



## EXPLANATORY NOTES

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### Procurement Act 2023

#### Chapter 54

EXPLANATORY NOTES—PROCUREMENT ACT 2023



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# PROCUREMENT ACT 2023

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Procurement Act 2023 which received Royal Assent on 26 October 2023 (c. 54).

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

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## Overview of the Act

- 1 The purpose of the Procurement Act 2023 is to reform the United Kingdom's public procurement regime following its exit from the European Union (EU), creating 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 legislation gives effect to the policies that were set out in the Government's Green Paper 'Transforming Public Procurement'<sup>1</sup> published in December 2020, and the Government's response to the consultation published in December 2021.<sup>2</sup>
- 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 provides a number of sector-specific features, including tailored rules for defence and security procurement.
- 6 The legislation also amends 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 legislation contains 13 parts with 11 Schedules addressing a range of issues relating to public procurement. The legislation replaces a number of existing statutory instruments, most notably the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011, which are largely drawn from EU Directives.

## Policy background

- 8 At around £300 billion every year, public procurement accounts for a third of all public expenditure. By improving the way public procurement is regulated, the Government can not only save the taxpayer money, but spread opportunity and improve public services, across every region of the country.
- 9 The procurement of goods, services and works by public bodies and some private utilities is an area of law previously governed by EU Directives. The Procurement Act 2023 repeals the Regulations which implemented this regime and replaces these with a single new public procurement regime with a number of sector specific features.

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

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

- 10 The Government's policy objectives for these reforms were 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 previous regimes for awarding public contracts were too restrictive and complex for buyers and suppliers alike. The Government's objective is that the new regime is simpler and more flexible, to make it better able to adapt to the fast-moving environment in which businesses operate. Markets and commercial practices are constantly evolving and it is the Government's aim that the new regulatory framework drives 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 legislation regulates 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 legislation repeals 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, subject to transitional provisions) and creates a single, uniform framework for public procurement in the UK.

## **Public contracts**

- 16 The Public Contracts Regulations 2015 are repealed and new rules on procurement are 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 have to follow the procedures set out in the legislation in awarding non-exempt contracts with a value above set thresholds, to suppliers.

## **Utilities contracts**

- 17 The Utilities Contracts Regulations 2016 are repealed and new rules applicable to utilities procurement are set out in the new regime. The single framework for procurement set out in the legislation generally applies to the award of utilities contracts, with some limited differences, for example, in relation to "utilities dynamic markets" and the duration of "closed frameworks". The legislation applies to the award of contracts by utilities operating in the

water, energy and transport sectors. Utilities can be: contracting authorities; public undertakings (persons that operate commercially but are subject to public authority oversight); or private utilities (persons that are not public authorities or public undertakings but that are authorised to carry out utility activities, due to being granted “special or exclusive rights” under any statutory, regulatory or administrative provision where that right also substantially prevents other utilities from carrying out those activities).

- 18 The Government did not wish to regulate where utility activities are exposed to competition. The legislation therefore includes a power, where it is satisfied that this is the case, for an appropriate authority (defined in section 123(1) of the Act) to make regulations exempting a particular utility activity from regulation in the future. The legislation also includes a power to further reduce the regulatory burden for private utilities wherever possible and is consistent with the UK’s international procurement obligations.

## Concession contracts

- 19 The Concession Contracts Regulations 2016 are repealed and the single framework for procurement set out in the legislation 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. Examples include the construction and operation of a toll road, or the operation of a car park or a hospital shop. There are specific provisions covering the definition of a concession contract, how a concession contract is to be valued, as well as some specific exemptions from the regime of certain types of concession contracts.

## Defence and security contracts

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

## Single Source Contract Regulations

- 21 Part 2 of the Defence Reform Act 2014 (DRA) creates a framework for regulating defence contracts and sub-contracts which have not been competed. These are known as single source contracts (SSCs). Such contracts account for about half of MOD procurement spend, which is equivalent to over £8 billion per year. The Single Source Contract Regulations 2014 (S.I. 2014/3337) (SSCRs), made under the DRA, are engaged when a defence contract is awarded with a value over £5 million without any competition, unless one or more of the specific exclusions set out in the SSCRs apply. These are known as qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs). There is a general power under section 14(7) of the



DRA for the Secretary of State to direct that a particular contract which would otherwise meet the requirements should not be subject to the SSCRs. The DRA does not specify whether a contract should be competed. Where the DRA and SSCRs are engaged they make provision for the pricing of SSCs. They also make provision for transparency and record-keeping requirements, from the beginning of an SSC to its completion. The DRA also creates an arm's length body, the Single Source Contracts Office (the SSRO) which issues guidance on the application of the regime and adjudicates on disputes between the Secretary of State and contractors.

- 22 The Government set out its broad policy objectives for reform of the regulatory regime in the DRA and SSCRs in a Command Paper published on 4 April 2022 (Defence and Security Industrial Strategy: Reform of the Single Source Contract Regulations).<sup>3</sup> This set out changes centred around three main themes: providing greater choice and flexibility in procurement; speeding-up and simplifying the procurement process and promoting innovation. It also included several technical changes designed to address problems that have been identified during the eight years over which the regime has been operating. Delivery of the reform will require amending the DRA (which is achieved by way of a Schedule to the legislation), amending existing or creating new secondary legislation, and changes to Statutory Guidance issued by the SSRO.

## Key components of the legislation

- 23 Procurement is covered by a number of the UK's international trade agreements including the GPA. The regime in the legislation is compliant with these obligations and allows a degree of future-proofing through targeted delegated powers to update the regime in the event that new agreements are signed.
- 24 The legislation embeds a number of key principles (prohibiting discrimination against treaty state suppliers, and treating suppliers the same) and objectives (delivering value for money, maximising public benefit, sharing information and acting with integrity) for public procurement.
- 25 Reforms have been introduced to support small and medium-sized enterprises (SMEs), including a duty for contracting authorities to have regard to reducing and removing barriers to SME participation in procurement, and removing unnecessary obstacles relating to audited accounts and insurance in the conditions of participation.
- 26 The legislation requires the evaluation of tenders to be based on criteria that identify the "Most Advantageous Tender" and requires contracting authorities to have regard to delivering value for money and maximising the public benefit from the contract.
- 27 The legislation 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.

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

- 28 Powers in the legislation allow Regulations to require all contracting authorities to use a single digital platform for supplier registration, ensuring businesses will only have to submit certain types of information to demonstrate their credentials once to be considered for a public sector procurement. There is a duty on a Minister of the Crown to establish and operate such an online system for this purpose and for the purpose of publishing notices, documents and other information.
- 29 To support prompt payment, 30 day payment terms are passed down through public sector supply chains and private and public sector payment reporting is aligned to allow comparison of how quickly different organisations pay their suppliers.
- 30 The legislation 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 legislation also includes provision for a centralised debarment list of suppliers which the Government considers must or may be excluded from procurements.
- 31 The legislation introduces new arrangements for how procurement should be conducted in an emergency such as the Covid-19 pandemic. There is a new power for Ministers to make provision in Regulations allowing the direct award of contracts when necessary to protect life so that contracting authorities can procure at pace.
- 32 Under the old procurement regime, information on public procurement was published in multiple different locations. The legislation ensures greater transparency of data to make it easier to scrutinise procurement decisions. Notices need to be published at each stage of the commercial lifecycle in an open, accessible format.
- 33 The legislation integrates the previous “Light Touch Regime” for social, health, education and certain other services into the broader provisions but with a series of exceptions to recognise that “Light Touch Contracts” may require different treatment.
- 34 Ministers of the Crown, Welsh Ministers and Northern Ireland Departments have new powers to investigate cases of non-compliance with the legislation and make recommendations to contracting authorities to ensure future compliance.

## Legal background

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

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## Territorial extent and application

- 38 Section 126 (extent) sets out that the legislation extends to England and Wales, Scotland and Northern Ireland. The majority of provisions in the legislation apply equally to English, Welsh and Northern Ireland contracting authorities.
- 39 There are a small number of sections 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.
- 40 The legislation 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 sections 92 (treaty state suppliers: non-discrimination in Scotland) and 115 (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 legislation.

## Commentary on provisions of Act

### Part 1: Key definitions

#### Section 1: Procurement and covered procurement

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

## Section 2: Contracting authorities

- 44 This section sets out the definition of a “contracting authority”. The section sets out which entities are covered, and the criteria to determine whether a person is such an entity, and which entities are specifically excluded from the definition. All entities that are contracting authorities are subject to the rules set out in the Act.
- 45 Subsection (1) sets out that a contracting authority is either a “public authority”; or, in relation to a utilities contract, a public authority, “public undertaking” or “private utility”, other than an “excluded authorities”. These terms are defined in subsections that follow.
- 46 Subsection (2) defines a “public authority” as a “person” that is wholly or mainly publicly-funded, or subject to public authority oversight. A person is defined in Schedule 1 to the Interpretation Act 1978 and is indivisible for the purpose of the legislation - i.e. it is a body of persons corporate or unincorporate and is to be treated for the purpose of the legislation as a single entity regardless of its internal makeup or function.
- 47 However, subsection (2) also provides that if a public authority “operates on a commercial basis” then it will not be a contracting authority (regardless of whether it is wholly or mainly publicly funded or subject to oversight). The definition of a public authority is subject to subsections (9) and (10).
- 48 Subsection (2) also defines a “public undertaking” as a person that is subject to public authority oversight and operates on a commercial basis; and a “private utility” as a person that carries out a “utility activity” and is not a public authority or public undertaking. (See section 6 (Utilities contracts) for the definition of a utility activity.)
- 49 Subsection (3) explains the meaning of “public authority oversight” (used in the definitions of public authority and public undertaking) as being where a person is subject to management or control by one or more public authorities, or where more than half its board members are appointed by one or more public authorities. Under normal circumstances simple oversight by a regulator would not amount to “management or control”.
- 50 Subsection (4) clarifies what is meant when a person “operates on a commercial basis” by providing examples of matters to be considered in determining whether this is the case: If a person directly or indirectly relies on a public authority to ensure its ongoing operation, or to bear its losses; or if it benefits from contracting on more advantageous terms than would be available to another person because of its connection with a public authority, then such factors might indicate that it is not operating on a commercial basis. If a person operates on a market that is subject to fair and effective competition (e.g. it competes for contracts alongside others in competitive procurements), then that might indicate that it is operating on a commercial basis. The list in subsection (4) is not exhaustive.
- 51 Subsection (5) lists the authorities that are excluded from the definition of a contracting authority (“excluded authorities”). This allows the intelligence agencies listed and the Advanced Research and Invention Agency (ARIA), together with (in each case) any person subject to their oversight, to carry out their procurement activity outside the regime established by the Act. Devolved Scottish authorities, together with any person subject to public oversight only by a Devolved Scottish authority, are also excluded but are regulated under separate legislation.
- 52 Subsection (6) defines the term “devolved Scottish authority” as any authority which exercises functions only in or as regards Scotland, where none or some of those functions relate to “reserved matters” (defined in subsection (12)).

- 53 Subsection (7) explains that public undertakings and private utilities are to be treated as devolved Scottish authorities if they operate only in or as regards Scotland, where none or some of their activities relate to reserved matters. This is similar to the definition of a devolved Scottish authority, but refers to activities rather than functions. Linked to subsection (7), subsection (8) provides that a reference in the Act to a devolved Scottish authority includes a reference to an authority that is to be treated as a devolved Scottish authority (i.e. it includes an authority referred to in subsection (7)).
- 54 Subsection (9) makes clear that a reference in the Act to a public authority includes the Common Council of the City of London, but refers to Schedule 2, paragraph 38, which, notwithstanding subsection (2) and the definition of a public authority, provides that contracts entered into by the Common Council of the City of London other than for the purposes of its public functions are exempt from the Act.
- 55 Subsection (10) serves as an anti-avoidance mechanism. Notwithstanding subsection (2) and the definition of a public authority, the subsection provides that, where a contract is awarded in reliance on the vertical arrangement exemption in paragraph 2 of Schedule 2 to a controlled person that operates on a commercial basis, any subcontract substantially for, or contributing to, the performance of that contract or any part of it (a “relevant sub-contract”) that the controlled person enters into must be awarded in accordance with the Act.
- 56 Subsection (11) makes it clear that the Act does not apply to His Majesty in his private capacity.
- 57 Subsection (12) provides definitions for the terms “relevant sub-contract” (which is referred to at paragraph [58] above) and “reserved matters” (which means the same as in the Scotland Act 1998).

### Section 3: Public contracts

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

## Section 4: Valuation of contracts

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

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

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

## Section 6: Utilities contracts

- 73 Subsection (1) sets out the definition of a “utilities contract”, being a contract for the supply of goods, services or works wholly or mainly for the purpose of a “utility activity”.
- 74 Subsection (2) defines a “utility activity” by reference to a number of things. Firstly, whether the activity is included in Parts 1 or 2 of Schedule 4 (utility activities); if it is included in Part 1, it is a utility activity (e.g. the provision of a public electricity transmission network) and if it is included in Part 2 it is not (e.g. electricity generation and wholesale or retail sale of gas). It also provides that utility activities carried out wholly outside of the UK (e.g. not involving the use

of a network or geographical area within the UK) are not utility activities and that for private utilities, utility activities are only those for which the utility has been granted a special or exclusive right (i.e. procurements for which a private utility has not been granted such a right would not be covered by the Act).

- 75 Subsection (3) defines a “special or exclusive right” as a right to carry out utility activities granted by any statutory, regulatory or administrative provision where that right also substantially prevents other persons 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 or the private utilities that operate rail passenger transport services under contracts which have been directly awarded in accordance with the public service obligations regulations (as defined at paragraph 21(2) of Schedule 2).
- 76 Subsection (4) provides that a right is not a “special or exclusive right” if it has been granted following a competitive tendering procedure under the Act or where the opportunity was adequately publicised, and the grant of the right was based on non-discriminatory criteria. This would include competitive processes in place before this Act came into force (such as a competitive process set out in Regulation 5(6)(a) of the Utilities Contracts Regulations 2016) or other compliant procedures. But it would not, for example, include a direct award of a contract to an incumbent under the public service obligations regulations (as defined at paragraph 21(2) of Schedule 2), including where the original contract had been awarded following a competitive process.
- 77 Subsections (5) and (6) work together and provide that an appropriate authority may amend Part 2 of Schedule 4, which sets out activities that are not utility activities, to specify or remove activities. An appropriate authority may only specify an activity in Part 2 where it is satisfied that the test at subsection (6) has been met - i.e., that the market for the activity specified is subject to fair and effective competition and entry to that market is unrestricted.
- 78 Subsection (7) makes clear that a reference to a framework agreement where that framework is for the future award of utility contracts is a reference to a utility contract.

## Section 7: Defence and security contracts

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

84 Subsection (6) places a restriction on the Minister to specify in regulations under subsection (5) only those contracting authorities whose function is wholly or mainly for the purposes of defence or national security.

85 Subsection (7) provides further definitions for terms used in subsection (1).

### Section 8: Concession contracts

86 Subsection (1) defines a concession contract as a contract for the supply, for pecuniary interest, of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services that are the subject of the contract and where under the contract the supplier is exposed to a real operating risk. A contract for the provision of goods cannot be a concession contract, as goods contracts do not involve the supplier being exposed to a real operating risk.

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

### Section 9: Light touch contracts

88 Subsection (1) introduces the term “light touch contract” i.e., contracts for the supply of certain services which will be identified by regulations made under subsection (2). Throughout the legislation this term is used to distinguish light touch contracts (which benefit from less regulation and some special rules).

89 Subsection (2) states an appropriate authority (defined in 123(1)) may by regulations determine which contracts should be deemed light touch contracts.

90 Subsections (3)-(4) bind the power at subsection (2) by requiring an appropriate authority to have regard to the nature of the services and consider whether it is appropriate for them to be light touch contracts; taking into account cross border interest by suppliers, whether the benefit is for an individual or a community and whether proximity of the supplier and recipient is required for effective and efficient supply of the services.

91 Subsection (5) makes clear that a reference to a light touch contract includes a reference to a framework for the award of light touch contracts.

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

92 Some mixed contracts will contain elements which, if procured separately, would be subject to special rules, such as light touch contracts. This section provides for when those contracts are to be handled according to the rules that reflect the special nature of one element (i.e. when they are to be treated as a “special regime contract” as defined in this section), or where they are to be treated as subject to the general rules in this legislation.

93 When placing a mixed contract containing one or more elements that would, if procured separately, be subject to a “special regime”, together with other above-threshold elements that would not be subject to that special regime, subsection (3) provides that a contracting authority cannot take advantage of such special regime rules where it would be reasonable to split out that special regime element or elements.

94 Subsection (1) applies the above test to mixed contracts for goods, services or works that contain a “special regime” element but that are not framework agreements.



- 95 Subsection (2) applies the above test to mixed contracts for goods, services or works that contain a “special regime” element but are framework agreements.
- 96 Subsection (3) prohibits treating a contract as a special regime contract if either of the tests in subsections (1) or (2) are met.
- 97 Subsection (4) permits mixed special regime contracts that are defence and security contracts to be treated as a special regime contract even where the conditions in subsection (1) or (2) apply, where there are good reasons for procuring the elements together.
- 98 Subsection (5) sets out factors contracting authorities may have regard to when determining whether elements of a mixed contract can reasonably be procured separately.
- 99 Subsection (6) lists the different types of special regime contract: concessions, defence and security, light touch, and utilities.
- 100 Subsection (7) ensures that, where the analysis above means the mixed contract cannot be treated as a special regime contract, the contract is still to be treated as a public contract subject to the legislation.
- 101 Subsection (8) makes clear that subsection (3) does not apply to mixed contracts awarded under a framework.

## Part 2: Principles and objectives

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

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

### Section 12: Covered procurement: objectives

- 104 Subsection (1) requires that contracting authorities have regard to the importance of the objectives listed when carrying out a covered procurement.
- 105 Subsection (2) imposes on contracting authorities an obligation to treat suppliers the same in carrying out a covered procurement, unless differences between the suppliers justify different treatment.
- 106 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.
- 107 Subsection (4) requires contracting authorities, in carrying out a covered procurement, to have regard to the particular barriers to participation in public procurement that small and medium-sized enterprises may have, and whether they can be removed or reduced. Section 122 (interpretation) defines what “small and medium-sized enterprises” means.

### Section 13: The national procurement policy statement

- 108 Subsections (1) and (2) establish that a Minister of the Crown may publish a statement under this section which sets out the Government’s strategic priorities in relation to procurement, and that this is known as the national procurement policy statement.

- 109 Subsections (3)-(6) make provision for how a national procurement policy statement must be made, including requirements relating to consultation and laying the statement before Parliament.
- 110 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 section apply to all future national procurement policy statements (i.e. any amended or replacement statements), not just the first one made under these provisions.
- 111 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.
- 112 Subsection (10) sets out those contracting authorities and contracts to which the obligation in subsection (9) does not apply.

### Section 14: The Wales procurement policy statement

- 113 Subsections (1)-(2) establish that the Welsh Ministers may publish a statement under this section which sets out the Welsh Government's strategic priorities in relation to procurement, and that this is known as the Wales procurement policy statement.
- 114 Subsections (3)-(5) make provision for how a Wales procurement policy statement must be made, including requirements relating to consultation and laying the statement before the Senedd.
- 115 Subsections (6) and (7) set out that the Welsh Ministers must keep the Wales procurement policy statement under review and that the statement may be amended or replaced. Subsection (7) also confirms that the section applies to all future Wales procurement policy statements, not just the first one made under these provisions.
- 116 Subsections (8) and (9) sets out which contracting authorities, and under what circumstances those authorities, must have regard to a Wales procurement policy statement.
- 117 Subsection (10) defines the Senedd.

## Part 3: Award of public contracts and procedures

### Chapter 1: Preliminary steps

#### Section 15: Planned procurement notices

- 118 Subsection (1) gives contracting authorities an option to publish a planned procurement notice. The benefit of this would be for them to take advantage of the reduction of time periods that apply to the award procedure (set out further in section 54 (time limits)).
- 119 Subsection (2) sets out the minimum information that must be contained within the notice. Further details of what the notice will contain will be set out in regulations.
- 120 Subsection (3) sets out the time periods for when the notice must have been published in order for the reduced time limits to apply. This is referred to as a "qualifying planned procurement notice".
- 121 Subsection (4) directs the reader to section 54(4) where time reductions are outlined if a qualifying planned procurement notice is published.

## Section 16: Preliminary market engagement

- 122 Subsection (1) permits contracting authorities to engage with suppliers and other persons (e.g. trade associations, consultants, think tanks, charities) before commencing a procurement and lists the purpose of such engagement (e.g. for developing contracting authority requirements or designing a procurement process).
- 123 Subsection (2) explains that the engagement described in subsection (1) is called preliminary market engagement.
- 124 Subsection (3) requires contracting authorities to ensure that suppliers involved in the preliminary market engagement do not later receive an unfair advantage over those suppliers not involved, and that the competition that follows the preliminary market engagement is not distorted by the engagement.
- 125 Subsection (4) sets out the circumstances in which a supplier is to be treated as an “excluded supplier” (i.e. requiring the contracting authority to exclude them from the procurement) under subsection (5). This applies where they have an unfair advantage in the procurement, due to taking part in preliminary market engagement and that advantage cannot be avoided (e.g. by taking measures later to correct any advantage, such as giving all suppliers the same information).
- 126 Subsection (5) requires contracting authorities to treat a supplier that has been given an unfair advantage through their participation in preliminary market engagement which cannot be avoided as an “excluded supplier”. This does not mean that the supplier is an excluded supplier for all procurements (unlike in other circumstances set out in section 57 and Schedule 6) but only for this procurement, with the result that the other provisions relating to “excluded suppliers” do not apply to the supplier. This means that the risk of the circumstances recurring or continuing (otherwise known as “self-cleaning”) does not need to be considered, the time periods during which events can be taken into account for the purpose of exclusions are not applicable and this cannot be used as a ground for a Minister to put the supplier on the debarment list.

## Section 17: Preliminary market engagement notices

- 127 Subsection (1) requires that if a contracting authority carries out preliminary market engagement (defined in section 16) it must publish a preliminary market engagement notice before it publishes a tender notice or, when it does publish a tender notice, explain why it did not publish a preliminary market engagement notice.
- 128 Subsection (2) sets out the minimum information that must be contained within the notice. Further details of what the notice will contain will be set out in regulations.

## Section 18: Duty to consider lots

- 129 Subsection (1) requires that before publishing a tender notice in respect of a public contract, a contracting authority must consider whether breaking a contract into smaller chunks, known as lots, is reasonable and appropriate.
- 130 Subsection (2) requires the contracting authority to then either arrange for the award of the contract(s) by reference to lots, or provide reasons for not doing so, where the contracting authority considers under subsection (1) that lots would be reasonable and appropriate.

## Chapter 2: Competitive award

### Terms of a procurement

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

- 131 Section 19 sets out the principles of awarding public contracts that apply following a competitive tendering procedure.
- 132 Subsection (1) provides that in a competitive tendering procedure, a contracting authority may only award a contract to the supplier that submits the “most advantageous tender”.
- 133 Subsection (2) explains how the most advantageous tender is identified. This is determined by the contracting authority, following its assessment of the tenders submitted, and is the tender that both satisfies the contracting authority’s requirements and best meets the award criteria. It provides that when assessing tenders against the award criteria, contracting authorities must base that assessment on the assessment methodology as defined in section 23(3)(a) and (where there is more than one award criterion) the relative importance of the award criteria - if there is only one criterion, tenders will be assessed against that single criterion. The possibility for there to be only one award criterion or a number allows contracting authorities to, for example, award the contract to the supplier submitting the lowest priced tender (where price is the sole criterion) or to the supplier submitting the tender that scores best across a range of price and quality criteria. The options available to contracting authorities to indicate the relative importance of the award criteria are set out in section 23(3) (award criteria).
- 134 Subsection (3) sets out the circumstances where a contracting authority must or may disregard a tender. Subsection (3)(a) requires contracting authorities to disregard a tender where the supplier does not satisfy the conditions of participation (which are set out in section 22). Subsection (3)(b) gives contracting authorities discretion as to whether they disregard a tender where the supplier is not a United Kingdom or “treaty state supplier” or where the supplier intends to sub-contract the delivery of the contract or part of the contract to a supplier that is not a United Kingdom supplier or treaty state supplier. (A treaty state supplier is defined in section 89 (treaty state suppliers).) Subsection (3)(c) makes clear that contracting authorities may disregard an abnormally low tender. Whether contracting authorities investigate or disregard abnormally low tenders is within their discretion and there is no obligation to do so. Subsection (4) makes further provision about disregarding abnormally low tenders. Subsection (3)(d) gives contracting authorities discretion as to whether they disregard a tender that breaches a procedural requirement set out in the tender notice or associated tender documents.
- 135 Subsection (4) provides that before a contracting authority may disregard an abnormally low tender, which is provided for in (3)(c), they must first notify the supplier and give them the opportunity to demonstrate that they are able to deliver the contract at the price offered. [A tender may not be disregarded simply because the price appears low, but only where the contracting authority considers that the price is so abnormally low that the contract cannot be performed for the tender price.] For example, a low price might be due to production efficiencies or leveraging economies of scale. Alternatively, a low price might be due to inaccuracies in cost modelling or as a result unlawful practices or funding sources, casting doubt on the ability of the tender to perform the contract.
- 136 Subsection (5) clarifies that if the supplier successfully demonstrates, in the judgement of the contracting authority, that they are able to deliver the contract, then the abnormally low tender may not be disregarded.

- 137 Subsection (6) clarifies that a breach of a procedural requirement includes in relation to the tender. This would include, for example, where there are material omissions in the tender.
- 138 Subsection (7) clarifies that a reference to a contracting authority's requirements is a reference to the requirements described in either the tender notice or associated tender documents. Further details in this regard are set out in section 21(5) and (6).
- 139 Subsection (8) refers to section 26 (excluding suppliers from a competitive award) and section 28 (excluding suppliers by reference to sub-contractors), which make provision for disregarding tenders from suppliers that are excluded or excludable suppliers or that are intending to subcontract to excluded or excludable suppliers. (Excluded and excludable suppliers are defined in section 57 (meaning of excludable suppliers)).
- 140 Subsection (9) refers to section 32 (reserving contracts to supported employment providers) and section 33 (reserving contracts to public service mutuals), which make provision for reserving public contracts to supported employment providers and qualifying public service mutuals. (Supported employment providers and qualifying public service mutuals are defined in section 32(4) and section 33(5) respectively.)
- 141 Subsection (10) refers to section 34 (competitive award by reference to dynamic markets) which makes provision for disregarding tenders from suppliers that are not members of a dynamic market, when the contract is being awarded under a dynamic market.
- 142 Subsection (11) provides that "procedural requirement" includes a requirement that a supplier provide information.

## Section 20: Competitive tendering procedures

- 143 Subsection (1) requires that before awarding a public contract under section 19 (award of public contracts following a competitive tendering procedure), a contracting authority must carry out a competitive tendering procedure in accordance with a tender notice (like an advert) and associated (supporting) tender documents. This ensures potential bidders know what to expect from the procedure.
- 144 Subsection (2) sets out that a competitive tendering procedure can take two forms. The first is an "open procedure", which is a single stage procedure whereby the opportunity for the public contract is advertised and any interested party can submit a tender (and the authority will decide who to award the contract to solely on the basis of that single tender, in accordance with section 19). The second is a "competitive flexible procedure" which is any other competitive tendering procedure which the contracting authority considers appropriate for the purpose of awarding the public contract. Any competitive flexible procedure designed by the contracting authority will need to operate within the bounds of the provisions of the legislation (such as the covered procurement objectives, publication of required notices and other requirements applicable to a competitive tendering procedure); but otherwise can be designed around what would work best for the specific procurement.
- 145 Subsection (3) requires contracting authorities to ensure that the procedure is a proportionate means of awarding the contract, having regard to the nature, complexity and cost of the contract. This is to avoid procedures being designed in a manner that is unnecessarily complex or burdensome.
- 146 Subsection (4) further differentiates the two types of competitive procedure by reference to some of the actions that could be taken in a competitive flexible procedure. In contrast to an open procedure, a competitive flexible procedure will likely be multi-staged and therefore may (under subsection (4)(a)) limit the number of suppliers participating in a procurement (or

progressing to the next stage). For example, a competitive flexible procedure may have a first stage that invites tenders from all interested parties and a second price negotiation stage with those suppliers successful at the first stage. Alternatively, the first stage could be a request to participate which outlines the essential requirements that must be met in order for suppliers to tender (the conditions of participation- see section 22), and thereafter only those suppliers who can meet those conditions are invited to bid.

- 147 Subsection (4)(b) identifies that award criteria can be refined in the course of the procedure, within the parameters set out in section 24. Subsection (4)(c) prohibits contracting authorities from allowing participation of suppliers not previously involved and/or suppliers excluded in an earlier stage.
- 148 Subsection (5) sets out other ways a contracting authority may remove suppliers from a competitive flexible procedure. Under subsection 5(a), if the supplier has not complied with the conditions of participation set for the procurement (pursuant to section 22) they may be excluded. Subsection 5(b) states that a supplier may be excluded when they have failed to meet any intermediate assessment of tenders. Subsection 5(c) provides that contracting authorities may also exclude a supplier that is not a United Kingdom supplier (as defined in section 90(7)) or treaty state supplier (as defined in section 89). Subsection 5(d) provides that a contracting authority may exclude a supplier that intends to sub-contract the performance of all or part of the contract to a supplier that is not a United Kingdom supplier or treaty state supplier.
- 149 Subsection (6) explains that the reference to intermediate assessment of tenders in subsection (5)(b) means assessing which tenders satisfy the contracting authority's requirements and best satisfy the award criteria at the point of exclusion by reference to certain assessment requirements relating to award criteria (which are dealt with in section 23).
- 150 Subsection (7) allows a competitive tendering procedure to have a limit to the number of lots any one supplier can tender for.
- 151 Subsection (8) refers to section 27 (excluding suppliers from a competitive flexible procedure) section 28 (excluding suppliers by reference to sub-contractors) and section 30 (excluding suppliers for improper behaviour), which make provision for excluding suppliers that are excluded or excludable suppliers or that are intending to subcontract to excluded or excludable suppliers (excluded and excludable suppliers are defined in section 57 (meaning of excluded and excludable suppliers.)
- 152 Subsection (9) refers to sections 32 (reserving contracts to supported employment providers) and 33 (reserving contracts to public service mutuals) about reserving contracts to certain suppliers.
- 153 Subsection (10) refers to section 34 (competitive award by reference to dynamic markets), which allows the exclusion of suppliers that are not members of a dynamic market or part of a dynamic market.

## Section 21: Tender notices and associated tender documents

- 154 Subsection (1) sets out when a tender notice must be published. When using the open procedure a contracting authority must publish a tender notice to invite suppliers to submit their tenders. For a competitive flexible procedure (defined in section 20), a contracting authority must publish a tender notice to invite suppliers to submit a request 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.

- 155 Subsection (2) states that a tender notice is a notice which sets out that a contracting authority intends to award a public contract under section 19 (award of public contracts following a competitive tendering procedure). It also requires that the tender notice must contain any other information specified in regulations, which will be made under section 95 (notices, documents and information: regulations and online system).
- 156 Subsection (3) allows for associated tender documents to be produced separately from the tender notice and that they must be provided in accordance with the tender notice.
- 157 Subsection (4) explains that associated tender documents must, where provided, 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 section 95 (notices, documents and information: regulations and online system).
- 158 Subsection (5) sets out that a contracting authority cannot invite the submission of tenders, and therefore commence the tendering period under section 54, until the contracting authority is satisfied that the tender notice and any associated tender documents provide sufficient information to allow the preparation of a tender and, in particular, details of the goods, services or works to be supplied.
- 159 Subsection (6) sets out that a contracting authority must be satisfied that the requirements in the tender notice and any associated tender documents are sufficiently clear and specific, and do not break the rules in section 56 (on technical specifications).
- 160 Subsection (7) refers to section 40 (Qualifying utilities dynamic market notices: no duty to publish a tender notice) which provides an exception to the obligation to publish a tender notice when contracts are awarded under a utilities dynamic market established by reference to a qualifying utilities dynamic market notice. In such cases, utilities are required, instead, to provide tender notices only to suppliers that are members of the utilities dynamic market or relevant part of the market (see section 40).

## Section 22: Conditions of participation

- 161 Subsection (1) enables contracting authorities to set conditions relating to suppliers' participation in a procurement process, prior to the award of a public contract under section 19 (award of public contracts following a competitive tendering procedure). These conditions must be limited to those that are a proportionate means of ensuring that a supplier has the legal and financial capacity, or the technical ability to perform the contract. Proportionate conditions should help encourage market participation and avoid requirements being unnecessarily onerous for suppliers.
- 162 Subsection (2) defines the term "condition of participation".
- 163 Subsection (3) prohibits contracting authorities from requiring as a condition of participation (a) the provision of audited annual accounts from suppliers that are not otherwise required by the Companies Act 2006 or an overseas equivalent to have their accounts audited and (b) insurance relating to the performance of the contract to be in place before award. This ensures that suppliers that are not required to have their accounts audited (e.g. small companies) can provide alternative evidence of financial capacity and allows suppliers to commit to having insurance in place at award, rather than before (which may incur unnecessary cost if they do not win the contract).
- 164 Subsection (4) makes it clear that whilst conditions can include qualifications, experience or technical ability, to ensure fair treatment of suppliers and equality of opportunity, they cannot relate to a particular prior award of a public contract (e.g. public sector experience may be

requested but experience with a specific public sector organisation cannot). In addition, conditions may not contravene the rules on technical specifications in section 56 (technical specifications) or require particular qualifications without allowing for their equivalents.

- 165 Subsection (5) contains further guidance on proportionality when setting conditions of participation, having regard to the nature, cost and level of complexity of the contract.
- 166 Subsection (6) permits a contracting authority to require evidence that is verifiable by a third party to satisfy a condition of participation.
- 167 Subsection (7) allows a contracting authority to remove a supplier from the competition when the supplier has not satisfied the conditions of participation. This means that whilst a supplier must satisfy the conditions of participation in order to be awarded the ensuing public contract (see subsection (2)), a contracting authority may choose the timing at which exclusion from the procedure takes place (for example, the authority may allow for suppliers to confirm they have met the conditions at a later stage).
- 168 Subsection (8) refers to situations where a supplier has relied on another supplier (an associated supplier) in order to satisfy the conditions of participation. Where this occurs the contracting authority is to treat the supplier as having passed the conditions if the other supplier has passed the conditions. Further rules on sub-contracting can be found in section 28 (excluding suppliers by reference to sub-contractors) and section 72 (sub-contracting: directions).
- 169 Subsection (9) explains the different relationships that can occur between two suppliers for them to be classed as associated. The suppliers could submit a tender together, for example as a consortium, or there could be an arrangement with one supplier sub-contracting or guaranteeing aspects of the contract to or by another. The contracting authority must be satisfied that the suppliers will enter into a legally binding arrangement to cover the sub-contracting or guarantee arrangement. Section 72 (sub-contracting: directions) includes more detail on sub-contracting arrangements.

### Section 23: Award criteria

- 170 This section deals with the rules that apply to award criteria.
- 171 Subsection (1) explains that the “award criteria” means criteria against which tenders are assessed during a competitive tendering procedure, which must be set in accordance with this section.
- 172 Subsection (2) sets out specific rules that contracting authorities must follow when setting the award criteria. The criteria must relate to the subject matter of the contract; be sufficiently clear, measurable and specific; comply with the rules on technical specifications and be proportionate having regard to the nature, complexity and cost of the contract.
- 173 Subsection (3) enables the award process to be transparent and defines and sets out what must be included in the “assessment methodology”. Contracting authorities are required to describe how the award criteria will be applied and, if there is more than one criterion, to set out their relative importance, which may be by weighting or ranking them, or through an alternative approach.
- 174 Subsection (4) provides that when procurements are divided into separate lots, a contracting authority may limit the number of lots an individual supplier may be awarded provided it applies an objective mechanism to do so.
- 175 Subsection (5) provides a non-exhaustive list of what may constitute the “subject matter of a contract” (referred to at subsection (2)).



176 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.

## Section 24: Refining award criteria

177 Subsection (1) provides that, as part of a competitive flexible procedure, a contracting authority may refine the award criteria provided the right to do so is set out in the tender notice or associated tender documents. As such, refinements are allowed during the procurement process, 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 section 19 (to conclude the procedure).

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

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

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

## Section 25: Sub-contracting specifications

181 This section sets out a specific provision whereby a contracting authority can require a supplier to sub-contract the supply of goods, services or works to another supplier.

182 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 section 41 (direct award in special cases), such as for technical reasons or when a supplier has exclusive rights.

183 Subsection (2) sets out that where a contracting authority awards a contract for the supply of goods, services or works under section 19 (award of public contracts following a competitive tendering procedure), the contracting authority may require a supplier to sub-contract the supply of goods, works or services to a particular supplier where the conditions for a direct award under section 41 of the supply of goods, works or services to that supplier are met.

## Exclusions and modifications

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

184 Subsection (1) requires a contracting authority to disregard any tender from a supplier that is an “excluded supplier” when assessing which tender is the most advantageous tender. This means that contracting authorities must consider whether each supplier meets any of the mandatory grounds for exclusion, and if so whether the issue in question is likely to occur again or is continuing; whether the supplier is to be treated as an excluded supplier for other reasons (see sections 16(5), 30(6) and 82(4)); as well as checking whether the supplier is on the debarment list on the basis of a mandatory ground for exclusion.

185 Subsection (2) places an obligation on a contracting authority to consider whether a supplier is an “excludable supplier” before assessing tenders for the most advantageous tender and allows a contracting authority to disregard a tender submitted by such a supplier. This means that contracting authorities must consider whether each supplier meets any of the discretionary grounds for exclusion, and if so whether the issue in question is likely to occur

again or is continuing; as well as checking whether the supplier is on the debarment list on the basis of a discretionary ground for exclusion.

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

187 Subsection (4) defines an “associated person” as any entity which the supplier in question is relying upon to meet the conditions of participation in the procurement (see sections 22(8) and (9)) with the exception of guarantors, which would for example include banks. Associated persons could be individuals, companies, partnerships or any entity with legal personality. An associated person might include subcontractors or consultants who are essential to ensure the supplier has the technical ability to perform the contract or other consortium members if the supplier is relying on them to ensure it has the legal and financial capacity to perform the contract.

188 The basis on which a supplier is an excluded supplier (i.e. subject to mandatory exclusion) or an excludable supplier (i.e. subject to discretionary exclusion) is set out in sections 57 (meaning of excluded and excludable supplier) and 58 (considering whether a supplier is excluded or excludable) and the grounds on which a supplier is an excluded or excludable supplier are set out in Schedule 6 (mandatory exclusion grounds) and 7 (discretionary exclusion grounds). A supplier must also be treated as an excluded supplier in certain other circumstances (see sections 16(5), 30(6) and 82(4)).

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

189 Subsection (1) requires a contracting authority to determine for all competitive flexible procedures whether a supplier is an excluded or excludable supplier before allowing them to participate. This means that contracting authorities must consider: whether each supplier meets any of the mandatory or discretionary grounds for exclusion, and if so whether the issue in question is likely to occur again or is continuing; whether the supplier is to be treated as an excluded supplier for other reasons (see sections 16(5), 30(6) and 82(4)); as well as checking whether the supplier is on the debarment list. This check must happen before allowing the supplier to participate in the procedure (see subsection (5)). This obligation does not apply to open procedures as these are single stage procedures where exclusions can only be considered when tenders are assessed - see section 26 (excluding suppliers from a competitive award).

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

191 Subsection (4) requires a contracting authority, where it is excluding a supplier by virtue of one of its associated persons, to first notify the supplier of its intention to exclude them and give the supplier the opportunity to replace the associated person with a suitable alternative. A supplier must or may be excluded under this provision only if the supplier fails to replace the associated person. An “associated person” is defined in section 26(4).

192 Subsection (5) says that a supplier participating in a competitive flexible procedure refers to a supplier progressing beyond requests to participate in the procurement or beyond submission of tenders (which will depend on the process adopted by the contracting authority, e.g. if the process includes a stage where requests to participate in the procurement are required then this refers to that stage).

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

193 Subsection (1) requires a contracting authority to ask for details of intended sub-contractors and to check whether any intended sub-contractors are on the debarment list, as part of determining whether the supplier is an excluded or excludable supplier.

194 Subsection (2) permits a contracting authority to ask a supplier for information to determine if any sub-contractor it intends to sub-contract to is an excluded or excludable supplier. Whilst details of all intended sub-contractors must be asked for under subsection (1) and checks must be made as to whether they are on the debarment list, this subsection (2) allows, but does not require, consideration of the exclusion grounds, other than by virtue of being on the debarment list, in relation to intended sub-contractors.

195 Subsection (3) says that, where a contracting authority has decided to ask for information about a sub-contractor to determine if they are subject to exclusion under subsection (2), if a sub-contractor is an excluded supplier, the contracting authority must treat the supplier itself as an excluded supplier and disregard a tender from that supplier or exclude them from participating or progressing in a competitive tendering procedure.

196 Subsection (4) says that, where a contracting authority has decided to ask for information about a sub-contractor to determine if they are subject to exclusion under subsection (2), if a sub-contractor is an excludable supplier, the contracting authority may treat the supplier itself as an excludable supplier and may disregard a tender from that supplier or excluding them from participating or progressing in a competitive tendering procedure.

197 Subsection (5) requires a contracting authority to notify the supplier of its intention to disregard their tender or exclude the supplier and provide the supplier with the opportunity to find a suitable replacement sub-contractor before their tender is disregarded or the supplier is excluded under subsections (3) or (4).

198 Subsection (6) says that a supplier participating in a competitive tendering procedure refers to a supplier progressing beyond requests to participate in the procurement or beyond submission of tenders (which will depend on the process adopted by the contracting authority, e.g. if the process includes a stage where requests to participate in the procurement are required then this refers to that stage).

199 Subsection (7) states that the requirements in subsection (3) and (4) regarding disregarding tenders and excluding suppliers from competitive tendering procedures where an intended sub-contractor is an excluded or excludable supplier do not apply if the intended sub-contractor is an associated person, i.e. a sub-contractor that is being relied on by the supplier to meet a condition of participation (see section 26(4)). This is because a supplier is an excluded or excludable supplier under section 57 (meaning of excluded and excludable supplier) where an associated person of the supplier is an excluded or excludable supplier. A sub-contractor that is an associated person is covered in section 26 (excluding suppliers from a competitive award) and section 27 (excluding suppliers from a competitive flexible procedure). The effect of this is that contracting authorities must always consider exclusions with regard to sub-contractors that are associated persons but have flexibility under section 28 (excluding suppliers by reference to sub-contractors) to consider exclusions, other than by

virtue of being on the debarment list, with regard to other intended sub-contractors if they wish to do so.

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

- 200 Subsection (1) sets out that subsection (2) applies to a relevant contracting authority if it intends to disregard a tender or exclude a supplier on the basis of the national security discretionary exclusion ground in paragraph 14 of Schedule 7.
- 201 Subsection (2) allows for exclusion on this basis only where the contracting authority has notified a Minister of the Crown and the Minister considers that the exclusion ground applies and the supplier's tender should be disregarded or the supplier should be excluded.
- 202 Subsection (3) cross refers to provisions in sections 26, 27 and 28 which provide for notification to a supplier that an associated supplier or intended sub-contractor is considered by the contracting authority to be a threat to national security. This is consistent with the rest of this section, which requires ministerial consideration and approval prior to a supplier being excluded or their tender disregarded where the discretionary national security exclusion ground applies.
- 203 Subsection (4) defines a "relevant contracting authority" as any contracting authority other than a Minister of the Crown, a Government department, the Corporate Officer of the House of Commons or the Corporate Officer of the House of Lords.

## Section 30: Excluding suppliers for improper behaviour

- 204 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 of the supplier.
- 205 Subsection (2) says that, in these circumstances, the contracting authority must treat the supplier as an excluded supplier in relation to the award of the public contract, disregard a tender from the suppliers and prevent the supplier from participating in, or progressing as part of, any competitive tendering procedure.
- 206 Subsection (3) requires the contracting authority to allow representations to be made and evidence to be put forward by the supplier before determining whether a supplier has acted improperly.
- 207 Subsection (4) sets out an exhaustive list of the circumstances in which a supplier has acted improperly in a procurement.
- 208 Subsection (5) says subsection (6) applies where a supplier has failed to provide information about connected persons or associated persons to assess whether the supplier is subject to exclusion or has provided incomplete, inaccurate or misleading information.
- 209 Subsection (6) says that, in these circumstances, the contracting authority must treat the supplier as an excluded supplier in relation to the award of the public contract, disregard a tender from the supplier and prevent the supplier from participating in, or progressing as part of, any competitive tendering procedure.
- 210 An excluded supplier under this section is not treated as an excluded supplier other than in the procurement where the improper behaviour occurred. As a result, the risk of the improper behaviour continuing or occurring again (i.e. self-cleaning) is not relevant, the time periods during which events can be taken into account for the purpose of exclusions are not applicable and this cannot be used as a ground for a Minister to put the supplier on the debarment list.

However, the behaviour of a supplier described in this section may also be a basis for discretionary exclusion on future procurements, where all of these matters are relevant (see paragraph 13 of schedule 7).

## Section 31: Modifying a section 19 procurement

- 211 There will be times when changes need to be made to the “terms of a covered procurement” (defined at subsection (7)). Subsection (1) sets out when it is permitted to make changes to the terms of a covered procurement during an open procedure (i.e. prior to tenders being received), and during a competitive flexible procedure (i.e. before the deadline for submitting a request to participate or before the deadline for submitting the first or only tender). This aims to strike an appropriate balance between permitting changes to the terms of a covered procurement without allowing contracting authorities to change the goal posts after suppliers have already relied on that information.
- 212 Subsection (2) also provides for “non-substantial” modifications to be made after requests to participate or initial tenders are received in a (multi-staged) competitive flexible procedure. These must be made before the deadline for submitting final tenders.
- 213 For light touch contract procurements (where contracting authorities benefit from greater freedoms), modifications of any type are allowed before the submission of tenders.
- 214 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 section mandates that a substantial change is one that would likely impact the market response to the procurement.
- 215 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.
- 216 Subsection (5) requires transparency of the modifications made under subsection (1) through the revision and reissue of the tender notice and any associated tender documents that were affected by the changes.
- 217 Similarly, if the modification was made under subsection (2), subsection (6) requires a contracting authority to notify those remaining in the procedure (since it is only those remaining in the competition who need to be aware).
- 218 Subsection (7) defines “terms of a covered procurement” and “participating supplier”.
- 219 Subsection (8) cross refers to section 43 (switching to direct award).

## Reserving contracts to certain suppliers

### Section 32: Reserving contracts to supported employment providers

- 220 Subsection (1) allows the exclusion of suppliers that are not “supported employment providers” from a competitive flexible procedure. The contract will accordingly be reserved to supported employment providers.
- 221 Subsections (2) and (3) set out the process. 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.

222 Subsection (4) defines a “supported employment provider” as an organisation, organisations, or parts thereof, that specifically aims to provide employment, or employment-related support, to disabled or disadvantaged persons, and where at least 30% of the workforce of the organisation, organisations or relevant parts, is disabled or disadvantaged. This definition intends to capture such arrangements as are commonly referred to as employment programmes, to support the continued collaboration among organisations.

### Section 33: Reserving contracts to public service mutuals

223 Subsection (1) sets out that this section applies if the procurement is for a contract for “reservable light touch services” (as defined in subsection (7)) and has a maximum term of five years or less. The contract may accordingly be reserved for “qualifying public service mutuals” under this section.

224 Subsections (2) to (4) set out the procedure. Under subsection (2), in a competitive flexible procedure, the contracting authority may provide that the procedure excludes suppliers that are not qualifying public service mutuals. Subsections (3) and (4) make it clear that in these circumstances the authority must disregard any tender from a supplier that is not a qualifying public service mutual.

225 Subsection (5) defines a “qualifying public service mutual” as a “public service mutual” that has not entered into a comparable contract.

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

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

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

### Awarding contracts by reference to dynamic markets

#### Section 34: Competitive award by reference to dynamic markets

229 Subsection (1) provides that a competitive flexible procedure may provide for the exclusion of suppliers that are not members of an appropriate dynamic market or are not members of an appropriate part of an appropriate dynamic market. The effect of this is that the award of a contract under a dynamic market must be by way of a competitive flexible procedure and cannot be by way of an open procedure or direct award.

230 Subsection (2) provides that subsection (3) applies in relation to the award of a public contract where a contracting authority requires suppliers to be members of a dynamic market or part of a dynamic market, as provided for in subsection (1).

231 Subsection (3) requires that when a contracting authority is assessing tenders under section 19, it must disregard tenders from suppliers who are not members of the relevant dynamic market or appropriate part of it. This is to ensure that, where subsection (1) applies, a contract cannot be awarded to a supplier that is not a member of the dynamic market, or appropriate part of it.

232 Subsection (4) requires that before a contracting authority excludes a supplier or disregards a tender from a supplier that is not a member of the relevant dynamic market or appropriate part of it, it must, if the supplier has submitted an application for membership of the dynamic market, consider their application. This allows suppliers who are not on the dynamic market at the time a tender notice for a procurement is published to still participate in a procurement under it if they are successful in their application for membership of the dynamic market.

233 Subsection (5) states that the requirements in subsection (4) do not apply if, due to exceptional circumstances arising from the complexity of the particular procurement, the contracting authority has insufficient time to consider the supplier's application for membership before the deadline for submitting a request to participate in the procedure or the deadline for submission of tenders.

234 Subsection (6) says that an "appropriate" dynamic market or "appropriate" part of a dynamic market means a dynamic market or part thereof which allows for the award of the particular contract being procured by the contracting authority.

235 Subsection (7) provides that concession contracts, other than those which are utilities contracts, cannot be awarded under dynamic markets.

236 Subsection (8) defines a "dynamic market" as an arrangement set up in accordance with section 35(1). This subsection also clarifies that references to a contract being awarded by reference to suppliers' membership of a dynamic market means that contracts are awarded in reliance on section 34 and that references to suppliers' membership of a dynamic market are references to suppliers' participation in dynamic markets set up under section 35(1).

### Section 35: Dynamic markets: establishment

237 Subsection (1) allows a contracting authority to establish arrangements, known as dynamic markets (see section 34(8) for definition of dynamic market), in order that a contracting authority may subsequently award contracts by reference to suppliers' participation in such dynamic markets.

238 Subsection (2) defines a utilities dynamic market as a dynamic market set up only for the purpose of the award of utilities contracts by utilities.

239 Subsection (3) provides that, if any person sets up a utilities dynamic market which complies with the provisions of the legislation applicable to utilities dynamic markets established by private utilities, that is to be treated as a utilities dynamic market established by a private utility for the purpose of the Act and utilities can use them to award utilities contracts.

240 Subsection (4) defines a "utility" (see also section 6).

241 Subsection (5) clarifies that documents establishing or modifying a dynamic market are not public contracts. This is one of the factors distinguishing dynamic markets from frameworks, which are public contracts, and reflects the fact that a dynamic market is essentially a list of pre-qualified suppliers.

### Section 36: Dynamic markets: membership

242 Subsection (1) allows a contracting authority to set conditions for membership of a dynamic market or part of a dynamic market. These are similar to conditions for participation used in the award of a public contract under a competitive tendering procedure (see section 22 (Conditions of participation)) and are permitted as long as they are a proportionate way of ensuring suppliers have the legal and financial capacity or technical ability to perform contracts. The following subsections set out the matters to be taken into account in determining whether a condition is proportionate and the rules that apply to conditions for membership.

243 Subsection (2) prohibits contracting authorities from setting certain conditions for membership of a dynamic market when seeking to ensure that suppliers have the legal and financial capacity to perform contracts to be awarded by reference to the dynamic market. Subsection (2)(a) prohibits contracting authorities from requiring the provision of audited

annual accounts from suppliers that are not required by the Companies Act 2006 or an overseas equivalent to have their accounts audited (for example small companies). Subsection (2)(b) prohibits contracting authorities from requiring insurance relating to the performance of the contract to be in place before award of the contract. This allows suppliers that are not legally required to have their accounts audited to provide alternative evidence and allows suppliers to commit to having insurance in place at award.

244 Subsection (3) makes it clear that whilst the conditions for membership of a dynamic market set under subsection (1)(b) can relate to qualifications, experience or technical ability, they cannot require suppliers to have been awarded a contract by a particular contracting authority, contravene the rules on technical specifications in section 56 (technical specifications) or require particular qualifications without allowing for equivalents. This is to ensure that suppliers are not put at an unfair advantage or disadvantage with respect to such matters.

245 Subsection (4) defines what is meant by conditions for membership being (as referred to in subsection (1)) proportionate, which is that they are commensurate to the nature, complexity and cost of contracts to be awarded under the dynamic market.

246 Subsection (5) permits a contracting authority to require evidence that is verifiable by a third party to satisfy a condition for membership of a dynamic market e.g. certification to an “ISO standard”.

247 Subsection (6) sets out contracting authorities’ responsibilities in relation to the membership of the dynamic market or part of the market (as relevant). These are that the contracting authority must accept applications at any time, consider applications in a reasonable period of time, admit suppliers to the dynamic market (as long as they are not excluded suppliers and they satisfy the conditions for membership) as soon as reasonably practicable, consider whether to admit suppliers that are excludable suppliers and that meet the conditions for membership and inform suppliers of the outcome of their applications, and the reasons for the decision, as soon as reasonably practicable.

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

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

249 Subsection (1) requires contracting authorities to remove a supplier from a dynamic market where it is on the debarment list for a mandatory exclusion ground under section 57(1)(b) (Meaning of excluded and excludable supplier).

250 Subsection (2) sets out the circumstances under which contracting authorities have a discretion to remove a supplier from a dynamic market. These are where the supplier is an excluded supplier under section 57(1)(a) (Meaning of excluded and excludable supplier) or where it does not satisfy the conditions for membership of the dynamic market, or where it has become an excludable supplier since joining the dynamic market or where the contracting authority has become aware that the supplier was an excludable supplier when it was admitted to the dynamic market and so could have been excluded at that point.

251 Subsection (3) sets out particular circumstances in which a supplier may become an excludable supplier for the purposes of subsection (2). This is where a discretionary exclusion ground did not apply to the supplier before it became a member of the dynamic market and



where a discretionary exclusion ground applied to a supplier before it became a member but related to different circumstances. There may be other circumstances not set out in subsection (3).

252 Subsection (4) sets out that, before removing a supplier from a dynamic market, the contracting authority must inform the supplier of its decision, and the reasons for the decision.

### Section 38: Dynamic markets: fees

253 Section 38 provides that fees may be charged to suppliers on a dynamic market provided they are set out in the documents establishing the dynamic market. This applies to dynamic markets and utilities dynamic markets, although the basis of charging is different for each, as set out in the section.

254 Subsection (1) provides that fees can only be charged under a dynamic market (other than a utilities dynamic market) to suppliers that are awarded a contract under the dynamic market.

255 Subsection (2) provides that fees charged to suppliers under subsection (1) can only be a fixed percentage of the estimated value of the contract awarded to the supplier under the dynamic market.

256 Subsection (3) provides that fees can only be charged to suppliers under a utilities dynamic market where they are connected to obtaining and maintaining membership of the market.

### Section 39: Dynamic market notices

257 This section requires the publication of various notices in relation to the establishment and operation of dynamic markets and when they cease to operate. Further details regarding the form and content of notices and how they are to be published will be included in regulations made under section 95 (Notices, documents and information: regulations and online system).

258 Subsection (1) states that a notice under the section is called a “dynamic market notice”.

259 Subsections (2) to (4) require a contracting authority to publish a notice before establishing a dynamic market and (in each case) as soon as reasonably practicable after establishing the dynamic market and after modifying it. These notices must contain the information required in the relevant subsections and any other information specified in regulations made under section 95 (Notices, documents and information: regulations and online system).

260 Subsection (5) states that the contracting authority establishing the dynamic market must, as soon as reasonably practicable after a dynamic market ceases to operate, publish a notice to that effect and any other information specified in regulations made under section 95 (Notices, documents and information: regulations and online system).

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

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

262 Utilities dynamic markets may be established in the usual way, using a dynamic market notice, or using a qualifying utilities dynamic market notice. Section 40 sets out the different rules for tender notices and the exceptions to the rules for dynamic markets that apply to utilities dynamic markets established under a qualifying utilities dynamic market notice and defines a qualifying utilities dynamic market notice.

- 263 Subsection (1) provides that a contracting authority that establishes a dynamic market by reference to a qualifying utilities dynamic market notice is not required, as part of a competitive flexible procedure under that market, to publish a tender notice for the purpose of inviting suppliers to submit a request to participate or, where relevant, tenders (see section 21(1) (Tender notices and associated tender documents)).
- 264 Subsection (2) provides that where subsection (1) applies, a contracting authority must, instead of publishing a tender notice, provide a tender notice to members of the market or appropriate part of the market.
- 265 Subsection (3) allows a contracting authority the discretion to provide a tender notice to suppliers that are still being considered for membership of the market, or part of the market, by the contracting authority.
- 266 Subsection (4) incorporates a qualifying utilities dynamic market notice into section 21(5) (Tender notices and associated tender documents). This means that, in the case of a utilities dynamic market established by reference to a qualifying utilities dynamic market notice, the qualifying utilities dynamic market notice, tender notice provided to suppliers or associated tender documents must contain the level of sufficiency of information required by section 21(5) in order to invite suppliers to submit a tender under the market.
- 267 Subsection (5) disapplies the duty in section 34(4) (Competitive award by reference to utilities dynamic markets) on contracting authorities to consider applications for membership of a utilities dynamic market, or part of such a market, established by reference to a qualifying utilities dynamic market notice.
- 268 Subsection (6) defines a “qualifying utilities dynamic market notice”. This notice must comply with the requirements for a dynamic market notice in section 39(2), relate to the establishment of a utilities dynamic market and contain the information specified in subsection (6)(b).
- 269 Subsection (7) provides that a reference to “publication” of a tender notice in the Act includes a reference to “provision” of a tender notice as described in subsections (2) or (3).

## Chapter 3: Direct award

### Section 41: Direct award in special cases

- 270 There are certain circumstances where the contracting authority may award a contract to a supplier without first running a competitive tendering procedure. This section makes provision for when such direct awards are permitted.
- 271 Subsection (1) allows a contract to be awarded directly to a supplier (as long as they are not an excluded supplier as defined in section 57(1)) where one of the justifications for direct award applies (set out in Schedule 5 (direct award justifications)).
- 272 Subsection (2) permits a direct award to an excluded supplier where there is an overriding public interest to do so.
- 273 Subsection (3) allows for a selection process or other preliminary steps to be taken prior to any direct award. This allows a direct award to still involve some informal competition or selection process.
- 274 Subsection (4) requires a contracting authority to consider whether the supplier is an excludable supplier (as defined in section 57(2)) before awarding the contract.

275 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 award is essential for the construction, maintenance or operation of critical national infrastructure; secondly, where the award is necessary to ensure strategically important sectors for the UK, i.e. those that are vital to the defence, security or economic stability of the UK, function properly. Thirdly, where excluding the supplier would prejudice the conduct of military or security operations or the effective operation of the armed forces or intelligence services; and finally, where the justification for direct award is extreme and unavoidable urgency (as set out in paragraph 13 of Schedule 5 (direct award justifications)) and the contract cannot be awarded to or performed by a supplier that is not an excluded supplier within the necessary time frame.

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

277 Subsection (7) defines the term “intelligence services” for the purpose of this section, as the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.

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

278 The purpose of this section is to ensure procurements during an emergency event (like the Covid-19 pandemic) can be conducted as quickly and in full knowledge, even if the circumstances leading to the event are foreseeable (which would rule out the extreme urgency justification for direct award contained in paragraphs 13 and 14 of Schedule 5).

279 Subsection (1) permits a Minister of the Crown, where necessary, to make regulations to provide that specified public contracts may be entered into via direct award as if section 41 (Direct award in special cases) and a direct award justification applies. Regulations made under this power would, in accordance with section 122, be subject to the made affirmative procedure; this means that they will be effective immediately but must be approved by Parliament within 28 days or they will lapse at that point.

280 Subsection (2) provides a definition of “necessary” (referred to in subsection (1)), which means necessary. to protect human, animal or plant life or health or public order or safety). This limits the discretion afforded to the Minister in subsection (1), and any regulations made under this section would need to comply with subsection (2).

281 Subsection (3) provides a list of specific provisions that the Minister can set out in the regulations made under the power in subsection (1).

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

## Section 43: Switching to direct award

283 This section allows a contracting authority to switch from a competitive tendering procedure to the direct award of a contract. Subsection (1) provides that this is permissible in circumstances where no suitable tenders or requests to participate have been received in that competitive procedure and the contracting authority considers that the award of a contract under a competitive tendering procedure is not possible in the circumstances. In addition, subsection (1) provides that the direct award in this case cannot be to an excluded supplier (as defined in section 57(1)).

284 Subsection (2) sets out when a tender or request would not be considered “suitable”. There are four circumstances: firstly where the supplier’s tender would be disregarded in accordance with section 19(3)(a),(b), or (c) (Award of public contracts following a competitive tendering procedure), secondly when the tender does not satisfy the contracting authorities requirements or award criteria, thirdly where there is evidence of corruption or collusion and finally where the tender materially breaches a procedural requirement set out in the tender notice or associated tender documents as elaborated further in subsections (3) and (4).

285 Subsection (5) allows for a selection process or other preliminary steps to be taken prior to any direct award (in the same way as in section 41(3) (Direct award in special cases)).

286 Subsection (6) provides that before making any direct award under this section, the contracting authority must consider whether the supplier is an excludable supplier (as defined under section 57(2)) or whether it submitted an unsuitable tender or request to participate in the unsuccessful competitive tendering procedure. This is because it may not be appropriate in these situations for such a supplier to benefit from a direct award, although it is not an absolute prohibition as it would depend on the particular circumstances. For instance, if the supplier’s previous tender was unsuitable due to collusion, a subsequent direct award for the same contract may be inappropriate; however if it were due to a failure to meet certain award criteria, it may, nevertheless, be preferable in the circumstances to directly award the contract to the supplier rather than to a supplier who had no prior involvement.

#### Section 44: Transparency notices

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

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

289 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 section 95 (notices, documents and information: regulations and online system).

290 Subsection (3) sets out that transparency notices do not apply to contracts directly awarded under the user choice provision in paragraph 15 of Schedule 5 (direct award justifications).

## Chapter 4: Award under frameworks

### Section 45: Frameworks

291 A framework which has an estimated value above the relevant threshold, and is not exempt, is a public contract (see section 3(3)) and, as such, must be awarded in accordance with the Act. This section sets out the basis on which the award of future public contracts can be made under a framework that is a public contract.

292 Subsection (1) allows for public contracts to be awarded in accordance with a framework. This enables contracting authorities to award public contracts under frameworks without having to undertake a competitive tendering procedure or justify a direct award.

- 293 Subsection (2) defines a “framework” as a contract between a contracting authority and one or more suppliers which provides for future award of contracts by the contracting authority to the supplier or suppliers. This definition does not restrict the use of frameworks to the future award of public contracts, i.e. they can be used for the future award of contracts which do not fall within the definition of a “public contract”, such as below threshold contracts, but the remainder of the section regulates only the award of public contracts under frameworks.
- 294 Subsection (3) states that, unless subsection (4) applies, a framework can only provide for the award of a public contract following a competitive selection process (see section 46 (Frameworks: competitive selection process)).
- 295 Subsection (4) sets out the circumstances in which a public contract can be awarded under a framework without a competitive selection process. These are where there is only one supplier on the framework or where the framework sets out the core terms of the contract to be awarded, as well as an objective mechanism to determine which supplier the contract is to 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 allows additional terms on matters which are specific to the contract to be awarded to be included at the time of award, for example a detailed specification, prices and detailed performance requirements.
- 296 Subsection (5) sets out the information that must be contained within the framework. This information includes, for example, the contracting authorities entitled to use the framework and information about the scope of the framework - i.e. information about the nature, type and value of future public contracts that can be awarded under it.
- 297 Subsection (6) sets out that a framework must not allow the award of a public contract under it to a supplier that is an excluded supplier. It also provides that contracting authorities must be allowed to request additional information from suppliers under the framework before awarding a contract.
- 298 Subsection (7) provides that fees can only be charged to suppliers that are party to a framework when they are awarded a contract under that framework. Those fees can only be set as a fixed percentage of the estimated value of the contract awarded under the framework. This enables contracting authorities to charge a supplier a fee each time they are awarded a contract under the framework, but not otherwise.
- 299 Subsection (8)(a) provides that this section does not apply to the award of concession contracts, which means that concession contracts cannot be awarded under a framework. Subsection 8(b) clarifies that this section does not regulate the award of a framework itself, but the award of contracts under a framework.
- 300 Subsection (9) sets out that subsections (3) to (5) do not apply when the framework is a light touch contract (see section 9).

## Section 46: Frameworks: competitive selection process

- 301 Section 46 sets out the rules governing a competitive selection process under a framework.
- 302 Subsection (1) allows a contracting authority to set conditions of participation as part of the competitive selection process. These are similar to conditions of participation used in the award of a public contract (see section 22 (Conditions of participation)) without a framework (i.e. under a competitive tendering procedure) and are permitted as long as they are a proportionate way of ensuring suppliers on the framework have the legal and financial

capacity or technical ability to perform the contract to be awarded under the framework. Subsections (3) to (6) set out the matters to be taken into account in determining whether a condition is proportionate and the rules that apply to conditions of participation.

- 303 Subsection (2) defines a “condition of participation” in this section as a condition that a supplier must meet in order to be awarded a public contract under a framework.
- 304 Subsection (3) prohibits contracting authorities from setting certain conditions of participation when seeking to ensure that suppliers have the legal and financial capacity to perform contracts to be awarded under a framework. Subsection (3)(a) prohibits contracting authorities from requiring the provision of audited annual accounts from suppliers that are not required by the Companies Act 2006 or an overseas equivalent to have their accounts audited (for example small companies) Subsection (3)(b) prohibits contracting authorities from requiring insurance relating to the performance of the contract to be awarded under the framework to be in place before the award. This allows suppliers that are not legally required to have their accounts audited to provide alternative evidence of financial capacity and allows suppliers to commit to having insurance in place at award.
- 305 Subsection (4) makes it clear that whilst conditions of participation can relate to qualifications, experience or technical ability, to ensure fair treatment of suppliers and equality of opportunity, they cannot require suppliers to have previously been awarded a contract under the framework or require that they have previously been awarded a contract by a specific contracting authority; contravene the rules on technical specifications in section 56 (technical specifications); or require particular qualifications without allowing for equivalents.
- 306 Subsection (5) defines what is meant by conditions of participation being proportionate, which is that they are commensurate to the nature, complexity and cost of the contract to be awarded under the framework.
- 307 Subsection (6) permits a contracting authority to require evidence that is verifiable by a third party to satisfy a condition of participation, e.g. certification to an “ISO standard”.
- 308 Subsection (7) allows a contracting authority to exclude a supplier from participating in, or progressing as part of, the competitive selection process under the framework if it does not satisfy a condition of participation.
- 309 Subsection (8) states that a competitive selection process under a framework may provide for the assessment of proposals, but that this must only be by reference to one or more of the award criteria against which tenders were assessed when the framework was awarded.
- 310 Subsection (9) allows for the award criteria to be refined when assessing proposals under subsection (8). Subsections (8) and (9) ensure that proposals can be assessed against some or all of the award criteria that were used when awarding the framework whilst allowing for those award criteria to be refined, but prevent the use of different award or substantially altered award criteria.
- 311 Subsection (10) defines a “competitive selection process” as a competitive selection process for the award of a public contract in accordance with a framework.
- 312 Subsection (11) states that this section does not apply where the framework is a light touch contract (see section 9).

#### Section 47: Frameworks: maximum term

- 313 Subsection (1) provides that the maximum term for a framework is 4 years (generally longer periods than this reduce market competition) or 8 years if it is a defence and security framework or a utilities framework.

314 Subsection (2) however sets out that it is permissible to have a longer term than set out in subsection (1) where the contracting authority considers that the nature of the goods, services or works to be supplied under contracts to be awarded under a framework means that a longer term is required.

315 Subsection (3) states that if a framework has a longer term than set out in subsection (1), the contracting authority must set out the reasons for this in its tender or transparency notice for the framework.

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

317 Subsection (5) provides that this section (and therefore the maximum terms set out in subsection (1)) does not apply to the award of a framework under an open framework, framework awarded by a private utility and a framework which is a light touch contract. Open frameworks are addressed in section 49 (open frameworks).

### Section 48: Frameworks: implied terms

318 Subsection (1) provides that a term is implied into all frameworks that a contracting authority can exclude a supplier from participating in a selection process for the award of a contract under a framework where the supplier is an excluded supplier or has, since the award of the framework, become an excludable supplier.

319 Subsection (2) sets out some of the circumstances in which a supplier may become an excludable supplier for the purposes of subsection (1). These are where a discretionary exclusion ground did not apply before the award of the contract or applied before the award of the contract but by reference to different circumstances and where the contracting authority discovers, before the award of the contract, that the supplier was an excludable supplier.

320 Subsection (3) provides that, before excluding a supplier on the basis only that an associated person is an excluded or excludable supplier, the contracting authority must give the supplier reasonable opportunity to replace the associated person.

321 Subsection (4) provides that any term in the framework which attempts to restrict or override the implied term at subsection (1) is of no effect.

### Section 49: Open frameworks

322 Subsection (1) explains that an open framework is a scheme of successive frameworks that together make up an open framework. This allows new suppliers to be added at set times during its lifetime, as each successive framework in the scheme is entered into. Unlike a closed framework, an open framework is not closed to new suppliers, but it is also not permanently open to new suppliers like a dynamic market. The subsection also makes it clear that the terms of the open framework must be substantially the same throughout.

323 Subsection (2) sets out various minimum time periods. Subsection (2)(a) requires that an open framework must be reopened at least once during the first 3 years and at least once every 5 years thereafter. This allows for the open framework to be re-opened on a more frequent basis - e.g. annually - if desired. Subsection 2(b) provides for each framework to expire when the successive framework is awarded (but see subsection (3)). Subsection 2(c) provides that the maximum term of an open framework is 8 years.

324 Subsection (3) is a transitional provision that provides that although a framework expires when each successive framework is awarded (see subsection 2(b)), any live procurements (i.e. procurements that have already commenced) may be continued under the expired

framework. However, no new procurements may be started once the next framework has been awarded.

325 Subsection (4) states how an existing supplier can be re-admitted to the open framework on its re-opening in circumstances where there is no limit on the number of suppliers to be appointed to the new framework. Subsection (4)(a) allows a supplier which is already party to an open framework to remain party without having to either have a tender it previously submitted reassessed or submitting a new tender. Subsection 4(b) allows it to request a previous tender is re-assessed. Subsection 4(c) allows it to submit a new tender.

326 Subsection (5) states how an existing supplier can be re-admitted to the open framework if there is a limit on the number of suppliers to be appointed to the new framework. This can only be on the basis of the supplier's tender submitted when it was previously appointed or a new tender.

327 Subsection (6) states that, if a single supplier is awarded a framework under an open framework, the maximum term of the framework and the open framework is 4 years from the day on which the single supplier was appointed. For example, if a single supplier was appointed to the first framework in the scheme of open frameworks, the open framework can only last four years; if several suppliers were appointed to first framework in the scheme of open frameworks, but a single supplier was appointed at the end of year two to the second framework in the scheme, the open framework can last six years (being the two initial years where there were several suppliers, plus the maximum four years where there is only one supplier).

328 Subsection (7) states that the maximum term of 4 years for a single supplier open framework in subsection (6) applies notwithstanding the fact that in all other cases the maximum term of an open framework is 8 years.

329 Subsection (8) defines an "existing supplier" (as referred to in subsections (4) and (5)) as a supplier that is on a framework under an open framework.

330 Subsection (9) states that references to award of successive frameworks on substantially the same terms (as referred to in subsection (1)) means that an award could be made without a new tender or transparency notice in line with the provisions for modifications in section 31. If award on substantially different terms is needed, to ensure open competition, a new framework under section 45 (Frameworks) or a new open framework under section 49) must be awarded rather than re-opening the existing open framework.

331 Subsection (10) states that a framework under an open framework may never be awarded by direct award under section 41 (Direct award in special cases) or section 43 (switching to direct award).

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

### **Section 50: Contract award notices and assessment summaries**

332 Subsection (1) requires a contracting authority to publish a contract award notice before entering into a public contract.

333 Subsection (2) establishes that an "award notice" is a notice setting out that the contracting authority intends to enter a contract. It must also contain any other information required by regulations made under section 95 (notices, documents and information: regulations and online system).



334 Subsection (3) requires that before issuing an award notice, contracting authorities that award a contract following a competitive procedure set out in section 19 (award of public contracts following a competitive tendering procedure) must provide certain suppliers with an assessment summary. Those suppliers are suppliers that submitted an “assessed tender”.

335 Subsection (4) defines an assessment summary to mean an assessment of the supplier's tender and if that supplier did not win, also an assessment of the winning (most advantageous) tender.

336 Subsection (5) defines an assessed tender as a tender which was assessed for the purposes of determining the most advantageous tender and not disregarded. A tender may be disregarded if, for example, it was removed from the competition in accordance with section 19(3), which allows for a tender to be disregarded in a variety of circumstances, including failure to satisfy the conditions of participation. Subsection (6) removes the requirement to publish award notices for defence and security contracts awarded under defence and security frameworks. It also removes the requirement to publish a contract award notice in the case of user choice contracts when directly awarded under paragraph 15 of Schedule 5 (direct award justifications). It should be noted that a contract award notice may still be published on a voluntary basis in relation to contracts awarded under defence and security frameworks and user choice contracts, if the contracting authority wants to enter into a voluntary standstill period (see section 51).

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

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

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

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

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

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

## Section 52: Key performance indicators

- 342 Subsection (1) requires a contracting authority, before it enters into a public contract worth £5 million or more, to set at least three key performance indicators in respect of the contract.
- 343 Subsection (2) disapplies the obligation in subsection (1) where the contracting authority considers that the supplier's performance cannot appropriately be assessed through such indicators.
- 344 Subsection (3) requires a contracting authority to publish any key performance indicators set under subsection (1).
- 345 Subsection (4) defines a "key performance indicator" as a factor or measure against which a supplier's performance of a contract can be assessed during the life-cycle of the contract.
- 346 Subsection (5) creates a power for an appropriate authority to amend the £5 million threshold by regulations.
- 347 Subsection (6) sets out that the obligation to set and publish at least three key performance indicators does not apply in relation to certain types of public contracts.
- 348 Subsection (7) directs the reader to section 71 (assessment of contract performance) for further provision about assessing contract performance against, and publishing information about, key performance indicators.

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

- 349 Subsection (1) requires that once a contracting authority has entered into a public contract (as defined in section 3), it must publish a contract details notice in relation to that contract within a specified time period after the contract is entered into. For most public contracts, that period is 30 days from the day the contract is entered into. For light touch contracts, the relevant period is 120 days.
- 350 Subsection (2) establishes that a "contract details notice" is a notice setting out that the contracting authority has entered into a contract. It also requires that the notice must contain such other information as is set out in regulations made under section 95 (notices, documents and information: regulations and online system).
- 351 Subsection (3) requires a contracting authority to publish a copy of a public contract within a specified time period of the date that it is entered into, if the estimated value exceeds £5 million. The time period for doing is in most cases 90 days, increased to 180 days in respect of light touch contracts.
- 352 Subsection (4) disapplies the obligation to publish contracts, established in subsection (3), to contracts within the regulatory ambit of Welsh Ministers and Northern Ireland departments.
- 353 Subsection (5) allows a Minister of the Crown to change the financial threshold for the publication of a contract.
- 354 Subsection (6) sets out that neither the obligation to publish a contract details notice, nor the obligation to publish a contract apply to private utilities. It also exempts user choice contracts directly awarded under paragraph 15 of schedule 5 (direct award justifications), from these obligations.

## Chapter 6: General provision about award and procedures

### Time limits and termination

#### Section 54: Time limits

355 This section establishes the minimum periods that contracting authorities must allow for the submission of tenders (and/or requests to participate) in relation to procurements under Part 3. Subsection (1) requires that when setting time limits contracting authorities must have regard to a number of factors, established in paragraphs (a)-(e).

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

357 Subsections (3) and (4) set out in tables the mandatory time limits that must be met or exceeded in different circumstances. These are in line with the requirements of the GPA. Broadly, suppliers have less time for certain procurements, if there is a state of urgency, if it is a utilities contract or being awarded by a non-central government authority or if suppliers are already on notice of the impending procurement via a planned procurement notice; and more time if tenders cannot be submitted electronically or if supporting information is changed or not fully provided with the tender notice.

358 Subsection (5) sets out definitions used in this section and explains the meanings of a central government authority, negotiated tendering period, qualifying planned procurement notice, participation period, pre-selected supplier and tendering period.

#### Section 55: Procurement termination notices

359 Subsection (1) requires a contracting authority, which has published a tender or transparency notice, to confirm by way of a further notice if it decides not to award the contract, i.e. if it terminates a procurement process.

360 Subsection (2) sets out that once the contracting authority has decided to terminate a procurement, it must issue the notice as soon as reasonably practicable.

361 Subsection (3) stipulates that this section does not apply to private utilities.

### Technical specifications

#### Section 56: Technical specifications

362 In public procurement technical specifications contain the required characteristics of the goods, services or works that a supplier has to provide. They are included within procurement documents to present suppliers with a full description of the contracting authority's needs, to enable suppliers to propose a solution to meet those needs in their tenders.

363 This section contains provisions on technical specifications and subsection (1) sets out the areas to which this section is applicable.

364 Subsection (2) requires that the procurement documents must not refer to a design, particular licensing model or a description of characteristics when they could appropriately 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 appropriate to instead include a description of how the goods or services should perform. This is to avoid contracting authorities creating unnecessary barriers to suppliers' participation in a procurement by proposing a specific or narrow solution. However there

may be circumstances where it would not be appropriate to refer to performance or functional requirements and thus design characteristics can be used, for example in order to ensure standardisation across a series of procurements.

365 Subsection (3) sets out that the procurement documents can only refer to a United Kingdom standard if this standard adopts an internationally recognised equivalent or if there is no internationally recognised equivalent. For example, if international standards or United Kingdom standards adopting international standards, deliver the procurement requirement, these must be used. Only in the absence of these may a United Kingdom standard be used. This is to ensure procurement documents do not limit a competition or set out discriminatory conditions in relation to their technical specifications.

366 Subsection (4) requires that if a United Kingdom standard is used, a contracting authority must set out in the procurement documents that an equivalent standard will be treated as having met the United Kingdom standard.

367 Subsection (5) clarifies that for the purpose of determining whether a standard is equivalent pursuant to subsection (4), a contracting authority may consider the purpose behind setting the standard, for example, whether this was to meet a statutory requirement or if it was used by the contracting authority as a general indication of the type of good or service it envisaged. A similar international standard may not always be equivalent to a United Kingdom standard.

368 Subsection (6) makes clear that contracting authorities can require certification or other evidence to verify that a standard is satisfied or equivalent. For example, this may include conformity assessments from certification bodies accredited by organisations such as the United Kingdom Accreditation Service or other equivalent accreditation organisations.

369 Subsection (7) prohibits the procurement documents from referring to a particular trademark, trade name, patent, design or type, place of origin, producer or supplier, unless using the term is necessary to make the requirements of the contract understood. This is to ensure the procurement documents do not unduly limit competition.

370 If specifying matters outlined in subsection (7) is necessary, subsection (8) states that the procurement documents must also provide that tenders will not be disadvantaged if they demonstrate equivalent quality and performance.

371 Subsection (9) sets out what is meant by “procurement documents”. It also explains that a United Kingdom standard is a standard set by the British Standards Institution (BSI) or one that is primarily developed for use in the United Kingdom, or part of the United Kingdom.

## Excluding suppliers

### Section 57: Meaning of excluded and excludable supplier

372 This section creates the concepts of “excluded” and “excludable” suppliers. Reference to these concepts is made throughout the legislation, typically requiring contracting authorities to prevent excluded suppliers from participating in procurements and being awarded public contracts and allowing contracting authorities to prevent excludable suppliers from participating in procurements and being awarded public contracts (see sections 26, 27 and 29). Excluded and excludable suppliers must or may be removed from dynamic markets (see section 37), must or may not be awarded public contracts under frameworks and may not be permitted to participate in selection processes under frameworks (see sections 45 and 48) and may have public contracts terminated under terms implied by the legislation (see section 78).

Aside from the core definitions in this section, there are other provisions in sections 16, 28, 30 and 82 which require contracting authorities to treat suppliers as if they were excluded or excludable in certain circumstances.

373 Subsection (1) defines “excluded suppliers” as suppliers which meet a mandatory ground for exclusion and where the contracting authority considers it likely that the circumstances giving rise to the ground will reoccur or are continuing. Suppliers which are on the debarment list on the basis of a mandatory ground for exclusion must also be considered as excluded. A supplier may also be an excluded supplier by virtue of a mandatory exclusion ground applying to its associated persons, which are defined in section 26 as meaning any entity that the supplier is relying on in order to satisfy the conditions of participation, with the exception of a guarantor.

374 Subsection (2) defines “excludable suppliers” as suppliers which meet a discretionary ground for exclusion and where the contracting authority considers it likely that the circumstances giving rise to the ground will reoccur or are continuing. Suppliers which are on the debarment list on the basis of a discretionary ground for exclusion must also be considered as excludable. A supplier may also be an excludable supplier by virtue of a discretionary exclusion ground applying to its associated persons.

375 Subsection (3) applies where a supplier is on the debarment list because the supplier or a connected person of the supplier poses a threat to national security in relation to particular types of public contracts (see paragraph 35 of Schedule 6), If this is the case, the supplier must be treated as an excluded supplier only in relation to the public contracts of the kind described in the debarment list.

376 Subsection (4) affords flexibility to contracting authorities which are private utilities to treat excluded suppliers as if they were excludable.

377 Subsection (5) defines the debarment list.

378 Subsections (6) and (7) refer to the mandatory and discretionary exclusion grounds in schedules 6 and 7.

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

379 Subsection (1) sets out the factors that contracting authorities may take into account when evaluating the risk that the circumstances giving rise to an exclusion ground will recur or are continuing. 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.

380 Subsection (2) imposes a duty on contracting authorities, in applying the exclusions regime, to give suppliers an opportunity to make representations as to whether grounds apply and to submit evidence that the circumstances are not likely to recur or are continuing (a so-called “self-cleaning” process).

381 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

### Section 59: Notification of exclusion of supplier

382 Sections 59-66 provide for the creation and maintenance of a centralised debarment list. This list will sit alongside the exclusions regime as an additional protection against public contracts being awarded to unfit suppliers. As set out in section 57, suppliers which are on the debarment list must be considered as either excluded or excludable by contracting authorities, depending on whether the exclusion ground they meet is mandatory or discretionary.

383 Section 59 imposes a duty on contracting authorities to notify the relevant appropriate authority whenever they come to the decision that a supplier is excluded or excludable and take the relevant action to prevent them from participating in a procurement (whether that is disregarding their tender, proposing their replacement as a sub-contractor or associated person, rejecting their application for membership of a dynamic market, or removing them from a dynamic market). This is intended to provide information to an appropriate authority to consider whether to undertake an investigation of the supplier under section 60 and then for a Minister of the Crown to consider whether to add the supplier to the debarment list.

384 Subsection (1) lists the scenarios in which the notification duty applies. These are when a contracting authority considers a supplier to be excluded or excludable on the basis of a relevant exclusion ground; and has excluded the supplier, rejected its tender, rejected its application for or removed it from a dynamic market, when the supplier is an intended sub-contractor or associated person and has been replaced or removed at the suggestion of the contracting authority, or where the supplier is on the debarment list because the supplier or a connected person of the supplier poses a threat to national security in relation to particular types of public contracts (see paragraph 35 of Schedule 6).

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

386 Subsection (3) sets out what the notice must contain. This includes the exclusion ground that the contracting authority has applied and any other information to be specified in regulations made under section 95 (notices, documents and information: regulations and online system).

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

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

### Section 60: Investigations of supplier: exclusion grounds

389 Subsection (1) provides powers for appropriate authorities (a Minister of the Crown or Welsh Ministers or Northern Ireland department) to investigate whether an exclusion ground applies to a supplier and whether the circumstances giving rise to the ground are likely to recur or are continuing. These investigatory powers are for the purpose of a Minister of the Crown considering whether a supplier should be added to the debarment list. Any supplier may be investigated, including overseas suppliers, sub-contractors, and suppliers which have never bid for or been awarded a public contract. This includes, but is not limited to, suppliers

brought to the attention of an appropriate authority by a contracting authority via a notification under section 59 (notification of exclusion of supplier).

390 Subsection (2) places a duty on a Minister of the Crown to keep under review whether particular suppliers or sub-contractors should be investigated, having regard to the fact that contracting authorities may be awarding public contracts to suppliers that are themselves (or their sub-contractors are) excludable suppliers by virtue of the discretionary exclusion ground relating to national security (see paragraph 14 of Schedule 7).

391 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 section 95 (notices, documents and information: regulations and online system).

392 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.

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

394 Subsections (6) and (7) allow for the appropriate authority to request information or assistance from the supplier or connected persons to support the investigation by issuing a notice. The notice must set out the potential consequences for the supplier of not complying with the request - which are that the supplier may be subject to the mandatory ground at Schedule 6, paragraph 43 in relation to “failure to cooperate with investigation”.

395 Subsection (8) defines the terms “relevant documents” and “relevant exclusion grounds”.

## Section 61: Investigations under Section 60: reports

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

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

398 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 a copy of the report to the supplier and publish the report.

399 Subsection (4) sets out what the report must contain. These include the Minister’s decision on whether any relevant exclusion ground applies, whether the exclusion ground is mandatory or discretionary, the date on which the exclusion ground is expected to cease to apply and whether the Minister intends to enter the supplier’s name (or maintain an existing entry) on the debarment list and in each case the reasons.

400 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 where the Minister considers this is necessary for national security or commercial sensitivity reasons.

401 Subsection (7) provides relevant definitions.

## Section 62: Debarment list

402 This section as per subsections (1) to (3) provides a power for a Minister of the Crown to add a supplier to the debarment list where the Minister has conducted an investigation or considered an investigation by another appropriate authority (i.e. the Welsh Ministers or a

Northern Ireland department) and has concluded that a relevant exclusion ground applies to the supplier and that the supplier has failed to demonstrate that the circumstances giving rise to the ground are not likely to recur or are continuing. 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 (see Schedule 6, paragraph 42).

- 403 Subsections (3) and (4) set out what the report for entry of a supplier on the debarment list must contain. This includes the relevant exclusion ground that applies, whether this is mandatory or discretionary, where the mandatory exclusion ground for national security threats for particular types of contracts applies (see paragraph 35 of Schedule 6) a description of the types of contracts, and the date the exclusion ground is expected to cease to apply.
- 404 Subsection (5) provides that the Minister must give advance notice to a supplier before adding it to the debarment list.
- 405 Subsection (6) provides for a standstill period of eight working days after giving notice to the supplier before the supplier may be added to the debarment list. This is intended to give suppliers the opportunity to apply to the court for a temporary suspension of the debarment decision pending any appeal made under section 65 (debarment decisions: appeals). Further provision on applications for suspension during the standstill period is made at section 63 (Debarment decisions: interim relief).
- 406 Subsection (7) provides that the Minister may not add the supplier to the debarment list while proceedings brought under section 63 (debarment decisions: interim relief) are ongoing and have not concluded.
- 407 Subsection (8) requires the Minister to keep the debarment list under review and allows the Minister to revise the date on which the Minister expects the entry to be removed from the list or the description of the types of contracts where the mandatory exclusion ground for national security threats for particular types of contracts applies (see paragraph 35 of Schedule 6), or remove a supplier from the debarment list.
- 408 Subsection (9) provides that if the Minister voluntarily removes a supplier from the debarment list while the supplier is bringing an appeal under section 65 (debarment decisions: appeals), the Minister may reinstate the entry only after the proceedings have concluded.
- 409 Subsection (10) requires the Minister to remove a supplier from the debarment list if the Minister is satisfied that the supplier is not an excluded or excludable supplier by virtue of the ground stated in the entry and to revise an entry on the basis of the mandatory exclusion ground for national security threats for particular types of contracts (see paragraph 35 of Schedule 6) if the Minister is satisfied that the ground no longer applies to those types of contracts.
- 410 Subsection (11) provides that the debarment list must be published.
- 411 Subsection (12) requires the Minister to consult with the Welsh Ministers and most appropriate Northern Ireland department prior to entering or removing a supplier's name from the debarment list or revising an entry.
- 412 Subsection (13) refers to the definition of "relevant exclusion ground".

### Section 63: Debarment decisions: interim relief

- 413 This section provides a right for suppliers to apply to the court for suspension of a decision to add them to the debarment list while they are appealing that decision, or considering whether to appeal.



414 Subsection (2) states that applications for suspension must be brought within the eight-day standstill period which begins when the supplier is notified that its name is to be added to the debarment list (see section 62(6)).

415 Subsection (3) allows the court to make an order to suspend the debarment decision (and temporarily remove the supplier's name from the list if it has already been added) until the supplier's appeal has concluded or if it has failed to bring an appeal within the 30-day period permitted under section 65 (debarment decisions: appeals).

416 Subsection (4) provides that in making a decision on an application for suspension, the court must balance the interests of the public (in preventing the award of contracts to unfit suppliers) and the interests of the supplier (including financial interests), but may also have regard to any other matters that the court considers appropriate.

417 Subsection (5) defines various terms used in this section.

### Section 64: Debarment list: application for removal

418 This section under subsection (1) allows for a supplier named on the debarment list to apply for their removal from the list or the revision of the entry.

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

420 Subsection (3) requires the Minister to notify the supplier of their decision and the reasons for it.

### Section 65: Debarment decisions: appeals

421 Subsection (1) provides for a right of appeal for suppliers against a decision to put their name on, or not remove or revise an entry on, the debarment list. Suppliers may also bring an appeal in relation to the date stated in the debarment list on which the Minister expects the exclusion ground to cease to apply to the supplier and a description of the types of contracts where the entry is by virtue of the mandatory exclusion ground for national security threats for particular types of contracts (see paragraph 35 of Schedule 6).

422 Subsection (2) states that appeals may only be brought by United Kingdom or treaty state suppliers (as defined in Section 89 (Treaty state suppliers)); may only be brought on the grounds that there has been a material mistake of law (which includes a right to challenge findings of fact in certain circumstances); and must be commenced before the end of the period of 30 days beginning with the day on which the supplier first knew, or ought to have known, about the debarment decision.

423 Subsections (3-5) provide that, if the supplier's appeal is successful, the court may make an order setting aside the Minister's decision. This means that, rather than substitute its own decision in place of the Minister's, the Minister's decision will be overturned, allowing the Minister to retake it in a lawful manner. If, during the appeal, the supplier was excluded from a procurement or other selection process as a result of the decision in question, the court may also award compensation for any costs incurred by the supplier in bidding. Suppliers will not be entitled to lost income or lost opportunity of income and will be expected to mitigate their costs in the usual way.

424 Subsection (6) defines some of the terms used in this section.

## Section 66: Debarment proceedings and closed material procedure

425 Section 66 provides that both debarment appeals and applications for suspension of a debarment decision may take place under the closed material procedure as provided by Part 2 of the Justice and Security Act 2013, as if references to the Secretary of State in that Act included the Minister for the Cabinet Office. This allows the Minister for the Cabinet Office to apply for that procedure to be used in such cases.

## Part 4: Management of public contracts

### Terms implied into public contracts

#### Section 67: Electronic invoicing: implied term

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

427 Subsection (2) describes the implied term, being an obligation on contracting authorities to accept (and therefore process for payment) an undisputed e-invoice issued in compliance with the e-invoice standard (explained further in subsection (3)).

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

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

430 Subsection (5) sets out that the implied contract term can not be restricted or overridden.

431 Subsection (6)(a) ensures that the implied term in section 67 does not prevent contracting authorities from requiring electronic invoices, in the required electronic form, to be sent to specified electronic systems for processing, e.g. invoice processing systems. Subsection (6)(b) allows for defence authorities to charge suppliers for using such systems.

432 Subsection (7) provides a power for an appropriate authority to amend the e-invoicing standard.

433 Subsection (8) requires a consultation with such persons as the appropriate authority considers appropriate before making regulations under subsection (7).

#### Section 68: Implied payment terms in public contracts

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

435 Subsection (1) provides that concession contracts, utilities contracts awarded by private utilities, and contracts awarded by schools are exempt from the obligations in this section, which imply payment terms into public contracts.

436 Subsection (2) describes the implied term; that payments due under a public contract must be paid within 30 days from either the day the invoice is received by the contracting authority or if later, by a specified payment date as set out on the invoice.

- 437 Subsection (3) pauses the obligation to pay within 30 days where the invoice is invalid or in dispute.
- 438 Subsection (4) requires the contracting authority to notify the payee promptly if it considers that the invoice is invalid or disputes the invoice.
- 439 Subsection (5) permits a contracting authority to rely on a payment made by a third party to satisfy the implied term in section 68, but only if such an arrangement is agreed by the payee.
- 440 Subsection (6) sets out that these terms cannot be restricted or overridden by express contractual terms.
- 441 Subsection (7) clarifies that public contracts may contain shorter payment terms where agreed between the parties or where required by statute.
- 442 Subsection (8) defines a valid invoice as one issued in a required electronic format or containing the minimum level of required information and meeting any other requirements set out in the contract. The required electronic format has the same meaning as that in section 67(3).
- 443 Subsection (9) sets out the minimum level of information required for an invoice to be valid, including the name of the invoicing party, a description of the goods, services or works supplied, the sum requested, and a unique identification number.
- 444 Subsection (10) provides a power for an appropriate authority to change the payment days under subsection (2), providing the payment period does not exceed 30 days.
- 445 Subsection (11) sets out the definitions used in this section. It explains the meaning of “payee” and explains that references to a contracting authority receiving an invoice includes an invoice being delivered to an address, or through an electronic invoicing system, as set out for that purpose in the contract.

## Notices about payments and performance

### Section 69: Payments compliance notices

- 446 Subsection (1) obliges a 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 the contract becomes payable.
- 447 Subsections (2) and (5) define a “payments compliance notice” as a notice setting out information (to be specified in regulations to be made under section 95) about the authority’s compliance with the obligation to make payments under public contracts within 30 days of such payments falling due (see section 68(2) (implied payment terms in public contracts)). It must also include any other information specified in regulations under section 95 (notices, documents and information: regulations and online system).
- 448 Subsection (3) states the reporting periods as being, initially, the period beginning with the coming into force of this section and ending with whichever is earlier of the following 31 March or 30 September, and subsequently each 6 month period ending with 31 March and 30 September.
- 449 Subsection (4) provides a power for a Minister of the Crown or the Welsh Ministers to make regulations relating to the preparation and approval of a payments compliance notice.
- 450 Subsection (6) disapplies the obligations in this section in relation to a transferred Northern Ireland authority, contracts awarded by schools, private utilities, or when it pertains to a concession contract.

## Section 70: Information about payments under public contracts

- 451 Subsection (1) requires a contracting authority to publish specified information (see subsection (5)) whenever it makes a payment of £30,000 or more under a public contract.
- 452 Subsection (2) requires such information to be published within 30 days of the end of the quarter in which the payment was made.
- 453 Subsection (3) creates a power for a Minister of the Crown or the Welsh Ministers to make regulations changing the financial threshold, or the time limit for publication.
- 454 Subsection (4) provides an exemption from the provision of this section for utilities contracts awarded by a private utility, concessions contracts, and public contracts awarded by a school, as defined in section 123. The section also does not apply to public contracts awarded by a transferred Northern Ireland authority, unless they are awarded under a reserved procurement arrangement or devolved Welsh procurement arrangement, or public contracts awarded under a transferred Northern Ireland procurement arrangement.
- 455 Subsection (5) defines “quarter” and provides that regulations made under section 95 may set out what “specified information” must be published under this section.

## Section 71: Assessment of contract performance

- 456 Subsection (1) provides that subsection (2) applies where a contracting authority has set key performance indicators under section 52(1) (key performance indicators).
- 457 Subsection (2) requires that at least annually during the lifetime of the contract and on termination of the contract, the contracting authority must assess the suppliers’ performance against the key performance indicators and publish certain information in relation to that assessment. That information is to be specified in regulations made under section 95 (notices, documents and information: regulations and online system).
- 458 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 between the supplier and the contracting authority. Secondly, where a contracting authority considers that a supplier is not performing a public contract to the authority’s satisfaction, has been given proper opportunity to improve performance, but has failed to do so.
- 459 Subsection (5) sets out the consequences of the occurrence of any of the events in subsections (3) or (4). Where any of these take place, a contracting authority must publish a notice stating that this subsection applies, as well as the circumstances giving rise to that fact, and any other information specified in regulations made under section 95 (notices, documents and information: regulations and online system). The notice must be published within 30 days of the day on which this subsection first applied.
- 460 Subsection (6) exempts light touch contracts from the publication obligations in subsection (5).
- 461 Subsection (7) states that the entire section does not apply to private utilities.

## Sub-contracting

### Section 72: Sub-contracting: directions

462 Subsection (1) explains that this section will apply where the contracting authority requires sub-contracting, or where a supplier has indicated to the contracting authority that they intended to sub-contract and rely on that sub-contractor to pass the conditions of participation (see section 22(8)).

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

464 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 (a) choose not to enter into the contract with the supplier, (b) require that the supplier enter into a sub-contracting arrangement with another appropriate supplier (where the supplier has relied on the sub-contracting arrangement in the tender), or (c) terminate the contract (if the contract has already been awarded).

465 Subsection (4) explains the term “appropriate supplier” under subsection (3)(b) as being a supplier that is not excluded and having the same qualifying credentials to pass the conditions of participation as the original sub-contractor.

466 Subsection (5) explains that where a contracting authority has directly awarded a contract, that contract may contain sub-contracting conditions.

467 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 satisfy the conditions of participation.

### Section 73: Implied payment terms in sub-contracts

468 Subsection (1) sets out that payment terms (set out in section 68(2)-(5) (implied payment terms in public contracts) are implied in every public sub-contract (defined in subsection (5)).

469 Subsection (2) clarifies that in those terms that are to be implied into public sub-contracts, references to the contracting authority will mean the party to whom goods, services or works are supplied under the contract. It also clarifies that the requirement for invoices to be issued in the requisite electronic form set out in section 68(8)(a) (relating to electronic invoices) does not apply.

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

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

472 Subsection (5) explains the meaning of “public sub-contract”.

473 Subsection (6) sets out that Section 73 does not apply to public sub-contracts that are for the purpose of carrying out all or any part of a concession contract, a utilities contract awarded by a private utility, or a contract awarded by a school.

## Modifying public contracts

### Section 74: Modifying a public contract

- 474 This section sets out the circumstances under which public contracts may be modified during their term without the need to run a new procurement process under Part 3.
- 475 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) the modification is expressly permitted under the grounds set out in Schedule 8; b) the modification is not a substantial modification; or c) the modification is a below-threshold modification.
- 476 Subsection (2) sets out that a contracting authority may modify a public contract or a convertible contract if the contract is a light touch contract.
- 477 Subsection (3) explains that a substantial modification is one that would increase or decrease the term of the contract by more than 10 per cent, materially change the scope of the contract, or materially change the economic balance of the contract in favour of the supplier.
- 478 Subsection (4) explains that a modification is a below-threshold modification where it meets all of the following conditions: a) the modification would 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; b) the aggregated value of below-threshold modifications would be less than the threshold applicable to that type of contract (Schedule 1 sets out the threshold amounts); c) the modification would not materially change the scope of the contract and d) the modification is outside the scope of subsection 1(a) (permitted under schedule 8) or 1(b) (non-substantial).
- 479 Subsection (5) sets out that a reference to a modification materially changing the scope of the contract means making a modification that provides for the supply of goods, services or works of a kind that are not already provided for in the contract.
- 480 Subsection (6) explains “the aggregated value of below-threshold modifications” referenced in subsection (4) is the estimated value of all contract modifications previously made that were deemed below threshold.
- 481 Subsection (7) and (8) set out that if modifications could reasonably have been made together and that combined modification would not be permitted under subsection (1), the individual modifications (that could be combined) are also not permitted.
- 482 Subsection (9) sets out that a contracting authority may not modify a public contract so as to change the supplier except as provided for by paragraph 9 of Schedule 8 (transfer on corporate restructuring).
- 483 Subsection (10) makes it clear that Part 3 does not apply in relation to the modification of a contract under this section, meaning contracting authorities do not have to run a new procurement procedure if they are modifying a contract in accordance with this section.

### Section 75: Contract change notices

- 484 Subsection (1) requires a contracting authority to publish a contract change notice before modifying a public contract or a convertible contract (defined under 74(1)).
- 485 Subsection (2) sets out specific exceptions to the requirement to publish a contract change notice prior to modification; namely when the modification (a) increases or decreases the contract value by up to 10 per cent for goods or services or up to 15 per cent for works; or (b) changes the contract term by 10 per cent or less of the maximum term provided for on award.

If, however, the modification is permitted under paragraph 9 of Schedule 8 (novation or assignment on corporate restructuring), these exceptions do not apply and consequently a contract change notice must be published.

486 Subsection (3) states what a “contract change notice” is and that it must contain any information required by regulations made under section 95 (notices, documents and information: regulations and online system).

487 Subsections (4) and (5) have the effect that if separate modifications made using the rationale in subsections (2)(a) or (b) (where a contract change notice is not required) could reasonably have been made together with an earlier modification of the contract, a contract change notice must still be published.

488 Subsection (6) sets out exceptions to the requirement to publish a contract change notice for: (a) defence and security contracts, (b) light touch contracts, (c) contracts awarded by a private utilities, (d) contracts awarded by a transferred Northern Ireland authority, unless awarded as part of a procurement under a reserved procurement arrangement or a devolved Welsh procurement arrangement, or (e) contracts awarded as part of a procurement under a transferred Northern Ireland procurement arrangement.

489 Subsection (7) grants a power allowing a Minister of the Crown or the Welsh Ministers to amend the percentage thresholds in subsections (2)(a) and (b).

## Section 76: Voluntary standstill period on the modification of contracts

490 Subsection (1) sets out that if a contracting authority elects to enter a voluntary period of standstill when it publishes a contract change notice, it may not modify the public contract or convertible contract before the end of the standstill period provided for in the contract change notice.

491 Subsection (2) stipulates that a voluntary standstill period must be no less than eight working days, beginning with the day on which the contract change notice is published.

## Section 77: Publication of modifications

492 Subsection (1) sets out that if a contracting authority makes a “qualifying modification” to a contract under section 74(1) (modifying a public contract), the contracting authority must within 90 days of making the qualifying modification publish either a copy of the contract as modified or the modification itself.

493 Subsection (2) sets out that a “qualifying modification” is a modification which: (a) requires the publication of a contract change notice under section 75; and (b) modifies, or results in, a public contract with an estimated value of more than £5 million.

494 Subsection (3) exempts from this section the modification of contracts awarded by a devolved Welsh authority (unless awarded as part of a procurement under a reserved procurement arrangement) or contracts awarded as part of a procurement under a devolved Welsh procurement arrangement.

495 Subsection (4) grants a Minister of the Crown the power to amend the financial threshold in subsection (2).

## Terminating public contracts

### Section 78: Implied right to terminate public contracts

496 Subsection (1) sets out that in every public contract, it is an implied term that the contracting authority can terminate the contract if a termination ground applies.

- 497 Subsection (2) sets out the termination grounds. Those grounds being where: (a) the contract was awarded or modified in material breach of the Act or any regulations made under it; (b) the supplier has, since the award of the contract, become an excluded supplier or excludable supplier, including due to a person that the supplier is relying on in order to satisfy the conditions of participation); (c) a sub-contractor to which a supplier is sub-contracting all of or part of a contract is an excluded supplier or excludable supplier.
- 498 Subsection (3) sets out that the termination ground in (2)(c) cannot be used unless the contracting authority requested information under section 28(1)(a) (information about sub-contractors) in relation to contract award and subsection (4), (5) or (6) applies.
- 499 Subsection (4) applies if, before awarding the contract, the contracting authority was not aware that the supplier intended to sub-contract all or part of the contract.
- 500 Subsection (5) applies if the sub-contractor is an excluded or excludable supplier under section 57(1)(b) or (2)(b) (the debarment list), and before awarding the contract the contracting authority sought to determine if the sub-contractor was an excluded or excludable supplier on the debarment list, but did not know that it was.
- 501 Subsection (6) applies if the sub-contractor is an excluded or excludable supplier (under 57(1)(a) or (2)(a)) and the contracting authority requested information about the sub-contractor as part of the competitive tendering procedure, but before awarding the contract did not know if the sub-contractor was an excluded or excludable supplier.
- 502 Subsection (7) sets out that before terminating a contract by reference to the implied term in section 78 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 a reasonable opportunity to make representations about whether a termination ground applies, and the authority's decision to terminate.
- 503 Subsection (8) sets out that before terminating a contract under subsection (2)(b) or (c), the contracting authority must give the supplier a reasonable opportunity to bring the sub-contract with the excluded or excludable sub-contractor to an end and, if necessary, replace them with an alternative suitable sub-contractor.
- 504 Subsection (9) permits a public contract to contain provision about restitution and other matters ancillary to the termination of the contract by reference to the implied termination grounds.
- 505 Subsection (10) prohibits the parties from using contractual terms to restrict or override the implied term that a contract can be terminated by a contracting authority if a termination ground applies.
- 506 Subsection (11) clarifies that references to a supplier becoming an excludable supplier in the section includes where the relevant discretionary exclusion ground did not apply before the contract was awarded or, if it did apply before award, it applied by reference to a different circumstance and the supplier has since become subject to the ground as a result of new circumstances (such as a different episode of poor performance or professional misconduct). This reference also includes situations where the contracting authority found out that the supplier was an excludable supplier before the contract was awarded.
- 507 Subsection (12) provides a definition of "material breach" for the purposes of this section.



## Section 79: Terminating public contracts: national security

508 Subsection (1) sets out that a relevant contracting authority may not terminate a contract by reference to the implied term in section 78, on the basis of the national security discretionary exclusion ground (Schedule 7, paragraph 14) unless the following requirements are met. Firstly, that the authority has notified a Minister of the Crown of its intention and secondly, that the Minister agrees that the supplier or sub-contractor is excludable on the ground set out in Schedule 7, paragraph 14 and that the contract should be terminated.

509 Subsection (2) sets out that a relevant contracting authority may not terminate a contract by reference to the implied term in section 78, on the basis of the national security mandatory exclusion ground (Schedule 6, paragraph 35) unless the authority has first notified a Minister of the Crown of its intention. The Minister's agreement is not required in these circumstances as the Minister has already determined that the supplier is an excluded supplier on this ground by virtue of adding their name to the debarment list.

510 Subsection (3) sets out that a "relevant contracting authority" is a contracting authority that is not a Minister of the Crown, a government department, or a Corporate Officer of the House of Commons or House of Lords.

## Section 80: Contract termination notices

511 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.

512 Subsection (2) sets out what a "contract termination notice" is and that it must include any information required in regulations made under section 95 (notices, documents and information: regulations and online system).

513 Subsection (3) sets out a non-exhaustive list of the possible meanings of "termination" leading to this notice being published, including discharge, expiry, termination by a party, rescission, or set aside by a court order.

514 Subsection (4) disapplies the obligation from private utilities or user choice contracts that were directly awarded (see paragraph 15 of Schedule 5).

## Part 5: Conflicts of interest

### Section 81: Conflicts of interest: duty to identify

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

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

### Section 82: Conflicts of interest: duty to mitigate

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

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

519 Subsections (3) and (4) set out that where a conflict of interest puts a supplier at an advantage in respect of a specific covered procurement that can not 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. An excluded supplier under this section is not treated as an excluded supplier other than in the procurement where the unavoidable conflict of interest occurred. As a result, the risk of a conflict continuing or occurring again (i.e. self-cleaning) is not relevant, the time periods during which events can be taken into account for the purpose of exclusions are not applicable and this cannot be used as a ground for a Minister to put the supplier on the debarment list.

520 Subsection (5) refers back to the meaning of conflict of interest provided in section 81 (conflicts of interest: duty to identify). Whilst “conflict of interest” is not a defined term, by inference, a conflict of interest is where a personal, professional or financial interest of a relevant person, as set out in section 81, could conflict with the integrity of the procurement.

### Section 83: Conflicts assessments

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

522 Subsection (3) sets out that a conflicts assessment must include the conflicts or potential conflicts of interest identified in accordance with section 81 (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 section 82 (conflicts of interest: duty to mitigate).

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

524 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. Thus the requirement is to give confirmation, via a published notice, that the relevant obligations in Part 5 have been carried out, however there is no duty to publish a conflicts assessment.

525 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.

526 Subsection (7) sets out how the previous subsections apply to private utilities to take account of the fact that private utilities are not required to publish notices to terminate a dynamic market (see section 39 - dynamic market notices), terminate procurements (see section 55 - procurement termination notices) or terminate contracts (section 80 - contract termination notices).

527 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 section.

## Part 6: Below-threshold contracts

528 Part 6 of the legislation sets out rules for the conduct of procurement where the value of the resulting contract is 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.

### Section 84: Regulated below-threshold contracts

529 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 (defined in section 8); or a utilities contract (defined in section 6).

530 Subsection (2) explains that Part 6 does not apply to procurement by a school (as defined in section 123) or to Northern Ireland transferred authorities, unless the procurement takes place under a reserved procurement arrangement or a devolved Welsh procurement arrangement. Section 114 contains definitions relating to procurement arrangements.

### Section 85: Regulated below-threshold contracts: procedure

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

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

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

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

535 Subsection (5) excludes from the application of this section contracts awarded by devolved Welsh authorities, unless awarded under a reserved procurement arrangement, or the award of a contract under devolved Welsh procurement arrangements, and contracts under frameworks.

### Section 86: Regulated below-threshold contracts: duty to consider small and medium-sized enterprises

536 Subsection (1) requires contracting authorities, before inviting the submission of tenders in relation to the award of a regulated below threshold contract (defined in section 84), to have regard to the particular barriers to participation in public procurement that small and medium-sized enterprises may face, and whether those barriers can be removed or reduced. Section 123 (Interpretation) defines what “small and medium-sized enterprises” means.

537 Subsection (2) disapplies this obligation in relation to awards made under a framework. However, it is worth noting that the establishment of frameworks will likely be subject to the duty to have regard to barriers facing SMEs, set out in section 12(4).

## Section 87: Regulated below-threshold contracts: notices

- 538 A contracting authority conducting a below-threshold procurement is not required to advertise the contract in question, but may choose to do so. Subsection (1) requires that if a contracting authority intends to advertise a procurement publicly, it must first publish a “below-threshold tender notice”, as defined in subsection (5).
- 539 Subsection (2) disappplies 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.
- 540 Subsection (3) requires that after entering into a notifiable below-threshold contract, a contracting authority must publish a contract details notice, the requirements for which will be set out in regulations made under section 95 (Notices, documents and information: regulations and online system) as specified in subsection (5). This must be done as soon as reasonably possible after entering into the contract.
- 541 Subsection (4) sets out the 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.
- 542 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 section 95 (Notices, documents and information: regulations and online system).
- 543 Subsection (6) says that if the contracting authority uses a below-threshold tender notice to impose any time limits for the purposes of the procurement process they must be both reasonable and the same for all suppliers.
- 544 Subsection (7) allows a Minister of the Crown or the Welsh Ministers to make regulations amending the thresholds specified in subsection (4), for example to take account of inflation.

## Section 88: Regulated below-threshold contracts: implied payment terms

- 545 The rules in this section mirror the prompt payment rules for the main, above-threshold regime found in sections 68 (Implied payment terms in public contracts) and 73 (Implied payment terms in sub-contracts), but adapted for the below-threshold context.
- 546 Subsection (1) provides that the terms set out in subsections (2) to (5) are implied into regulated below threshold public contracts.
- 547 Subsection (2) sets out the requirement that a payment due to be made under a regulated below-threshold contract by the contracting authority must be paid within 30 days from the day the invoice is received or becomes due (whichever is later).
- 548 Subsection (3) clarifies that subsection (2) does not apply if the contracting authority considers that the invoice is invalid or disputes it.
- 549 Subsection (4) requires the contracting authority to notify the payee without undue delay if the invoice is considered to be invalid or is disputed.
- 550 Subsection (5) clarifies that payment can only be made by a third party if agreed by the payee.
- 551 Subsection (6) specifies that an invoice is valid if it sets out minimum required information required by subsection (7) and meets any other requirement set out in the contract. Subsection (7) provides that, in order to be valid, an invoice must contain the name of the invoicing party, a description of the goods, services or works supplied, the sum requested and a unique identification number.

552 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, or contributing to the performance of, the regulated below threshold contract.

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

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

555 Subsection (11) clarifies that parties may agree to shorter payment terms.

556 Subsection (12) allows a Minister of the Crown or the Welsh Ministers to amend this section to reduce (but not increase) the term in which payment must be made.

557 Subsection (13) defines payee and sets out that receipt of an invoice at an address specified in the contract is sufficient to amount to the contracting authority having received that invoice.

## Part 7: Implementation of international obligations

### Section 89: Treaty state suppliers

558 Some of the international agreements to which the UK is a party include obligations on the UK to ensure that contracting authorities extend entitlements to access the UK procurement regime to the goods, services and suppliers of other States.

559 Subsection (1) defines a “treaty state supplier” as a supplier that benefits from an international agreement listed in Schedule 9 (treaty state suppliers (specified international agreements)). This definition applies throughout the Act.

560 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.

561 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.

562 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).

563 Subsection (5) ensures that entitlements to benefit from an international agreement may derive from the place of origin of goods, services or works.

564 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.

565 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.

## Section 90: Treaty state suppliers: non-discrimination

- 566 Subsection (1) prohibits a contracting authority from discriminating against a treaty state supplier when it carries out a procurement.
- 567 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.
- 568 Subsection (3) clarifies that the test of discrimination is whether there is a material difference in treatment between a UK supplier and treaty state supplier.
- 569 Subsection (4) clarifies that a supplier has an association with a state (being the concept used in subsection (2)) where that state is the place of origin of the goods, services or works being supplied by that supplier.
- 570 Subsection (5) defines a "treaty state". It is a state, territory or group of states or territories that is party to an international agreement specified in Schedule 9 (treaty state suppliers (specified international agreements)).
- 571 Subsection (6) clarifies that in respect of subsection (2)(a) a treaty state is a supplier's treaty state if the supplier is entitled to the benefits of such an international agreement by virtue of that treaty state being a party to the agreement.
- 572 Subsection (7) defines "United Kingdom supplier", which includes suppliers from the British Overseas Territories and the Crown Dependencies.

## Section 91: Treaty state suppliers: non-discrimination in Scotland

- 573 Subsection (1) confers on Ministers of the Crown or Scottish Ministers the power to make regulations to ensure that treaty suppliers are not discriminated against in carrying out devolved procurements.
- 574 Subsection (2) limits the power in subsection (1) to only making provision which is equivalent to substantive provision elsewhere in Part 7 and Schedule 9. This includes specifying what it means for a supplier to be a treaty state supplier, and stipulating that a treaty state supplier cannot be discriminated against.
- 575 Subsection (3) limits the power in subsection (1) so that it cannot be used unless it is necessary in order to ratify or comply with an international agreement, such as adding to or amending the list of international agreements in Scottish procurement legislation.
- 576 Subsection (4) defines the term "signatory" used in subsection 3.
- 577 Subsection (5) defines "devolved procurement" as procurement carried out by a devolved Scottish authority. That term is defined in section 2. Subsection (5) also ensures that the reference to discrimination in this section is defined in the same way as in section 90.
- 578 Subsection (6) ensures that the power in subsection (1) can be used to amend primary legislation, including primary legislation that is yet to be made.

## Section 92: Trade disputes

- 579 Subsection (1) sets out that section 92 is applicable where there is or has been, a dispute relating to procurement between the United Kingdom and another state, territory or organisation of states or territories in relation to an international agreement listed in Schedule 9.

580 Subsection (2) confers a power on an appropriate authority (see section 123 (Interpretation)) or the Scottish Ministers to make regulations as a result of a procurement related dispute as described in subsection (1) - for example, to take retaliatory or compensatory action.

581 Subsection (3) provides that any provision made by the Scottish Ministers under subsection (2) must relate to procurement carried out by devolved Scottish authorities or under devolved Scottish procurement arrangements.

582 Subsection (4) provides that regulations made under this section may modify primary legislation including the Procurement Act 2023, irrespective of when such primary legislation is passed.

583 Subsection (5) provides that the reference to an international agreement in Subsection (1) excludes a reference to the Trade and Cooperation Agreement between the United Kingdom and the European Union and the European Atomic Energy Community on 30 December 2020. This is because power exists already in the legislation implementing that agreement (The European Union (Future Relationship) Act 2020) to make provision as described in this section.

## Part 8: Information and notices: general provision

### Section 93: Pipeline notices

584 Subsection (1) establishes that this section applies to any contracting authority that considers that in the next financial year it will spend more than £100 million on certain types of contracts, known as relevant contracts and defined in subsection (4) as any contract for the supply of goods, services or works, other than exempted contracts.

585 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.

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

587 Subsection (4) sets out definitions of “financial year”, “relevant contracts”, “reporting period” and “specified information”.

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

589 Subsection (6) stipulates that this section does not apply to private utilities or a transferred Northern Ireland authority (a concept defined in section 112).

### Section 94: General exemptions from duties to publish or disclose information

590 Subsection (1) sets out that when contracting authorities are obliged by any provision of the legislation (or regulations made under it) to publish or disclose information, there are two circumstances in which they may withhold information from publication or other disclosure. 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.

- 591 Subsection (2) defines the phrase “sensitive commercial information”, used in subsection (1), as meaning information which constitutes a trade secret or something that, if published or disclosed, would prejudice the commercial interests of any person (which includes legal persons such as companies).
- 592 Subsection (3) requires contracting authorities that withhold or redact information under this section to notify anyone 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.
- 593 Subsection (4) establishes that the obligation to provide information on reliance on this section (in subsection (3)) does not apply in the event that the contracting authority considers that doing so would be contrary to the interests of national security.

## Section 95: Notices, documents and information: regulations and online system

- 594 Subsection (1) sets out that an appropriate authority can make regulations about the form and content of notices, documents and other information that the Act requires to be published or provided and how they are published, provided or revised.
- 595 Subsection (2) sets out 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 or documents and specifying the online system they are published on.
- 596 Subsection (3) stipulates that different provision can be made for different types of notice, document or information and for the same type of notice for different purposes.
- 597 Subsection (4) imposes a duty on a Minister of the Crown to make arrangements to establish an online system capable of being used to publish information required to be published under this Act.
- 598 Subsection (5) requires that the system described in subsection (4) must make information required to be published under the Act available free of charge and that the online system must be accessible to people with disabilities.

## Section 96: Electronic communications

- 599 Subsection (1) requires contracting authorities to, so far as is practicable, communicate with suppliers electronically and take steps to ensure that suppliers participating in a covered procurement communicate electronically.
- 600 Subsection (2) requires that electronic communication systems used or required by a contracting authority must be free of charge; readily accessible to suppliers; generally available or interoperable with other systems; and accessible to people with disabilities.
- 601 Subsection (3) sets out an exception to the requirement for electronic communications systems to be free of charge and readily accessible to suppliers in (2)(a), for when these systems are used after an award of a public contract or in relation to a utilities dynamic market (defined at section 35 - dynamic market: establishment).
- 602 Subsection (4) sets out that section 96 does not apply if the contracting authority considers it poses a security risk in the circumstances.
- 603 Subsection (5) sets out the definition of “electronic communication system” which for these purposes includes any electronic systems used for the purpose of communication.



## Section 97: Information relating to a procurement

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

605 Subsection (2) provides that regulations made under this section may regulate how contracting authorities share information and require them to take steps to ensure that suppliers participating in a procurement share information in a particular way.

606 Subsection (3) sets out that, for the purposes of this section, “information” means information shared under, or for a purpose relating to, this legislation.

## Section 98: Record-keeping

607 Subsection (1) sets out the obligation on contracting authorities to keep such records as the authority considers are sufficient to explain a material decision made for the purpose of awarding or entering into a public contract.

608 Subsection (2) clarifies that a material decision is one which requires the contracting authority to publish or provide a notice, document or other information related to that decision, or decisions which are required to be made under this legislation.

609 Subsection (3) requires contracting authorities to keep records of any communication between the authority and a supplier in relation to the award or entry into a public contract which is made before a contract is entered into.

610 Subsection (4) sets out the time limits applicable to the obligations in subsections (1) and (3). Records need only be kept until the day on which the contracting authority gives notice of a decision not to award the contract or the end of the period of three years beginning with the day on which the contract is entered into or, if the contract is awarded but not entered into, the day on which it is awarded.

611 Subsection (5) excludes defence and security contracts from this obligation.

612 Subsection (6) specifies that this amendment does not affect any other legal obligation under which a contracting authority must retain documents or keep records, including for a longer period.

## Section 99: Data protection

613 Subsection (1) provides that this legislation does not authorise or require a disclosure of information that would contravene the data protection legislation, as defined in subsection (2). Subsection (1) also makes clear that, in determining whether a disclosure would contravene data protection legislation, account should be taken of the powers and duties arising from this Act.

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

# Part 9: Remedies for breach of statutory duty

## Section 100: Duties under this Act enforceable in civil proceedings

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

- 616 Subsection (2) says that statutory duties are owed to UK suppliers or treaty state suppliers (as defined in section 89).
- 617 Subsection (3) sets out the requirements for a challenger to have standing to bring a claim for breach of statutory duty under Part 9. Firstly, the challenger must be a UK or treaty state supplier. Secondly, the duty is only enforceable where the supplier has suffered or is at risk of suffering loss or damage in consequence of breach of the duty (to require the claimant to demonstrate they could have been successful had the rules been followed).
- 618 Subsection (4) cross refers to section 106 (Time limits on claims) which sets time limits (statutory limitation periods) that apply to claims under this Part.
- 619 Subsection (5) states that a contracting authority's duty to have regard to barriers facing small and medium-sized enterprises (section 12(4)), the National Procurement Policy Statement (section 13(9)) and the Wales Procurement Policy Statement (section 14(8)) fall outside the scope of Part 9.
- 620 Subsection (6) clarifies that treaty state suppliers cannot bring a claim under Part 9 for breach of statutory duty in relation to a procurement that isn't a covered procurement (e.g below-threshold procurements).
- 621 Subsection (7) prevents a supplier bringing proceedings under Part 9 in respect of debarment decisions made by a Minister of the Crown (and cross refers to section 65 for specific provision about debarment decision appeals).
- 622 Subsection (8) provides 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.
- 623 Subsection (9) defines "claimant" and "the court" for the different parts of the UK.

### Section 101: Automatic suspension of the entry into or modification of contracts

- 624 Subsection (1) states that if a contracting authority has been notified that a claim has commenced during any applicable standstill period, the contracting authority is not permitted to enter into that contract/modification. This is known as the automatic suspension.
- 625 Subsection (2) indicates that section 102 (interim remedies) allows the court (via court order) to lift or modify the automatic suspension.
- 626 Subsection (3) provides that the automatic suspension does not apply if first instance proceedings have concluded and there is no order to extend the restriction (e.g. to take account of an appeal).
- 627 Subsection (4) makes it clear "convertible contract" in this section has a meaning given in section 74 (modifying a public contract).
- 628 Subsection (5) cross refers to the standstill provisions in sections 51 and 76.

### Section 102: Interim remedies

- 629 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).

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

- a. the public interest - including both the public interest in ensuring the contract is awarded (or modified) 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);
- b. the interests of suppliers - which will include the winning bidder and claimant and specifically require consideration of whether damages are an adequate remedy for the claimant;
- c. any other issues the court may wish to consider.

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

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

### Section 103: Pre-contractual remedies

633 Subsection (1) explains that the remedies under this section 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).

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

### Section 104: Post-contractual remedies

635 Subsection (1) explains that the remedies under this section for breach of statutory duty under section 101(1) are only available where the public contract (or contract modification) has already been entered into (i.e. they are post-contractual remedies).

636 If the subsection (1) requirements are fulfilled, subsection (2) obliges the court to set aside a public contract (or a contract modification) if the specified conditions in section 103 (post contractual remedies: set aside conditions) are also met. It also allows the court to award damages to the claimant at the post contractual stage.

637 Subsection (3) states that even where a set aside condition is met under section 103, the court does not need to set aside the public contract (or contract modification) if it determines there is an overriding public interest in allowing the contract to continue (including defence and security interests).

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

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

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

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

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

### Section 105: Post-contractual remedies: set aside conditions

643 This section establishes the criteria which must be satisfied in order for the court to set aside a contract or modification (in the absence of an overriding public interest) under section 104.

644 Subsection (1) says a set aside condition is met if the claimant was denied a proper opportunity to seek a pre-contractual remedy (because the claimant did not have a proper opportunity to challenge the breach that led to the faulty award decision prior to the contract or modification being entered into) because:

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

- f. The breach which led to the wrong supplier receiving the contract could only be discoverable after the contract/modification had been entered into (for example because the award notice or contract change notice did not correspond with the contract or modification that was entered into, meaning that the claimant had not been aware earlier that the contract would cause them to suffer, or risk suffering, loss or damage).

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

646 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.

### Section 106: Time limits on claims

647 Subsection (1) sets out that “specified set aside proceedings” (i.e. certain claims looking to set aside a contract or modification pursuant to Part 9) must be commenced within 30 days of when the supplier knew, or ought to have known about the alleged breach (and in any event within 6 months of the contract/modification being entered into). This means a claimant may in some instances have less than 30 days for specified set aside proceedings; for example, if the contract was signed on 1st January and the breach comes to light on 11th June, the supplier only has 20 days, as it needs to bring a challenge prior to the end of the six-month period.

648 Sub-section (5) defines “specified set aside proceedings” for the application of the limitation period in sub-section (1) as proceedings under section 104(2) where a) the contract details notice was not published or b) in respect of a contract modification. The significance of the contract details notice is that it is usually the last point in the procurement that information is publicly provided that may inform a claim, so its absence means the threat of a set aside claim exists until the six-month cut-off (to provide certainty to the parties of the contract and the end customer that after this point the contract cannot be made void).

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

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

### Section 107: Part 9 proceedings and closed material procedure

651 This section allows proceedings under Part 9 of the Procurement Act 2023 to take place under the closed material procedure as provided by Part 2 of the Justice and Security Act 2013. The closed material procedure protects sensitive information (which would be damaging to the interests of national security), and the section specifies that references to the Secretary of State in that Act include the Minister for the Cabinet Office. This allows the Minister for the Cabinet Office to apply for that procedure to be used for any proceedings under Part 9.

## Part 10: Procurement oversight

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

### Section 108: Procurement investigations

653 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).

654 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.

655 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.

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

657 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 certain listed authorities. The subsection also specifies that only documents within the possession or control of the contracting authority can be requested.

### Section 109: Recommendations following procurement investigations

658 Subsection (1) sets out the circumstances in which a statutory recommendation, known as a “section 109 recommendation”, can be made. A section 109 recommendation:

- a. can only follow a procurement investigation by an appropriate authority (under section 108 (procurement investigations)),
- b. can only be made to a contracting authority that was the subject of a procurement investigation, and
- c. can only be made where the appropriate authority considers, in light of the results of that investigation, that the contracting authority has breached the requirements of the legislation, or is likely to do so. The appropriate authority can draw on results of more than one procurement investigation in coming to this conclusion.

659 Subsection (2) and (3) set out the content of a section 109 recommendation. A section 109 recommendation details the action the contracting authority should take so that it complies with the requirements of the legislation, and the timeframe in which such action should take place. A section 109 recommendation must not relate to how the contracting authority has regard to procurement objectives (set out in section 12 (covered procurement objectives)), the

national procurement policy statement (as per section 13 (the national procurement policy statement)) or the Wales procurement policy statement (as per section 14 (the Wales procurement policy statement)), nor how the contracting authority complies with the duty in section 86 (regulated below-threshold contracts: duty to consider SMEs) or takes specific decisions in relation to a particular procurement.

660 Subsection (4) provides that contracting authorities who received a section 109 recommendation must have regard to it.

661 Subsection (5) sets out that where a section 109 recommendation specifies, the contracting authority must provide a progress report to the appropriate authority, at specified intervals.

662 Subsection (6) states that a progress report must set out the action the contracting authority has taken as a result of the section 109 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.

663 Subsection (7) provides that if a contracting authority has not taken any action after the receipt of a section 109 recommendation, or has taken different action to that recommended, it must provide its reasons for doing so in the progress report.

664 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.

665 Subsection (9) provides relevant definitions.

### Section 110: Guidance following procurement investigations

666 Subsection (1) states that an appropriate authority may decide to publish guidance for contracting authorities following a procurement investigation under section 108 (procurement investigations). Such guidance will relate to lessons learned from investigations to assist in compliance with the legislation by contracting authorities generally.

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

668 Subsection (3) ensures that contracting authorities are only obliged to have regard to guidance issued in accordance with the limitations on Ministers' exercise of powers provided in Part 11. For example, a devolved Welsh contracting authority need not have regard to guidance issued by a Northern Ireland Department.

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

### Section 111: Welsh Ministers: restrictions on the exercise of powers

669 This section places restrictions on the Welsh Ministers when exercising powers under this legislation.

670 Subsection (1) sets out that the powers granted to Welsh Ministers under the legislation only apply to certain contracting authorities and procurement under a devolved Welsh procurement arrangement (as defined at section 114). The contracting authorities to which the powers apply are devolved Welsh authorities (within the meaning given in section 157A of the Government of Wales Act 2006) and other authorities which the legislation requires are to be treated as devolved Welsh authorities despite falling outside the definition in the Government of Wales Act (see subsection (2)).

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

672 Subsection (3) states that contracting authorities which are not a public undertaking or private utility are to be treated as a devolved Welsh authority if their functions are both exercisable wholly or mainly in relation to Wales and are not wholly or mainly reserved. Both subsections (2) and (3) will therefore include contracting authorities which operate, to some extent, outside Wales.

673 Subsection (4) sets out that, other than in this section and section 127 (commencement), any reference to devolved Welsh authorities in the legislation also includes the authorities which this section states should be treated as such.

674 Subsection (5) provides that the restriction on the powers of the Welsh Ministers to regulate procurement does not apply in respect of any power contained in sections 59 to 66 of the Act (debarment).

675 Subsection (6) defines certain concepts used in this section.

### Section 112: Northern Ireland department: restrictions on the exercise of powers

676 This section places restrictions on Northern Ireland departments when exercising powers under this legislation.

677 Subsection (1) sets out that the powers granted to a Northern Ireland department under the legislation only apply to certain contracting authorities and procurement under a transferred Northern Ireland procurement arrangement (as defined at section 114). The contracting authorities in relation to which the powers may be exercised are transferred Northern Ireland authorities and public undertakings or private utilities which are not transferred Northern Ireland authorities but are to be treated as such (see subsection (2)).

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

679 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.

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

### Section 113: Minister of the Crown: restrictions on the exercise of powers

681 This section 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.

682 Subsection (1) establishes that a Minister of the Crown may only exercise powers for the purposes of regulating a devolved Welsh authority in relation to procurement under a reserved procurement arrangement or a transferred Northern Ireland procurement



arrangement (but see subsections (2) and (6)). Those concepts are defined in section 114 (definitions relating to procurement arrangements).

683 Subsection (2) disapplies the limitation on a Minister of the Crown set out in subsection (1) in relation to powers exercised under section 67 (electronic invoicing: implied term) and section 110 (guidance following procurement investigations).

684 Subsection (3) provides that a Minister of the Crown requires the consent of Welsh Ministers to make regulations under section 67, publish guidance under section 110 or make consequential amendments under section 125 for the purpose of regulating a Welsh devolved authority. However, consent is not required when the regulations or guidance relates to a reserved procurement arrangement or a devolved Northern Ireland procurement arrangement. Both of these concepts are defined in section 114 (definitions relating to procurement arrangements).

685 Subsection (4) provides that a Minister of the Crown may only make regulations under this legislation that regulate a transferred Northern Ireland authority with the consent of a Northern Ireland Department, unless the regulations relate to a reserved procurement arrangement or a devolved Welsh procurement arrangement. Both of these concepts are defined in section 114 (definitions relating to procurement arrangements).

686 Subsection (5) requires that a Minister of the Crown may only publish guidance under section 110 for the purposes of regulating a Northern Ireland department with the consent of a Northern Ireland Department. This consent is not required when the guidance relates to a reserved procurement arrangement or a devolved Welsh procurement arrangement.

687 Subsection (6) sets out that the restrictions on a Minister of the Crown in subsections (1) and (4) do not apply in relation to any power under sections 59 to 66 (debarment), 89 (treaty-state suppliers), 91 (treaty-state suppliers: non-discrimination in Scotland), 92 (trade disputes), 125 (power to make consequential provision) and 127 (commencement).

## Section 114: Definitions relating to procurement arrangements

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

689 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.

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

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

## Section 115: Powers relating to procurement arrangements

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

693 Subsection (2) provides powers for a Minister of the Crown to amend the Act in order to disapply provisions of the legislation in respect of devolved Scottish procurement arrangements.

694 Subsection (3) provides powers for Scottish Ministers to amend Scottish procurement legislation to allow contracting authorities within the scope of the Act to access devolved Scottish procurement arrangements and to disapply it in respect of devolved Scottish authorities participating in procurement regulated by the Act.

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

## Part 12: Amendments and repeals

### Section 116: Disapplication of duty in section 17 of the Local Government Act 1988

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

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

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

699 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.

700 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 section.

### Section 117: Single source defence contracts

701 This section points to Schedule 10, which makes amendments to the Defence Reform Act 2014.

### Section 118: Concurrent powers and the Government of Wales Act 2006

702 This section amends provision in the Government of Wales Act 2006 relating to general restrictions on devolved competence. This provision removes, in respect of the Procurement Act 2023, 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.

### Section 119: Repeals etc.

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

## Part 13: General

### Section 120: Application of this Act to procurement by NHS England

704 This section provides a power for a Minister of the Crown to make regulations disapplying any provision of the Act in relation to procurements that are subject to a separate regulatory regime established pursuant to section 12ZB of the National Health Service Act 2006.

### Section 121: Power to amend this Act in relation to private utilities

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

706 Subsection (2) provides a non-exhaustive list of the provisions that may be included, for example to disapply requirements; or modify them so as to reduce a particular burden or the overall burden.

707 Subsection (3) sets out who the appropriate authority must consult with before making regulations under subsection (1).

708 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.

### Section 122: Regulations

709 This section sets out the procedure that applies where regulations are made under this legislation.

710 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.

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

712 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.

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

714 Subsections (5) and (6) establish that, with the exception of regulations made under sections 42 (direct award to protect life, etc) and 127 (commencement), all other regulation-making powers in this legislation that are exercisable by a Minister of the Crown are subject to the negative procedure.

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

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

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

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

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

720 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.

721 Subsection (14) sets out that regulations made by the Scottish Ministers under sections 90 (treaty state suppliers: non-discrimination), 92 (trade disputes) and 115 (powers relating to procurement arrangements) are subject to the affirmative procedure.

### Section 123: Interpretation

722 This section defines certain terms used (but not defined) elsewhere in the legislation.

### Section 124: Index of defined expressions

723 This section provides a table which cross-references expressions used elsewhere in the legislation to the relevant provisions where they are defined.

### Section 125: Power to make consequential, etc, provision

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

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

### Section 126: Extent

726 This section confirms that the legislation extends to England and Wales, Scotland and Northern Ireland.

### Section 127: Commencement

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

728 Subsections (3) to (5) provide that a Minister of the Crown requires the consent of Welsh Ministers to make certain commencement regulations which affect devolved Welsh procurement and subsections (6) and (7) provide that a Minister of the Crown may make regulations to provide that certain provisions which have not yet been brought into force do not regulate procurement by devolved Welsh authorities under reserved or transferred Northern Ireland procurement arrangements and that existing legislation continues to regulate such procurements.

729 Subsection (8) provides definitions used in this section.

### Section 128: Short title

730 This section confirms that the short title of the legislation will be the Procurement Act 2023.

## Schedule 1: Threshold amounts

731 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 legislation, or the below-threshold regime contained in Part 6.

732 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.

733 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.

734 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.

735 Paragraph 4 contains a definition of the term "works contract". It is defined as being a contract whose main purpose is either the carrying out of "works", which is itself defined in paragraph 5, or one that leads to the carrying out of works under a separate contract but complying with specifications set out in the main contract. This might, for example, capture a situation where a local authority enters into a contract for the sale of land to a developer (which would not be a public contract), but stipulates that the resulting private development must also contain a public library for the benefit of the community.

736 Paragraph 5(1) defines other important terms used in this Schedule. It also contains two regulation-making powers permitting an appropriate authority to list: (a) those contracting authorities that are "central government authorities" for the purposes of this Schedule; and (b) those categories of activity that are to count as "works" for the purposes of defining a "works contract". Paragraph 5(2) clarifies that references to contracts for goods, services or works and works contracts include references to frameworks for the future award of such contracts. The relevant threshold for a framework therefore depends on the types of contracts to be awarded under the framework.

## Schedule 2: Exempted contracts

737 The exemptions are separated in two Parts. Part 1 includes exemptions where the distinguishing characteristic is a relationship between the contracting authority and the other contracting party (i.e. the counterparty). Part 2 exemptions are those where the key characteristic is the subject-matter of the exemption. This means that the other notable difference between the exemptions in Part 1 and those in Part 2 is that the overarching "main purpose" test which applies to all subject-matter exemptions in Part 2, does not apply in Part 1, although other tests do apply to some of the exemptions in Part 1.

### Part 1 - Counterparty Exempted Contracts

#### General

738 Paragraph 1 explains that this Part sets out counterparty exempted contracts.

## **Vertical arrangements**

- 739 Paragraph 2 exempts quasi “in-house awards” between a contracting authority (or group of contracting authorities) and an organisation that is connected “vertically” with the contracting authority (or authorities), i.e. a body which has a separate legal personality but is under the control of the contracting authority (or authorities). A typical example may be a contract between a trading company set up and controlled by a local authority (or its subsidiary authority) and that local authority.
- 740 Sub-paragraph (2) sets out the tests to ascertain whether a person is “controlled” by the contracting authority (or group of contracting authorities). These tests include a requirement that more than 80% of the activities carried out by the controlled person are for or on behalf of the contracting authority (or authorities) or other persons that are controlled by the contracting authority (or authorities).
- 741 Sub-paragraph (3) confirms the body must be owned wholly by a public authority (or authorities).
- 742 Sub-paragraph (4) sets out the meaning of “parent undertaking” (and parent undertakings) and refers to the definition within the Companies Act 2006, amended to include any “person” (“person” is as defined in the Interpretation Act 1978).
- 743 Sub-paragraph (5) clarifies that being a director, member or officer alone does not constitute “decisive influence” (as referred to in subsection (2)(b)); other factors must also exist in order for there to be a “decisive influence”.
- 744 Sub-paragraph (6) provides for an appropriate authority to make regulations that set out how to calculate the percentage of activities referred to in sub-paragraph (2)(c).
- 745 Sub-paragraph (7) explains that for joint control, one representative may represent more than one contracting authority on the controlled person’s board, or equivalent decision-making body.
- 746 Sub-paragraph (8) explains that the exemption in this paragraph does not apply to public undertakings or private utilities. (A public undertaking or private utility may instead use the exemption at paragraph 32 of this Schedule.)

## **Horizontal arrangements**

- 747 Paragraph 3 exempts contracts between two or more contracting authorities that 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 authorities aimed at the joint performance of a common task related to delivery of their collective waste disposal functions.
- 748 Sub-paragraph (2) sets out the tests to ascertain whether there is a “horizontal arrangement”. These tests include a requirement that no more than 20% of the proposed activities to be carried out under the arrangement are carried out for purposes other than the authorities’ public functions. The purpose being to limit the use of the exemption to activities that are substantially within the public interest and public functions of the authority.
- 749 Sub-paragraph (3) provides for an appropriate authority to make regulations that set out how to calculate the percentage of activities intended to be carried out under the arrangement for the purpose of sub-paragraph (2)(b).
- 750 Sub-paragraph (4) explains that the exemption does not apply to public undertakings or private utilities. (A public undertaking or private utility may instead use the exemption at paragraph 6 of this Schedule.)

## **Defence and security contracts (counterparty)**

751 Paragraph 4 exempts defence and security contracts where the supplier is another government.

## **Utilities contracts (counterparty)**

752 Joint Ventures. Paragraph 5(1) exempts utilities contracts between utilities and relevant joint ventures to which they are a party. The joint venture must have been formed for the purpose of carrying out a utility activity and be committed to doing so for a period of at least three years. In addition, the utilities forming the joint venture must remain members of the joint venture for a minimum of three years after the date of the agreement.

753 Affiliated Persons. Paragraph 5(2) defines a “relevant joint venture”, which is used in paragraphs 5(1) and 6(1) of this Schedule. A relevant joint venture is a joint venture that was formed for the purpose of carrying out a utility activity and is comprised only of utilities.

754 Paragraph 6(1) exempts utilities contracts awarded:

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

755 Paragraph 6(2) explains, by reference to the Companies Act 2006, what it means if a person is “affiliated” with another. A person is affiliated with another if the person is in a “group undertaking”, as defined in section 1161(5) of that Act, with that person. Paragraph 6(2) provides that this would be the case even where one of them is not an “undertaking” as defined in section 1161(1) of that Act - for example, where one is not a company.

756 Paragraphs 6(3) - (5) explain the turnover test to be met and contain a power for an appropriate authority to make regulations that set out how to calculate affiliated turnover amount and total turnover amount for the purposes of sub-paragraph (3).

## **Part 2: Subject Matter Exempted Contracts**

### **General**

757 Paragraph 7 sets out the general provisions for subject-matter exempted contracts.

758 Sub-paragraph (1) explains that this Part lists what is an exempted contract, which includes a framework provided it is only for the future award of contracts only of a kind that fall within the exemptions in this Part. 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 the Act.

759 Sub-paragraph (2) makes provision about mixed contracts that partly fall within a subject-matter exemption and partly outside. Not all mixed contracts are exempt and this provision is intended to prevent situations where contracts are inappropriately amalgamated in order to take advantage of an exemption to bring the contract outside the scope of the procurement rules. The effect of this section is that where the exempt and non-exempt elements of the contract could reasonably be separated into different contracts, but the contracting authority chooses to procure a single contract, and the main purpose of the contract does not fall within an exemption listed in Part 2, the whole of that contract will be subject to the Act (i.e. it will not be an exempted contract).

760 Sub-paragraph (3) explains factors that may be taken into account when considering if it is reasonable to supply under a separate contract.

761 Sub-paragraph (4) clarifies that a “Part 2-only contract” is only a contract listed in Part 2 and not a contract listed in Part 1 of this Schedule.

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

762 Paragraph 8 exempts a contract for the acquisition by a contracting authority of land, buildings, or other complete work or any interest or right over any of them. It also exempts a contract which concerns an interest or right over any of them, e.g. rental interests (e.g. leases or licences etc.).

763 Sub-paragraph (2) refers to Schedule 1 for the definition of “complete work”.

### **Broadcasting**

764 Paragraph 9 exempts contracts for the acquisition, development, production or co-production of material intended for broadcasting to the general public, 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 broadcast content through creative competition, or to support for example encouraging regional development or production of minority language content.

765 Paragraph 10 exempts contracts for broadcast (by any means) to the general public of broadcast material supplied by the supplier. This would cover media services and on-demand services, and contracts for broadcasting time. The reference here to “broadcasting time” relates to publicly-owned broadcasters commissioning programming or selling broadcasting time (for example, for advertising).

### **Electronic communications services**

766 Paragraph 11 exempts contracts which facilitate a contracting authority to provide the general public with an electronic communications service (as defined in paragraph 11).

767 Paragraph 12 exempts contracts which permit a contracting authority to provide, maintain or use an electronic communications network (as defined in paragraph 12).

### **Alternative dispute resolution**

768 Paragraph 13 exempts contracts for various forms of dispute resolution. These contracts are generally agreed by the parties or nominated by a third party and so not suitable for regulation under this legislation.

### **Legal services**

769 Paragraph 14 exempts contracts for “exempt legal services”, which are legal services provided in specific circumstances where the nature of the legal services is unsuitable for regulation under the Act. The exemption does not cover contracts for other legal services, which are covered by the Act.

770 Sub-paragraph (2) sets out a definitive list of what is meant by “exempt legal services”, which would include, for example: legal representation in court proceedings; pre-litigation advice by a lawyer; and services provided by a notary to certify or authenticate documents.

771 Sub-paragraph (3) provides definitions of terms used in this paragraph.



## **Financial services**

772 Paragraph 15 exempts contracts for loans to a contracting authority.

773 Paragraph 16 exempts (at sub-paragraph (1)) contracts awarded to an investment firm or qualifying credit institution for an investment service or activity, or ancillary service, in connection with a financial instrument (e.g. services related to the issue, sale, transfer of securities). Sub-paragraph (2) sets out the meaning of the terms used in sub-paragraph (1).

774 Paragraph 17 exempts contracts for services by the Bank of England.

## **Employment**

775 Paragraphs 18 and 19 exempt employment contracts or workers' contracts, and any other contractual appointment which may not be classed as an employment or worker's contract (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**

776 Paragraph 20 exempts contracts for various categories of emergency services (including search and rescue services, ambulance or fire brigade related service) performed by non-profit organisations or associations.

## **Public passenger transport services**

777 Paragraph 21 exempts contracts that are awarded under the "public service obligations regulations" which are defined in section 136(11) of the Railways Act 1993. This provision operates to exempt from the Act certain public passenger transport services.

## **Research and development services**

778 Paragraph 22 exempts contracts for "research and development services" that are intended for general public benefit, provided the contract does not include goods or works that might otherwise flow from the research and development activity. This would include fundamental research, applied research and experimental development up to but not including preparation for manufacturing a new product or carrying out works in a commercial market).

779 Sub-paragraph (2) sets out what is meant by "research and development services". The essence here is the process of testing the validity of a theory through the controlled process of interaction and observation. This may involve the use of live experimentation which provides new knowledge about specific factors relevant to a particular activity.

780 Sub-paragraph (3) sets out things that are not research and development services, e.g. where there are elements that would allow commercialisation of the research (e.g. the production of tools or development of industrial processes to enable the manufacture of goods for a commercial market). The list at sub-paragraph (3) is not exhaustive.

781 There is a degree of overlap between this exemption and the direct award justification for prototypes and development (Schedule 5, paragraph 2). Direct award would need to be used where, for example, the research and development programme also involved goods or the production of a prototype to test the viability of industrial processes to manufacture novel goods (as defined in Schedule 5, paragraph 3) at scale.

## **International agreements and organisations**

782 Paragraph 23 exempts contracts where the contracting authority is obliged to follow a procedure prescribed by an international agreement (of which the UK is a signatory) relating to the stationing of military personnel or the implementation of a joint project between the signatories to that international agreement. This exemption enables cooperation with international partners.

783 Paragraph 24 exempts contracts awarded under a procedure adopted by an international organisation of which the UK is a member, where the rules of the procedure are materially inconsistent with those set out in the Act. If the rules of the procedure are not materially inconsistent with the Act, the exemption will not apply. Paragraph 24 makes it clear that this exemption does not apply to defence and security contracts, which are dealt with separately (in accordance with paragraph 29).

## **National security**

784 Paragraph 25 exempts contracts that a contracting authority considers should not, in the interests of national security, be subject to the Act. Although the contracting authority may only be of the view that only some of the Act should not apply, where it has identified interests of national security in a contract, the whole of the contract is exemption is from all provisions of the Act.

## **Intelligence activities**

785 Paragraph 26 exempts contracts for the purposes of carrying out, facilitating or supporting intelligence activities. While the intelligence services (Security Service, Secret Intelligence Service, and the Government Communication Headquarters) are excluded from the Act (see section 2(5)(b)) entirely, this provision provides an exemption for contracting authorities who are not part of the intelligence services, but who carry out facilitate or support intelligence activities.

## **Defence and security contracts (subject matter)**

786 Paragraph 27 exempts defence and security contracts placed with a supplier located outside of the United Kingdom where the armed forces are deployed and the operational needs of the armed forces require the contract to be placed with that supplier.

787 Paragraph 28 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, in connection with that presence, a contract to be placed with a particular supplier.

788 Paragraph 29 exempts defence and security contracts which are awarded under a procedure of an international organisation of which the UK is a member.

789 Paragraph 30 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, or is in connection with, the joint development of a new product or the exploitation of that product once developed.

## **Utilities contracts (subject matter)**

790 Paragraph 31 exempts utilities contracts made for the purpose of further sale or lease to third parties, provided the utility enjoys no special or exclusive right (as defined in section 6(3)) to sell or lease the subject-matter of such contracts and other entities are free to sell or lease them under the same conditions as the utility. This is because it is considered that in such scenarios

the utility will be operating in a competitive market. This exemption is not available to utilities acting as centralised purchasing authorities.

791 Paragraph 32 exempts utilities contracts where water is supplied to a utility that is carrying out a water related utility activity (i.e. described in Schedule 4, paragraph 3(1)(a) or (b)).

792 Paragraph 33 exempts utilities contracts under which energy, or fuel for the production of energy, is supplied to a utility that is carrying out a utility activity relating to gas and heat, electricity and oil and gas extraction and exploration for, or extraction of, coal or other solid fuels. These utility activities are set out in paragraphs 1, 2, and 6 of Schedule 4. In the case of the supply of fuel, the exemption only applies to the supply of fuel for the production of energy, and not to the supply of fuel for other reasons in connection with the utility activity, for example, purchases of fuel for transport.

793 Paragraph 34 ensures the exemptions at Part 2 of Schedule 4 apply to exempt contracts for those activities from the Act. Public undertakings and private utilities are exempt by the operation of Schedule 4, but this exemption is required to ensure public authorities are exempt from the Act entirely where the exemption in Part 2 of Schedule 4 applies.

### **Concession contracts**

794 Paragraph 35 exempts concession contracts for utility activities relating to water services described in Schedule 4 paragraph 3(1) or (2).

795 Paragraph 36 exempts concession contracts for scheduled air services for up to 4 years within the UK or the UK and Gibraltar and which are operated under an exclusive licence and subject to minimum service requirements. The Secretary of State must consider that the air services are needed to maintain sufficient transport links between the areas serviced. This exemption is intended to cover the situation where an exclusive public service obligation is put in place by the Secretary of State under Article 16 of Regulation (EC) No. 1008/2008 where there is a need for air services for public interest reasons where availability of other modes of transport / other air services is insufficient to serve the transport needs of the region. Whilst the Secretary of State imposes the obligation, once it is imposed, contracts to deliver the air services can be awarded by any contracting authority.

796 Paragraph 37 exempts concession contracts for the provision of public passenger transport services.

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

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

### **General Rule**

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

## **Frameworks**

799 Paragraph 2(1) provides that a contracting authority must estimate the value of a framework as the sum of the estimated values of all the contracts that have or may be awarded in accordance with that framework. Paragraph 2(2) states that, in the case of an open framework, as per section 49 (open frameworks), the estimated value of a framework awarded under the open framework must include the value of all of the frameworks already awarded or to be awarded under the open framework. Paragraph 2(3) provides that “framework” has the meaning given in section 45(2) (frameworks).

## **Concession contracts**

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

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

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

## **Anti-avoidance**

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

## **Cases where estimate not possible**

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

## **Schedule 4: Utility activities**

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

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

### **Gas and heat**

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

807 Subparagraph (1) specifies that the provision or operation of fixed networks to provide a service to the public in connection with the production, transport or distribution of gas or heat and the supply of gas or heat to such networks are utility activities.

808 Sub-paragraph (2) sets out circumstances where the supply of gas and heat to a network is not considered a utility activity, all of which must be met for the exemption to apply. These are: that the operator (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 (which are referred to in this paragraph and paragraphs 2 and 3 of the Schedule) are set out in paragraph 7 of the Schedule.

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

## **Electricity**

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

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

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

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

## **Water**

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

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

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

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

818 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 drinking water) is a private utility or public undertaking; the operator produces drinking water because it needs the drinking water to do something other than a specified activity; the drinking water supplied is only the excess from such production

that the operator has not used itself; and the drinking water supplied represents not more than 30% of all the drinking water produced by the operator.

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

### **Transport**

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

### **Ports and airports**

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

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

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

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

824 Paragraph 6 provides that activities relating to the exploitation of a geographical area for the purposes of extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels are utility activities.

### **Interpretation of Schedule**

825 Paragraph 7 is self-explanatory.

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

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

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

827 Paragraph 1 explains that this Schedule sets out circumstances in which a public contract may be awarded directly to a supplier in accordance with the Act.

### **Prototypes and development**

828 Paragraph 2 allows for direct award of contracts for prototypes or novel goods or services to a scale of production necessary only for the purposes set out at paragraphs 2(a) - (c).

829 Paragraph 3 defines novel goods or services.

### **Single suppliers**

830 Paragraph 4 allows for direct award where the contract is for the creation or acquisition of a unique work of art or artistic performance. This may, for example, be based on preference rather than objective criteria.

831 Paragraph 5 allows for direct award of a contract when only one supplier can deliver the contract due to intellectual property or other exclusive rights, this could be for example licence or contractual rights, owning particular property or having statutory rights.

832 Paragraph 6 allows for direct award of a contract where, due to an absence of competition for technical reasons, only a particular supplier can deliver the contract. This may be for example due to technical know-how, changes to or support services for existing goods where the supplier is the original supplier.

833 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**

834 Paragraph 7 allows for the direct award of a contract for further goods, services or works or for their partial replacement to the existing supplier. This is only where a change in supplier would result in goods, services or works that are different from, or incompatible with, the existing goods, services or works which would result in disproportionate technical difficulties in operation of maintenance.

835 Paragraph 8 allows for the direct award of a contract for similar goods, works or services to those procured under a previous competitive tendering procedure where the intention to make a direct award for such provision was set out in the tender notice or associated tender documents for that previous procedure. The direct award must be made within 5 years of the award of the previous contract, as described in paragraph 8(a).

836 Paragraph 9 defines “existing goods, services or works” and “existing supplier” for the purposes of paragraphs 7 and 8.

### **Commodities**

837 Paragraph 10 allows for the direct award of a contract for goods purchased on a commodity market. 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.

### **Advantageous terms on insolvency**

838 Paragraph 11 allows a contracting authority to directly award a contract where it will ensure particularly advantageous terms due to a supplier, which may or may not be the supplier to whom the contract is awarded, undergoing insolvency proceedings.

839 Paragraph 12 defines “undergoing insolvency proceedings”.

### **Urgency**

840 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 tendering procedure is not possible.

841 Paragraph 14 defines “unavoidable”.

### **User choice contracts**

842 Paragraph 13 allows for direct award of a user choice contract provided certain conditions are met. This is because such contracts are not suitable for a competitive tendering procedure due to the needs or preference of an individual.

843 . Paragraph 16 defines “user choice services” as the type of services to be provided under light touch contracts (i.e. of a kind specified in regulations made under section 9), which must be for the benefit of a particular individual and where, by another enactment (e.g. the Care Act 2014), the contracting authority is required to take into account the view of the individual or their carer as to who should supply the service.

844 Paragraph 17 requires that the individual or their carer has expressed a preference as to who should provide the service or the nature of the service to be provided means only one supplier can provide it. In addition, the contracting authority must consider that it is in the best interest of the individual that the contract is not awarded under a competitive tendering procedure.

### **Defence and security**

845 Paragraph 18 provides for direct awards for defence and security contracts relating to the supply of air or maritime transport services to the armed forces or security services in order for them 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.

846 Paragraph 19 permits contracting authorities which could rely on the contract modification grounds in sub paragraphs (2) and (3) to modify a contract to instead directly award a new contract covering the same matters as a modification would cover. This is only permissible if the new contract would be a qualifying defence contract within the meaning of section 14(2) of the Defence Reform Act 2014.

847 Paragraph 20 permits the direct award of a defence authority contract that is not a defence and security contract only because section 7(1)(g) (or, in the case of a framework, section 7(1)(g) and 2) applies 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**

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

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

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

### **Terrorism**

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

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

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



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

852 Paragraphs 19 to 26 designate conviction for various offences related to serious labour misconduct – and their equivalents in Scottish and Northern Irish law where relevant – as mandatory grounds for exclusion. These offences are largely based on the set of offences within the purview of the Director for Labour Market Enforcement.

### **Organised crime**

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

### **Tax offences**

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

### **Cartel offence**

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

### **Ancillary offences**

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

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

857 Paragraph 34 sets out that equivalent overseas convictions constitute mandatory grounds for exclusion if this would have resulted in conviction in the UK under one of the offences listed in Part 1 of Schedule 6. For example, if a foreign jurisdiction had a broader definition of the offence of fraud than the UK offence as set out in the Fraud Act 2006, then a supplier with a fraud conviction in that jurisdiction will only be subject to the mandatory exclusion ground if the supplier's behaviour meets the UK definition of fraud (and therefore the supplier would have been convicted had the conduct in question occurred in the UK).

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

### **National security**

858 Paragraph 34 sets out that where a supplier has been added to the debarment list by virtue of posing a threat to national security for contracts of a particular description constitutes mandatory grounds for exclusion.

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

859 Paragraphs 36 to 40 set out that certain civil penalties relating to tax evasion and HMRC decisions relating to abusive tax practices constitute mandatory grounds for exclusion.

### **Competition law infringements**

860 Paragraph 41 states that suppliers meet a mandatory ground for exclusion where the Competition and Markets Authority has found that they were involved in a cartel, unless the CMA has granted them immunity from prosecution under its leniency scheme.

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

861 Paragraph 42 sets out that situations which occur overseas and are equivalent to the tax and cartel-related grounds in this Part also constitute mandatory grounds for exclusion.

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

862 Paragraph 43 sets out that failure to comply with a request for information or assistance as part of a debarment investigation under section 60 is a mandatory ground for exclusion, providing the Minister has determined that the failure to do so was sufficiently serious.

## **Part 3 - General**

### **Excluded matters**

863 Paragraph 44 sets out the time periods which determine when relevant events can be considered for the purpose of the mandatory grounds for exclusion. This means that only convictions (or other events where relevant) within the relevant periods count for the purposes of applying the grounds.

### **Definitions**

864 Paragraph 45 sets out definitions for various terms in this Schedule.

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

### **Labour market misconduct**

865 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.

866 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.

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

### **Environmental misconduct**

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

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

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

### **Potential competition infringements**

870 Paragraphs 7 to 10 set out that violations of the Competition Act 1998 through making agreements preventing, restricting or distorting competition (the Chapter I prohibition), or through abuse of a dominant position (the Chapter II prohibition) constitute discretionary grounds for exclusion. This applies even where there has been no decision by the Competition and Markets Authority or an equivalent regulator. 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**

871 Paragraph 11 designates professional misconduct as a discretionary ground for exclusion. In order to meet the ground, the misconduct must be sufficiently serious as to bring the supplier's integrity into question, even where the misconduct was committed by a connected person. Examples of professional misconduct are given including dishonesty, impropriety (such as improper performance of a public function as defined in the Bribery Act 2010) and serious breaches of ethical or professional standards applicable to the supplier. These standards might be set out by a regulator for the supplier's profession, or in a voluntary code of conduct to which the supplier has signed up.

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

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

873 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.

874 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.

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

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

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

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

### **National security**

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

### **Excluded matters**

879 Paragraph 15 sets out the look-back periods which apply to the discretionary grounds for exclusion. This means that only events which were known about or which ought to have been

known about (or the date of a ruling in certain circumstances) count for the purposes of applying the grounds.

### **Definitions**

880 Paragraph 16 contains relevant definitions.

881 Paragraph 17 states that the definitions set out in Schedule 6 (mandatory grounds for exclusion) also apply to this Schedule.

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

882 This Schedule lists the “permitted modifications” referred to at section 74 (modifying a public contract), allowing modification of a contract without triggering the requirement to undertake a full procurement procedure.

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

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

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

884 Paragraph 2 provides that a modification is permitted if its purpose could be justified under the direct award of a contract in special cases (section 41). The purpose must also be for “extreme and unavoidable urgency” in accordance with paragraph 13 of Schedule 5 or “to protect life etc”, following regulations made under section 42.

885 Paragraph 3 clarifies that for the purposes of paragraph 2 the contract would be a public contract as defined in section 3 (public contracts).

### **Unforeseeable circumstances**

886 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.

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

887 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 known risk and the amendment must not increase the estimated value of the contract by more than 50% (unless it is a utilities contract, in which case the 50% threshold does not apply).

888 Paragraph 6 defines a known risk as a risk which the contracting authority considers could jeopardise the satisfactory performance of the contract but could not, due to its nature, be addressed in the contract from the outset. The tender or transparency notice must have indicated that the known risk meets this description and that the contract may require amendment due to the known risk.

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

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

890 Paragraph 8 provides that a modification is permitted for additional goods, services or works if the following four statements apply. Firstly, the modification must be for goods, services or works that are additional to (or a repetition of) goods, services or works already provided for in the contract. Secondly, using a different supplier would result in the supply of goods, services or works that are different from, or incompatible with, those already provided for in the contract. Thirdly, the contracting authority considers that the difference or incompatibility would result in disproportionate technical differences in operation or maintenance or other significant inconvenience, and 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 (unless it is a utilities contract, in which case the 50% threshold does not apply).

### **Transfer on corporate restructuring**

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

### **Defence authority contracts**

892 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.

893 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. A defence authority contract may also be modified if it is necessary to ensure there is a continuous supply of those goods, services or works.

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

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

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

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

895 Schedule 10 of the legislation amends Part 2 of the Defence Reform Act 2014 (the "DRA"). Part 2 of the DRA creates a framework for regulating single source contracts, with the detail being set out in regulations (single source contract regulations or SSCRs) made under that Act. The SSCRs are engaged when a defence contract is awarded with a value above a threshold specified in the SSCRs (currently £5 million) without any competition, unless one or more of the specific exclusions set out in the SSCRs apply. These contracts are

known as qualifying defence contracts (QDCs), with non-competitive sub-contracts made in connection with them and above a specified value threshold known as qualifying sub-contracts (QSCs). The DRA does not specify whether a contract should be competed. Where the DRA and SSCRs are engaged they make provision for the pricing of QDCs and QSCs. They also make provision for transparency and record-keeping requirements, from the beginning of a qualifying contract to its completion. The DRA also creates the Single Source Regulations Office (the SSRO) which issues guidance on the application of the regime and adjudicates between the Secretary of State and contractors.

896 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.

897 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.

898 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.

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

## **Pricing of qualifying defence contracts**

900 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”)

901 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.

902 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.

903 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;
- d. where a contract has been converted from a non-QDC to a QDC and it may be impracticable to re-price the existing scope in accordance with section 15(3)(a) because of the duration of the contract, or there may be little value in reopening parts of the contract where the work has already been done and the agreed price paid;
- e. where a QDC is novated to another contractor to perform the remainder of the contractual requirement. Such novations often arise through the restructuring of a corporate group, with the result being that contracts are novated from one company to a different company in the same corporate group;
- f. where one or more elements of the price are obtained through competition (such as an hourly rate) but at least one element is not obtained through competition (such as the estimated volume of hours to which the competitive rate is applied);
- g. where a contract is split into components, and it is necessary to specify means of determining an overall price for the contract; and
- h. where the parties wish to make changes to the contract profit rate without changing the work to be performed under the contract, for instance where the Secretary of State decides not to use the incentive adjustment when the contract profit rate was agreed but subsequently decides that it would be appropriate to use the incentive adjustment to help to achieve the commercial objectives.

904 Paragraph 3 also amends section 15 of the DRA to permit the parties to agree that different parts of a contract may be treated distinctly (i.e. split into components). Paragraph 3(8) amends section 15 of the DRA by inserting new subsections (6), (7) and (8) 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.

905 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.

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

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

### **Contract profit rate**

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

- a. Step 1: take the baseline profit rate set by the Secretary of State which is in force at the time the QDC is entered into;
- b. Step 2: adjust that rate by an agreed amount within parameters specified in the SSCRs above or below the baseline profit rate to reflect the risk that the contractor's actual allowable costs will differ from those estimated when the contract was agreed;
- c. Step 3: deduct from the amount resulting from step 2 an agreed amount so as to ensure that profit arises only once in relation to those allowable costs that relate to the price payable under certain sub-contracts (this is referred to as the "profit on cost once" ("POCO") adjustment);
- d. Step 4: deduct from the amount resulting from step 3 the SSRO funding adjustment which is in force at the time the QDC is entered into (the purpose of the SSRO funding adjustment is to allow the MOD to recoup some of the SSRO's running costs);
- e. Step 5: increase the amount resulting from step 4 by such amount specified by the Secretary of State, not exceeding an amount specified in the SSCRs, as it considers appropriate to give the contractor a particular financial incentive in relation to specified provisions of the contract; and
- f. Step 6: increase or decrease the amount resulting from step 5 an agreed amount to ensure that the contractor receives an appropriate and reasonable return on the fixed and working capital employed by it to perform the QDC (regulation 11(7) to (9)).

908 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.

909 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.



- 910 Paragraph 9(3)(a) amends section 17 of the DRA to widen the definition of “risk” described in Step 2 in section 17(2) to include financial risks that would not be allowable as costs of the contract, for which the contractor’s shareholders could legitimately expect to be compensated. The amendment also clarifies the definition of “risk” to provide that activity type may be taken into account when assessing financial risk to reflect that some activities are financially riskier for contractors than others.
- 911 Paragraph 9(3)(b) also amends section 17(2) of the DRA to remove step 3, the profits on cost once (POCO) adjustment and step 4 the SSRO funding adjustment from the profit setting process. Paragraph 9 also makes consequential amendments to renumber the steps in what is now a four-step process where reference is made to other steps. Both of these steps are intended to speed up and simplify the agreement of profit rates for individual contracts.
- 912 Paragraph 9(3)(e) amends section 17(2) of the DRA to provide the Secretary of State with a power to make SSCRs to set out how and when the incentive fee in new step 3 would be applied.
- 913 Paragraph 10(5) amends section 18 of the DRA by substituting subsection (3)(a) to provide the Secretary of State with a power to make SSCRs that permit, on the application of either party to a QDC or an authorised person, the SSRO to make a determination in relation to all the contract profit steps set out in section 17(2) as amended. In relation to step 1, whilst the Baseline Profit Rate (BPR) is fixed for a particular year, disputes arise as to which BPR should be applied, particularly to amendments. Disputes may also arise over the correct application of new step 3, the incentive adjustment.

### **Allowable costs**

- 914 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)).
- 915 Paragraph 12(3) amends section 20 of the DRA by inserting subsection (2A) to provide the Secretary of State with a power to make SSCRs that provide that the POCO adjustment can be made as an appropriate adjustment to allowable costs, if the profit has been incurred by a person which has a relevant connection with the primary contractor. This amendment moves the POCO adjustment from the profit setting process to the allowable costs process.
- 916 Paragraph 12(3) also amends section 20 of the DRA by inserting subsection (2B) to provide the Secretary of State with a power to make SSCRs to define the relevant connection between a primary contractor and a person for the purposes of a POCO adjustment and what adjustment should be made to allowable costs.
- 917 Paragraph 12(5) amends section 20 of the DRA by substituting subsection (5) and inserting subsection (5A) to require the SSRO to make a determination on the allowability of a specified cost. The amendment clarifies that a person listed in subsection (5A) may apply to the SSRO for a determination on whether a cost would be allowed without such an application necessarily being linked to a specific QDC.

## **Reports**

- 918 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.
- 919 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)).
- 920 Paragraph 13(2) amends section 25 of the DRA by substituting subsection (3)(a). This amendment will provide the Secretary of State with a power to make SSCRs to allow the Secretary of State to agree with the party which would otherwise be required to provide the report mentioned in section 25(2) that the report may instead be provided by another undertaking within the group. If such agreement cannot be reached the default position is that the report is to be provided by the ultimate parent undertaking.
- 921 Paragraph 13(3) amends section 25 of the DRA to insert subsection (8A). Subsection (8A) amends the definition of “financial year” for the purposes of section 25 to enable the Secretary of State to agree with a contractor that the reports required by SSCRs made under section 25 may be related to the designated person’s financial year rather than the financial year as defined in the Act as unamended.

## **Qualifying sub-contracts**

- 922 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.
- 923 Paragraphs 15(2) and (3) amends section 29 of the DRA by inserting new subsections (2)(c) and (4)(c) to provide the Secretary of State with a power to make SSCRs to provide that if a primary contractor or a prospective primary contractor makes a negative assessment (i.e. that the prospective sub-contract does not meet the conditions to be a QSC) then the contractor must notify the Secretary of State, an authorised person and the prospective sub-contractor of that assessment and give reasons for that assessment.
- 924 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”.
- 925 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.

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

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

927 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.

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

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

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

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

## **Related documents**

931 The following documents are relevant to the legislation and can be read at the stated locations:

- [Transforming Public Procurement Green Paper](#)
- [Transforming Public Procurement - Government response to consultation](#)
- [The Public Contracts Regulations 2015](#)
- [The Concessions Contracts Regulations 2016](#)
- [The Utilities Contracts Regulations 2016](#)
- [The Defence and Security Contracts Regulations 2011](#)

## Annex A - Hansard References

932 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
<i>House of Lords</i>		
Introduction	11 May 2022	<a href="#">Vol. 822</a>
Second Reading	25 May 2022	<a href="#">Vol. 822 Col. 856</a>
Grand Committee	4 July 2022	<a href="#">First sitting: Vol. 823 Col. 182 - 234</a>
	6 July 2022	<a href="#">Second sitting: Vol. 823 Col. 236 - 294</a>
	11 July 2022	<a href="#">Third sitting: Vol. 823 Col. 338 - 396</a>
	13 July 2022	<a href="#">Fourth sitting: Vol. 823 Col. 454 - 520</a>
	18 July 2022	<a href="#">Fifth sitting: Vol. 823 Col. 546 - 626</a>
	24 October 2022	<a href="#">Sixth sitting: Vol. 824 Col. 278 - 346</a>
	26 October 2022	<a href="#">Seventh sitting: Vol. 824 Col. 374 - 446</a>
Report and Third Reading	28 November 2022	<a href="#">First sitting: Vol. 825 Col. 1576 - Col 1660</a>
	30 November 2022	<a href="#">Second sitting: Vol. 825 Col. 1792 - 1868</a>
Third Reading	13 December 2022	<a href="#">Vol. 826 Col. 553 - 557</a>
<i>House of Commons</i>		
Introduction	14 December 2022	
Second Reading	9 January 2023	<a href="#">Vol. 725 Col. 340 - 385</a>
Public Bill Committee	31 January	<a href="#">First sitting: Col. 1 - 28</a> <a href="#">Second sitting: Col. 29 - 70</a>
	2 February	<a href="#">Third sitting: Col. 71 - 96</a> <a href="#">Fourth sitting: Col. 97 - 128</a>
	7 February	<a href="#">Fifth sitting: Col. 129 - 166</a> <a href="#">Sixth sitting: Col. 167 - 208</a>
	9 February	<a href="#">Seventh sitting: Col. 209 - 236</a> <a href="#">Eighth sitting: Col. 237 - 259</a>
	21 February	<a href="#">Ninth sitting: Col. 261 - 294</a>
	Report and Third Reading	13 June 2023
Lords Consideration of Commons Amendments	11 September 2023	<a href="#">Vol. 832 Col. 720 - 762</a>
	25 October 2023	<a href="#">Vol. 833 Col. 639 - 643</a>
Commons Consideration of Lords Amendments	13 September 2023	<a href="#">Vol. 737 Col. 925 - 936</a>
Royal Assent	26 October 2023	<a href="#">House of Lords Vol. 833 Col. 695</a>

*These Explanatory Notes relate to the Procurement Act 2023 which received Royal Assent on 26 October 2023 (c. 54).*

## Annex B - Progress of Bill Table

933 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Bill through Parliament.

Section of the Act	Bill as Introduced in the Lords	Bill as amended in Committee in the Lords	Bill as introduced in the Commons	Bill as amended in Committee in the Commons	Bill as amended on Report in the Commons
Section 1			Clause 1	Clause 1	Clause 1
Section 2	Clause 1	Clause 1	Clause 2	Clause 2	Clause 2
Section 3	Clause 2	Clause 2	Clause 3	Clause 3	Clause 3
Section 4	Clause 3	Clause 3	Clause 4	Clause 4	Clause 4
Section 5	Clause 4	Clause 4	Clause 5	Clause 5	Clause 5
Section 6	Clause 5	Clause 5	Clause 6	Clause 6	Clause 6
Section 7	Clause 6	Clause 6	Clause 7	Clause 7	Clause 7
Section 8	Clause 7	Clause 7	Clause 8	Clause 8	Clause 8
Section 9	Clause 8	Clause 8	Clause 9	Clause 9	Clause 9
Section 10	Clause 9	Clause 9	Clause 10	Clause 10	Clause 10
Section 11	Clause 10	Clause 10	Clause 11	Clause 11	Clause 11
Section 12	Clause 11	Clause 11	Clause 12	Clause 12	Clause 12
Section 13	Clause 12	Clause 12	Clause 13	Clause 13	Clause 13
Section 14	Clause 13	Clause 13	Clause 14	Clause 14	Clause 14
Section 15	Clause 14	Clause 14	Clause 15	Clause 15	Clause 15
Section 16	Clause 15	Clause 15	Clause 16	Clause 16	Clause 16
Section 17	Clause 16	Clause 16	Clause 17	Clause 17	Clause 17
Section 18	Clause 17	Clause 17	Clause 18	Clause 18	Clause 18
Section 19	Clause 18	Clause 18	Clause 19	Clause 19	Clause 19
Section 20	Clause 19	Clause 19	Clause 20	Clause 20	Clause 20
Section 21	Clause 20	Clause 20	Clause 21	Clause 21	Clause 21
Section 22	Clause 21	Clause 21	Clause 22	Clause 22	Clause 22
Section 23	Clause 22	Clause 22	Clause 23	Clause 23	Clause 23
Section 24	Clause 23	Clause 23	Clause 24	Clause 24	Clause 24
Section 25	Clause 25	Clause 24	Clause 25	Clause 25	Clause 25
Section 26	Clause 26	Clause 25	Clause 26	Clause 26	Clause 26
Section 27	Clause 27	Clause 26	Clause 27	Clause 27	Clause 27
Section 28	Clause 28	Clause 27	Clause 28	Clause 28	Clause 28
Section 29	Clause 29	Clause 28	Clause 29	Clause 29	Clause 29
Section 30	Clause 30	Clause 29	Clause 30	Clause 30	Clause 30

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Section 31	Clause 31	Clause 30	Clause 31	Clause 31	Clause 31
Section 32	Clause 32	Clause 31	Clause 32	Clause 32	Clause 32
Section 33	Clause 33	Clause 32	Clause 33	Clause 33	Clause 33
Section 34	Clause 34	Clause 33	Clause 34	Clause 34	Clause 34
Section 35	Clause 35	Clause 34	Clause 35	Clause 35	Clause 35
Section 36	Clause 36	Clause 35	Clause 36	Clause 36	Clause 36
Section 37	Clause 37	Clause 36	Clause 37	Clause 37	Clause 37
Section 38	Clause 38	Clause 37	Clause 38	Clause 38	Clause 38
Section 39	Clause 39	Clause 38	Clause 39	Clause 39	Clause 39
Section 40			Clause 40	Clause 40	Clause 40
Section 41	Clause 40	Clause 39	Clause 41	Clause 41	Clause 41
Section 42	Clause 41	Clause 40	Clause 42	Clause 42	Clause 42
Section 43	Clause 42	Clause 41	Clause 43	Clause 43	Clause 43
Section 44	Clause 43	Clause 42	Clause 44	Clause 44	Clause 44
Section 45	Clause 44	Clause 43	Clause 45	Clause 45	Clause 45
Section 46			Clause 46	Clause 46	Clause 46
Section 47	Clause 45	Clause 44	Clause 47	Clause 47	Clause 47
Section 48	Clause 46	Clause 45	Clause 48	Clause 48	Clause 48
Section 49	Clause 47	Clause 46	Clause 49	Clause 49	Clause 49
Section 50	Clause 48	Clause 47	Clause 50	Clause 50	Clause 50
Section 51	Clause 49	Clause 48	Clause 51	Clause 51	Clause 51
Section 52	Clause 50	Clause 49	Clause 52	Clause 52	Clause 52
Section 53	Clause 51	Clause 50	Clause 53	Clause 53	Clause 53
Section 54	Clause 52	Clause 51	Clause 54	Clause 54	Clause 54
Section 55	Clause 53	Clause 52	Clause 55	Clause 55	Clause 55
Section 56	Clause 24	Clause 53	Clause 56	Clause 56	Clause 56
Section 57	Clause 54	Clause 54	Clause 57	Clause 57	Clause 57
Section 58	Clause 55	Clause 55	Clause 58	Clause 58	Clause 58
Section 59	Clause 56	Clause 56	Clause 59	Clause 59	Clause 59
Section 60	Clause 57	Clause 57	Clause 60	Clause 60	Clause 60
Section 61	Clause 58	Clause 58	Clause 61	Clause 61	Clause 61
Section 62	Clause 59	Clause 59	Clause 62	Clause 62	Clause 62
Section 63				Clause 63	Clause 63
Section 64	Clause 60	Clause 60	Clause 63	Clause 64	Clause 64
Section 65	Clause 61	Clause 61	Clause 64	Clause 65	Clause 65

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Section 66				Clause 66	Clause 66
Section 67	Clause 62	Clause 62	Clause 66	Clause 67	Clause 67
Section 68	Clause 63	Clause 63	Clause 67	Clause 68	Clause 68
Section 69	Clause 64	Clause 64	Clause 68	Clause 69	Clause 69
Section 70	Clause 65	Clause 65	Clause 69	Clause 70	Clause 70
Section 71	Clause 66	Clause 66	Clause 70	Clause 71	Clause 71
Section 72	Clause 67	Clause 67	Clause 71	Clause 72	Clause 72
Section 73	Clause 68	Clause 68	Clause 72	Clause 73	Clause 73
Section 74	Clause 69	Clause 69	Clause 73	Clause 74	Clause 74
Section 75	Clause 70	Clause 70	Clause 74	Clause 75	Clause 75
Section 76	Clause 71	Clause 71	Clause 75	Clause 76	Clause 76
Section 77	Clause 70	Clause 72	Clause 76	Clause 77	Clause 77
Section 78	Clause 72	Clause 73	Clause 77	Clause 78	Clause 78
Section 79		Clause 74	Clause 78	Clause 79	Clause 79
Section 80	Clause 73	Clause 75	Clause 79	Clause 80	Clause 80
Section 81	Clause 74	Clause 76	Clause 80	Clause 81	Clause 81
Section 82	Clause 75	Clause 77	Clause 81	Clause 82	Clause 82
Section 83	Clause 76	Clause 78	Clause 82	Clause 83	Clause 83
Section 84	Clause 77	Clause 79	Clause 83	Clause 84	Clause 84
Section 85	Clause 78	Clause 80	Clause 84	Clause 85	Clause 85
Section 86			Clause 85	Clause 86	Clause 86
Section 87	Clause 79	Clause 81	Clause 86	Clause 87	Clause 87
Section 88	Clause 80	Clause 82	Clause 87	Clause 88	Clause 88
Section 89	Clause 81	Clause 83	Clause 88	Clause 89	Clause 89
Section 90	Clause 82	Clause 84	Clause 89	Clause 90	Clause 90
Section 91	Clause 83	Clause 85	Clause 90	Clause 91	Clause 91
Section 92				Clause 92	Clause 92
Section 93	Clause 84	Clause 86	Clause 91	Clause 93	Clause 93
Section 94	Clause 85	Clause 87	Clause 92	Clause 94	Clause 94
Section 95	Clause 86	Clause 88	Clause 93	Clause 95	Clause 95
Section 96	Clause 87	Clause 89	Clause 94	Clause 96	Clause 96
Section 97	Clause 88	Clause 90	Clause 95	Clause 97	Clause 97
Section 98					Clause 98
Section 99		Clause 91	Clause 96	Clause 98	Clause 99
Section 100	Clause 89	Clause 92	Clause 97	Clause 99	Clause 100

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Section 101	Clause 90	Clause 93	Clause 98	Clause 100	Clause 101
Section 102	Clause 91	Clause 94	Clause 99	Clause 101	Clause 102
Section 103	Clause 92	Clause 95	Clause 100	Clause 102	Clause 103
Section 104	Clause 93	Clause 96	Clause 101	Clause 103	Clause 104
Section 105	Clause 94	Clause 97	Clause 102	Clause 104	Clause 105
Section 106	Clause 95	Clause 98	Clause 103	Clause 105	Clause 106
Section 107				Clause 106	Clause 107
Section 108	Clause 96	Clause 99	Clause 104	Clause 107	Clause 108
Section 109	Clause 97	Clause 100	Clause 105	Clause 108	Clause 109
Section 110	Clause 98	Clause 101	Clause 106	Clause 109	Clause 110
Section 111	Clause 99	Clause 102	Clause 107	Clause 110	Clause 111
Section 112	Clause 100	Clause 103	Clause 108	Clause 111	Clause 112
Section 113	Clause 101	Clause 104	Clause 109	Clause 112	Clause 113
Section 114	Clause 102	Clause 105	Clause 110	Clause 113	Clause 114
Section 115	Clause 103	Clause 106	Clause 111	Clause 114	Clause 115
Section 116	Clause 104	Clause 107	Clause 112	Clause 115	Clause 116
Section 117	Clause 105	Clause 108	Clause 113	Clause 116	Clause 117
Section 118	Clause 106	Clause 109	Clause 114	Clause 117	Clause 118
Section 119	Clause 107	Clause 110	Clause 115	Clause 118	Clause 119
Section 120	Clause 108	Clause 111	Clause 116	Clause 119	Clause 120
Section 121	Clause 109	Clause 112	Clause 117	Clause 120	Clause 121
Section 122	Clause 110	Clause 113	Clause 118	Clause 121	Clause 122
Section 123	Clause 111	Clause 114	Clause 119	Clause 122	Clause 123
Section 124	Clause 112	Clause 115	Clause 120	Clause 123	Clause 124
Section 125	Clause 113	Clause 116	Clause 121	Clause 124	Clause 125
Section 126	Clause 114	Clause 117	Clause 122	Clause 125	Clause 126
Section 127	Clause 115	Clause 118	Clause 123	Clause 126	Clause 127
Section 128	Clause 116	Clause 119	Clause 124	Clause 127	Clause 128
Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1	Schedule 1
Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2	Schedule 2
Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3	Schedule 3
Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4	Schedule 4
Schedule 5	Schedule 5	Schedule 5	Schedule 5	Schedule 5	Schedule 5
Schedule 6	Schedule 6	Schedule 6	Schedule 6	Schedule 6	Schedule 6
Schedule 7	Schedule 7	Schedule 7	Schedule 7	Schedule 7	Schedule 7

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Schedule 8	Schedule 8	Schedule 8	Schedule 8	Schedule 8	Schedule 8
Schedule 9	Schedule 9	Schedule 9	Schedule 9	Schedule 9	Schedule 9
Schedule 10	Schedule 10	Schedule 10	Schedule 10	Schedule 10	Schedule 10
Schedule 11	Schedule 11	Schedule 11	Schedule 11	Schedule 11	Schedule 11

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