 December 2022 (Bill 218)

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