

PROCUREMENT BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Procurement Bill [HL] as introduced in the House of Lords on 11 May 2022 (HL Bill 4).

- 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 2020¹, and the Government's response to the consultation published in December 2021.²
- 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 historic EU Directives.

Policy background

- 8 At around £300 billion every year, public procurement accounts for a third of all public expenditure. Making changes to how procurement is regulated will allow procuring authorities to be make more effective use of taxpayer money.
- 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-

1 <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>

2 <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation>

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 "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 funded wholly or mainly from public funds or over which a contracting authority exercises a dominant influence); 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 for an appropriate authority to determine the process for 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 consistently with the UK's international procurement obligations.

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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. 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; greater flexibility to award contracts directly to specific suppliers to allow transportation of the armed forces where procurement timescales cannot be met to deal with the interaction between the procurement rules on contract modifications; and having to the ability to enter into new contracts when needed under the Single Source Contract Regulations 2014, and 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 completed. 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 completed. 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 SSCR) 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)³. 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

³ <https://www.gov.uk/government/publications/defence-and-security-industrial-strategy-reform-of-the-single-source-contract-regulations>

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 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.
- 26 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.
- 27 All contracting authorities will be required to use a single digital platform for supplier registration. Businesses will only have to submit certain types of information to demonstrate their credentials once to be considered for a public sector procurement.
- 28 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.
- 29 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.
- 30 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.
- 31 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.
- 32 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" require different treatment and with certain modifications.
- 33 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

- 34 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: the Public Contracts Regulations 2015; the Utilities Contracts Regulations 2016; the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011. These regulations will be repealed by this Bill, subject to transitional provisions for ongoing procurements and contracts.
- 35 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.
- 36 The Bill will not cover the procurement of health care services that are regulated in accordance with regulations made under section 12ZB of the National Health Service Act 2006 (as inserted by the Health and Care Act 2022).
- 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 113 (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 83 (treaty state suppliers: non-discrimination in Scotland) and 103 (powers relating to procurement arrangements). These make provision respectively for making regulations to ensure that suppliers that are “treaty state suppliers” (i.e. 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 will therefore be 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.

- 43 See the table in Annex A for a summary of the position regarding territorial extent and application.

Commentary on provisions of Bill

Part 1: Key definitions

Clause 1: Contracting authorities

- 44 The first 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.
- 45 Subsection (1) provides that a contracting authority is a “public authority” or, in relation to a utilities contract, a “public authority”, “public undertaking” or “private utility”. But such entities do not include “excluded authorities”. These terms are defined in the subsections that follow.
- 46 Subsection (2) defines public authorities as entities that undertake functions of a public nature, such as building roads or policing, and that are wholly or mainly publicly-funded or subject to contracting authority oversight. Subsection (2) also defines public undertakings, which are bodies that are also wholly or mainly publicly-funded or subject to contracting authority oversight, but who do not have a public function and operate on a more commercial basis.
- 47 Subsection (3) provides that the concept of “public funds” does not include money received by a body in return for the provision of goods, services or works. This is necessary to ensure that the regime does not inadvertently cover private sector suppliers that have been awarded contracts for the delivery of public functions.
- 48 Subsection (4) elaborates on the meaning of contracting authority oversight being where a body is subject to management or control by a contracting authority or where more than half the board members of the body are appointed by a contracting authority.
- 49 Subsection (5) defines “excluded authorities”, which are entities that are excluded from the definition of “contracting authority”. The excluded entities are listed and include “devolved Scottish authorities”. Devolved Scottish authorities are defined in the following subsections.
- 50 Subsections (6-8) define the term “devolved Scottish authority” by reference to its functions.
- 51 Subsection (9) makes it clear that the Act does not apply to Her Majesty in her private capacity.
- 52 Subsection (10) defines certain other terms used within the clause and, other than in relation to “authority”, highlights where such terms are defined elsewhere in the legislation.

Clause 2: Public contracts

- 53 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”.
- 54 Subsection (2) provides that contracts for the supply, for pecuniary interest, of goods, services and works to a contracting authority are in-scope of the legislation provided they are not exempt and have an estimated value above an applicable threshold.
- 55 Subsection (3) provides that frameworks (i.e. contracts providing for the future award of other contracts) are in-scope of the legislation provided they are not exempt and have an estimated value above an applicable threshold.

- 56 Subsection (4) provides that concession contracts are in-scope of the legislation provided they are not exempt and have an estimated value above an applicable threshold.
- 57 Subsection (5) points to Schedule 1 (threshold amounts), which sets out the different thresholds applicable to different types of contracts.
- 58 Subsection (6) points to Schedule 2 (exempted contracts), which sets out which contracts are exempt from the legislation.

Clause 3: Valuation of contracts

- 59 Contracting authorities will need to estimate the value of contracts, in particular to determine whether the value of those contracts are above threshold and whether the contracts are therefore in scope of this legislation. Subsection (1) sets out that the “estimated value” of a contract is the value for the time being estimated by a contracting authority.
- 60 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).
- 61 Subsection (3) requires 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 4: Mixed procurement: above and below threshold

- 62 There are different thresholds in Schedule 1 for different types of contract. It is therefore necessary to determine for the purposes of applying those thresholds whether a contract containing elements relating to different types (a mixed contract) should have those elements separated into different contracts so that the thresholds can be calculated separately for each separate contract (each of which will only fall within one such type).
- 63 If this is possible but a contracting authority chooses not to separate the mixed contract, the mixed contract will, where one of its elements would be above a threshold but it would otherwise be a below-threshold contract, be treated as above a threshold (and therefore, unless an exemption applies, a public contract to which this legislation applies).
- 64 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.
- 65 Subsection (1) identifies as relevant mixed contracts other than frameworks which contain above and below threshold elements that are reasonably capable of being procured separately.
- 66 Subsection (2) identifies as relevant mixed contracts which are frameworks containing above and below threshold elements that are reasonably capable of being procured outside the framework.
- 67 Subsection (4) sets out factors contracting authorities may have regard to when determining whether elements of a mixed contract can reasonably be procured separately.
- 68 Subsection (5) makes clear the meaning of a below-threshold contract.
- 69 Subsection (6) makes clear that subsection (3) does not apply to mixed contracts awarded under a framework.

Clause 5: Utilities contracts

- 70 Subsection (1) sets out the definition of a “utilities contract”, being a contract for the supply of goods, services or works mainly for the purpose of a “utility activity”. A utility activity is defined in the subsection that follows.

- 71 Subsection (2) defines a “utility activity” as being an activity listed in Schedule 4 (utility activities). It also provides that utility activities carried out wholly outside the UK (e.g. not involving the use of a network or geographical area within the UK) are not covered by the regime.
- 72 Subsection (3) defines a “private utility”, which is a non-public entity that has been granted “special or exclusive rights” to carry out utility activities. Special or exclusive rights are defined in the subsections that follow.
- 73 Subsection (4) 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.
- 74 Subsection (5) provides that a right is not a “special or exclusive right” if it has been granted following a competitive process under this legislation 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 Contract Regulations 2015).
- 75 Subsection (6) makes clear that a reference to a framework agreement where that framework is for the future award of utility contract(s) is a reference to a utility contract.

Clause 6: Defence and security contracts

- 76 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).
- 77 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.
- 78 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.
- 79 Subsection (4) defines “defence authority contract”. This is a subset of defence and security contracts to which the “direct award justification” in paragraph 21 of Schedule 5 and the “permitted contract modifications” in paragraphs 10 and 11 of Schedule 8 (permitted contract modifications) apply.
- 80 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”).
- 81 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.
- 82 Subsection (7) provides further definitions for terms used in subsection (1).

Clause 7: Concession contracts

- 83 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.

- 84 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 8: Light touch contracts

- 85 Subsection (1) introduces the term “light touch contract” i.e. contracts for the supply of certain services identified by regulations made under subsection (2).
- 86 Subsection (2) states an appropriate authority may by regulations determine which contracts should be light touch contracts.
- 87 Subsections (3-4) bound the power at (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 (which are, via later provisions, exempted from the full requirements of the regime); 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.
- 88 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 9: Mixed procurement: special regime contracts

- 89 This clause provides for when certain contracts containing elements of different types of contracts (mixed contracts) subject to different rules, such as light touch contracts, are to be handled according to those rules to reflect their special nature (i.e. 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.
- 90 Subsection (3) provides that where a mixed contract meets the conditions in subsection (1) or (2), it is not to be treated as a “special regime contract”.
- 91 Subsection (1) refers to a mixed contract (other than a framework) for goods, services or works which are provided as part of a special regime contract but reasonably could be procured separately. A special regime contract is a concession contract, a defence and security contract, a light touch contract, or a utilities contract.
- 92 Subsection (2) refers to a mixed contract which is a framework for goods, services or works which are provided as part of a framework that is a special regime contract but reasonably could be procured outside the framework.
- 93 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.
- 94 Subsection (5) sets out factors contracting authorities may have regard to when determining whether elements of a mixed contract can reasonably be procured separately.
- 95 Subsection (6) lists the different types of special regime contract: concessions, defence and security, light touch, and utilities.
- 96 Subsection (7) ensures that, in determining what threshold applies to a mixed contract, the rules in clause 4 apply rather than the rules in this clause.

These Explanatory Notes relate to the Procurement Bill [HL] as introduced in the House of Lords on 11 May 2022 (HL Bill 4)

97 Subsection (8) makes clear that subsection (3) does not apply to mixed contracts awarded under a framework.

Part 2: Principle and objectives

Clause 10: Procurement only in accordance with this Act

98 Clause 10 describes what is meant by “a procurement” and “a contracting authority carrying out a procurement”. Subsection (1) sets out that a procurement must not be carried out by a contracting authority except in accordance with this Act.

99 In this legislation, “a procurement” refers to all of the steps taken for the purpose of awarding or managing a contract, as set out at subsection (2). This extends further than just the steps taken to award a contract and includes steps relating to contract management through to the exit from a contract. “A procurement” might also only refer to part of a procurement.

100 Subsection (3) sets out the different methods by which a contracting authority may award a contract. These are by competitive award, direct award or award under a framework.

101 Subsection (4) recognises that there are a variety of ways in which a contracting authority might undertake a procurement. Where the legislation refers to a contracting authority undertaking a procurement, it includes each of these scenarios. These include a contracting authority undertaking a procurement on its own behalf; jointly with another person; through another person, or procurement by a centralised procurement authority.

102 Subsection (5) defines “centralised procurement authority”. Only contracting authorities can be centralised procurement authorities.

Clause 11: Procurement objectives

103 Subsection (1) requires that contracting authorities have regard to the objectives listed when carrying out a procurement.

104 Subsection (2) imposes on contracting authorities an obligation to treat suppliers the same in carrying out a 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.

Clause 12: The national procurement policy statement

106 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.

107 Subsections (3) to (6) make provision for how a national procurement policy statement must be made, including requirements relating to consultation and laying the statement before Parliament.

108 Subsections (7) and (8) set out that the Minister must keep the national procurement policy statement under review and that the statement may be amended or replaced. Subsection (8) confirms that the provisions of this clause apply to all future national procurement policy statements (i.e. any amended or replacement statements), not just the first one made under these provisions.

109 Subsection (9) 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.

110 Subsection (10) sets out those contracting authorities and contracts to which subsection (9) does not apply.

Clause 13: The Wales procurement policy statement

111 Subsections (1)-(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.

112 Subsections (3)-(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.

113 Subsections (6)-(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.

114 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.

115 Subsection (10) defines the Senedd.

Part 3: Award of public contracts and procedures

Chapter 1: Preliminary steps

Clause 14: Planned procurement notices

116 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 52 (time limits)).

117 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.

118 Subsection (3) sets out the time periods for when the notice must have been published in order for the reduced time limits to apply.

119 Subsection (4) directs to clause 52 (time limits) where time reductions are outlined, in clause 52(3), if a planned procurement notice meeting the time periods in subsection (3) is published.

Clause 15: Preliminary market engagement

120 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 a specification or designing a procurement process.

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

122 Subsection (3) requires contracting authorities to ensure that suppliers engaged in the preliminary market engagement do not later receive an unfair advantage over those suppliers

not involved, and that competition that follows the preliminary market engagement is not distorted by the engagement.

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

124 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 “excludable supplier”. This does not mean that the supplier is an excludable supplier for all procurements (unlike in other circumstances set out in clause 54 and Schedule 7) but only for this procurement, with the result that the other provisions relating to “excludable 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 an exclusion under this clause.

Clause 16: Preliminary market engagement notices

125 Subsection (1) sets out that a contracting authority may publish a preliminary market engagement notice before it engages with suppliers or other persons leading up to the publication of a tender.

126 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 17: Duty to consider lots

127 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.

128 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 18: Award of public contracts following a competitive procedure

129 Clause 18 sets out the principles of awarding public contracts that apply to the award of such a contract following a competitive procedure. The clause does not apply in other circumstances.

130 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”.

131 Subsection (2) explains the meaning of “most advantageous tender”. This is determined by the contracting authority and is the tender that best meets the award criteria with reference to the assessment methodology and relative importance of the award criteria. The assessment methodology and relative importance of the criteria are defined in clause 22(3) (award criteria).

132 Subsection (3) sets out the circumstances where a contracting authority must or may disregard a tender. Paragraph (a) says that a tender must be disregarded where the supplier does not satisfy conditions of participation. Paragraph (b) provides that a contracting authority may,

but is not obliged to, disregard a tender where the supplier is not based in the UK or is not a “treaty state supplier” or where the supplier intends to sub-contract the delivery to a supplier that is not a UK supplier or treaty state supplier. A treaty state supplier is defined in clause 81 (treaty state suppliers). Paragraph (c) requires a contracting authority to disregard a tender that materially breaches a procedural requirement set out in either the tender notice or associated documents. An explanation of what “breaching a procedural requirement” means is set out in the subsection that follows.

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

134 Subsection (5) explains what “material” means, which is that where the contracting authority considers that ignoring the breach would put that supplier at an unfair advantage compared to other tenderers in the competition.

135 Subsection (6) refers to clauses 26 (excluding suppliers from competitive award) and clause 28 (excluding suppliers by reference to sub-contractors), which make provision for disregarding tenders from suppliers that are subject to mandatory or discretionary exclusion.

136 Subsection (7) refers to clauses 32 (reserving contracts to supported employment providers) and 33 (reserving contracts to public mutual service), which make provision for disregarding tenders not from certain specified types of supplier, where the contract is reserved for those types of supplier.

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

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

Clause 19: Competitive tendering procedures

139 Subsection (1) requires that before awarding a public contract under clause 18 (award of public contracts following a competitive procedure) (i.e. to the supplier that submits the Most Advantageous Tender) 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.

140 Subsection (2) sets out that a competitive procedure can take two forms. The first is an “open procedure”, which is a single stage procedure whereby the opportunity 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, subject to clause 18). The second is any other competitive tendering procedure which the contracting authority deems appropriate for the purpose of awarding the public contract. Implicitly this will operate within the bounds of the provisions of the Bill (such as the procurement principles, publication and other requirements applicable to a competitive procedure) but can be designed around what would work best for the specific procurement.

141 Subsection (3) requires contracting authorities to ensure that the procedure is not designed in a manner that is unnecessarily complex or burdensome for suppliers considering the nature, complexity and cost of the contract requirement.

142 Subsection (4) differentiates the two overall forms of competitive procedure by reference to some of the actions that could be taken in procedures other than open procedures (which inevitably will be multi-staged). It allows the design of a multi-stage procedure to include a limited number of participants in any of the stages. Award criteria can also be refined in the

course of the procedure (within the parameters set out in the relevant section of the Bill). The subsection prohibits contracting authorities from allowing suppliers who did not enter the competition at the start of the process, or were excluded in an earlier stage, to continue in a multi-stage procurement.

- 143 Subsection (5) sets out other ways a contracting authority can remove suppliers from the competition in a multi-staged procedure. If the supplier has not passed the necessary conditions of participation set for the procurement then they would be excluded from further stages of the competition. The supplier would not be invited to continue when they have failed to meet the award criteria applied to a prior stage. Where particular procurements are reserved for public service mutuals or sheltered employment providers and a supplier submitting a tender does not qualify, then they are to be removed. Contracting authorities may also disregard any tender from a supplier that is not a United Kingdom supplier or treaty state supplier (as defined).
- 144 Subsection (6) explains that the reference to award criteria in the previous subsection refers to both the assessment methodology and the scoring against that methodology.
- 145 Subsection (7) allows the number of lots a supplier submits a tender for to be restricted in the procedure.
- 146 Subsection (8) refers to clauses 27 (excluding suppliers from a competitive tendering procedure) and clause 28 (excluding suppliers by reference to sub-contractors), which make provision for excluding suppliers that are subject to mandatory or discretionary exclusion from a competitive tendering procedure, and to clause 30 (excluding suppliers for improper behaviour).
- 147 Subsection (9) refers to clauses 32 (reserving contracts to supported employment providers) and 33 (reserving contracts to public service mutual) about reserving contracts to certain suppliers.
- 148 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 20: Tender notices and associated tender documents

- 149 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 procedure that is not an open procedure, 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.
- 150 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 18 (award of public contracts following a competitive procedure). It also requires that the tender notice may contain other information specified in regulations, which will be made under clause 86 (notices, documents and information: regulations).
- 151 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.
- 152 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 86 (notices, documents and information: regulations).

Clause 21: Conditions of participation

153 Subsection (1) enables contracting authorities to set conditions on suppliers' participation in a procurement process, prior to the award of a public contract under clause 18 (award of public contracts following a competitive 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.

154 Subsection (2) explains the term "condition of participation".

155 Subsection (3) 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, contravene the rules on technical specifications in clause 24 (technical specifications) or require UK qualifications without allowing for foreign equivalents.

156 Subsection (4) 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.

157 Subsection (5) permits a contracting authority to require evidence that is verifiable by a third party to satisfy a condition of participation.

158 Subsection (6) allows a contracting authority to remove a supplier from the competition when the supplier has not satisfied the conditions of participation.

159 Subsection (7) 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 67 (sub-contracting: directions).

160 Subsection (8) 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 67 (sub-contracting: directions) includes more detail on sub-contracting arrangements.

Clause 22: Award criteria

161 Clause 22 deals with the rules that apply to award criteria.

162 Subsection (1) explains that the "award criteria" mean criteria against which suppliers are assessed during a competitive procedure.

163 Subsection (2) sets out specific rules that contracting authorities must follow when setting the award criteria to apply. The criteria must relate to the subject matter of the contract, be 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.

164 Subsection (3) requires that the award process is transparent and defines the "assessment methodology". Contracting authorities are required to describe how the award criteria will be applied and to set out their relative importance, which may be by weighting or ranking them, or through an alternative approach.

- 165 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 determine to do so.
- 166 Subsection (5) provides a non-exhaustive list of what may constitute the “subject matter of a contract” (referred to at subsection (2)).
- 167 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 23: Refining award criteria

- 168 Subsection (1) provides that, as part of a competitive tendering procedure (other than an open 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, e.g. 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 18 (to conclude the procedure).
- 169 Subsection (2) provides that as a consequence of refining an award criterion, the relative importance may also be refined.
- 170 Subsection (3) prevents refinements that mean the award criteria change so significantly that one or more suppliers who haven’t made it through in an earlier round would have done so.
- 171 Subsection (4) provides that if a refinement affects the tender notice and any associated tender documents, these must be modified and provided again.

Clause 24: Technical specifications

- 172 Subsection (1) requires that terms of a procurement 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.
- 173 Subsection (2) sets out that the terms of procurement can refer to a United Kingdom technical standard only if there isn’t an internationally recognised equivalent, otherwise they must allow equivalents to be acceptable.
- 174 The purpose of subsection (3) is to ensure the terms of a procurement 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.
- 175 If specifying these terms is unavoidable, subsection (4) states that the terms of procurement must also allow for the demonstration of equivalent quality and performance with no disadvantage if such demonstrations are provided.
- 176 Subsection (5) sets out that a term of a procurement is anything set out in the procurement documents covering conditions of participation, competitive tendering requirements or award criteria. 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.

Clause 25: Sub-contracting specifications

- 177 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.
- 178 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 40 (direct award in special cases), such as for technical reasons or when a supplier has exclusive rights.
- 179 Subsection (2) sets out that where a contracting authority awards a contract for the supply of goods, services or works under clause 18 (award of public contracts following a competitive 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.

Exclusions and modifications

Clause 26: Excluding suppliers from a competitive award

- 180 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.
- 181 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.
- 182 A supplier may be an excluded or an excludable supplier by virtue of their “associated suppliers” being an excluded or excludable supplier. Subsection (3) requires a contracting authority to give a supplier the opportunity to replace a sub-contractor that is an associated supplier with a suitable alternative prior to being excluded due to an exclusion ground applying to that sub-contractor.
- 183 Subsection (4) defines an “associated supplier” as a sub-contractor which is being relied upon to meet the conditions of participation in the procurement (under clause 21(6)).
- 184 The basis on which a supplier is excluded (i.e. subject to mandatory exclusion) or excludable (i.e. subject to discretionary exclusion) is set out in clauses 54 (meaning of excluded and excludable supplier) and 55 (considering whether a supplier is excluded or excludable) and the grounds on which they are (exclusion grounds) are set out in Schedule 6 (mandatory exclusion grounds) and 7 (discretionary exclusion grounds).

Clause 27: Excluding suppliers from a competitive tendering procedure

- 185 Subsection (1) requires a contracting authority to determine for all multi-stage competitive tendering procedures whether a supplier is subject to mandatory or discretionary exclusion before allowing them to participate. This check must happen before allowing the supplier to participate in the procedure to ensure exclusions are considered at the start of multi-stage procedures. 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).
- 186 Subsection (2) places an obligation on contracting authorities to exclude a supplier from participating in a competitive tendering procedure if it determines that the supplier is an excluded supplier.

- 187 Subsection (3) allows a contracting authority to exclude a supplier from participating in a competitive tendering procedure if it determines that the supplier is an excluded supplier.
- 188 Subsection (4) requires a contracting authority to give a supplier the opportunity to replace a sub-contractor that is an associated supplier with a suitable alternative prior to being excluded due to an exclusion ground applying to that sub-contractor.
- 189 Subsection (5) 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 (depending on the process chosen by the contracting authority).
- 190 Subsection (6) defines an “associated supplier” as a sub-contractor which is being relied upon to meet the conditions of participation.

Clause 28: Excluding suppliers by reference to sub-contractors

- 191 Subsection (1) permits a contracting authority to ask a supplier for information on whether they intend to sub-contract any or all of a contract to another supplier. In addition, the contracting authority can ask for information on sub-contractors to determine if the sub-contractor is an excluded or excludable supplier. This allows, but does not require, consideration of the exclusion grounds in relation to sub-contractors that are not associated suppliers, i.e. which are not being relied upon to meet the conditions of participation.
- 192 Subsection (2) 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 (1), if a sub-contractor is an excluded supplier, the contracting authority must treat the supplier as itself subject to mandatory exclusion and disregard a tender from that supplier or exclude them from participating in a competitive tendering procedure.
- 193 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 (1), if a sub-contractor is an excludable supplier, the contracting authority may treat the supplier as itself subject to discretionary exclusion for the purpose of disregarding a tender from that supplier or excluding them from participating in a competitive tendering procedure.
- 194 Subsection (4) requires a contracting authority to provide a supplier with the opportunity to find a suitable replacement sub-contractor before their tender is disregarded or the supplier is excluded under subsections (2) or (3).
- 195 Subsection (5) 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 (6) clarifies that the requirements in subsection (2) and (3) regarding disregarding tenders and excluding suppliers from competitive tendering procedures do not apply to associated suppliers, i.e. sub-contractors that are being relied on by the supplier to meet a condition of participation. A sub-contractor being relied on in this way is covered in clause 25 (excluding suppliers from a competitive award) and clause 26 (excluding suppliers from a competitive tendering procedure). The effect of this is that the supplier submitting the tender is not treated as an excluded or excludable supplier for any other purpose under this legislation.

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

- 197 Subsection (1) sets out that subsection (2) applies to any contracting authority other than a Minister of the Crown if it intends to disregard a tender or exclude a supplier on the basis of the national security discretionary exclusion ground in paragraph 15 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 has obtained the Minister's consent to the exclusion.

Clause 30: Excluding suppliers for improper behaviour

199 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.

200 Subsection (2) says that, in these circumstances, the supplier must be treated as an excluded supplier in relation to the award of the public contract.

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

202 Subsection (4) sets out the circumstances in which a supplier might act improperly in a procurement.

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

204 Subsection (6) says that, in these circumstances, the supplier must be treated as an excluded supplier in relation to the award of the public contracts.

205 An excluded supplier under this clause is not automatically an excluded or excludable supplier for the purposes of clauses 54 (meaning of excluded and excludable supplier) and 55 (considering whether a supplier is excluded or excludable) as it addresses exclusion for behaviour specific to the procurement. 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. However, 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 14 of schedule 7).

Clause 31: Modifying a section 18 procurement

206 There will be times when changes need to be made to the 'terms of a procurement' (defined at clause 31(7)). Subsection (1) sets out when it is permitted to make certain changes to the criteria or conditions during an open procedure (prior to tenders being received), and during a multi-stage procurement (before the deadline for submitting a request to participate and before the deadline for submitting the first or only tender), provided there is no material impact on the market response to the Tender Notice (in particular the decision to participate). This aims to strike the balance between permitting changes required by contracting authorities and preventing abuse of flexibility (e.g. to suit a particular supplier).

207 Subsection (2) only applies to multi-stage procurements and allows for modification after initial tenders are received but before the deadline for submitting final tenders has passed, provided the modification is not 'substantial'. For light touch contract procurements modifications of any type are allowed after the submission of tenders to allow for maximum flexibility.

208 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.

- 209 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.
- 210 Subsections (5) - (6) require transparency of the modifications through the revision and re-publication of the tender notice and any associated tender documents that were affected by the changes or revisions to the time limits (where the modification was prior to the deadline for requests to participate or first and only tenders).
- 211 If the modification was made after such a deadline in accordance with subsection (2), subsection (7) requires a contracting authority to only notify those remaining in the procedure of the modification (since it is only those remaining who need to be aware). The modification must be before final tenders are submitted and must not be substantial.
- 212 Subsection (7) defines 'terms of a procurement' and 'participating supplier'.
- 213 Subsection (8) cross refers to section 41 (switching to direct award).

Reserving contracts to certain suppliers

Clause 32: Reserving contracts to supported employment providers

- 214 Subsection (1) allows the exclusion of suppliers that are not "supported employment providers" from a competitive tendering procedure other than an open procedure. The contract will accordingly be reserved to supported employment providers.
- 215 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.
- 216 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

- 217 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.
- 218 Subsections (2) to (4) set out the procedure for this. Under subsection (2), in a competitive tendering procedure other than an open 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 such an excluded supplier.
- 219 Subsection (5) defines a "qualifying public service mutual" as a "public service mutual" that has not been awarded a comparable contract by the contracting authority in accordance with this clause in the previous three years.
- 220 Subsection (6) defines a "public service mutual".
- 221 Subsection (7) defines "reservable light touch services" and "comparable contract".
- 222 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 8 (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

- 223 Subsection (1) says a multi-stage competitive tendering procedure can be reserved for suppliers who are members of a dynamic market or part of a dynamic market (e.g. a category under a dynamic market).
- 224 Subsection (2) states that subsection (3) applies if the competitive tendering procedure is restricted in the way anticipated in subsection (1).
- 225 Subsection (3) requires a contracting authority to disregard tenders from suppliers who are not members of a dynamic market or a part of it.
- 226 Subsection (4) says that, before a contracting authority excludes a supplier or disregards a tender from a supplier under this clause, it must consider an application for membership of the dynamic market received from that supplier where one has been submitted. This allows suppliers who are not on a dynamic market to still bid for contracts under it if they have applied to be on the dynamic market at the time they submit their tender.
- 227 Subsection (5) states that subsection (4) does not apply if, due to exceptional circumstances relating to the procurement, there is insufficient time to consider the application for membership before the deadline for submission of tenders.

Clause 35: Dynamic markets: establishment

- 228 Subsection (1) allows a contracting authority to establish a dynamic market in order to award contracts under it.
- 229 Subsection (2) allows a utility to also establish a utilities dynamic market in order to award utilities contracts under it.
- 230 Subsection (3) sets out that a centralised procurement authority may establish a dynamic market for use by other contracting authorities and may also set up a utilities dynamic market to award only utilities contracts.
- 231 Subsection (4) sets out that, if other organisations set up a utilities dynamic market which complies with the provisions of the legislation applicable to utilities dynamic markets established by private utilities, utilities can use them to award utilities contracts.
- 232 Subsection (5) says that references to contracts awarded by reference to membership of a dynamic market refers to where a contract is awarded under clause 34 (competitive award by reference to dynamic markets).
- 233 Subsection (6) defines a “utility” for the purpose of this clause.
- 234 Subsection (7) clarifies that documents establishing or modifying a dynamic market are not a public contract.
- 235 Subsection (8) sets out which provisions in this clause do not apply to concession contracts and which apply to utilities contracts that are concession contracts.

Clause 36: Dynamic markets: membership

- 236 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.
- 237 Subsection (2) 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 that are excluded or excludable suppliers and that meet the conditions for membership, considering whether to admit suppliers that are excludable suppliers exclusion and that meet the conditions for membership and informing suppliers of the outcome of their applications.

238 Subsection (3) sets out that the number of suppliers on a dynamic market cannot be capped and that the conditions for membership of a dynamic market may not be modified during the life of the dynamic market.

Clause 37: Dynamic markets: removing members from the market

239 Subsection (1) requires the removal of a supplier from a dynamic market where they are on the debarment list for a mandatory exclusion ground.

240 Subsection (2) allows for the removal of a supplier that is otherwise 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.

241 Subsection (3) clarifies the circumstances in which a supplier becomes an excludable supplier for the purposes of subsection (2).

242 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 why before doing so.

Clause 38: Dynamic markets: fees

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

244 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.

245 Subsection (3) sets out that fees can be charged to suppliers under a utilities dynamic markets 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

246 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.

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

248 Subsections (2) to (5) say that a contracting authority must publish notices on establishment of the dynamic market, after modifying a dynamic market and when the dynamic market ceases to operate. Notices must contain the information required in the clause and any other information specified in regulations made under clause 86 (notices, documents and information: regulations).

249 Subsection (6) stipulates that subsection (5) does not apply to private utilities (but the other requirements do).

Chapter 3: Direct award

Clause 40: Direct award in special cases

- 250 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 that (a direct award) is permitted.
- 251 Subsection (1) allows a contract to be awarded directly to a supplier (as long as they are not an excluded supplier) where one of the justifications for direct award applies (set out in Schedule 5 (direct award justifications)).
- 252 Subsection (2) permits a direct award to an excluded supplier where there is an overriding public interest to do so.
- 253 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.
- 254 Subsection (4) requires a contracting authority to consider whether the supplier is an excludable supplier before awarding the contract.
- 255 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.
- 256 Subsection (6) refers to the justifications for direct award set out in Schedule 5 (direct award justifications).
- 257 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 41: Direct award to protect life, etc

- 258 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 made 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).
- 259 Subsection (2) provides a definition of what would be deemed "necessary" (i.e. to protect life or public safety).
- 260 Subsection (3) provides a list of specific provisions that the Minister can set out in the regulations envisaged in subsection (1).
- 261 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 40 (Direct award in special cases) is no longer necessary they must revoke the regulations.

Clause 42: Switching to direct award

- 262 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 a competitive procedure.
- 263 Subsection (1) provides the conditions that must apply when a contracting authority wants to do so. The direct award cannot be to a supplier who has previously been excluded from the competition for any reason.
- 264 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 18(3) (competitive tendering procedures), secondly when the tender was assessed it did not satisfy the 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).
- 265 Subsection (5) allows for selection or preliminary steps to be taken prior to any direct award (in the same way as in clause 40(3)).
- 266 Subsection (6) says that, before making a direct award under this clause, the contracting authority must consider whether the supplier is an excludable supplier under clause 54(2)(a).

Clause 43: Transparency notices

- 267 Subsection (1) requires that before a contract is awarded by a direct award under clause 40 (direct award in special cases) (though see subsection (3) for a restriction on that) or clause 42 (switching to direct award), the contracting authority must publish a transparency notice.
- 268 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 86 (notices, documents and information: regulations).
- 269 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 44: Frameworks

- 270 A framework itself is a public contract (see clause 2(3)) and, as such, must be awarded in accordance with the legislation. This clause sets out the basis on which the award of future contracts can be made under a framework.
- 271 Subsection (1) allows for public contracts to be awarded in accordance with the terms of a framework. This enables contracting authorities to use frameworks awarded in compliance with the rules to award public contracts, without having to undertake a competitive tendering procedure or justify direct award.
- 272 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 above threshold contracts, i.e. they can be used for the award of below threshold contracts, but the remainder of the clause regulates only the award of public contracts under frameworks.

273 Subsections (3) to (4) set out the two ways in which a framework can provide for the future award of public contracts. Subsection (3) addresses award without competition, which is permitted 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. Subsection (4) states that a framework can alternatively provide for the award of a public contract following a competitive process.

274 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 contracts that can be awarded under it.

275 Subsection (6) sets out that a framework must not allow the award of a public contract under it to a supplier who is subject to mandatory exclusion. 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.

276 Subsection (7) sets out that fees can be charged of 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.

277 Subsection (8) makes it clear that this clause does not apply to the award of concession contracts or to the award of a framework under an open framework.

Clause 45: Frameworks: maximum term

278 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 framework set up by a public utility.

279 Subsection (2) however 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.

280 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.

281 Subsection (4) provides definitions of a “defence and security framework” and a “utilities framework”.

282 Subsection (5) says this clause does not apply to the award of a framework under an open framework (i.e. the maximum term requirements of 4 years do not apply to each framework which forms part of the open framework) or frameworks established by private utilities. Open frameworks are addressed in clause 47 (open frameworks) and there is no limit on the term of frameworks established by private utilities.

Clause 46: Frameworks: implied terms

- 283 Subsection (1) says that a term is implied into all frameworks that a contracting authority can exclude a supplier from the framework or from their right to compete for contracts under the framework where the supplier has become an excluded or excludable supplier after the framework was awarded.
- 284 Subsection (2) says that an excludable supplier for the purpose of subsection (1) includes where the supplier becomes an excludable supplier because of new or changed circumstances that occurred after the award of the framework or where the contracting authority finds out that the supplier is an excludable supplier.
- 285 Subsection (3) says that, before excluding a supplier on the basis that an associated supplier is an excluded or excludable supplier, the contracting authority must give the supplier reasonable opportunity to replace the associated supplier.
- 286 Subsection (4) says any terms in the framework which attempt to restrict or override the implied term are of no effect.

Clause 47: Open frameworks

- 287 Subsection (1) outlines that an open framework is a scheme under which new suppliers can be added to the scheme 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 frameworks must be substantially the same throughout. Subsection (2) sets out the minimum frequency of when an open framework must be reopened, i.e. after the first three years and at least every five years thereafter, up to a maximum term of eight years. This allows for the open framework to be re-opened on a more frequent basis - e.g. annually - if desired.
- 288 Subsection (3) states how a supplier can be re-admitted to the open framework on 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.
- 289 Subsection (4) 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.
- 290 Subsection (5) states that, if a single supplier is awarded to 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.
- 291 Subsections (6) and (7) are self explanatory.
- 292 Subsection (8) states that the requirement in subsection (1) that the terms of the open framework must be substantially the same throughout is in line with the provisions for contract amendments set out in the Bill. If a substantially different set of terms is needed at re-award, then a new framework must be awarded in accordance with the Bill rather than reopening an open framework.
- 293 Subsection (9) states that an open framework may never be awarded by direct award.

Chapter 5: After award, standstill periods and notices

Clause 48: Contract award notices and assessment summaries

- 294 Subsection (1) requires a contracting authority to publish a contract award notice before entering into a public contract, awarded under Part 3.
- 295 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 86 (notices, documents and information regulations).
- 296 Subsection (3) requires that before issuing an award notice, contracting authorities that awarded a contract following a competitive procedure set out in clause 18 (award of public contracts following a competitive procedure) must provide certain suppliers with an assessment summary. Those suppliers are suppliers that submitted an “assessed tender”.
- 297 Subsection (4) defines an assessment summary to include the assessment of the supplier's tender and the winning (most advantageous) tender.
- 298 Subsection (5) defines an assessed tender as a tender which was assessed against the award criteria applicable to the procurement and was not removed from the competition in accordance with clause 18(3) (award of public contracts following a competitive procedure).
- 299 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 an 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.

Clause 49: Standstill periods on the award of contracts

- 300 Subsection (1) states a contract must not be entered into before the end of any mandatory standstill period specified in subsection (2). Contracting authorities may specify a longer standstill period in the award notice - if they do so, that standstill period must be complied with.
- 301 Subsection (2) defines the mandatory standstill period as 8 working days which begins the day the award notice is published.
- 302 Subsection (3) explains that certain types of contract do not attract a mandatory standstill. These are: direct award on the grounds of extreme and unavoidable urgency, to protect life, contracts awarded under a framework, contracts awarded by reference to a dynamic market (which includes utilities dynamic market) and light touch contracts. This means the contracts can be entered into immediately following the decision to award the contract.
- 303 Subsection (4) permits contracting authorities awarding the type of contracts listed in subsection (3) to voluntarily specify a standstill period in the award notice, but provides that if such a standstill is provided for, it must be complied with.

Clause 50: Key performance indicators

- 304 Subsection (1) requires a contracting authority, before it enters into a contract worth £2 million or more, to set and publish at least three key performance indicators in respect of the contract.
- 305 Subsection (2) disapplies the obligation to set such indicators where the contracting authority considers that the supplier's performance cannot appropriately be assessed through such indicators.

306 Subsection (3) defines ‘key performance indicator’.

307 Subsection (4) creates a power for an appropriate authority to amend the £2 million threshold by regulations.

308 Subsection (5) sets out that the obligation to set such key performance indicators does not apply in relation to certain types of contract.

309 Subsection (6) directs the reader to clause 66 (assessment of contract performance) for further provision about assessing contract performance against these indicators.

Clause 51: Contract details notices and publication of contracts

310 Subsection (1) requires that once a contracting authority has entered into a public contract awarded under Part 3, it must publish information on that contract within a specified time period after the contract is entered into.

311 Subsection (2) establishes that a “contract details notice” is a notice setting out that the contracting authority has entered into a contract as required by subsection (1). It also requires that the notice must contain such other information as is set out in regulations made under clause 86 (notices, documents and information: regulations).

312 Subsection (3) requires a contracting authority to publish a copy of a public contract within 90 days of the date that it is entered into, if the estimated value exceeds £2 million.

313 Subsection (4) disapplies the obligation to publish contracts, established in subsection (3), to contracts within the regulatory ambit of Welsh Ministers.

314 Subsection (5) allows either a Minister of the Crown or a Northern Ireland department to change the financial thresholds that are contained within subsection (3).

315 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 52: Time limits

316 This clause establishes the minimum periods that contracting authorities must allow for submission of tenders (and/or requests to participate) in relation to procurements under Part 3. It also establishes a range of matters to which they must have regard when setting those time limits and any other time limits relevant to Part 3.

317 Subsection (1) requires that when setting those time limits contracting authorities must have regard to a number of factors, established in paragraphs (a)-(e).

318 Subsection (2) requires that the same time limits must apply to all suppliers.

319 Subsections (3) and (4) set out in tables the mandatory time limits that must be met or exceeded in different circumstances.

320 Subsection (5) sets out useful definitions used in this clause.

Clause 53: Procurement termination notices

- 321 Subsection (1) requires a contracting authority to confirm (by way of a notice) if it decides not to award a procurement, i.e. if it terminates a procurement process.
- 322 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 to do so.
- 323 Subsection (3) stipulates that this clause does not apply to private utilities.

Excluding suppliers

Clause 54: Meaning of excluded and excludable supplier

- 324 Subsection (1) defines 'excluded suppliers' as suppliers which meet a mandatory ground for exclusion and where the contracting authority considers there to be a risk 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 suppliers, which are defined at subsection (4).
- 325 Subsection (2) defines 'excludable suppliers' as suppliers which meet a discretionary ground for exclusion and where the contracting authority considers there to be a risk 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 suppliers, which are defined at subsection (4).
- 326 Subsection (3) affords flexibility to contracting authorities which are private utilities to treat the mandatory exclusion grounds as discretionary.
- 327 Subsection (4) defines associated suppliers as suppliers being relied upon by the supplier to meet the conditions of participation. For instance, in a supply chain arrangement with one lead supplier and several principal sub-contractors, these sub-contractors participants will typically be associated suppliers of the lead supplier.
- 328 Subsections (5) and (6) refer to the mandatory and discretionary exclusion grounds in schedules 6 and 7.

Clause 55: Considering whether a supplier is excluded or excludable

- 329 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 reoccur. 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.
- 330 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 reoccur (a so-called 'self-cleaning' process).
- 331 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 56: Notification of exclusion of supplier

- 332 This clause imposes a duty on contracting authorities to notify the relevant Minister whenever they exclude a supplier (or a sub-contractor which has been replaced due to being an excluded or excludable supplier). This will allow suppliers which have been excluded to be considered for addition to the 'debarment list'. This list will sit alongside the exclusions regime as an additional protection against contracts being awarded to unfit suppliers.
- 333 Subsection (1) says the clause applies when a contracting authority has excluded a supplier from a procurement due to an exclusion ground applying to them or a sub-contractor has been replaced due to an exclusion ground applying to the sub-contractor (except where that ground is a failure to cooperate with an investigation under clause 57).
- 334 Subsection (2) places an obligation on contracting authorities to notify of the exclusion within 30 days of notifying the supplier.
- 335 Subsection (3) sets out what the notice must contain. This includes the exclusion ground that the contracting authority has applied and any other information specified in regulations made under clause 86.
- 336 Subsections (4) and (5) place an 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 the outcome of the challenge within 30 days of commencement or determination of proceedings.
- 337 Subsection (6) defines the terms "exclusion grounds" "relevant exclusion grounds" and "relevant appropriate authority".

Clause 57: Investigations of supplier - exclusion grounds

- 338 Subsection (1) provides powers for appropriate authorities to investigate whether an exclusion ground applies to a supplier and whether the circumstances giving rise to the ground are likely to reoccur.
- 339 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.
- 340 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 86.
- 341 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.
- 342 Subsection (5) provides that contracting authorities must comply with the notice within whatever deadline is set in the notice.
- 343 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 mandatory exclusion.
- 344 Subsection (8) defines the terms "relevant documents" and "relevant exclusion grounds".

Clause 58: Investigations under section 57: reports

- 345 Subsection (1) says this clause applies where an appropriate authority has conducted an investigation into a supplier under clause 57.
- 346 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.
- 347 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.
- 348 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.
- 349 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.
- 350 Subsection (7) provides relevant definitions.

Clause 59: Debarment list

- 351 This clause as per subsections (1) to (3) provides a power for the Minister 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 reoccur. 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.
- 352 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.
- 353 Subsection (5) provides that the Minister must give advance notice to a supplier before adding it to the debarment list.
- 354 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.
- 355 Subsection (8) provides that the debarment list must be published.
- 356 Subsection (9) requires the Minister to consult with the Welsh Ministers and Northern Ireland Department prior to entering or removing a supplier's name from the debarment list.
- 357 Subsection (10) refers to the definition of 'relevant exclusion ground'.

Clause 60: Debarment list - application for removal

- 358 This clause under subsection (1) allows for a supplier named on the debarment list to apply for their removal from the list.
- 359 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 61: Debarment decisions - appeals

360 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.

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

Part 4: Management of public contracts

Terms implied into public contracts

Clause 62: Electronic invoicing: implied term

362 Subsection (1) introduces a term to be implied in all public contracts awarded subject to the Bill.

363 Subsection (2) sets out the implied contract term that contracting authorities must accept and process for payment an undisputed e-invoice issued for payment that complies with the e-invoice standard.

364 Subsection (3) sets out the reference details of the British standard for electronic invoicing, and defines an electronic invoice as an invoice that is issued, transmitted and received in a structured electronic format that allows for automatic and electronic processing. The Standard has two parts: the semantic model (the computer language to be used), and the syntax (the structure). As the Standard may be amended, to reflect corrections or additions, this subsection allows for the reference to the British Standard in this legislation to be automatically updated.

365 Subsection (4) clarifies that reference to the standard is as that standard stands on the day the contract is entered into or, if agreed between the parties, the day the invoice is issued.

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

367 Subsection (6) provides a power for an appropriate authority to amend the e-invoicing standard that an e-invoice is to comply with.

368 Subsection (7) sets out that before regulations are made to amend the e-invoicing standard, a consultation with relevant stakeholders must take place.

Clause 63: Implied payment terms in public contracts

369 This clause sets out terms to be implied into all public contracts concerning the prompt payment of valid, undisputed invoices.

370 Subsection (1) sets out those contracts that will not have the payment terms implied (concession contracts, private utilities' contracts, maintained schools, Academies or sixth form colleges).

371 Subsection (2) sets out the requirement that a payment due to be made under the contract by the contracting authority must be paid within 30 days from the day the invoice is received by the authority (or later where a payment date is specified).

372 Subsection (3) sets out that subsection (2) does not apply if the invoice is invalid or in dispute.

373 Subsection (4) requires the contracting authority to notify the payee promptly if the invoice is invalid or disputed.

374 Subsection (5) permits payment to be accepted where made by a third party, but only if agreed by the payee.

375 Subsection (6) sets out that these terms cannot be restricted or overridden by express contractual terms.

376 Subsection (7) clarifies that public contracts may contain shorter payment terms where agreed between the parties or where required by statute.

377 Subsection (8) defines a valid invoice.

378 Subsection (9) sets out the minimum information contained in a valid invoice.

379 Subsection (10) provides a power for the Minister to change the payment days under subsection (2), subject to a maximum payment term of 30 days.

380 Subsection (11) defines Academy, maintained school, payee and sixth form college.

Notices about payments and performance

Clause 64: Payments compliance notices

381 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 became payable.

382 Subsection (2) defines a payments compliance notice as a notice setting out specific information about the authority's compliance with the obligation to make payments under public contracts within 30 days (see clause 63(2) (implied payment terms in public contracts)). It must also include any other information specified in regulations under clause 86 (notices, documents and information: regulations).

383 Subsection (3) defines the reporting periods.

384 Subsection (4) provides a power for an appropriate authority to make regulations relating to the preparation of the notice.

385 Subsection (5) defines 'specified information' by reference to regulations under clause 86.

386 Subsection (6) disapplies the obligations in this section to private utilities.

Clause 65: Information about payments under public contracts

387 Subsection (1) sets out that when a contracting authority makes a payment of £30,000 or more, under a public contract, it must publish specified information (see subsection (6)). The purpose of this provision is to enable citizens to scrutinise payments made by contracting authorities under public contracts.

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

389 Subsection (3) creates a power for an appropriate authority to make regulations changing the relevant financial threshold or time limit.

390 Subsection (4) states that this clause does not apply in the case of utilities contracts, concessions contracts and those awarded by a maintained school, Academy or sixth form college corporation.

391 Subsection (5) sets out definitions relevant to this clause and sets out that the information to be published will be specified in regulations made under clause 86 (notices, documents and information: regulations).

Clause 66: Assessment of contract performance

392 Subsection (1) explains that subsection (2) applies where a contracting authority has set key performance indicators under clause 50(1) (key performance indicators).

393 Subsection (2) requires that at least annually during the lifetime of the contract and at the termination of the contract, the contracting authority must assess the suppliers' performance against the established key performance indicators and publish certain information about them. That information is to be specified in regulations made under clause 86 (notices, documents and information: regulations).

394 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.

395 Subsection (5) sets out the consequences of the occurrence of any of the events in subsections (3) or (4). Where any of these takes 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 86 (notices, documents and information: regulations). This notice must be published within 30 days of the day on which this subsection first applied.

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

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

Sub-contracting

Clause 67: Sub-contracting: directions

398 Subsection (1) applies where a supplier has indicated that they intended to sub-contract the whole or part of the contract to a sub-contractor (see clause 27 subsection (1)(a) (excluding suppliers by reference to sub-contractors), or that the supplier has relied on another supplier to pass the conditions of participation (see clause 21 subsection (8) (conditions of participation)).

399 Subsection (2) permits the contracting authority to require the supplier to enter into legally binding agreements with sub-contractors where such an arrangement is indicated.

400 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 require that the supplier enter into a sub-contracting arrangement with another supplier, or (if the contract has already been awarded) to terminate the contract.

401 Subsection (4) explains that the term 'appropriate supplier' that a contracting authority could direct a supplier to enter into a legally binding arrangement under subsection (3)(b), means a supplier that has not breached any of the exclusion grounds, and also has the same qualifying

credentials to pass the conditions of participation as the sub-contractor that was initially either chosen by the contracting authority, or relied upon by the supplier.

402 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.

403 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 68: Implied payment terms in sub-contracts

404 Subsection (1) sets out that payment terms (set out in subsections (2)-(5) of clause 63 (implied payment terms in public contracts) are implied in every public sub-contract.

405 Subsection (2) clarifies that the terms as implied into public sub-contracts will, instead of contracting authority, refer to the party to whom goods, services or works are supplied under the contract.

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

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

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

409 Subsection (6) sets out those contracts which will not have these terms implied into them (concession contracts, private utilities' contracts, contracts awarded by maintained schools, Academy or sixth form).

410 Section (7) confirms that expressions used in subsection (6)(c) have the same meaning as in subsection (12) of clause 63 (implied payment terms in public contracts).

Modifying public contracts

Clause 69: Modifying a public contract

411 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 that modification. If the modification is otherwise 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.

412 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.

413 Subsection (2) 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 change the overall nature of the contract or materially change its scope, or materially change the economic balance of the contract in favour of the supplier.

414 Subsection (3) sets out that a modification is below threshold where it is neither permitted by Schedule 8 nor is substantial within the meaning of subsection (2), 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 change the scope of a contract.

415 Subsection (4) sets out that the aggregated value of below-threshold modifications is the amount of the estimated value of the contract after modification that is attributable to below-threshold modifications.

416 Subsection (5) 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 (corporate restructuring).

417 Subsection (6) expressly permits that modifications may be made to light touch contracts.

418 Subsection (7) 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 these contract modification rules.

419 Subsections (8) and (9) provide that modifications that could reasonably have been made together (and if made together would have been subject to Part 3) cannot be made separately and be permitted under this clause without a procedure under Part 3 being carried out.

Clause 70: Contract change notices and publication of modifications

420 Subsection (1) sets out that before modifying a public contract or convertible contract, a contracting authority must publish a contract change notice.

421 Subsection (2) sets out where subsection (1) does not apply, which is when: (a) the modification is (i) a below-threshold modification (as set out in clause 69 - modifying a public contract) and (ii) does not increase or decrease the term of the contract by more than 10 percent of the maximum term provided for on award; or (b) the public contract is a light touch contract.

422 Subsection (3) states what a 'contract change notice' is and that it must contain any information required by regulations made under clause 86 (notices, documents and information: regulations).

423 Subsections (4) and (5) have the effect that if separate modifications could have been made together but were not, and, as a result of that separation, each modification falls below a threshold for publishing a contract change notice, a contract change notice must still be published (unless the contract is a light touch contract).

424 Subsection (6) sets out that the contracting authority must publish a copy of the contract as modified, within 90 days of making a qualifying modification under section 69(1). Subsection (7) sets out that a "qualifying modification" is a modification which modifies, or results in, a public contract with an estimated value of more than £2 million. Subsection (8) sets out that in publishing a contract under subsection (6), a contracting authority may withhold from publication information which the contracting authority considers is exempt information.

425 Subsection (8) sets out that subsection (6) does not apply in relation to a modification of a contract that was (a) awarded by a devolved Welsh authority, unless it was awarded under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement, or (b) awarded under a devolved Welsh procurement arrangement.

426 Subsection (9) sets out that this section does not apply in relation to a modification of a contract that was (a) awarded by a transferred Northern Ireland authority, unless it was

awarded under a reserved procurement arrangement or a devolved Welsh procurement arrangement, or (b) awarded under a transferred Northern Ireland procurement arrangement.

427 Subsection (10) states that this section does not apply to defence and security contracts or private utilities' contracts.

428 Subsection (11) provides that a Minister of the Crown may make regulations to amend this section for the purpose of changing the value thresholds in subsection (2) and the financial threshold in subsection (7).

Clause 71: Voluntary standstill period on the modification of contracts

429 This clause provides that if a contracting authority elects to enter a period of standstill when it publishes a contract change notice, a contracting authority may not modify a public contract or a convertible contract before the end of any standstill period provided for in a contract change notice. A contracting authority is not required to specify a standstill period in a contract change notice.

Terminating public contracts

Clause 72: Implied right to terminate public contracts

430 Subsection (1) sets out that in every public contract, it is an implied term that the contracting authority can terminate the contract if one of the termination grounds applies.

431 Subsection (2) sets out the termination grounds. Those grounds being where the contracting authority considers that: (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 an associated supplier (i.e. a sub-contractor which was relied upon to meet the conditions of participation); (c) another sub-contractor has, since the award of the contract, become an excluded supplier or an excludable supplier.

432 Subsection (3) makes it clear that (c) only applies where the sub-contractor is one about which the contracting authority requested information during the procurement and the contracting authority was not aware that the supplier intended to sub-contract all or some of the performance of the contract to an excluded or excludable supplier.

433 Subsection (4) 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 decision to terminate.

434 Subsection (5) sets out that before terminating a contract under (b) or (c) referred to in subsection (2), the contracting authority must give the supplier an opportunity to bring the sub-contract with the relevant sub-contractor to an end and replace them with an alternative suitable sub-contractor.

435 Subsection (6) sets out a public contract may contain provision about restitution and other matters ancillary to the termination of the contract by reference to the implied term in this section.

436 Subsection (7) states that any contractual term purporting to restrict or override the implied term is without effect.

437 Subsection (8) 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 and also where the contracting authority has found out that the supplier was an excludable supplier before the contract was awarded.

438 Subsection (9) provides a definition of “material breach”.

Clause 73: Contract termination notices

439 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.

440 Subsection (2) sets out what a ‘contract termination notice’ is and that it must include any information required in regulations made under clause 86 (notices, documents and information: regulations).

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

442 Subsection (4) states that this section does not apply to private utilities.

Part 5: Conflicts of interest

Clause 74: Conflicts of interest - duty to identify

443 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.

444 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 procurement. The section applies when the individual or Minister is in a position to have an influence over a decision on a procurement, and have 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 75: Conflicts of interest - duty to mitigate

445 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 as compared to other suppliers in relation to the specific procurement.

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

447 Subsections (3) and (4) set out that where a conflict of interest puts a supplier at an advantage in respect of a specific 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.

448 Subsection (5) refers back to the definition of a conflict of interest provided in clause 74 (conflicts of interest - duty to identify).

Clause 76: Conflicts assessments

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

450 Subsection (3) sets out that a conflicts assessment must include the conflicts or potential conflicts of interest identified in accordance with clause 74 (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 75 (conflicts of interest - duty to mitigate).

451 Subsection (4) adds that a conflicts assessment is also to include steps taken or to be taken to demonstrate that perceived conflicts of interest will not turn into actual or potential conflicts of interest.

452 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.

453 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.

454 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 establish or terminate a dynamic market (see clause 38 - dynamic market notices), terminate procurements (see clause 53 - procurement termination notices) or terminate contracts (see clause 73 - contract termination notices).

455 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

456 Part 6 of the Act 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 77: Regulated below-threshold contracts

457 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.

458 Subsection (2) explains that Part 6 does not apply to maintained schools, Academies or sixth form colleges or to Northern Ireland devolved authorities.

459 Subsection (3) defines the important terms used in this section.

Clause 78: Regulated below-threshold contracts: procedure

460 Subsection (1) states that contracting authorities conducting a regulated below-threshold procurement may not operate a separate suitability stage before tendering as a way of reducing the number of bidders who are invited to tender.

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

462 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 thresholds for goods and services established in Schedule 1 (threshold amounts). This is because the 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.

463 Subsection (4) allows an appropriate authority to make regulations amending the financial thresholds in subsection (3).

464 Subsection (5) excludes from the application of this clause, contracts by devolved Welsh authorities and contracts under frameworks.

465 Subsection (6) defines the important terms used in this section.

Clause 79: Regulated below-threshold contracts: notices

466 Where a contracting authority decides to publicly advertise a below-threshold contract opportunity (which it is not otherwise required to do under this legislation), it must publish two notices, in accordance with the rules set out in this clause.

467 Subsection (1) requires that if a contracting authority intends to advertise a procurement publicly, it must first publish a “below-threshold tender notice”.

468 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.

469 Subsection (3) requires that after entering into a notifiable below-threshold contract, a contracting authority must publish a contract details notice as defined in subsection (5).

470 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.

471 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 86 (Notices, documents and information: regulations).

472 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.

473 Subsection (7) disapplies the obligations in this clause in relation to publication of tender notices for contracts to be awarded under frameworks and dynamic markets.

474 Subsection (8) allows an appropriate authority to make regulations amending the “lower” thresholds specified in subsection (4), for example to take account of inflation.

475 Subsection (9) defines the important terms used in this section.

Clause 80: Regulated below-threshold contracts: implied payment terms

476 The rules in this section mirror the prompt payment rules for the main, above-threshold regime found in clauses 63 (Implied payment terms in public contracts) and 68 (Implied payment terms in sub-contracts), but adapted for the below-threshold context.

477 Subsection (1) clarifies that 30 day payment terms set out in subsections (2) to (5) are implied into below threshold public contracts.

478 Subsection (2) sets out the first 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 became due (whichever is later).

- 479 Subsection (3) clarifies that subsection (2) does not apply if the contracting authority considers that the invoice is invalid or disputes it.
- 480 Subsection (4) requires the contracting authority to notify the payee immediately if the invoice is invalid or disputed.
- 481 Subsection (5) clarifies that payment can only be made by a third party if agreed by the payee.
- 482 Subsection (6) specifies that an invoice is valid if it sets out minimum required information set out in subsection (7) and meets any other requirement set out in the contract.
- 483 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.
- 484 Subsection (9) clarifies that the reference to ‘contracting authority’ for the purpose subsection (8) (which implies terms into certain contracts) 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.
- 485 Subsection (10) ensures that the implied payment terms cannot be overridden in below threshold contracts.
- 486 Subsection (11) clarifies that parties may agree to shorter payment terms (or that other statutory provision may provide for shorter terms).
- 487 Subsection (12) allows an appropriate authority to amend this clause to reduce (but not increase) the number of days below 30.
- 488 Subsection (13) defines ‘payee’.

Part 7: Implementation of international obligations

Clause 81: Treaty state suppliers

- 489 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.
- 490 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)).
- 491 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.
- 492 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.
- 493 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).
- 494 Subsection (5) includes a number of definitions used in the rest of this section.
- 495 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.

496 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 82: Treaty state suppliers: non-discrimination

497 Subsection (1) prohibits a contracting authority from discriminating against a treaty state supplier when it carries out a range of procurements for which provision is made in the Bill.

498 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.

499 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.

500 Subsection (4) 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)).

501 Subsection (5) 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.

502 Subsection (6) defines "United Kingdom supplier", which includes suppliers from the British Overseas Territories and the Crown Dependencies.

503 Subsection (7) has the same effect as clause 82(6)(b).

Clause 83: Treaty state suppliers: non-discrimination in Scotland

504 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.

505 Subsections (2) and (4) define certain concepts for the purpose of this clause.

506 Subsection (3) ensures that the power in subsection (1) can be used to amend primary legislation.

Part 8: Information and notices: general provision

Clause 84: Pipeline notices

507 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 procurement.

508 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.

509 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 (which relates to certain types of competition)

or a transparency notice (which relates to certain types of direct award, within the reporting period).

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

511 Subsection (5) allows an appropriate authority to amend the section for the purpose of changing the financial thresholds.

512 Subsection (6) stipulates that this section does not apply to private utilities.

Clause 85: General exemptions from duties to publish or disclose information

513 Subsection (1) sets out that when contracting authorities are obliged by any provision of the Bill (or regulations made under it), there are two circumstances in which they may withhold information from publication or redact the information that they publish. 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, rather than disclosed.

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

515 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.

516 Subsection (4) establishes that the obligation in subsection (3) to inform a person that information is being withheld does not apply in the event that the contracting authority considers that doing so would be contrary to the interests of national security.

Clause 86: Notices, documents and information: regulations

517 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 otherwise communicated.

518 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.

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

Clause 87: Electronic communication

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

521 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 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.

522 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.

523 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 88: Information relating to a procurement

524 Subsection (1) confers on an appropriate authority the power to make regulations requiring certain information relating to a procurement 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 single electronic portal for the sharing of procurement information.

525 Subsection (2) clarifies that appropriate authorities may make arrangements to establish and operate the system referred to above.

526 Subsection (3) 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.

527 Subsection (4) 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. It does not specify how this record must be kept.

528 Subsection (5) sets out that, for the purposes of this clause, “information” means information shared under, or for a purpose relating to, this legislation.

Part 9: Remedies for breach of statutory duty

Clause 89: Duties under this Act enforceable in civil proceedings

529 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. It creates a duty enforceable in those proceedings that is owed (as per subsection (2)) to a UK supplier or a treaty state supplier. The duty is only enforceable in such proceedings where (as per subsection (3)) the supplier has suffered or is at risk of suffering loss or damage in consequence of breach of the duty (including, for example, by missing out on an opportunity to compete for a public contract).

530 Subsection (4) cross refers to clause 95 (Time limits on claims) which sets time limits (statutory limitation periods) that apply to submitting claims.

531 Subsection (5) clarifies that treaty state suppliers cannot bring a claim for breach of statutory duty in relation to below-threshold or international obligation procurements.

532 Subsection (6) 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.

533 Subsection (8) cross refers to clause 81 (Treaty State suppliers) to define below-threshold procurement and international organisation procurement.

Clause 90: Automatic suspension of the entry into or modification of contracts

534 Subsection (1) states that if a contracting authority has been notified that a claim has commenced in relation to the procurement prior to entering into the contract/modification the

contracting authority is not permitted to enter into that contract/modification. This is known as the automatic suspension.

535 Subsection (2) indicates that clause 91 (interim remedies) allows the court by order to lift or modify the automatic suspension.

536 Subsection (3) states that automatic suspension does not apply if the contracting authority was only notified of the claim after any applicable standstill period (mandatory or voluntary) has passed.

537 Subsection (4) states that the automatic suspension does not apply if first instance proceedings have concluded and there is no order to extend the restriction (e.g. to take account of an appeal).

538 Subsection (5) makes it clear “convertible contract” in this section has a meaning given in clause 69 (modifying a public contract).

Clause 91: Interim remedies

539 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).

540 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:

- 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 (e.g. to defence or security interests);
- 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.
- Any other issues the court may wish to consider.

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

542 Subsection (4) allows the court to provide for undertakings or conditions in support of any interim order made under subsection (1).

Clause 92: Pre-contractual remedies

543 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 (i.e. they are pre-contractual remedies).

544 Subsection (2) details the types of 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 re-do their evaluation process); requiring payment of damages; or anything else the court determines to be appropriate.

Clause 93: Post-contractual remedies

545 Subsection (1) explains that the remedies under this clause for breaches of the relevant Parts of this legislation are only available where the contract/modification has already been entered into (i.e. post-contractual remedies).

546 Subsection (2) obliges the court to set aside contract/modification if the specified conditions in clause 94 (post contractual remedies: set aside conditions) are met. It also allows the court to award damages to the claimant if a set aside condition in clause 94 is met or in any other case.

547 Subsection (3) states the court does not need to set aside the contract/modification if it determines there is an overriding public interest in allowing the contract to continue (including defence and security interests).

548 If there is such an overriding public interest, subsection (4) permits the court to reduce the duration or the scope of the contract (including as modified) instead of rendering it entirely ineffective.

549 Subsection (5) establishes that a court may not take certain considerations into account when determining whether an overriding public interest exists. This states that the financial consequences of setting the contract aside can only be taken into account in exceptional circumstances (likely to be macro-economic impacts). The court is expressly not permitted to take into account the financial costs associated with re-procurement, differences in price between the contract in question and any replacement, the cost of delays in performance or any legal obligations relating to setting aside the contract (such as sunk costs and compensation to the supplier who holds the contract).

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

551 Subsection (7) establishes that an order to set aside a framework contract does not render void any contracts which have been called off under that framework (although separate orders may be applied for in relation to those contracts).

552 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.

Clause 94: Post-contractual remedies: set aside conditions

553 This clause establishes the grounds which oblige the court to set aside a contract or modification (in the absence of an overriding public interest).

554 Subsection (1) obliges the court to set aside the contract/modification if the claimant did not have a proper opportunity to challenge the breach prior to the contract/modification being entered into because either:

555 The contracting authority did not publish a contract award notice where they are obliged to do by the legislation. This includes circumstances where the contracting authority wrongly classified the procurement and followed a subset of rules which do not require the notices such as defence and security contracts, below threshold, exempt contracts, as well as where the contracting authority was following the full regime but did not publish the notice.

556 The contracting authority did not comply with the terms of an applicable standstill (whether mandated or voluntarily applied). 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).

- 557 The contracting authority entered into the contract where a suspension or court order preventing that action was in place.
- 558 The claimant first became aware of the breach when the award notice was published but was prevented from bringing a claim because no standstill period applied, such as frameworks, dynamic markets, light touch contracts etc.
- 559 The claimant first became aware of the breach when the contract change notice was published but was prevented from bringing a claim because no standstill period applied.
- 560 The breach 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 such that the claimant had not been aware the contract would cause them to suffer, or risk suffering, loss or damage).
- 561 Subsections (2) and (3) provide protection against the contract/modification being declared 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.
- 562 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 95: Time limits on claims

- 563 Subsection (1) sets out that claims must be commenced within 30 days of when the supplier knew, or ought to have known about the alleged breach.
- 564 However, subsection (2) stipulates that the time limit in subsection (4) applies if a contract details notice was not published where required to be published under clause 51 and the claim is for the set aside of a contract, and subsection (3) stipulates that the time limit in subsection (4) also applies where the application is to set aside a modification.
- 565 Subsection (4) states that proceedings must commence within the earlier of 30 days of the breach being discovered (or when it should have been discovered) or within 6 months of the contract/amendment being entered into. The purpose of this alternative deadline is so that an application to set aside a contract or modification has a certain deadline in addition to the less certain deadline arising from knowledge.
- 566 Subsection (5) permits the court to extend deadlines if it considers there is a good reason for doing so.
- 567 Subsection (6) restricts the court's ability to extend the deadlines to 3 months from the date when the supplier knew or ought to have known about the breach.

Part 10: Procurement oversight

- 568 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.

Clause 96: Procurement investigations

- 569 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). An investigation undertaken under this provision is called a “procurement investigation”.

570 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.

571 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.

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

573 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; or (d) a private utility. The subsection also specifies that only documents within the possession or control of the contracting authority can be requested.

Clause 97: Recommendations following procurement investigations

574 Subsection (1) sets out the circumstances in which a recommendation, known as a “section 97 recommendation”, can be made. A section 97 recommendation can only follow a procurement investigation by an appropriate authority (under clause 96 (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.

575 Subsection (2) and (3) set out the content of a section 97 recommendation. A section 97 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 97 recommendation must not relate to how the contracting authority has regard to procurement objectives (set out in clause 11 (procurement objectives)), the national procurement policy statement (as per clause 12 (the national procurement policy statement)) or the Wales procurement policy statement (as per clause 13 (the Wales procurement policy statement)), or specific decisions in relation to a particular procurement.

576 Subsection (4) provides that contracting authorities who received a section 97 recommendation must have regard to it.

577 Subsection (5) sets out that where a section 97 recommendation specifies, the contracting authority must provide a progress report to the appropriate authority, at specified intervals.

578 Subsection (6) states that a progress report must set out the action the contracting authority has taken as a result of the section 97 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.

579 Subsection (7) provides that if a contracting authority has not taken any action after the receipt of a section 97 recommendation, or has taken different action to that recommended, it must provide its reasons for doing so in the progress report.

580 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.

581 Subsection (9) provides relevant definitions.

Clause 98: Guidance following procurement investigations

582 Subsection (1) states that an appropriate authority may decide to publish guidance for contracting authorities following a procurement investigation under clause 96 (procurement investigations). Such guidance will relate to lessons learned from previous investigations to assist in compliance with the Bill by contracting authorities generally.

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

Part 11: Appropriate authorities and cross-border procurement

Clause 99: Welsh Ministers: restrictions on the exercise of powers

584 This clause establishes the areas of this Bill in which the Welsh Ministers can exercise functions.

585 Subsection (1) sets out that the powers granted to Welsh Ministers under the Bill only apply to certain contracting authorities and certain contracts. The contracting authorities to which their 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. The contracts to which their powers apply are those awarded under devolved Welsh procurement arrangements as defined at clause 102 (definitions relating to procurement arrangements).

586 Subsection (2) defines one category of contracting authority to be treated as a devolved Welsh authority. These are 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.

587 Subsection (3) defines another category of contracting authority to be treated as a devolved Welsh authority. These are contracting authorities that operate to some extent outside Wales, but whose functions are both exercisable wholly or mainly in relation to Wales and are not wholly or mainly reserved. These authorities are only to be treated as devolved Welsh authorities when awarding or managing a contract in relation only to their functions in Wales. In respect of a contract that relates to more than just functions in Wales, the authority would not be a devolved Welsh authority.

588 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.

589 Subsections (5) and (6) clarify or define certain concepts used in this clause.

Clause 100: Northern Ireland department: restrictions on the exercise of powers

590 This clause establishes the areas of this Bill in which a Northern Ireland Department can exercise functions.

591 Subsection (1) sets out that the powers granted to a Northern Ireland Department under the Bill only apply to certain contracting authorities and certain contracts. The contracting authorities to which their powers apply are a transferred Northern Ireland authority and other authorities which the Bill requires are to be treated as a transferred Northern Ireland authority despite falling outside the definition in subsection (2) of this clause. The contracts to which their powers apply are those awarded under transferred Northern Ireland procurement arrangements, which is defined in clause 102 (definitions relating to procurement arrangements).

592 Subsection (2) determines that an authority is a transferred Northern Ireland authority if its functions are exercisable only in Northern Ireland and are wholly or mainly functions that do not relate to reserved or excepted matters.

593 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.

594 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.

595 Subsections (5) clarifies the matters to be included in any reference in this clause to the award and management of a contract.

Clause 101: Minister of the Crown: restrictions on the exercise of powers

596 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.

597 Subsection (1) establishes that a Minister of the Crown may only exercise functions in relation to a devolved Welsh authority in relation to the award and management of contracts under a reserved procurement arrangement or a Northern Ireland procurement arrangement. Those concepts are defined in clause 102 (definitions relating to procurement arrangements). This must be read with subsections (2) and (5).

598 Subsection (2) disapplies the limitation on a Minister of the Crown set out in subsection (1) in relation to powers exercised under clause 62 (electronic invoicing).

599 Subsection (3) requires that a Minister of the Crown may only make regulations under section 62 with the consent of Welsh Ministers, if and to the extent that they apply to a devolved Welsh authority. This does not apply to regulations relating to a reserved procurement arrangement or a devolved Northern Ireland procurement arrangement. Both of these concepts are defined in clause 102 (definitions relating to procurement arrangements).

600 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, This does not apply to regulations relating to a reserved procurement arrangement or a devolved Welsh procurement arrangement. Both of these concepts are defined in clause 102 (definitions relating to procurement arrangements).

601 Subsection (5) sets out that the restrictions on a Minister of the Crown, imposed by subsections (1) and (4) (which relate to powers to make regulations relating to devolved Welsh authorities and devolved Northern Ireland authorities) do not apply in relation to any power under the clauses set in paragraphs (a)-(d).

602 Subsection (6) elaborates on the meaning of references to the award or management of a contract.

Clause 102: Definitions relating to procurement arrangements

603 Subsection (1) defines what is meant by a contract being awarded under a procurement arrangement for the purpose of the powers in clause 103. This covers the award of contracts under frameworks and dynamic markets, the award of contracts to centralised purchasing authorities, procurements undertaken jointly by contracting authorities and the award of contracts under arrangements set up by centralised purchasing authorities.

604 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.

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

606 Subsection (6) refers to relevant definitions.

Clause 103: Powers relating to procurement arrangements

607 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.

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

609 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.

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

Part 12: Amendments and repeals

Clause 104: Disapplication of duty in section 17 of the Local Government Act 1988

611 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.

612 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.

613 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.

614 Subsection (3) outlines that the duty may be disapplied 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.

615 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 105: Single source defence contracts

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

Clause 106: Concurrent powers and the Government of Wales Act 2006

617 This clause amends provision in the Government of Wales Act 2006, which relates to general restrictions on devolved competence. This provision removes 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 107: Repeals etc.

618 This clause refers to Schedule 11, which lists the primary and secondary legislation which will be repealed or revoked by this Bill, and clarifies the scope of certain Scottish secondary legislation such that it only applies in relation to devolved Scottish authorities.

Part 13: General

Clause 108: Power to disapply this Act in relation to procurement by NHS in England

619 This clause provides a power for a Minister of the Crown to make regulations disapplying this Act in relation to areas covered by procurement regulations made under the section 12ZB of the National Health Service Act 2006 (as inserted by the Health and Care Act 2022).

Clause 109: Power to amend this Act in relation to private utilities

620 Subsection (1) provides a power for an appropriate authority to make regulations to reduce the regulatory burden this legislation places on private utilities.

621 Subsection (2) provides a non-exhaustive list of how regulations may be used to reduce regulatory burden, for example by disapplying or modifying provisions.

622 Subsection (3) describes who the appropriate authority must consult with before making the regulations created under this power.

623 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 110: Regulations

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

625 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.

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

627 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.

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

629 Subsection (5) establishes that, with the exception of regulations made under clauses 41 (direct award to protect life, etc) and 114 (commencement), all other regulation making powers in this legislation that are exercisable by a Minister of the Crown are subject to the negative procedure.

630 Subsection (6) establishes that regulations made by a Minister of the Crown under clause 41 (direct award to protect life, etc) are subject to the “made affirmative” procedure.

631 Subsection (7) requires that unless preserved by the approval of a resolution in each House of Parliament, regulations made under clause 41 (direct award to protect life, etc) cease to have effect after 28 days.

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

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

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

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

636 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.

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

Clause 111: Interpretation

638 This clause lists the meanings of terms used throughout this legislation.

Clause 112: Index of defined expressions

639 This clause provides a table listing definitions of expressions in this legislation.

Clause 113: Power to make consequential, etc, provision

640 Subsection (1) provides for a Minister of the Crown to make regulations that make provision that is consequential, supplementary or incidental to any provision in this legislation.

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

Clause 114: Extent

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

Clause 115: Commencement

643 This clause provides when and how the provisions of this legislation are to come into force. This clause will come into force on the day on which it is passed and provides the power for other provisions to be brought into force by regulations (which may also make transitional, transitory or saving provision).

Clause 116: Short title

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

Schedule 1: Threshold amounts

- 645 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.
- 646 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.
- 647 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.
- 648 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.
- 649 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 is intended to capture situations where, for example, a local authority enters into a contract for the sale of land to a developer (which would otherwise be an exempt contract as per Schedule 2 paragraph 4), but stipulates that the resulting private development must also contain a public library for the benefit of the community.
- 650 Paragraph 5 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'.

Schedule 2: Exempted contracts

General

- 651 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).
- 652 Sub-paragraph (2) makes provision about contracts that partly fall within an exemption to determine when an exemption applies in those cases.

Vertical arrangements

653 Paragraph 2 exempts “quasi in-house awards”, which arise where a contracting authority enters into an arrangement with 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 a trading company set up by a local authority to fulfil a specific task, such as carrying out waste treatment and collection for the authority.

654 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.

655 Sub-paragraph (3) 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’.

656 Sub-paragraph (4) provides for an appropriate authority to make 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).

Horizontal arrangements

657 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, e.g. waste disposal across several contracting authority areas.

658 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 not intended to be associated with the authorities’ public functions.

659 Sub-paragraph (3) provides for an appropriate authority to make regulations that set out the calculation for how much of the proposed activities are not intended to be associated with the authorities’ public functions.

Land and buildings

660 Paragraph 4 exempts the acquisition by a contracting authority of land and buildings or any interest in land or buildings or ‘complete works’. This includes ownership rights or non-ownership rights, i.e. rental interests (e.g. leases or licences etc).

661 Sub-paragraph (2) refers to Schedule 1 for the definition of ‘complete works’.

Broadcasting

662 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.

663 Paragraph 6 exempts contracts provided by a supplier associated with broadcasting materials which are purchased by a contracting authority.

Electronic communications services

664 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

665 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

666 Paragraph 10 exempts contracts for 'exempt legal services' purchased by a contracting authority.

667 Sub-paragraph (2) lists what is meant by 'exempt legal services', including: legal representation in judicial proceedings (e.g. 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.

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

Financial services

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

670 Paragraph 12 exempts contracts awarded to an investment firm (or equivalent) where that firm is providing an investment or associated financial service (e.g. related to the issue, sale, transfer of securities).

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

Employment

672 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 including e.g. 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 Act.

Emergency services

673 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

674 Paragraph 17 exempts 'public passenger transport services' which are to be further described and specified in regulations made by an appropriate authority

Research and development services

675 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).

676 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, i.e. where there are elements that would allow commercialisation of the research (e.g. tools or industrial processes to enable manufacture).

677 There is a degree of overlap between this exemption and the direct award justifications for R&D. Direct award would need to be used where the R&D programme also involved goods or works or developing a prototype to test industrial processes to manufacture goods or works arising from the R&D. In other circumstances, this legislation would not apply.

International agreements and organisations

678 Paragraph 19 and 20 exempts contracts which the contracting authority is obliged to award in accordance with procurement rules of an international organisation, or set out in an international agreement. 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

679 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

680 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

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

682 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.

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

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

685 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

686 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 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 such sales or leasing contracts with third parties are exposed to competition. This exemption is not available to utilities acting as centralised purchasing authorities.

687 Paragraph 29 exempts utilities contracts for the supply of water to a utility carrying out a utility activity relating to water. Utility activities relating to water are set out in paragraph 3(1) of Schedule 4.

688 Paragraph 30 exempts utilities contracts for the supply of energy or fuels for the production of energy to a utility 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.

689 Paragraph 31 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 be committed to remain members of the joint venture for a minimum of three years.

690 Paragraph 32 exempts utilities contracts awarded:

- by a utility to its affiliated undertaking; and
- by a relevant joint venture, formed exclusively by a number of utilities for the purpose of carrying out utility activities, to an affiliated undertaking of one of its members, provided the condition of the exemption is met.

691 The condition of the exemption is that a turnover test is met when considering the affiliated person.

Concession contracts

692 Paragraph 33 exempts concession contracts for certain utility activities concerning water services.

693 Paragraph 34 exempts concession contracts for air services provided for a qualifying air carrier. "Air services" are defined and provision is made for a "qualifying air carrier" to be made by regulations.

694 Paragraph 35 exempts concession contracts for the provision of public passenger transport services.

Schedule 3: Estimating the value of a contract

695 This Schedule is referred to at clause 3 (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

696 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) lists the kinds of things that must 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) sets out 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.

Frameworks

697 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, as set out at paragraph 2(1). Paragraph 2(2) states that, where an open framework is re-opened, as per clause 47, 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) sets out that 'framework' has the meaning given in clause 44(2) (frameworks).

Concession contracts

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

699 Paragraph 3(2) obliges the contracting authority to estimate the maximum 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.

700 Paragraph 3(3) provides a list of the amounts a supplier may expect to receive. These include income received from any party from the ability to exploit the works or services; this income could be monetary but not necessarily so. 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 may receive in delivering the contract and amounts received on the sale of assets by the supplier.

Anti-avoidance

701 Paragraph 4 provides an anti-avoidance mechanism to dissuade 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

702 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

Gas and heat

703 Paragraph 1 sets out when activities associated with gas and heat are utilities activities.

704 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, or the supply of gas or heat to such networks are utility activities.

These Explanatory Notes relate to the Procurement Bill [HL] as introduced in the House of Lords on 11 May 2022 (HL Bill 4)

705 Sub-paragraph (2) sets out circumstances where the supply of gas and heat is not considered a utility activity, all of which must be met for the exemption to apply. These are: that the operator (i.e. 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 are set out in paragraph 9.

706 Sub-paragraphs (3) and (4) provide for an appropriate authority to make regulations that set out how to calculate the turnover amount and what things may be considered when calculating.

Electricity

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

708 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, or the supply of electricity to such a network are utility activities.

709 Sub-paragraph (2) sets out circumstances where the supply of electricity is not considered a utility activity, all of which must be met for the exemption to be met. These are: that the operator (i.e. the supplier of electricity) is not a contracting authority; the operator produces electricity because it needs the electricity to do something other than a “specified activity”; the electricity supplied is the excess from such production by the operator that the operator has not used itself; and the electricity supplied represents not more than 30% of all the energy produced by the operator. The specified activities are set out in paragraph 9.

710 Sub-paragraphs (3) and (4) provide for an appropriate authority to make regulations that set out how to calculate the proportion of electricity supplied against all energy produced by the operator.

Water

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

712 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, or the supply of drinking water to such a network are utility activities.

713 Sub-paragraph (2) sets out further activities which, if carried out by an entity that carries out the activities referred to above, can also be considered utility activities. These are: (a) any activity connected with the disposal or treatment of sewage, or (b) any activity connected with a hydraulic engineering project, irrigation or land drainage, provided in the case of (b) that that person meets the threshold in sub-paragraph (3).

714 Sub-paragraph (3) requires that an entity carrying out a hydraulic engineering project, irrigation or land drainage must (if it is to be a utility activity) reasonably expect the project to be able to supply a minimum amount of drinking water to a network being more than 20% of the total water that the project makes available.

715 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 (i.e. the supplier of electricity) is not a contracting authority; the operator produces drinking water because it needs the drinking water to do something other than a “specified activity”; the drinking water supplied is the excess from such production by the operator that the operator has not used itself; and is the drinking water supplied represents

not more than 30% of all the drinking water produced by the operator. The specified activities are set out in paragraph 9.

716 Sub-paragraphs (5) and (6) provide for [an appropriate authority] to make regulations that set out how to calculate the proportion of drinking water supplied against the total amount of drinking water produced and what things may be considered when calculating.

Transport

717 Paragraph 4 sets out when activities associated with transport are utility activities.

718 Sub-paragraph (1) specifies that the provision or operation of a network providing a service to the public for transport is a utility activity. Such services may be provided by any means, but notably by rail, tram or bus provided a “network” exists.

719 Sub-paragraph (2) sets out the meaning of “network”, being where a regulator sets out for example: the route, the capacity, the frequency of the services.

Ports and airports

720 Paragraph 5 sets out when activities associated with ports or airports are utility activities.

721 Sub-paragraph (1) specifies that activity relating to the exploitation of a geographic area to provide airport, port or other terminal facilities to carry passengers or goods by air, sea or inland waterway are utility activities.

722 Sub-paragraph (2) defines “airport” by reference to other legislation.

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

723 Paragraph 6 sets out when extraction of and/or exploration for oil, gas, coal or other solid fuels are utility activities.

Utility activities exposed to competition

724 Paragraphs 7 and 8 provide that, in certain circumstances, utility activities are to be treated as exempt.

725 Paragraph 7(1) provides that where an “exemption determination” is made, an activity is exempt. Sub-paragraph (2) defines an “exemption determination” as a determination made pursuant to a procedure set up by regulations made by an appropriate authority that there is fair and effective competition in the market and entry to that market is unrestricted. Sub-paragraph (3) sets out a non-exhaustive list of the matters that may be set out in those regulations, which includes matters relating to the amendment or revocation of exemption determinations. Sub-paragraph (4) provides that an expert determination may be made in respect of part of a utility activity sector or in respect of a particular location in the United Kingdom.

726 Paragraph 8 lists decisions of the European Commission which are repealed by this legislation and which exempted certain utility activities in the UK as they were considered to be sufficiently exposed to competition and access to the markets was unrestricted. Sub-paragraph (2) provides that an exemption determination (as referred to in paragraph 7) is deemed to exist in relation to the activities covered by the repealed decisions of the European Commission. These deemed exemption determinations continue until they are revoked or amended pursuant to the regulations referred to at paragraph 7.

Interpretation of Schedule

727 Paragraph 9 is self explanatory.

Schedule 5: Direct award justifications

728 Paragraph 1 is self explanatory – this Schedule sets out circumstances in which a public contract may be awarded directly to a supplier without competition in accordance with this legislation.

Prototypes and development

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

730 Paragraph 3 defines novel goods or services.

Single suppliers

731 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.

732 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.

733 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 knowhow, changes to existing goods that they are the original supplier for or providing a support service for a good they have provided.

734 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

735 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.

736 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.

737 Paragraph 9 defines ‘existing goods, services or works’ and ‘existing supplier’.

Commodity goods

738 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

739 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.

740 Paragraph 12 defines ‘undergoing insolvency proceedings’.

These Explanatory Notes relate to the Procurement Bill [HL] as introduced in the House of Lords on 11 May 2022 (HL Bill 4)

Urgency

741 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.

742 Paragraph 14 defines unavoidable.

Necessary to protect life, etc

743 Paragraph 15 refers to direct awards allowable if regulations are made under clause 41 (direct award in special cases).

User choice contracts

744 Paragraph 16 means that public contracts for the supply of “user choice services” may be awarded directly.

745 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 (17) defines ‘user choice services’ as “light touch services” specified under regulations in clause 8 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.

746 Paragraph 18 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 contracts

747 Paragraph 19 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.

748 Paragraph 20 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.

749 Paragraph 21 permits the direct award of a defence authority contract falling within the categories of contract within clause 6 (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

750 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.

- 751 Paragraph 2 states that conviction for corporate manslaughter is a mandatory ground for exclusion from procurements.
- 752 Paragraph 3 designates conviction for various terrorism offences as mandatory grounds for exclusion from procurements.
- 753 Paragraphs 4 to 16 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 from procurements.
- 754 Paragraphs 17 to 24 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 from procurements. These offences are largely based on the set of offences within the purview of the Director for Labour Market Enforcement.
- 755 Paragraphs 25 and 26 designate conviction for participating in organised crime – and the Scottish and Northern Irish equivalents of this offence – as mandatory grounds for exclusion from procurements.
- 756 Paragraphs 27 to 30 designate various offences linked to tax evasion as mandatory grounds for exclusion from procurements.
- 757 Paragraph 31 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.
- 758 Paragraph 32 states that inciting, attempting or conspiring to commit any of the mandatory ground offences is itself a mandatory ground for exclusion from procurements (other ancillary offences are also described).
- 759 Paragraph 33 sets out that equivalent overseas convictions constitute mandatory grounds for exclusion from procurements.

Part 2 - Other mandatory exclusion grounds

- 760 Paragraphs 34 to 38 set out that certain civil penalties relating to tax evasion and HMRC decisions relating to abusive tax practices constitute mandatory grounds for exclusion from procurements.
- 761 Paragraph 39 states that suppliers meet a mandatory ground for exclusion from procurements 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.
- 762 Paragraph 40 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 from procurements.
- 763 Paragraph 41 sets out that failure to comply with a request for information or assistance as part of a debarment investigation under clause 57 is a mandatory ground for exclusion from procurements, providing the Minister has determined that the failure to do so was sufficiently serious.

Part 3 - General

- 764 Paragraph 42 sets out the look-back periods which apply to the mandatory grounds for exclusion from procurements. This means that only convictions (or other events where relevant) within the relevant periods count for the purposes of applying the grounds.
- 765 Paragraph 43 sets out definitions for various terms in this Schedule.

Schedule 7: Discretionary exclusion grounds

Labour market misconduct

766 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 from procurements.

767 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 from procurements.

768 Paragraph 3 sets out that a discretionary ground for exclusion from procurements 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 from procurements even if they operate in jurisdictions where conviction for these offences may be unlikely.

Environmental misconduct

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

Insolvency, bankruptcy, etc.

770 Paragraphs 5 to 7 set out discretionary exclusion grounds related to insolvency and bankruptcy.

Potential competition infringements

771 Paragraphs 8 to 11 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 from procurements. This applies even where there has been no decision by the Competition and Markets Authority or an equivalent regulator. However 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

772 Paragraph 12 designates professional misconduct as a discretionary ground for exclusion from procurements. 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

773 Paragraph 13 sets out a discretionary ground for exclusion from procurements for poor performance or serious breaches of prior public contracts.

774 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.

775 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.

776 Sub-paragraph (5) defines 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.

Acting improperly in a procurement

777 Paragraph 14 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

778 Paragraph 15 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.

Excluded matters

779 Paragraph 16 sets out the look-back periods which apply to the discretionary grounds for exclusion from procurements. 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

780 Paragraph 17 states that “information” includes evidence verifying that information.

781 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

782 This Schedule lists the ‘permitted modifications’ referred to at clause 69 (modifying a public contract), allowing modification of a contract without a further full procurement procedure.

783 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.

784 Paragraph 2 provides that a modification is permitted if its purpose could be justified under the direct award of a contract in special cases. The purpose must also be for “extreme and unavoidable urgency” or “to protect life etc”. The contracting authority must also consider 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.

785 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. However paragraph 4(2) provides that this 50 percent threshold does not apply if the contract is a utilities contract.

786 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).

787 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. But the tender/transparency notice indicated that the contract may require amendment due to the risk.

788 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.

789 Paragraph 8 provides that a modification is permitted for additional goods, services or works if the following four statements apply. Firstly, the modification provides for the supply of goods, services or works in addition to the 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. However this threshold of 50 percent does not apply if the contract being modified is a utilities contract.

790 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.

791 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.

792 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)

793 This Schedule, relied on for clauses 81 (treaty state suppliers), 82 (treaty state suppliers: non-discrimination) and 83 (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

794 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.

795 Paragraph 2(2) 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.

796 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.

797 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.

Pricing of qualifying defence contracts

798 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”)

799 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.

800 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.

801 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 (e.g. 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; and
- 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 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.

802 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) amend section 15 of the DRA by inserting 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.

803 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.

804 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:

- determine whether the method used was appropriate; and
- 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

805 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:

806 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;

807 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;

808 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);

- 809 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);
- 810 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
- 811 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)).
- 812 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.
- 813 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.
- 814 Paragraph 8(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.
- 815 Paragraph 8(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 8 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.
- 816 Paragraph 8(3)(c) 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.
- 817 Paragraph 9(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

- 818 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)).
- 819 Paragraph 11(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.
- 820 Paragraph 11(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.
- 821 Paragraph 11(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

- 822 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.
- 823 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)).
- 824 Paragraph 12(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.
- 825 Paragraph 12(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

826 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.

827 Paragraphs 14(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.

828 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”.

829 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.

830 Paragraph 15 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”)

831 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.

832 Paragraph 17 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.

833 Paragraph 18 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

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

Financial implications of the Bill

835 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 - 2030/2031) the reforms are expected to result in a positive net present value of £205m. However, 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

836 The Bill does not require any increased public expenditure and there is no requirement for a money resolution.

Compatibility with the European Convention on Human Rights

837 The Government considers that the Procurement Bill is compatible with the European Convention on Human Rights (ECHR). Accordingly, Lord True, Minister of State at the Cabinet Office, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

No statement under the Environment Act 2021

838 Lord True, Minister of State at the Cabinet Office, is of the view that the Bill as introduced into the House of Lords 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

839 The following documents are relevant to the Bill and can be read at the stated locations:

- [Transforming Public Procurement Green Paper](https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement)
<https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>
- [Transforming Public Procurement - Government response to consultation](https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation)
<https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation>
- [The Public Contract Regulations 2015](https://www.legislation.gov.uk/uksi/2015/102/contents/made)
<https://www.legislation.gov.uk/uksi/2015/102/contents/made>
- [The Concessions Contract Regulations 2016](https://www.legislation.gov.uk/uksi/2016/273/contents/made)
<https://www.legislation.gov.uk/uksi/2016/273/contents/made>
- [The Utilities Contract Regulations 2016](https://www.legislation.gov.uk/uksi/2016/274/contents/made)
<https://www.legislation.gov.uk/uksi/2016/274/contents/made>
- [The Defence and Security Contract Regulations 2011](https://www.legislation.gov.uk/uksi/2011/1848/made)
<https://www.legislation.gov.uk/uksi/2011/1848/made>

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?
Part 1: Key definitions							
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
Part 2: Principles and objectives							
Clause 10	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 11	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 12	Yes	Yes	No	Yes	Yes	Yes	No
Clause 13	No	Yes	Yes	No	No	No	No
Part 3: Award of public contracts and procedures							
Clause 14	Yes	Yes	Yes	Yes	Yes	Yes	Yes
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

These Explanatory Notes relate to the Procurement Bill [HL] as introduced in the House of Lords on 11 May 2022 (HL Bill 4)

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 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
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	No	Yes	Yes	Yes	No
Clause 52	Yes	Yes	Yes	Yes	Yes	Yes	Yes
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

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Part 4: Management of public contracts							
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	Yes	Yes	Yes	Yes	Yes
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
Clause 70	Yes	Yes	Yes	Yes	Yes	Yes	No
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
Part 5: Conflicts of interest							
Clause 74	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 75	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 76	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Part 6: Below-threshold contracts							
Clause 77	Yes	Yes	Yes	Yes	Yes	Yes	No
Clause 78	Yes	Yes	No	Yes	Yes	Yes	No
Clause 79	Yes	Yes	Yes	Yes	Yes	Yes	No
Clause 80	Yes	Yes	Yes	Yes	Yes	Yes	No
Part 7: Implementation of international obligations							
Clause 81	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 82	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 83	No	No	No	Yes	Yes	No	No
Part 8: Information and notices: general provision							
Clause 84	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 85	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 86	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 87	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 88	Yes	Yes	Yes	Yes	Yes	Yes	Yes

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Part 9: Remedies for breach of statutory duty							
Clause 89	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 90	Yes	Yes	Yes	Yes	Yes	Yes	Yes
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
Part 10: Procurement oversight							
Clause 96	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 97	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 98	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Part 11: Appropriate authorities and cross-border procurement							
Clause 99	No	Yes	No	No	No	No	No
Clause 100	No	No	No	No	No	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
Part 12: Amendments and repeals							
Clause 104	Yes	Yes	Yes	No	No	No	No
Clause 105	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 106	No	Yes	Yes	No	No	No	No
Clause 107	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Part 13: General							
Clause 108	Yes	No	No	No	No	No	No
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
Clause 112	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 113	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 114	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 115	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Clause 116	Yes	Yes	Yes	Yes	Yes	Yes	Yes

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Schedules							
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

840 The core provisions of the Bill extend and apply across England, Wales, Scotland and Northern Ireland. The provisions which do not are as follows:

841 Clause 13 (The Wales procurement policy statement) applies only to certain Welsh contracting authorities and therefore does not apply in England, Northern Ireland or Scotland.

842 Clause 83 (Treaty state suppliers: non-discrimination in Scotland) applies only to certain Scottish contracting authorities and does not apply in England, Wales or Northern Ireland.

843 Clause 99 (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.

844 Clause 100 (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.

845 Clause 104 (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.

846 Clause 106 (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.

847 Clause 107 (Power to disapply this Act in relation to procurement by NHS in England) applies only in England and does not apply in Scotland, Wales or Northern Ireland.

848 The legislative competence of the Senedd is engaged in legislating for procurements undertaken by devolved Welsh authorities and certain private utilities.

849 The legislative competence of the Northern Ireland Assembly is engaged in legislating for procurements undertaken by transferred Northern Ireland authorities and certain private utilities.

850 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 [HL] as introduced in the House of Lords on 11 May 2022 (HL Bill 4).

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