

Procurement Bill [HL]

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Cabinet Office, have been ordered to be published as HL Bill 4 – EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Lord True has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Procurement Bill [HL] are compatible with the Convention rights.

Procurement Bill [HL]

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Make provision about procurement.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

KEY DEFINITIONS

1 Contracting authorities

- (1) In this Act “contracting authority” means —
- (a) a public authority other than an excluded authority, or 5
 - (b) in relation to a utilities contract, any of the following other than an excluded authority —
 - (i) a public authority,
 - (ii) a public undertaking, or
 - (iii) a private utility. 10
- (2) In this Act —
- “public authority” includes any authority with functions of a public nature that —
 - (a) is funded wholly or mainly from public funds, or
 - (b) is subject to contracting authority oversight; 15
 - “public undertaking” means an undertaking that is not a public authority but —
 - (a) is funded wholly or mainly from public funds, or
 - (b) is subject to contracting authority oversight.
- (3) An authority is not funded from public funds to the extent that such funds are provided in consideration of particular goods, services or works. 20
- (4) An authority is subject to contracting authority oversight if the authority is subject to the management or control of —

-
- (a) a contracting authority, or
 - (b) a board more than half the members of which are appointed by a particular contracting authority.
- (5) The following authorities are excluded authorities –
- (a) devolved Scottish authorities; 5
 - (b) the Security Service, the Secret Intelligence Service and the Government Communications Headquarters;
 - (c) the Advanced Research and Invention Agency.
- (6) An authority is a “devolved Scottish authority” if its functions are exercisable only in or as regards Scotland, and – 10
- (a) none of its functions relate to reserved matters, or
 - (b) some of its functions relate to reserved matters and some do not.
- (7) A contracting authority that is a public undertaking or private utility is to be treated as a devolved Scottish authority for the purposes of this Act if it operates only in or as regards Scotland, and – 15
- (a) none of its activities relate to reserved matters, or
 - (b) some of its activities relate to reserved matters and some do not.
- (8) In this Act, a reference to a devolved Scottish authority includes a reference to an authority that is to be treated as a devolved Scottish authority for the purposes of this Act. 20
- (9) This Act does not apply to Her Majesty acting in her private capacity.
- (10) In this section –
- “authority” includes person;
 - “reserved matters” has the same meaning as in the Scotland Act 1998.
- 2 Public contracts** 25
- (1) A “public contract” is a contract of a kind specified in subsection (2), (3) or (4).
- (2) Any contract for the supply, for pecuniary interest, of goods, services or works to a contracting authority which –
- (a) has an estimated value of not less than the threshold amount for the type of contract, and 30
 - (b) is not an exempted contract.
- (3) Any framework which –
- (a) has an estimated value of not less than the threshold amount for the type of contract, and
 - (b) is not an exempted contract. 35
- (4) Any concession contract which –
- (a) has an estimated value of not less than the threshold amount for the type of contract, and
 - (b) is not an exempted contract.
- (5) Schedule 1 sets out the threshold amounts. 40
- (6) Schedule 2 sets out contracts that are exempted contracts for the purposes of this Act.

3 Valuation of contracts

- (1) For the purposes of this Act, the “estimated value” of a contract is its value for the time being estimated by a contracting authority.
- (2) A contracting authority that estimates the value of a contract must do so in accordance with Schedule 3. 5
- (3) A contracting authority must not exercise a discretion in connection with estimating the value of a contract with a view to securing that any requirement of this Act does not apply in relation to the contract.

4 Mixed procurement: above and below threshold

- (1) Subsection (3) applies if, on award of a below-threshold contract other than a framework, a contracting authority considers that – 10
 - (a) certain of the goods, services or works to be supplied under the contract could reasonably be supplied under a separate contract, and
 - (b) that contract would have an estimated value of not less than the threshold amount for a contract of its type. 15
- (2) Subsection (3) applies if, on award of a below-threshold contract that is a framework, a contracting authority considers that –
 - (a) certain of the goods, services or works to be supplied under contracts awarded in accordance with the framework could reasonably be supplied under a contract not awarded in accordance with the framework, and 20
 - (b) that contract would have an estimated value of not less than the threshold amount for a contract of its type.
- (3) The contract is to be treated as having an estimated value of not less than the threshold amount for the type of contract. 25
- (4) In considering whether goods, services or works could reasonably be supplied under a separate contract, a contracting authority may, for example, have regard to the practical and financial consequences of awarding more than one contract.
- (5) In this Act “below-threshold contract” means – 30
 - (a) a contract for the supply, for pecuniary interest, of goods, services or works to a contracting authority,
 - (b) a framework, or
 - (c) a concession contract,that has an estimated value of less than the threshold amount for the type of contract. 35
- (6) This section does not apply to a contract awarded in accordance with a framework.

5 Utilities contracts

- (1) In this Act, “utilities contract” means a contract for the supply of goods, services or works mainly for the purpose of a utility activity. 40
- (2) In this Act, “utility activity” means an activity that –
 - (a) is of a kind specified in Schedule 4, and

- (b) is not carried out wholly outside the United Kingdom.
- (3) In this Act, “private utility” means a person, other than a public authority or public undertaking, that carries out a utility activity pursuant to a special or exclusive right.
- (4) A person carries out a utility activity pursuant to “a special or exclusive right” if – 5
- (a) the person (whether alone or with others) has been granted a right to carry out the activity pursuant to any statutory, regulatory or administrative provision, and
 - (b) that provision also substantially limits the ability of persons not granted the right to carry on the activity. 10
- (5) But a right to carry out a utility activity is not a “special or exclusive right” if it is granted –
- (a) following award under section 18 (competitive award), or
 - (b) otherwise pursuant to a procedure in which – 15
 - (i) the opportunity to be granted the right was publicised widely enough to avoid an artificial narrowing of competition, and
 - (ii) the grant of the right was based on criteria that did not favour or disadvantage certain persons.
- (6) In this Act, a reference to a utility contract includes a reference to a framework for the future award of contracts for the supply of goods, services or works wholly or mainly for the purpose of a utility activity. 20

6 Defence and security contracts

- (1) In this Act, “defence and security contract” means a contract for the supply of – 25
- (a) military equipment;
 - (b) sensitive equipment;
 - (c) goods, services or works necessary for the development, production, maintenance or decommissioning of military equipment or sensitive equipment;
 - (d) logistics services relating to military equipment or sensitive equipment; 30
 - (e) goods, services or works for wholly military purposes;
 - (f) sensitive services or sensitive works;
 - (g) goods, services or works that are otherwise relevant to the operational capability, effectiveness, readiness for action, safety or security of the armed forces. 35
- (2) In this Act, a reference to a defence and security contract includes a reference to a framework for the future award of contracts for the supply of goods, services or works of a kind described in subsection (1)(a) to (g).
- (3) A contract that is a defence and security contract only by virtue of subsection (1)(g) is not to be treated as a defence and security contract for the purposes of Schedule 1 (thresholds for application of this Act). 40
- (4) In this Act, “defence authority contract” means a defence and security contract awarded by a defence authority.
- (5) A “defence authority” is a contracting authority specified in regulations made by a Minister of the Crown. 45

- (6) A Minister of the Crown may only specify a contracting authority for the purposes of subsection (5) if the Minister considers that the authority exercises its functions wholly or mainly for the purposes of defence or national security.
- (7) In this section –
- “classified information” means information or other material which –
 - (a) in the interests of national security, requires protection from unauthorised access, distribution, or destruction, or from other compromise, and
 - (b) on the basis of those interests, has that protection under the law of any part of the United Kingdom;
 - “decommissioning”, in relation to equipment, includes –
 - (a) withdrawal of equipment from use;
 - (b) disposal or destruction of equipment;
 - “development”, in relation to equipment, includes –
 - (a) research allowing for the development of equipment, and
 - (b) development of industrial processes allowing for the production of equipment;
 - “equipment” includes any part, component or subassembly of equipment;
 - “maintenance”, in relation to equipment, includes –
 - (a) repair of equipment;
 - (b) modernisation of equipment;
 - (c) modifications to equipment;
 - (d) installing equipment, including after its transport to a new location;
 - (e) testing equipment;
 - “military equipment” means equipment specifically designed or adapted for military purposes, including –
 - (a) arms, munitions or war material, and
 - (b) any of the military goods, software and technology the export or transfer of which is controlled by virtue of Schedule 2 to the Export Control Order 2008 (S.I. 2008/3231), as amended from time to time;
 - “sensitive equipment” means equipment for use for security purposes where –
 - (a) the use or supply of the equipment may involve dealing with classified information,
 - (b) the supply of the equipment requires access to a physical site or to other equipment as a result of which classified information is likely to be accessible to the supplier, or
 - (c) the equipment contains classified information;
 - “sensitive services” means services performed for security purposes where performing the services –
 - (a) involves dealing with classified information, or
 - (b) requires access to a physical site or to equipment as a result of which sensitive equipment or classified information is likely to be accessible to the supplier,and includes the training of personnel to use sensitive equipment;
 - “sensitive works” means works undertaken for security purposes, where undertaking the works –
 - (a) involves dealing with classified information, or

- (b) requires access to a physical site or to equipment as a result of which sensitive equipment or classified information is likely to be accessible to the supplier;
- “supply”, in relation to equipment, other goods, services or works, includes the development of the equipment, other goods, services or works for the purposes of their supply to the contracting authority; 5
- “wholly military purposes” include –
- (a) the transportation of military personnel or military equipment;
 - (b) the training of military personnel;
 - (c) the training of other personnel to use military equipment; 10
 - (d) the construction of military facilities, including military airfields, military storage facilities or facilities for the maintenance of military equipment.
- 7 Concession contracts**
- (1) In this Act, “concession contract” means a contract for the supply, for pecuniary interest, of works or services to a contracting authority where – 15
- (a) at least part of the consideration for that supply is a right for the supplier to exploit the works or services, and
 - (b) under the contract the supplier is exposed to a real operating risk.
- (2) An “operating risk” is a risk that the supplier will not be able to recover its costs in connection with the supply and operation of the works or services, where the factors giving rise to that risk are – 20
- (a) reasonably foreseeable at the time of award, and
 - (b) arise from matters outside the control of the contracting authority and the supplier. 25
- 8 Light touch contracts**
- (1) In this Act, “light touch contract” means a contract wholly or mainly for the supply of services of a kind specified in regulations under subsection (2).
- (2) An appropriate authority may by regulations specify services for the purposes of the definition in subsection (1). 30
- (3) But an appropriate authority may specify services only if, having had regard to the nature of those services, the authority considers that it is appropriate for the award of public contracts for their supply to be exempted from the provisions of this Act that do not apply to light touch contracts.
- (4) In having regard to the nature of services for that purpose, the authority must, in particular, consider the extent to which – 35
- (a) suppliers from outside the United Kingdom are likely to want to compete for contracts for the supply of the services;
 - (b) the services are supplied for the benefit of individuals (for example, health or social care services) or the community generally; 40
 - (c) proximity between the supplier and the recipient of the services is necessary or expedient for the effective and efficient supply of the services.

- (5) In this Act, a reference to a light touch contract includes a reference to a framework for the future award of contracts wholly or mainly for the supply of services of a kind specified in regulations under subsection (2).

9 Mixed procurement: special regime contracts

- (1) Subsection (3) applies if, on award of a special regime contract other than a framework, a contracting authority considers that – 5
- (a) certain of the goods, services or works to be supplied under the contract could reasonably be supplied under a separate contract, and
 - (b) that contract –
 - (i) would not be a special regime contract, and 10
 - (ii) would have an estimated value of not less than the threshold amount for the type of contract.
- (2) Subsection (3) applies if, on award of a special regime contract that is a framework, a contracting authority considers that – 15
- (a) certain of the goods, services or works to be supplied under contracts awarded in accordance with the framework could reasonably be supplied under a contract not awarded in accordance with the framework, and
 - (b) that contract –
 - (i) would not be a special regime contract, and 20
 - (ii) would have an estimated value of not less than the threshold amount for the type of contract.
- (3) The contract is not to be treated as a special regime contract for the purposes of this Act.
- (4) Subsection (3) does not apply if the contract is a defence and security contract and the contracting authority has good reasons for not awarding separate contracts. 25
- (5) In considering whether goods, services or works could reasonably be supplied under a separate contract, a contracting authority may, for example, have regard to the practical and financial consequences of awarding more than one contract. 30
- (6) A “special regime contract” means –
 - (a) a concession contract,
 - (b) a defence and security contract,
 - (c) a light touch contract, or 35
 - (d) a utilities contract.
- (7) This section does not apply for the purpose of determining which is the relevant threshold under Schedule 1.
- (8) This section does not apply to a contract awarded in accordance with a framework. 40

PART 2

PRINCIPLES AND OBJECTIVES

10 Procurement only in accordance with this Act

- (1) A contracting authority may not carry out a procurement except in accordance with this Act. 5
- (2) In this Act –
- (a) “a procurement” means the award and management of a public contract, including any steps taken for the purpose of awarding or managing the contract, and
 - (b) references to a procurement include references to – 10
 - (i) a part of a procurement, and
 - (ii) where relevant, termination of a procurement before award.
- (3) Accordingly, a contracting authority may only award a public contract in accordance with – 15
- (a) section 18 (competitive award);
 - (b) section 40 (direct award in special cases);
 - (c) section 42 (direct award after switching procedures);
 - (d) section 44 (award under frameworks).
- (4) In this Act, a reference to a contracting authority carrying out a procurement is a reference to – 20
- (a) a contracting authority carrying out a procurement on its own behalf, including where it acts jointly with, or through, another person other than a centralised procurement authority, or
 - (b) a centralised procurement authority carrying out a procurement – 25
 - (i) for or on behalf of another contracting authority, or
 - (ii) for the purpose of the supply of goods, services or works to another contracting authority.
- (5) In this Act, “centralised procurement authority” means a contracting authority that is in the business of carrying out procurement for or on behalf of, or for the purpose of the supply of goods and services to, other contracting authorities. 30

11 Procurement objectives

- (1) In carrying out a procurement, a contracting authority must have regard to the importance of – 35
- (a) delivering value for money;
 - (b) maximising public benefit;
 - (c) sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions;
 - (d) acting, and being seen to act, with integrity.
- (2) In carrying out a procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment. 40
- (3) If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.

12 The national procurement policy statement

- (1) A Minister of the Crown may publish a statement setting out the Government’s strategic priorities in relation to procurement.
- (2) In this section, “the national procurement policy statement” means the statement for the time being published under this section. 5
- (3) Before publishing the national procurement policy statement, a Minister of the Crown must –
 - (a) carry out such consultation as the Minister considers appropriate,
 - (b) make any changes to the statement that appear to the Minister to be necessary in view of responses to the consultation, and 10
 - (c) lay the statement before Parliament.
- (4) A Minister of the Crown must withdraw the national procurement policy statement if, before the end of the 40-day period, either House of Parliament resolves not to approve it.
- (5) “The 40-day period” is the period of 40 days beginning with the day on which the statement is laid before Parliament (or, if it is not laid before each House of Parliament on the same day, the later of the days on which it is laid). 15
- (6) When calculating the 40-day period, ignore any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days. 20
- (7) A Minister of the Crown must keep the national procurement policy statement under review.
- (8) The national procurement policy statement may be amended or replaced by a subsequent statement, and this section applies in relation to any amended or replacement statement as it applies in relation to the original statement. 25
- (9) A contracting authority must have regard to the national procurement policy statement.
- (10) Subsection (9) does not apply –
 - (a) to private utilities;
 - (b) in relation to the award of a contract – 30
 - (i) in accordance with a framework, or
 - (ii) by reference to suppliers’ membership of a dynamic market;
 - (c) in relation to any devolved Welsh procurement arrangement or transferred Northern Ireland procurement arrangement;
 - (d) to a devolved Welsh authority or transferred Northern Ireland authority, except in relation to a reserved procurement arrangement (but not an arrangement of a kind mentioned in paragraph (b)). 35

13 The Wales procurement policy statement

- (1) The Welsh Ministers may publish a statement setting out the Welsh Government’s strategic priorities in relation to procurement. 40
- (2) In this section, “the Wales procurement policy statement” means the statement for the time being published under this section.

- (3) Before publishing the Wales procurement policy statement, the Welsh Ministers must –
- (a) carry out such consultation as the Welsh Ministers consider appropriate,
 - (b) make any changes to the statement that appear to the Welsh Ministers to be necessary in view of responses to the consultation, and
 - (c) lay the statement before the Senedd. 5
- (4) The Welsh Ministers must withdraw the Wales procurement policy statement if, before the end of the period of 40 days beginning with the day on which the statement is laid before the Senedd, the Senedd resolves that the statement be annulled. 10
- (5) When calculating the period of 40 days for the purposes of subsection (4), ignore any period during which the Senedd is dissolved or in recess for more than four days.
- (6) The Welsh Ministers must keep the Wales procurement policy statement under review. 15
- (7) The Wales procurement policy statement may be amended or replaced by a subsequent statement, and this section applies in relation to any amended or replacement statement as it applies in relation to the original statement.
- (8) The following contracting authorities must have regard to the Wales procurement policy statement – 20
- (a) a devolved Welsh authority, except in relation to a reserved procurement arrangement or transferred Northern Ireland procurement arrangement;
 - (b) a contracting authority other than a devolved Welsh authority in relation to a devolved Welsh procurement arrangement. 25
- (9) But subsection (8) does not apply –
- (a) to private utilities;
 - (b) in relation to the award of a contract –
 - (i) in accordance with a framework, or
 - (ii) by reference to suppliers’ membership of a dynamic market. 30
- (10) In this section “the Senedd” means Senedd Cymru.

PART 3

AWARD OF PUBLIC CONTRACTS AND PROCEDURES

CHAPTER 1

35

PRELIMINARY STEPS

14 Planned procurement notices

- (1) Before publishing a tender notice, a contracting authority may publish a planned procurement notice.
- (2) A “planned procurement notice” means a notice setting out – 40
- (a) that the contracting authority intends to publish a tender notice, and
 - (b) any other information specified in regulations under section 86.

- (3) A “qualifying planned procurement notice” means a planned procurement notice published at least 40 days but not more than 12 months before the day on which the tender notice is published.
- (4) See section 52(4) for provision for reduced tendering periods in cases where a qualifying planned procurement notice has been published. 5

15 Preliminary market engagement

- (1) Before publishing a tender notice in respect of a public contract, a contracting authority may engage with suppliers and other persons for the purpose of –
 - (a) developing the authority’s specifications and approach to the procurement; 10
 - (b) designing a procedure, conditions of participation or award criteria;
 - (c) preparing the tender notice and associated tender documents;
 - (d) identifying suppliers that may be able to supply the goods, services or works required;
 - (e) identifying likely contractual terms; 15
 - (f) building capacity among suppliers in relation to the contract being awarded.
- (2) Engagement under subsection (1) is called “preliminary market engagement”.
- (3) In carrying out preliminary market engagement, a contracting authority must take steps to ensure that – 20
 - (a) suppliers participating in the preliminary market engagement are not put at an unfair advantage, and
 - (b) competition in relation to the award of the public contract is not otherwise distorted.
- (4) Subsection (5) applies if a contracting authority considers that – 25
 - (a) a supplier’s participation in preliminary market engagement has put the supplier at an unfair advantage in relation to the award of a public contract, and
 - (b) the advantage cannot be avoided.
- (5) The contracting authority must treat the supplier as an excludable supplier in relation to the award of the contract. 30

16 Preliminary market engagement notices

- (1) Before carrying out preliminary market engagement, a contracting authority may publish a preliminary market engagement notice.
- (2) A “preliminary market engagement notice” means a notice setting out – 35
 - (a) that the contracting authority intends to conduct preliminary market engagement, and
 - (b) any other information specified in regulations under section 86.

17 Duty to consider lots

- (1) Before publishing a tender notice in respect of a public contract, a contracting authority must consider – 40

- (a) whether the goods, services or works to be supplied under the contract could reasonably be supplied under more than one contract, and
 - (b) whether such contracts could appropriately be awarded by reference to lots.
- (2) If the contracting authority considers that the goods, services or works could reasonably be supplied under more than one contract and such contracts could appropriately be awarded by reference to lots, the authority must –
- (a) arrange for the award of the contract or contracts by reference to lots, or
 - (b) provide reasons for not doing so.

CHAPTER 2

COMPETITIVE AWARD

Terms of a procurement

18 Award of public contracts following a competitive procedure

- (1) A contracting authority may award a public contract to the supplier that submits the most advantageous tender in a competitive tendering procedure. 15
- (2) The “most advantageous tender” is the tender that the contracting authority considers best satisfies the award criteria when assessed by reference to –
- (a) the assessment methodology under section 22(3)(a), and
 - (b) the relative importance of the criteria under section 22(3)(b).
- (3) In assessing which tender best satisfies the award criteria, a contracting authority –
- (a) must disregard any tender from a supplier that does not satisfy the conditions of participation;
 - (b) may disregard any tender from a supplier that –
 - (i) is not a United Kingdom supplier or treaty state supplier, or 25
 - (ii) 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;
 - (c) must disregard any tender which materially breaches a procedural requirement set out in the tender notice or associated tender documents. 30
- (4) The reference to a tender breaching a procedural requirement includes a reference to a supplier breaching a procedural requirement in relation to the tender.
- (5) A breach is material only if the contracting authority considers that ignoring it would put the tender at an unfair advantage. 35
- (6) See sections 26 and 28 for provision about disregarding tenders from suppliers that are excluded or excludable suppliers or that are sub-contracting to excluded or excludable suppliers.
- (7) See sections 32 and 33 for provision about reserving public contracts to supported employment providers and qualifying public service mutuals. 40

- (8) See section 34 for provision about disregarding tenders from suppliers that are not members of a dynamic market.
- (9) In this section “procedural requirement” includes a requirement that a supplier provide information.

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| 19 | Competitive tendering procedures | 5 |
| (1) | Before awarding a public contract under section 18, a contracting authority must carry out a competitive tendering procedure in accordance with a tender notice and any associated tender documents. | |
| (2) | A “competitive tendering procedure” is – | |
| | (a) a single-stage tendering procedure without a restriction on who can submit tenders (an “open procedure”), or | 10 |
| | (b) such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract. | |
| (3) | A contracting authority must ensure that the procedure is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract. | 15 |
| (4) | A competitive tendering procedure other than an open procedure – | |
| | (a) may limit the number of participating suppliers, generally or in respect of particular tendering rounds or other selection processes; | 20 |
| | (b) may provide for the refinement of award criteria in accordance with section 23; | |
| | (c) may not permit the participation of suppliers that did not submit a tender in the first round of tendering or that were excluded following an earlier round. | 25 |
| (5) | A competitive tendering procedure other than an open procedure may provide for the exclusion of suppliers – | |
| | (a) by reference to conditions of participation (see section 21); | |
| | (b) by reference to an intermediate assessment of tenders; | |
| | (c) that are not United Kingdom suppliers or treaty state suppliers; | 30 |
| | (d) that intend 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. | |
| (6) | The reference in subsection (5)(b) to the exclusion of suppliers by reference to an intermediate assessment of tenders is a reference to the exclusion of suppliers by reference to which tenders best satisfy the award criteria at the point of exclusion, when assessed by reference to – | 35 |
| | (a) the assessment methodology under section 22(3)(a), and | |
| | (b) the relative importance of the criteria under section 22(3)(b). | |
| (7) | A competitive tendering procedure may, if a contract is being awarded by reference to lots, limit the number of lots in respect of which any one supplier can submit a tender. | 40 |
| (8) | See sections 27, 28 and 30 for provision about excluding suppliers that are excluded or excludable suppliers, that are sub-contracting to excluded or excludable suppliers or for improper behaviour. | 45 |

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- (9) See sections 32 and 33 for provision about reserving public contracts to sheltered employment providers and qualifying mutual societies.
- (10) See section 34 for provision about excluding suppliers that are not members of a dynamic market.
- 20 Tender notices and associated tender documents** 5
- (1) A contracting authority must publish a tender notice for the purpose of –
- (a) inviting suppliers to submit a tender as part of an open procedure, or
 - (b) in the case of a competitive procedure other than an open procedure –
 - (i) inviting suppliers to submit a request to participate in the procedure, or 10
 - (ii) where no such invitation is made, inviting suppliers to submit their first, or only, tender as part of the procedure.
- (2) A “tender notice” means a notice setting out –
- (a) that a contracting authority intends to award a public contract under section 18, and 15
 - (b) any other information specified in regulations under section 86.
- (3) A contracting authority must provide any associated tender documents in accordance with the tender notice.
- (4) “Associated tender document” means, in relation to a tender notice, a document setting out information specified in regulations under section 86 that supplements that set out in the tender notice. 20
- 21 Conditions of participation**
- (1) A contracting authority may set conditions of participation in relation to the award of a public contract under section 18 only if it is satisfied that the conditions are a proportionate means of ensuring that suppliers have – 25
- (a) the legal and financial capacity to perform the contract, or
 - (b) the technical ability to perform the contract.
- (2) A “condition of participation” is a condition that a supplier must satisfy if the supplier is to be awarded the public contract.
- (3) A condition set under subsection (1)(b) may relate to suppliers’ qualifications, experience or technical ability, but may not – 30
- (a) require suppliers to have been awarded a contract by a particular contracting authority,
 - (b) break the rules on technical specifications in section 24, or
 - (c) require particular qualifications without allowing for their equivalents. 35
- (4) When considering whether a condition is proportionate for the purposes of subsection (1) a contracting authority must have regard to the nature, complexity and cost of the public contract.
- (5) A condition of participation may require the provision of evidence that is verifiable by a person other than the supplier. 40
- (6) If a supplier does not satisfy a condition of participation, the contracting authority may exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure.

- (7) A supplier is to be treated as satisfying a condition of participation to the extent that a supplier associated with the supplier satisfies the condition.
- (8) For the purposes of this section, a supplier is associated with another supplier if –
- (a) the suppliers are submitting a tender together, or 5
 - (b) the contracting authority is satisfied that the suppliers will enter into legally binding arrangements to the effect that –
 - (i) the supplier will sub-contract the performance of all or part of the contract to the other, or
 - (ii) the other supplier will guarantee the performance of all or part of the contract by the supplier. 10

22 Award criteria

- (1) In this Act, “award criteria” means criteria set in accordance with this section against which tenders may be assessed for the purpose of awarding a public contract under section 18 (award following competitive procedure). 15
- (2) In setting award criteria, a contracting authority must be satisfied that they –
- (a) relate to the subject-matter of the contract,
 - (b) are sufficiently clear, measurable and specific,
 - (c) do not break the rules on technical specifications in section 24, and
 - (d) are a proportionate means of assessing tenders, having regard to the nature, complexity and cost of the contract. 20
- (3) In setting award criteria, a contracting authority must –
- (a) describe how tenders are to be assessed by reference to them and, in particular, specify whether failure to meet one or more criteria would disqualify a tender (the “assessment methodology”), and 25
 - (b) indicate their relative importance by –
 - (i) weighting each as representing a percentage of total importance,
 - (ii) ranking them in order of importance, or
 - (iii) describing it in another way. 30
- (4) In setting award criteria for the assessment of tenders by reference to lots, a contracting authority –
- (a) may limit the number of lots that may be awarded to any one supplier, and
 - (b) in doing so, must provide an objective mechanism for supplier selection in circumstances where a supplier would otherwise exceed the limit. 35
- (5) In subsection (2), the reference to the subject-matter of a contract includes a reference to –
- (a) the goods, services or works to be supplied under the contract, including in respect of any aspect of their production, trading or other stage in their life-cycle; 40
 - (b) how or when those goods, services or works are to be supplied;
 - (c) the qualifications, experience, ability, management or organisation of staff where those factors are likely to make a material difference to the quality of goods, services or works being supplied; 45

- (d) price, other costs or value for money in all the circumstances.
- (6) In the case of a light touch contract, the reference to the subject-matter of the contract also includes a reference to –
- (a) the views of an individual for whose benefit the services are to be supplied (a “service recipient”), or of a person providing care to a service recipient, in relation to –
 - (i) who should supply the services, and
 - (ii) how and when they should be supplied;
 - (b) the different needs of different service recipients;
 - (c) the importance of proximity between the supplier and service recipients for the effective and efficient supply of the services.

23 Refining award criteria

- (1) A contracting authority may refine an award criterion as part of a competitive tendering procedure other than an open procedure if –
- (a) the tender notice or associated tender documents provide for the refinement of the criterion, and
 - (b) the authority is yet to invite suppliers to submit tenders to be assessed under section 18 (award following competitive procedure).
- (2) A contracting authority may, in consequence of refining an award criterion under subsection (1), refine the indication of the relative importance of the award criteria under section 22(3)(b).
- (3) A contracting authority may not make a refinement under this section if it would result in award criteria that would, had the refinement been made earlier, have allowed one or more suppliers that did not progress beyond an earlier round or selection process to have done so.
- (4) A contracting authority must modify and republish or provide again the tender notice and any associated tender documents affected by refinements under this section.

24 Technical specifications

- (1) The terms of a procurement may not refer to design, a particular licensing model or a description of characteristics in circumstances where they could appropriately refer to performance or functional requirements.
- (2) The terms of a procurement may not refer to United Kingdom standards unless –
- (a) there is no internationally-recognised equivalent, and
 - (b) they provide that tenders satisfying equivalent standards from other states or regions will, for the purposes of this Part, be treated as having satisfied the United Kingdom standards.
- (3) Unless the contracting authority considers it necessary in order to make its requirements understood, the terms of a procurement may not refer to a particular –
- (a) trademark, trade name, patent, design or type,
 - (b) place of origin, or
 - (c) producer or supplier.

- (4) If such matters are referred to, the terms of the procurement must also provide that tenders demonstrating equivalent quality or performance will not be disadvantaged.
- (5) In this section –
- “terms of a procurement” means anything set out in the tender notice or associated tender documents, including any competitive tendering procedure, conditions of participation or award criteria; 5
 - “United Kingdom standards” means standards that –
 - (a) are set by the British Standards Institute, or
 - (b) apply in the United Kingdom, or part of the United Kingdom, and do not apply elsewhere; 10
- a reference to standards includes a reference to any regulation, rules, code of practice or guidance.

25 Sub-contracting specifications

- (1) Subsection (2) applies if a contracting authority considers that the authority could award a contract for the supply of certain goods, services or works to a particular supplier under section 40 (direct award in special cases). 15
- (2) In awarding a contract that is wholly or partly for the supply of those goods, services or works under section 18 (award following competitive procedure), the contracting authority may require that a supplier sub-contracts the supply of those goods, services or works to the particular supplier. 20

Exclusions and modifications

26 Excluding suppliers from a competitive award

- (1) In assessing which tender best satisfies the award criteria for the purposes of section 18, a contracting authority must disregard any tender from a supplier that is an excluded supplier. 25
- (2) Before assessing which tender best satisfies the award criteria for the purposes of section 18, a contracting authority –
 - (a) must consider whether a supplier is an excludable supplier, and
 - (b) may disregard any tender from an excludable supplier. 30
- (3) If the supplier is an excluded or excludable supplier only by virtue of an associated supplier being an excluded or excludable supplier, the contracting authority must, before disregarding a tender, give the supplier reasonable opportunity to replace the associated supplier.
- (4) In this Act, “associated supplier” means a supplier that the supplier is relying on in order to in order to satisfy the conditions of participation. 35

27 Excluding suppliers from a competitive tendering procedure

- (1) Before permitting a supplier to participate in a competitive tendering procedure other than an open procedure, a contracting authority must determine whether the supplier is – 40
 - (a) an excluded supplier, or
 - (b) an excludable supplier.

- (2) The contracting authority must exclude an excluded supplier from participating in, or progressing as part of, the competitive tendering procedure.
- (3) The contracting authority may exclude an excludable supplier from participating in, or progressing as part of, the competitive tendering procedure. 5
- (4) Before excluding a supplier that is an excluded supplier or excludable supplier only by virtue of an associated supplier, a contracting authority must provide the supplier with reasonable opportunity to replace the associated supplier.
- (5) In this section, a reference to a supplier participating in a competitive tendering procedure is a reference to a supplier participating beyond the initial submission of tenders or requests to participate. 10

28 Excluding suppliers by reference to sub-contractors

- (1) A contracting authority may, as part of a competitive tendering procedure, request information – 15
 - (a) about whether a supplier intends to sub-contract the performance of all or part of a public contract, and
 - (b) for the purpose of determining whether any intended sub-contractor is an excluded or excludable supplier.
- (2) If, after requesting information under subsection (1), a contracting authority considers that a supplier intends to sub-contract to a supplier that is an excluded supplier, the contracting authority must – 20
 - (a) treat the supplier as an excluded supplier for the purpose of assessing tenders under section 18, and
 - (b) exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure. 25
- (3) If, after requesting information under subsection (1), a contracting authority considers that a supplier intends to sub-contract to a supplier that is an excludable supplier, the contracting authority – 30
 - (a) must treat the supplier as an excludable supplier for the purpose of assessing tenders under section 18, and
 - (b) may exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure.
- (4) Before disregarding a tender or excluding a supplier under subsection (2) or (3), a contracting authority must give the supplier reasonable opportunity to find an alternative supplier with which to sub-contract. 35
- (5) In this section, a reference to a supplier participating in a competitive tendering procedure is a reference to a supplier participating beyond the initial submission of tenders or requests to participate.
- (6) Subsections (2) and (3) do not apply if the intended sub-contractor is an associated supplier. 40

29 Excluding a supplier that is a threat to national security

- (1) This section applies if a contracting authority other than a Minister of the Crown intends to disregard a tender under section 26 or 28 or exclude a

supplier under section 27 or 28 on the basis of the discretionary exclusion ground in paragraph 15 of Schedule 7 (threat to national security).

- (2) The contracting authority may not disregard the tender or exclude the supplier unless –
- (a) the authority has notified a Minister of the Crown of its intention, and
 - (b) the Minister of the Crown considers that –
 - (i) the supplier or an intended sub-contractor is an excluded supplier by virtue of paragraph 15 of Schedule 7, and
 - (ii) the tender should be disregarded or supplier excluded.

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30 Excluding suppliers for improper behaviour

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- (1) Subsection (2) applies if a contracting authority determines that –
- (a) a supplier has acted improperly in relation to a procurement,
 - (b) in consequence, the supplier is put at an unfair advantage in relation to the award of a public contract, and
 - (c) the unfair advantage cannot be avoided other than by excluding the supplier.

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- (2) The contracting authority must treat the supplier as an excluded supplier in relation to the award of the public contract.

- (3) Before making a determination of the kind described in subsection (1), a contracting authority must give the supplier reasonable opportunity to –
- (a) make representations, and
 - (b) provide relevant evidence.

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- (4) A supplier might act improperly in relation to a procurement by –
- (a) failing to provide information requested by the contracting authority;
 - (b) providing information that is incomplete, inaccurate or misleading;
 - (c) accessing confidential information;
 - (d) unduly influencing the contracting authority’s decision-making.

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- (5) Subsection (6) applies if –
- (a) a contracting authority has, in relation to the award of a public contract, requested –
 - (i) information about a supplier’s connected persons or associated suppliers for the purpose of determining whether the supplier is an excluded or excludable supplier, or
 - (ii) other information under section 28(1) (excluding suppliers by reference to sub-contractors), and
 - (b) the supplier has –
 - (i) failed to provide the information requested, or
 - (ii) provided information that is incomplete, inaccurate or misleading.

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- (6) The contracting authority must treat the supplier as an excluded supplier in relation to the award of the public contract.

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31 Modifying a section 18 procurement

- (1) A contracting authority may modify the terms of a procurement before the following deadlines have passed –

-
- (a) in the case of an open procedure, the deadline for submitting tenders;
- (b) in the case of a competitive tendering procedure other than an open procedure—
- (i) the deadline for submitting a request to participate in the procedure, or 5
- (ii) where there has been no invitation to submit such requests, the deadline for submitting a first or only tender.
- (2) In the case of a competitive procedure other than an open procedure, a contracting authority may also modify the terms of a procurement before the deadline for submitting a tender for assessment under section 18 (award following competitive procedure) has passed if— 10
- (a) the modification is not substantial, or
- (b) the procurement relates to the award of a light touch contract.
- (3) A modification is “substantial” if— 15
- (a) it would permit suppliers that are not participating suppliers to submit a tender, or
- (b) the contracting authority considers that, had the modification been reflected in the tender notice or associated tender documents before a deadline referred to in subsection (1)(b) passed— 20
- (i) one or more participating suppliers would not be a participating supplier, or
- (ii) one or more suppliers that are not participating suppliers would be a participating supplier.
- (4) Whenever a contracting authority modifies the terms of a procurement, the authority must consider revising applicable tender deadlines and other time limits in accordance with section 52 (time limits). 25
- (5) If a contracting authority modifies the terms of a procurement under subsection (1), the authority must revise and republish or provide again the tender notice and any associated tender documents affected by the modifications or time limit revisions. 30
- (6) If a contracting authority modifies the terms of a procurement under subsection (2), the authority must notify each participating supplier.
- (7) In this section—
- “terms of a procurement” means anything set out in a tender notice or associated tender documents, including any competitive tendering procedure, conditions of participation or award criteria; 35
- “participating supplier” means a supplier that—
- (a) has submitted a request to participate in, or a tender as part of, the competitive tendering procedure, and
- (b) has not been excluded in accordance with the procedure or under this Act. 40
- (8) See section 42 for provision about switching to direct award.

Reserving contracts to certain suppliers

32 Reserving contracts to supported employment providers

- (1) A competitive tendering procedure other than an open procedure may provide for the exclusion of suppliers that are not supported employment providers.
- (2) Subsection (3) applies in relation to the award of a public contract under section 18 if the competitive procedure provides for the exclusion of suppliers as set out in subsection (1). 5
- (3) In assessing which tender best satisfies the award criteria for the purposes of section 18, a contracting authority must disregard any tender from a supplier that is not a supported employment provider. 10
- (4) A “supported employment provider” means an organisation –
 - (a) that operates for the purpose of providing employment, or employment-related support, to disabled or disadvantaged individuals, and
 - (b) in which disabled or disadvantaged individuals represent at least 30 per cent of the workforce. 15

33 Reserving contracts to public service mutuals

- (1) This section applies in relation to the award of a public contract under section 18 if the contract –
 - (a) is for reservable light touch services, and 20
 - (b) has a maximum term of five years or less.
- (2) A competitive tendering procedure other than an open procedure may provide for the exclusion of suppliers that are not qualifying public service mutuals.
- (3) Subsection (4) applies in relation to the award of a public contract under section 18 if the competitive procedure provides for the exclusion of suppliers as set out in subsection (2). 25
- (4) In assessing which tender best satisfies the award criteria for the purposes of section 18, a contracting authority must disregard any tender from a supplier that is not a qualifying public service mutual.
- (5) A “qualifying public service mutual” means a public service mutual that has not been awarded a comparable contract during the period of three years ending with the day on which the contract referred to in subsection (1) is awarded. 30
- (6) A “public service mutual” means a body that –
 - (a) operates for the purpose of delivering public services and mainly for the purpose of delivering one or more reservable light touch services, 35
 - (b) is run on a not-for-profit basis or provides for the distribution of profits only to members, and
 - (c) is under the management and control of its employees.
- (7) In this section – 40
 - “comparable contract” means a contract that was –
 - (a) a contract for the same kind of services,
 - (b) awarded by the same contracting authority, and

(c) awarded in reliance on this section;
 “reservable light touch services” means services of a kind specified in regulations under subsection (8).

- (8) An appropriate authority may by regulations specify services of a kind specified in regulations of the authority under section 8 (light touch contracts). 5

Awarding contracts by reference to dynamic markets

34 Competitive award by reference to dynamic markets

- (1) A competitive tendering procedure other than an open procedure may provide for the exclusion of suppliers that are not members of – 10
- (a) a particular dynamic market, or
 - (b) a particular part of a particular dynamic market.
- (2) Subsection (3) applies in relation to the award of a public contract under section 18 if the competitive procedure provides for the exclusion of suppliers as set out in subsection (1).
- (3) In assessing which tender best satisfies the award criteria for the purposes of section 18, a contracting authority must disregard any tender from a supplier that is not a member of – 15
- (a) a particular dynamic market, or
 - (b) a particular part of a particular dynamic market.
- (4) A contracting authority must, before excluding suppliers or disregarding tenders under this section, consider any applications for membership of the market or part of the market from suppliers that have submitted a tender as part of the competitive tendering procedure. 20
- (5) Subsection (4) does not apply in relation to an application for membership if, due to exceptional circumstances arising from the complexity of the particular procurement, a contracting authority is unable to consider the application before – 25
- (a) the deadline for submitting a request to participate in the procedure, or
 - (b) where there has been no invitation to submit such requests, the deadline for submitting a first or only tender. 30

35 Dynamic markets: establishment

- (1) A contracting authority may establish arrangements (a “dynamic market”) for the purpose of awarding public contracts by reference to suppliers’ membership of the market.
- (2) A contracting authority that is a utility may also establish a dynamic market for the purpose of awarding only public contracts that are utilities contracts by reference to suppliers’ membership of the market (a “utilities dynamic market”). 35
- (3) A contracting authority that is a centralised procurement authority may also establish – 40
- (a) a dynamic market for the purpose of other contracting authorities awarding public contracts by reference to suppliers’ membership of the market;

- (b) a utilities dynamic market for the purpose of utilities awarding only public contracts that are utilities contracts by reference to suppliers' membership of the market.
- (4) If arrangements established by any person comply with the requirements of this Act in relation to a utilities dynamic market established by a private utility –
 - (a) the arrangements are to be treated for the purposes of this Act as a utilities dynamic market established by a private utility, and
 - (b) a utility may award public contracts that are utilities contracts by reference to suppliers' membership of the market.
- (5) In this Act, references to a contract being awarded by reference to suppliers' membership of a dynamic market are references to a contract being awarded in reliance on section 34 (competitive award by reference to dynamic markets).
- (6) In this section, “utility” means –
 - (a) a public authority, or public undertaking, that carries out a utility activity;
 - (b) a private utility.
- (7) Documents establishing or modifying a dynamic market are not a public contract for the purposes of this Act.
- (8) Subsections (1) and (3)(a) do not apply in relation to public contracts that are concession contracts (but subsections (2) and (3)(b) do apply in relation to utilities contracts that are concession contracts).

36 Dynamic markets: membership

- (1) A contracting authority may set conditions for membership of a dynamic market or part of a dynamic market only if it is satisfied that the conditions are a proportionate means of ensuring that members –
 - (a) have the legal and financial capacity to perform contracts awarded by reference to membership of the market or the part of the market;
 - (b) the technical ability to perform such contracts.
- (2) A contracting authority must –
 - (a) accept applications for membership of a dynamic market or part of a dynamic market at any time during the term of the market;
 - (b) consider such applications within a reasonable period;
 - (c) admit to the market or the part of the market, as soon as reasonably practicable, any supplier that –
 - (i) is not an excluded or excludable supplier, and
 - (ii) satisfies the conditions for membership;
 - (d) consider whether to admit to the market or the part of the market any supplier that –
 - (i) is an excludable supplier, and
 - (ii) satisfies the conditions for membership;
 - (e) inform a supplier of the outcome of their application, together with reasons for the decision, as soon as reasonably practicable.
- (3) A contracting authority may not –
 - (a) limit the number of suppliers that can be admitted to a dynamic market or part of a market, or

- (b) modify the conditions for membership of a dynamic market or part of a market during the term of the market.

37 Dynamic markets: removing members from the market

- (1) A contracting authority must remove a supplier from a dynamic market if the authority considers that the supplier is an excluded supplier under section 54(1)(b) (debarment by reference to mandatory exclusion ground). 5
- (2) A contracting authority may remove a supplier from a dynamic market if –
- (a) the authority considers that the supplier –
 - (i) is an excluded supplier under section 54(1)(a),
 - (ii) does not satisfy the conditions for membership, or 10
 - (iii) has, since becoming a member, become an excludable supplier, or
 - (b) the authority discovers that, on becoming a member, the supplier was an excludable supplier.
- (3) The reference to a supplier becoming an excludable supplier includes a reference to a supplier becoming an excludable supplier by virtue of a discretionary exclusion ground that – 15
- (a) did not apply before the supplier became a member, or
 - (b) applied before the supplier became a member by reference to different circumstances. 20
- (4) Before removing a supplier from a dynamic market, a contracting authority must inform the supplier of its decision to do so, together with reasons for the decision.

38 Dynamic markets: fees

- (1) Documents establishing a dynamic market other than a utilities dynamic market may provide for the charging of fees to suppliers that are awarded a contract by reference to their membership of the market. 25
- (2) Fees charged by virtue of subsection (1) must be set as a fixed percentage to be applied to the estimated value of the awarded contract.
- (3) Documents establishing a utilities dynamic market may provide for the charging of fees to suppliers in connection with obtaining and maintaining membership of the market. 30

39 Dynamic market notices

- (1) A notice under this section is called a “dynamic market notice”.
- (2) Before establishing a dynamic market, a contracting authority must publish a notice setting out – 35
- (a) that the authority intends to establish a dynamic market, and
 - (b) any other information specified in regulations under section 86.
- (3) As soon as reasonably practicable after establishing a dynamic market, the contracting authority must publish a notice setting out – 40
- (a) that the dynamic market has been established, and
 - (b) any other information specified in regulations under section 86.

- (4) As soon as reasonably practicable after modifying a dynamic market, the contracting authority must publish a notice setting out –
 - (a) the modifications made to the market, and
 - (b) any other information specified in regulations under section 86.
- (5) As soon as reasonably practicable after a dynamic market ceases to operate, the contracting authority must publish a notice setting out –
 - (a) that the dynamic market has ceased to operate, and
 - (b) any other information specified in regulations under section 86.
- (6) Subsection (5) does not apply to private utilities.

CHAPTER 3

10

DIRECT AWARD

40 Direct award in special cases

- (1) If a direct award justification applies, a contracting authority may award a public contract directly –
 - (a) to a supplier that is not an excluded supplier, or
 - (b) in accordance with subsection (2).
- (2) A contracting authority may award a contract to a supplier that is an excluded supplier if the contracting authority considers that there is an overriding public interest in awarding the contract to that supplier.
- (3) A contracting authority may carry out a selection process or take such other preliminary steps as it considers appropriate for the purpose of awarding a contract under this section.
- (4) Before awarding a contract to a supplier under this section, a contracting authority must consider whether the supplier is an excludable supplier.
- (5) There is an overriding public interest in awarding a public contract to an excluded supplier if –
 - (a) it is necessary in order to construct, maintain or operate critical national infrastructure,
 - (b) it is necessary in order to ensure the proper functioning of a sector on which the defence, security or economic stability of the United Kingdom relies,
 - (c) failure to do so would prejudice the conduct of military or security operations, or the effective operation of the armed forces or intelligence services, or
 - (d) the contract is being awarded by reference to paragraph 13 of Schedule 5 (extreme and unavoidable urgency) and cannot be awarded to, or performed by, a supplier that is not an excluded supplier within the necessary time frame.
- (6) The direct award justifications are set out in Schedule 5.
- (7) In this section, “intelligence services” means the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.

41 Direct award to protect life, etc

- (1) If a Minister of the Crown considers it necessary, the Minister may by regulations provide that specified public contracts may be awarded under section 40 as if a direct award justification applies.
- (2) In subsection (1), “necessary” means necessary to – 5
- (a) protect human, animal or plant life or health, or
 - (b) protect public order or safety.
- (3) Provision under subsection (1) may – 10
- (a) specify contracts or classes of contract, or otherwise describe contracts by reference to purpose, subject-matter or contracting authority;
 - (b) include other conditions or limitations;
 - (c) confer a discretion.
- (4) A Minister of the Crown must – 15
- (a) keep regulations made under subsection (1) under review, and
 - (b) if the Minister considers that direct award under section 40 is no longer necessary, revoke the regulations.

42 Switching to direct award

- (1) A contracting authority may award a public contract directly to a supplier that is not an excluded supplier if – 20
- (a) the authority has invited suppliers to submit tenders as part of, or requests to participate in, a competitive tendering procedure in respect of the contract,
 - (b) it has not received any suitable tenders or requests in response, and
 - (c) it considers that award under section 18 is not possible in the circumstances. 25
- (2) A tender or request is not suitable if the contracting authority considers that – 30
- (a) it would be disregarded in an assessment of tenders under section 18;
 - (b) it does not satisfy the award criteria when assessed by reference to the assessment methodology and the relative importance of the criteria indicated under section 22(3);
 - (c) the price is abnormally low;
 - (d) there is evidence of corruption or collusion between suppliers or between suppliers and contracting authorities;
 - (e) it materially breaches a procedural requirement in the tender notice.
- (3) A reference to a tender breaching a procedural requirement includes a reference to a supplier breaching a procedural requirement in relation to the tender. 35
- (4) A breach is material if the contracting authority considers that ignoring it would put the tender at an unfair advantage.
- (5) A contracting authority may carry out a selection process or take such other preliminary steps as it considers appropriate for the purpose of awarding a contract under subsection (1). 40
- (6) Before awarding a contract to a supplier under this section, a contracting authority must consider whether the supplier is an excludable supplier.

43 Transparency notices

- (1) Before awarding a contract under section 40 or 42 a contracting authority must publish a transparency notice.
- (2) A “transparency notice” means a notice setting out –
 - (a) that a contracting authority intends to award a contract directly, and 5
 - (b) any other information specified in regulations under section 86.
- (3) This section does not apply in relation to the award of a contract under section 40 by virtue of paragraph 16 of Schedule 5 (direct award: user choice contracts).

CHAPTER 4

AWARD UNDER FRAMEWORKS 10

44 Frameworks

- (1) A contracting authority may award a public contract in accordance with a framework.
- (2) A “framework” is a contract between a contracting authority and one or more suppliers that provides for the future award of contracts by a contracting authority to the supplier or suppliers. 15
- (3) Unless subsection (4) applies, a framework may only provide for the future award of a public contract following a competitive selection process.
- (4) A framework may provide for the future award of a public contract without competition between suppliers – 20
 - (a) in circumstances where only one supplier is party to the framework, or
 - (b) if the framework sets out –
 - (i) the core terms of the public contract, and
 - (ii) an objective mechanism for supplier selection.
- (5) A framework must include the following information – 25
 - (a) a description of goods, services or works to be provided under contracts awarded in accordance with the framework;
 - (b) the price payable, or mechanism for determining the price payable, under such contracts;
 - (c) the estimated value of the framework; 30
 - (d) any selection process to be applied on the award of contracts;
 - (e) the term of the framework (see section 45);
 - (f) the contracting authorities entitled to award public contracts in accordance with the framework;
 - (g) whether the framework is awarded under an open framework (see 35 section 47).
- (6) A framework may not –
 - (a) permit the award of a public contract to an excluded supplier, or
 - (b) prevent a contracting authority from requesting additional information from suppliers before awarding a contract. 40

- (7) A framework may provide for the charging of fees at a fixed percentage of the estimated value of any contract awarded to the supplier in accordance with the framework.
- (8) This section does not apply in relation to the award of—
- (a) a concession contract, or 5
 - (b) a framework under an open framework (see section 47).

45 Frameworks: maximum term

- (1) The term of a framework may not exceed—
- (a) in the case of a defence and security framework or a utilities framework, eight years, and 10
 - (b) otherwise, four years.
- (2) Subsection (1) does not apply if the contracting authority considers the nature of the goods, services or works to be supplied under contracts awarded in accordance with the framework means that a longer term is required.
- (3) If a contracting authority relies on subsection (2) in awarding a framework with a term exceeding four or eight years, the contracting authority must set out its reasons in the tender or transparency notice for the framework. 15
- (4) In this section—
- (a) “a defence and security framework” is a framework which does not provide for the future award of public contracts other than defence and security contracts; 20
 - (b) “a utilities framework” is a framework which does not provide for the future award of public contracts other than utilities contracts.
- (5) This section does not apply in relation to a framework awarded—
- (a) under an open framework (see section 47), or 25
 - (b) by a private utility.

46 Frameworks: implied terms

- (1) It is an implied term of every framework that a contracting authority may exclude a supplier that is an excluded supplier or has, since the award of the framework, become an excludable supplier from participating in any selection process run in relation to the award of a contract under the framework. 30
- (2) For the purposes of the term in subsection (1), the reference to a supplier becoming an excludable supplier includes a reference to—
- (a) a supplier becoming an excludable supplier on the basis of a discretionary exclusion ground that— 35
 - (i) did not apply before award of the contract, or
 - (ii) applied before award of the contract by reference to different circumstances, and
 - (b) a contracting authority discovering that, before award of the contract, the supplier was an excludable supplier. 40
- (3) Before excluding a supplier that is an excluded or excludable supplier only by virtue of an associated supplier, the contracting authority must give the supplier reasonable opportunity to replace the associated supplier.

- (4) Any term purporting to restrict or override the term implied by subsection (1) is without effect.

47 Open frameworks

- (1) An “open framework” is a scheme of frameworks that provides for the award of successive frameworks on substantially the same terms. 5
- (2) An open framework must provide –
 - (a) for the award of a framework at least once during –
 - (i) the period of three years beginning with the day of the award of the first framework in the scheme, and
 - (ii) each period of five years beginning with the day of the award of the second framework in the scheme; 10
 - (b) for the expiry of one framework on the award of the next;
 - (c) for the final framework to expire at the end of the period of eight years beginning with the day on which the first framework under the scheme is awarded. 15
- (3) If there is no limit on the number of suppliers that can be party to a framework under an open framework, a contracting authority may award the framework to an existing supplier by reference to –
 - (a) the fact that the supplier has already been awarded a framework under the scheme, 20
 - (b) a tender relating to an earlier award under the scheme, or
 - (c) a tender relating to the current award.
- (4) Otherwise, a contracting authority may award a framework under an open framework to an existing supplier by reference to –
 - (a) a tender relating to earlier award under the scheme, or 25
 - (b) a tender relating to the current award.
- (5) If a framework under an open framework is awarded to only one supplier, the framework, and the open framework, must expire before the end of the period of four years beginning with the day on which the framework is awarded.
- (6) Subsection (5) applies despite subsection (2)(c) and any term of the framework or open framework. 30
- (7) In this section, an “existing supplier” means a supplier that is party to a framework under the open framework.
- (8) A reference to an award on substantially the same terms is a reference to an award that could be made by reference to the same tender or transparency notice without substantial modification (see section 31). 35
- (9) A framework under an open framework may not be awarded under section 40 (direct award in special cases) or 42 (switching to direct award).

CHAPTER 5

AFTER AWARD, STANDSTILL PERIODS AND NOTICES

48 Contract award notices and assessment summaries

- (1) Before entering into a public contract, a contracting authority must publish a contract award notice. 5
- (2) A “contract award notice” means a notice setting out—
 - (a) that the contracting authority intends to enter into a contract, and
 - (b) any other information specified in regulations under section 86.
- (3) Before publishing a contract award notice in respect of a contract awarded under section 18 (award following competitive procedure), a contracting authority must provide an assessment summary to each supplier that submitted an assessed tender. 10
- (4) An “assessment summary” means, in relation to an assessed tender, information about the contracting authority’s assessment of—
 - (a) the tender, and 15
 - (b) if different, the most advantageous tender submitted in respect of the contract.
- (5) In this section, an “assessed tender” is a tender which—
 - (a) was submitted in respect of the contract and assessed for the purposes of determining the most advantageous tender under subsection (1) of section 18, and 20
 - (b) was not disregarded in the assessment of tenders.
- (6) Subsection (1) does not apply in relation to—
 - (a) a defence and security contract awarded under a defence and security framework (see section 44 (frameworks)); 25
 - (b) a contract awarded under section 40 by virtue of paragraph 16 of Schedule 5 (direct award: user choice contracts).

49 Standstill periods on the award of contracts

- (1) A contracting authority may not enter into a public contract before—
 - (a) the end of the mandatory standstill period, or 30
 - (b) if later, the end of another standstill period provided for in the award notice.
- (2) The “mandatory standstill period” is the period of eight working days beginning with the day on which a contract award notice is published in respect of the contract. 35
- (3) Subsection (1) does not apply in relation to a contract that is—
 - (a) awarded under section 40 by reference to paragraph 13 of Schedule 5 (direct award: extreme and unavoidable urgency);
 - (b) awarded under section 40 by reference to regulations under section 41 (direct award to protect life, etc); 40
 - (c) awarded in accordance with a framework;
 - (d) awarded by reference to a dynamic market;
 - (e) a light touch contract.

- (4) If a contract is of a kind described in subsection (3), a contracting authority may not enter into the contract before the end of any standstill period provided for in the award notice.

50 Key performance indicators

- (1) Before entering into a public contract with an estimated value of more than £2 million, a contracting authority must set and publish at least three key performance indicators in respect of the contract. 5
- (2) Subsection (1) does not apply if the contracting authority considers that the supplier’s performance under the contract could not appropriately be assessed by reference to key performance indicators. 10
- (3) A “key performance indicator” is a factor or measure against which a supplier’s performance of a contract can be assessed during the life-cycle of the contract.
- (4) An appropriate authority may by regulations amend this section for the purpose of changing the financial threshold. 15
- (5) This section does not apply in relation to a public contract that is –
- (a) a framework,
 - (b) a utilities contract awarded by a private utility,
 - (c) a concession contract, or
 - (d) a light touch contract. 20
- (6) See section 66 for provision about assessing performance against, and publishing information about, key performance indicators.

51 Contract details notices and publication of contracts

- (1) A contracting authority that enters into a public contract awarded under this Part must publish a contract details notice – 25
- (a) if the contract is a light touch contract, before the end of the period of 120 days beginning with the day on which the contract is entered into;
 - (b) otherwise, before the end of the period of 30 days beginning with the day on which the contract is entered into.
- (2) A “contract details notice” means a notice setting out – 30
- (a) that the contracting authority has entered into a contract, and
 - (b) any other information specified in regulations under section 86.
- (3) Before the end of the period of 90 days beginning with the day on which a contracting authority enters into a public contract with an estimated value of more than £2 million, the authority must publish a copy of the contract. 35
- (4) Subsection (3) does not apply in relation to a contract –
- (a) awarded by a devolved Welsh authority, unless it is awarded under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement, or
 - (b) awarded under a devolved Welsh procurement arrangement. 40
- (5) A Minister of the Crown or a Northern Ireland department may by regulations amend this section for the purpose of changing the financial threshold in subsection (3).

- (6) This section does not apply –
- (a) to private utilities, or
 - (b) in relation to a contract awarded under section 40 by virtue of paragraph 16 of Schedule 5 (direct award: user choice contracts).

CHAPTER 6

5

GENERAL PROVISION ABOUT AWARD AND PROCEDURES

Time limits and termination

52 Time limits

- (1) In setting time limits for the purposes of this Part, a contracting authority must, where relevant, have regard to – 10
- (a) the nature and complexity of the contract being awarded;
 - (b) the need for site visits, physical inspections and other practical steps;
 - (c) the need for sub-contracting;
 - (d) the nature and complexity of any modification of the tender notice or any associated tender documents; 15
 - (e) the importance of avoiding unnecessary delay.
- (2) Time limits set for the purposes of this Part must be the same for each supplier.
- (3) A participation period set under this Part must equal or exceed the shortest minimum period specified in an entry in the second column of the following table that corresponds with an entry in the first column which applies to the circumstances of the case – 20

| <i>Circumstance</i> | <i>Minimum period</i> | |
|---|-----------------------|----|
| The contract being awarded is a light touch contract | No minimum period | |
| The contracting authority considers there to be a state of urgency that means that a 25 day participation period is impractical | 10 days | 25 |
| Neither of the above circumstances apply | 25 days | |

- (4) A tendering period set under this Part must equal or exceed the shortest minimum period specified in an entry in the second column of the following table that corresponds with an entry in the first column that applies to the circumstances of the case – 30

| <i>Circumstance</i> | <i>Minimum period</i> | |
|--|-----------------------|----|
| The contract being awarded is a light touch contract | No minimum period | 35 |

| <i>Circumstance</i> | <i>Minimum period</i> | |
|--|-----------------------|----|
| A qualifying planned procurement notice has been issued | 10 days | |
| The contracting authority considers there to be a state of urgency that means any other applicable minimum tender period is impractical | 10 days | 5 |
| Tenders may be submitted electronically, and the tender notice and associated tender documents are all provided at the same time | 25 days | |
| Tenders may be submitted electronically, but the tender notice and associated tender documents are not all provided at the same time | 30 days | 10 |
| Tenders may not be submitted electronically, but the tender notice and associated tender documents are all provided at the same time | 30 days | 15 |
| Tenders may not be submitted electronically, and the tender notice and associated tender documents are not all provided at the same time | 35 days | |

- (5) In this section –
- “qualifying planned procurement notice” has the meaning given in section 14; 20
 - “participation period” means the period beginning with the day following the day on which a contracting authority invites the submission of requests to participate in a competitive tendering procedure other than an open procedure and ending with the day by which those requests must be submitted; 25
 - “tendering period” means the period beginning with the day following the day on which a contracting authority invites the submission of tenders as part of a competitive tendering procedure and ending with the day by which tenders must be submitted. 30

53 Procurement termination notices

- (1) This section applies if, after publishing a tender or transparency notice in respect of a public contract, a contracting authority decides not to award the contract.
- (2) As soon as reasonably practicable after making the decision, the contracting authority must give notice to that effect. 35
- (3) This section does not apply to private utilities.

Excluding suppliers

54 Meaning of excluded and excludable supplier

- (1) A supplier is an “excluded supplier” if – 40
 - (a) the contracting authority considers that –

- (i) a mandatory exclusion ground applies to the supplier or an associated supplier, and
- (ii) the circumstances giving rise to the application of the exclusion ground are likely to occur again, or
- (b) the supplier or an associated supplier is on the debarment list by virtue of a mandatory exclusion ground. 5
- (2) A supplier is an “excludable supplier” if –
 - (a) the contracting authority considers that –
 - (i) a discretionary exclusion ground applies to the supplier or an associated supplier, and 10
 - (ii) the circumstances giving rise to the application of the exclusion ground are likely to occur again, or
 - (b) the supplier or an associated supplier is on the debarment list by virtue of a discretionary exclusion ground.
- (3) For the purposes of a procurement carried out by a private utility – 15
 - (a) an excluded supplier is to be regarded as an excludable supplier, and
 - (b) a reference in this Act to an excludable supplier includes a reference to such an excluded supplier.
- (4) In this section “debarment list” means the list kept under section 59.
- (5) The mandatory exclusion grounds are set out in Schedule 6. 20
- (6) The discretionary exclusion grounds are set out in Schedule 7.

55 Considering whether a supplier is excluded or excludable

- (1) In considering, for the purposes of section 54(1)(a) or (2)(a), whether the circumstances giving rise to the application of an exclusion ground are likely to occur again, a contracting authority may have regard to the following matters – 25
 - (a) evidence that the supplier, associated supplier or connected person has taken the circumstances seriously, for example by paying compensation;
 - (b) steps that the supplier, associated supplier or connected person has taken to prevent the circumstances occurring again, for example by changing staff or management, or putting procedures and training in place; 30
 - (c) commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps; 35
 - (d) the time that has elapsed since the circumstances last occurred;
 - (e) any other evidence, explanation or factor that the authority considers appropriate.
- (2) Before determining whether a supplier is an excluded supplier under section 54(1)(a) or an excludable supplier under section 54(2)(a), a contracting authority must give the supplier reasonable opportunity to – 40
 - (a) make representations, and
 - (b) provide evidence as to whether exclusion grounds apply and whether the circumstances giving rise to any application are likely to occur again (including information of a kind referred to in subsection (1)). 45

- (3) But a contracting authority may not require particular evidence or information unless the authority is satisfied that the requirements are proportionate in the circumstances, having regard to—
- (a) the nature and complexity of the matters being assessed,
 - (b) the financial and other resources of suppliers, and
 - (c) where relevant, the preliminary nature of a consideration under section 27(3).

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Debarment

56 Notification of exclusion of supplier

- (1) This section applies where—
- (a) a contracting authority—
 - (i) has disregarded a tender from an excluded or excludable supplier under section 26 or 28,
 - (ii) has excluded an excluded or excludable supplier from participating in, or progressing as part of a procurement procedure under section 27 or 28, or
 - (iii) is aware of an associated supplier or sub-contractor supplier having been replaced under section 26(3), 27(4) or 28(4) (replacing an excluded or excludable associated supplier or sub-contractor), and
 - (b) the supplier was an excluded or excludable supplier on the basis of a relevant exclusion ground.
- (2) The contracting authority must, before the end of the period of 30 days beginning with the day on which the tender was disregarded or the supplier excluded or replaced, give notice of that exclusion to the relevant appropriate authority.
- (3) A notice under subsection (2) must set out—
- (a) any relevant exclusion ground that the authority considers applies to the supplier, and
 - (b) any other information specified in regulations under section 86.
- (4) If any proceedings under Part 9 are brought in respect of the disregard or exclusion, the contracting authority must give notice to the relevant appropriate authority of—
- (a) the commencement of those proceedings or any appeal proceedings;
 - (b) the outcome of any proceedings within paragraph (a).
- (5) Notice under subsection (4)(a) or (b) must be given before the end of the period of 30 days beginning with the day the proceedings concerned are commenced or determined.
- (6) In this section—
- “exclusion ground” means a mandatory exclusion ground or a discretionary exclusion ground;
 - “relevant exclusion ground” means any exclusion ground except the one listed in paragraph 41 of Schedule 6 (failure to cooperate with investigation);
 - “relevant appropriate authority” means—

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- (a) if the contracting authority is a devolved Welsh authority, the Welsh Ministers;
- (b) in any other case, a Minister of the Crown.

57 Investigations of supplier: exclusion grounds

- | | |
|---|----|
| (1) An appropriate authority may investigate whether a supplier is, by virtue of the application to the supplier of a relevant exclusion ground – | 5 |
| (a) an excluded supplier under section 54(1)(a), or | |
| (b) an excludable supplier under section 54(2)(a). | |
| (2) An investigation under this section may be conducted at any time, including by a Minister of the Crown following an application under section 60 (application for removal from debarment list). | 10 |
| (3) If an appropriate authority decides to investigate under this section, the authority must give the supplier concerned a notice setting out – | |
| (a) the relevant exclusion grounds in respect of which the investigation is being conducted, | 15 |
| (b) how and when the supplier may make representations to the appropriate authority, and | |
| (c) any other information specified in regulations under section 86. | |
| (4) The appropriate authority may by notice require a contracting authority – | |
| (a) to provide such relevant documents as the appropriate authority may reasonably require for the purposes of the investigation, in the form or manner specified in the notice; | 20 |
| (b) to give such other assistance in connection with the investigation as is reasonable in the circumstances and is specified in the notice. | |
| (5) A contracting authority must comply with a notice under subsection (4) before the end of the period specified in the notice. | 25 |
| (6) The appropriate authority may by notice request the supplier concerned, or a connected person in relation to the supplier – | |
| (a) to provide such relevant documents as the appropriate authority may reasonably require for the purposes of the investigation, in the form or manner, and before the end of the period, specified in the notice; | 30 |
| (b) to give such other assistance in connection with the investigation as is reasonable in the circumstances and is specified in the notice, before the end of the period so specified. | |
| (7) A notice under subsection (6) must set out the potential consequences for the supplier of non-compliance with the request (see paragraph 41 of Schedule 6). | 35 |
| (8) In this section – | |
| “relevant documents” means documents or other information that – | |
| (a) are specified or described in a notice under subsection (4) or (6), and | 40 |
| (b) are in the possession or control of the recipient of the notice; | |
| “relevant exclusion ground” has the meaning given in section 56. | |

58 Investigations under section 57: reports

- (1) This section applies where an appropriate authority has conducted an investigation under section 57.
- (2) The Welsh Ministers or a Northern Ireland department –
 - (a) may refer the case to a Minister of the Crown for the Minister’s consideration for the purposes of section 59(1), and 5
 - (b) if they do so, must provide the Minister with all information relevant to their findings.
- (3) A Minister of the Crown who has conducted, or considered the findings of, an investigation must – 10
 - (a) prepare a report in relation to the findings of the investigation,
 - (b) give a copy to the supplier concerned as soon as reasonably practicable after the report is prepared, and
 - (c) publish it.Paragraphs (b) and (c) are subject to subsection (5). 15
- (4) The report must, in particular, set out –
 - (a) whether the Minister is satisfied that the supplier is, by virtue of the application of a relevant exclusion ground, an excluded or excludable supplier and, if so, in respect of each applicable exclusion ground – 20
 - (i) whether it is a mandatory exclusion ground or a discretionary exclusion ground, and
 - (ii) the date on which the Minister expects the ground to cease to apply;
 - (b) whether the Minister has entered, or decided to maintain the entry for, the supplier’s name on the debarment list (see section 59); 25
 - (c) in each case, the Minister’s reasons.
- (5) If the Minister considers it necessary to do so for a purpose mentioned in subsection (6), the Minister may –
 - (a) remove information from a report before publishing it or giving it to the supplier concerned; 30
 - (b) decide not to publish the report;
 - (c) decide not to give the report to the supplier;
 - (d) disclose the report only to such persons as the Minister considers appropriate.
- (6) The purposes are – 35
 - (a) safeguarding national security;
 - (b) preventing the publication of information that is sensitive commercial information where there is an overriding public interest in it being withheld from publication or other disclosure.
- (7) In this section – 40
 - “relevant exclusion ground” has the meaning given by section 56;
 - “sensitive commercial information” has the meaning given by section 85.

59 Debarment list

- (1) Subsection (3) applies where a Minister of the Crown –

-
- (a) has conducted an investigation under section 57 or considered the findings of such an investigation conducted by the Welsh Ministers or a Northern Ireland department, and
 - (b) is satisfied that the supplier is, by virtue of the application of a relevant exclusion ground, an excluded or excludable supplier. 5
 - (2) Subsection (3) also applies where a Minister of the Crown has made a determination as mentioned in paragraph 41 of Schedule 6 in relation to a supplier (mandatory exclusion ground for failing to cooperate with investigation).
 - (3) The Minister may enter the supplier’s name on a list kept by a Minister of the Crown for the purposes of this section (the “debarment list”). 10
 - (4) An entry on the debarment list must –
 - (a) state which of the relevant exclusion grounds the Minister has decided apply to the supplier, and
 - (b) in respect of each ground indicate – 15
 - (i) whether it is a mandatory exclusion ground or a discretionary exclusion ground, and
 - (ii) the date on which the Minister expects the ground to cease to apply (and, accordingly, the entry for the supplier to be removed from the list). 20
 - (5) Before entering a supplier’s name on the debarment list, the Minister must give notice to the supplier setting out –
 - (a) the decision to do so,
 - (b) an explanation of the supplier’s rights under section 61, and
 - (c) any other information specified in regulations under section 86. 25
 - (6) A Minister of the Crown –
 - (a) must keep the debarment list under review, and
 - (b) may amend or remove an entry from the debarment list at any time.
 - (7) A Minister of the Crown must remove the entry for a supplier from the debarment list if the Minister is satisfied that the supplier is not an excluded or excludable supplier. 30
 - (8) A Minister of the Crown must publish the debarment list (including any amended list).
 - (9) A Minister of the Crown must consult the Welsh Ministers and a Northern Ireland department before – 35
 - (a) entering a supplier’s name on the debarment list, or
 - (b) removing an entry from the debarment list pursuant to an application under section 60.
 - (10) In this section, “relevant exclusion ground” has the meaning given by section 56. 40

60 Debarment list: application for removal

- (1) A supplier may at any time apply to a Minister of the Crown for the removal of their name from the debarment list kept under section 59.
- (2) The Minister is only required to consider such an application if –

- (a) in the opinion of the Minister, there has been a material change of circumstances –
 - (i) since the supplier’s name was entered on the debarment list, or
 - (ii) in a case where the supplier has made a previous application under subsection (1), since the most recent application that was considered by the Minister was made, or
- (b) the application is otherwise accompanied by significant information that has not previously been considered by a Minister of the Crown.

61 Debarment decisions: appeals

- (1) A supplier may appeal against a decision of a Minister of the Crown –
 - (a) to enter their name on the debarment list kept under section 59;
 - (b) not to remove their name from the debarment list following the making of an application under section 60.
- (2) An appeal under subsection (1) must be brought and determined in accordance with regulations made by a Minister of the Crown.

PART 4

MANAGEMENT OF PUBLIC CONTRACTS

Terms implied into public contracts

62 Electronic invoicing: implied term

- (1) The term set out in subsection (2) is implied into every public contract entered into by a contracting authority. 20
- (2) The contracting authority must accept and process for payment any electronic invoice issued to the authority for payment under the contract which is –
 - (a) in the required electronic form, and
 - (b) not disputed by the authority. 25
- (3) For the purposes of the term in subsection (2) –
 - “electronic invoice” means an invoice which is issued, transmitted and received in a structured electronic format that allows for its automatic and electronic processing;
 - “required electronic form” means a form that –
 - (a) complies with the standard for electronic invoicing approved and issued by the British Standards Institution in the document numbered BS EN 16931-1:2017 (Electronic invoicing - Part 1: Semantic data model of the core elements of an electronic invoice), and 35
 - (b) uses a syntax which is listed as a syntax that complies with that standard in the document numbered PD CEN/TS 16931-2:2017 (Electronic invoicing - Part 2: List of syntaxes that comply with EN 16931-1) approved and issued by the British Standards Institution. 40
- (4) A reference to a standard or document is a reference to the standard or document as it stands –
 - (a) on the day that the contract is entered into, or

- (b) if the parties agree, on the day on which the invoice is issued.
- (5) Any term purporting to restrict or override the implied term is of no effect.
- (6) An appropriate authority may by regulations amend this section for the purpose of changing what it means for an invoice to be in the required electronic form. 5
- (7) Before making regulations under subsection (6), an appropriate authority must consult such persons as the authority considers appropriate.

63 Implied payment terms in public contracts

- (1) The terms in subsections (2) to (5) are implied into every public contract entered into by a contracting authority, except a public contract that is – 10
- (a) a concession contract,
 - (b) a utilities contract awarded by a private utility, or
 - (c) a contract awarded by a maintained school, an Academy or a sixth form college corporation.
- (2) Any sum due to be paid under the public contract by the contracting authority must be paid before the end of the period of 30 days beginning with – 15
- (a) the day on which an invoice is received by the contracting authority in respect of the sum, or
 - (b) if later, the day on which the payment falls due in accordance with the invoice. 20
- (3) The term in subsection (2) does not apply if the contracting authority –
- (a) considers the invoice invalid, or
 - (b) disputes the invoice.
- (4) On receiving an invoice from a payee, the contracting authority must notify the payee without undue delay if – 25
- (a) it considers the invoice invalid, or
 - (b) it disputes the invoice.
- (5) A contracting authority may rely on a payment made by a third party to satisfy the term in subsection (2) only with the agreement of the payee.
- (6) Any term purporting to restrict or override the terms implied by this section is without effect. 30
- (7) But nothing in this section prohibits the parties to a contract from agreeing that a sum due under the contract must be paid earlier than would be required by the term in subsection (2).
- (8) For the purposes of the terms in subsections (2) to (5), an invoice is valid if – 35
- (a) it is an electronic invoice issued in the required electronic form, or
 - (b) it sets out the minimum required information and meets any other requirement set out in the contract.
- (9) The minimum required information is – 40
- (a) the name of the invoicing party,
 - (b) a description of the goods, services or works supplied,
 - (c) the sum requested, and
 - (d) a unique identification number.

- (10) An appropriate authority may by regulations amend this section for the purpose of changing the period within which a sum due under a contract must be paid, but the period may not exceed 30 days.
- (11) In this Act—
- “Academy” means a person who is the proprietor, within the meaning of section 579(1) of the Education Act 1996, of an Academy within the meaning of that section; 5
 - “maintained school” means the governing body of a maintained school within the meaning of section 19(1) of the Education Act 2002;
 - “sixth form college corporation” has the meaning given in section 90(1) of the Further and Higher Education Act 1992. 10
- (12) In this section “payee” means the person due to be paid under the invoice concerned.

Notices about payments and performance

64 Payments compliance notices 15

- (1) Before the end of the period of 30 days beginning with the last day of a reporting period, a contracting authority must publish a payments compliance notice if during that period—
- (a) the authority made a payment under a public contract;
 - (b) a sum owed by the authority under a public contract became payable. 20
- (2) A “payments compliance notice” means a notice setting out—
- (a) specified information about the contracting authority’s compliance with the term set out in section 63(2) (payment within 30 days), and
 - (b) any other specified information.
- (3) For the purposes of this section, a reporting period is— 25
- (a) the period beginning with the day on which this section comes into force and ending with the 31 March or 30 September following that day, whichever is earlier, and
 - (b) each successive period of six months.
- (4) An appropriate authority may by regulations make provision about the preparation of a payments compliance notice, including provision requiring that the notice must be approved by a person of a description specified in the regulations. 30
- (5) In subsection (2), “specified information” means information specified in regulations under section 86. 35
- (6) This section does not apply to private utilities.

65 Information about payments under public contracts

- (1) A contracting authority must publish specified information about any payment of more than £30,000 made by the authority under a public contract.
- (2) The information must be published before the end of the period of 30 days beginning with the last day of the quarter in which the payment was made. 40

-
- (3) An appropriate authority may by regulations amend this section for the purpose of changing—
- (a) the financial threshold;
 - (b) the time limit for publication.
- (4) This section does not apply in relation to a public contract that is— 5
- (a) a utilities contract,
 - (b) a concession contract, or
 - (c) awarded by a maintained school, an Academy or a sixth form college corporation.
- (5) In this section— 10
- “quarter” means a period of three months ending with 31 March, 30 June, 30 September or 31 December in any year;
 - “specified information” means information in regulations under section 86.
- 66 Assessment of contract performance** 15
- (1) Subsection (2) applies where a contracting authority has set key performance indicators in accordance with section 50(1).
- (2) At least once in every period of twelve months during the life-cycle of the contract and on termination of the contract the contracting authority must — 20
- (a) assess performance against the key performance indicators, and
 - (b) publish information specified in regulations under section 86 in relation to that assessment.
- (3) Subsection (5) applies if— 25
- (a) a supplier has breached a public contract, and
 - (b) the breach results in—
 - (i) termination (or partial termination) of the contract,
 - (ii) the award of damages, or
 - (iii) a settlement agreement between the supplier and the contracting authority.
- (4) Subsection (5) also applies if a contracting authority considers that a supplier— 30
- (a) is not performing a public contract to the authority’s satisfaction,
 - (b) has been given proper opportunity to remedy the breach or improve performance, and
 - (c) has failed to do so.
- (5) Before the end of the period of 30 days beginning with the day on which this subsection first applies in relation to a particular breach or failure to perform, the contracting authority concerned must publish the following information— 35
- (a) that this subsection applies,
 - (b) the circumstances giving rise to its application, and
 - (c) any other information specified in regulations under section 86. 40
- (6) Subsection (5) does not apply in relation to a light touch contract.
- (7) This section does not apply to private utilities.

Sub-contracting

67 Sub-contracting: directions

- (1) This section applies in relation to a supplier if –
 - (a) a contracting authority, as a condition of awarding a public contract, required that the supplier sub-contract the supply of certain goods, services or works to another supplier, or 5
 - (b) the supplier –
 - (i) indicated to a contracting authority that it intended to sub-contract all or part of a public contract to another supplier, and
 - (ii) relied on that other supplier to satisfy any conditions of participation (see section 21(7)). 10
- (2) The contracting authority may direct that the supplier enter into a legally binding arrangement with the other supplier for the purpose of that supplier performing all or part of the contract (as required or indicated).
- (3) If a supplier fails to enter into a legally binding arrangement as directed by the contracting authority, the contracting authority may – 15
 - (a) choose not to enter into the contract with the supplier,
 - (b) where subsection (1)(b) applies, direct the supplier to enter into a legally binding arrangement with another appropriate supplier, or
 - (c) if the contract has already been entered into, terminate the contract. 20
- (4) In subsection (3), an “appropriate supplier” means a supplier that –
 - (a) is not an excluded supplier, and
 - (b) could have been relied on in place of the supplier referred to in subsection (1)(b)(ii).
- (5) In subsection(1)(a), the reference to a condition of award includes, in the case of a direct award, any condition attaching to the award of a contract. 25
- (6) For the purposes of subsection (1), a supplier is not to be treated as having relied on another supplier to satisfy conditions of participation if the conditions were satisfied by the first supplier alone.

68 Implied payment terms in sub-contracts 30

- (1) The terms in subsections (2) to (5) of section 63 (implied payment terms in public contracts) are implied into every public sub-contract.
- (2) But for the purposes of subsection (1) –
 - (a) references in those terms to the contracting authority are to be read as references to the person to whom goods, services or works are supplied under the public sub-contract, and 35
 - (b) subsection (8)(a) of section 63 does not apply.
- (3) Any term purporting to restrict or override the terms implied by this section is without effect.
- (4) But nothing in this section prohibits the parties to a public sub-contract from agreeing that a sum due under the contract must be paid earlier than would be required by the term in section 63(2). 40

- (5) In this section, “public sub-contract” means a contract substantially for the purpose of performing (or contributing to the performance of) the whole or any part of a public contract.
- (6) This section does not apply in relation to a public sub-contract that is for the purpose of performing (or contributing to the performance of) the whole or any part of –
- (a) a concession contract,
 - (b) a utilities contract awarded by a private utility, or
 - (c) a contract awarded by a maintained school, an Academy or a sixth form college corporation.

Modifying public contracts

69 Modifying a public contract

- (1) A contracting authority may modify a public contract or a contract that, as a result of the modification, will become a public contract (a “convertible contract”) if the modification –
- (a) is a permitted modification under Schedule 8 (permitted modifications),
 - (b) is not a substantial modification, or
 - (c) is a below-threshold modification.
- (2) A contracting authority may also modify a public contract or a convertible contract if the contract is a light touch contract.
- (3) A “substantial modification” is a modification which would –
- (a) increase or decrease the term of the contract by more than 10 per cent of the maximum term provided for on award,
 - (b) change the overall nature of the contract or materially change its scope, or
 - (c) materially change the economic balance of the contract in favour of the supplier.
- (4) A modification is a “below-threshold modification” if –
- (a) the modification would not itself increase or decrease the estimated value of the contract by more than –
 - (i) in the case of a contract for goods or services, 10 per cent;
 - (ii) in the case of a contract for works, 15 per cent,
 - (b) the aggregated value of below-threshold modifications would be less than the threshold amount for the type of contract,
 - (c) the modification would not change the scope of the contract, and
 - (d) the modification is not within subsection (1)(a) or (b).
- (5) For the purposes of subsection (4), the “aggregated value of below-threshold modifications” is the amount of the estimated value of the contract after modification that is attributable to below-threshold modifications.
- (6) Subsection (7) applies if, on modifying a public contract under this section, a contracting authority considers that –
- (a) the modification could reasonably have been made together with another modification made to the contract under this section, and

- (b) that single modification would not have been a modification within subsection (1) (and, accordingly, would have been subject to Part 3).
- (7) The modification is to be treated as not within subsection (1).
- (8) Except as provided for in paragraph 9 of Schedule 8 (modification permitted on corporate restructuring), a contracting authority may not modify a public contract so as to change the supplier. 5
- (9) Part 3 does not apply in relation to the modification of a contract under this section.

70 Contract change notices and publication of modifications

- (1) Before modifying a public contract or a convertible contract (see section 69(1)), a contracting authority must publish a contract change notice. 10
- (2) Subsection (1) does not apply if –
 - (a) the modification increases or decreases the estimated value of the contract by –
 - (i) in the case of a contract for goods or services, 10 per cent or less; 15
 - (ii) in the case of a contract for works, 15 per cent or less;
 - (b) the modification increases or decreases the term of the contract by 10 per cent or less of the maximum term provided for on award;
 - (c) the public contract or convertible contract is a light touch contract.
- (3) A “contract change notice” is a notice setting out – 20
 - (a) that the contracting authority intends to modify the contract;
 - (b) any other information specified in regulations under section 86.
- (4) Subsection (5) applies if, on making a modification to a public contract that is within subsection (2)(a) or (2)(b), a contracting authority considers that –
 - (a) the modification could reasonably have been made together with another modification made to the contract, and 25
 - (b) subsection (1) would have applied to that single modification.
- (5) Subsection (1) is to be treated as applying to the modification.
- (6) Before the end of the period of 90 days beginning with the day on which a contracting authority makes a qualifying modification under section 69(1), the authority must publish a copy of the contract as modified. 30
- (7) A “qualifying modification” is a modification which modifies, or results in, a public contract with an estimated value of more than £2 million.
- (8) Subsection (6) does not apply in relation to a modification of a contract that was – 35
 - (a) awarded by a devolved Welsh authority, unless it was awarded under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement, or
 - (b) awarded under a devolved Welsh procurement arrangement.
- (9) This section does not apply in relation to a modification of a contract that was – 40
 - (a) awarded by a transferred Northern Ireland authority, unless it was awarded under a reserved procurement arrangement or a devolved Welsh procurement arrangement, or

- (b) awarded under a transferred Northern Ireland procurement arrangement.
- (10) This section also does not apply to—
- (a) defence and security contracts, or
 - (b) private utilities. 5
- (11) A Minister of the Crown may by regulations amend this section for the purpose of changing—
- (a) the value thresholds in subsection (2), or
 - (b) the financial threshold in subsection (7).
- 71 Voluntary standstill period on the modification of contracts 10**
- A contracting authority may not modify a public contract or a convertible contract before the end of any standstill period provided for in a contract change notice in respect of the contract.
- Terminating public contracts*
- 72 Implied right to terminate public contracts 15**
- (1) It is an implied term of every public contract that the contract can, if a termination ground applies, be terminated by the contracting authority in accordance with this section.
- (2) Each of the following circumstances is a termination ground—
- (a) the contracting authority considers that the contract was awarded or modified in material breach of this Act or regulations made under it; 20
 - (b) a supplier has, since the award of the contract, become an excluded supplier or excludable supplier (including by reference to an associated supplier);
 - (c) a supplier (other than an associated supplier) to which the supplier is sub-contracting the performance of all or part of the public contract is an excluded or excludable supplier. 25
- (3) The termination ground in (2)(c) is not available unless the contracting authority—
- (a) requested information under section 28(1) (information about sub-contractors) in relation to the award of the public contract, and 30
 - (b) before awarding the public contract, did not know that the supplier intended to sub-contract the performance of all or part of the contract to an excluded or excludable supplier.
- (4) Before terminating a contract by reference to the term implied by subsection (1), a contracting authority must— 35
- (a) notify the supplier of its intention to terminate,
 - (b) specify which termination ground applies and why the authority has decided to terminate the contract,
 - (c) give the supplier reasonable opportunity to make representations about— 40
 - (i) whether a termination ground applies, and
 - (ii) the authority’s decision to terminate.

- (5) Before terminating a contract by reference to the fact that a supplier to which the supplier is sub-contracting is an excluded or excludable supplier (whether under subsection (2)(b) or (c)), a contracting authority must give the supplier reasonable opportunity to—
- (a) cease sub-contracting to the excluded or excludable supplier, and
 - (b) if necessary, find an alternative supplier to which to sub-contract.
- (6) A public contract may contain provision about restitution and other matters ancillary to the termination of the contract by reference to the term implied by subsection (1).
- (7) But any term purporting to restrict or override the implied term is without effect.
- (8) In subsection (2)(b), the reference to a supplier becoming an excludable supplier includes a reference to—
- (a) a supplier becoming an excludable supplier on the basis of a discretionary exclusion ground that—
 - (i) did not apply before award of the contract, or
 - (ii) applied before award of the contract by reference to different circumstances, and
 - (b) a contracting authority discovering that, before award of the contract, the supplier was an excludable supplier.
- (9) In this section, “material breach” means a breach that the contracting authority considers could reasonably result in a successful legal challenge under Part 8 or otherwise.

73 Contract termination notices

- (1) Before the end of the period of 30 days beginning with the day on which a public contract is terminated, a contracting authority must publish a contract termination notice.
- (2) A “contract termination notice” is a notice setting out—
- (a) that the contract has been terminated, and
 - (b) any other information specified in regulations under section 86.
- (3) In this section, a reference to termination includes a reference to—
- (a) discharge,
 - (b) expiry,
 - (c) termination by a party,
 - (d) rescission, or
 - (e) set aside by court order (whether or not under Part 9).
- (4) This section does not apply to private utilities.

PART 5

CONFLICTS OF INTEREST

74 Conflicts of interest: duty to identify

- (1) A contracting authority must take all reasonable steps to identify, and keep under review, in relation to a procurement any—

- (a) conflicts of interest, or
 - (b) potential conflicts of interest.
- (2) There is a conflict of interest in relation to a procurement if –
- (a) a person acting for or on behalf of the contracting authority in relation to the procurement has a conflict of interest, or 5
 - (b) a Minister acting in relation to the procurement has a conflict of interest.
- (3) A person who influences a decision made by or on behalf of a contracting authority in relation to a procurement is to be treated as acting in relation to the procurement. 10
- (4) In this section –
- “interest” includes a personal, professional or financial interest and may be direct or indirect;
 - “Minister” means – 15
 - (a) a Minister of the Crown;
 - (b) a member of the Welsh Government;
 - (c) the First Minister, deputy First Minister or a Northern Ireland Minister;
 - “member of the Welsh Government” means a person referred to in section 45 of the Government of Wales Act 2006. 20

75 Conflicts of interest: duty to mitigate

- (1) A contracting authority must take all reasonable steps to ensure that a conflict of interest does not put a supplier at an unfair advantage or disadvantage in relation to a procurement.
- (2) Reasonable steps may include requiring a supplier to take reasonable steps. 25
- (3) Subsection (4) applies if a contracting authority considers that –
- (a) a conflict of interest puts a supplier at an unfair advantage in relation to the award of a public contract, and
 - (b) either – 30
 - (i) the advantage cannot be avoided, or
 - (ii) the supplier will not take steps that the contracting authority considers are necessary in order to ensure it is not put at an unfair advantage.
- (4) The contracting authority must treat a supplier as an excluded supplier in relation to the award of the public contract. 35
- (5) In this section, “conflict of interest” has the meaning given in section 74.

76 Conflicts assessments

- (1) Before publishing a tender or transparency notice in relation to a procurement, a contracting authority must prepare a conflicts assessment in relation to the procurement. 40
- (2) Before publishing a dynamic market notice in relation to the establishment of a dynamic market, a contracting authority must prepare a conflicts assessment in relation to the establishment.

-
- (3) A conflicts assessment must include details of –
- (a) conflicts or potential conflicts of interest identified in accordance with section 74 (duty to identify), and
 - (b) any steps the contracting authority has taken or will take for the purposes of section 75 (duty to mitigate). 5
- (4) If a contracting authority is aware of circumstances that might cause a reasonable person to wrongly believe there to be a conflict or potential conflict of interest, a conflicts assessment must also include details of any steps the contracting authority has taken or will take to demonstrate that no such conflict or potential conflict exists. 10
- (5) A contracting authority must –
- (a) keep any conflicts assessment under review,
 - (b) revise the assessment as necessary, and
 - (c) when publishing any relevant notice, confirm that a conflicts assessment has been prepared and revised in accordance with this section. 15
- (6) Subsection (5) does not apply after –
- (a) a contracting authority has given notice of its decision not to award the contract (under section 53),
 - (b) a contract termination notice is published in relation to the procurement, or 20
 - (c) a dynamic market notice is published in relation to the market ceasing to operate.
- (7) In the case of a contracting authority that is a private utility –
- (a) the reference in this section to notice of a decision not to award a contract is a reference to the decision; 25
 - (b) the reference in this section to a contract termination notice being published in relation to a procurement is a reference to the contract being terminated;
 - (c) the reference in this section to a dynamic market notice being published in relation to a market ceasing to operate is a reference to the market ceasing to operate. 30
- (8) In this section –
- “conflict of interest” has the meaning given in section 74;
 - “relevant notice” means – 35
 - (a) a tender notice,
 - (b) a transparency notice,
 - (c) a dynamic market notice in relation to the establishment of a dynamic market,
 - (d) a contract details notice relating to a public contract, or 40
 - (e) a contract change notice;
 - “terminated” is to be understood by reference to section 73(3).

PART 6

BELOW-THRESHOLD CONTRACTS

77 Regulated below-threshold contracts

- (1) In this Part, a “regulated below-threshold contract” means a below-threshold contract which is not— 5
- (a) an exempted contract,
 - (b) a concession contract, or
 - (c) a utilities contract.
- (2) This Part does not apply— 10
- (a) to a contracting authority that is a maintained school, Academy or sixth form college,
 - (b) in relation to the award of a contract— 15
 - (i) by a transferred Northern Ireland authority, unless it is awarded under a reserved procurement arrangement or a devolved Welsh procurement arrangement, or
 - (ii) under a transferred Northern Ireland procurement arrangement, or
 - (c) in relation to the management of such a contract.

78 Regulated below-threshold contracts: procedure

- (1) Where a contracting authority invites the submission of tenders in relation to the award of a regulated below-threshold contract, the authority may not restrict the submission of tenders by reference to an assessment of a supplier’s suitability to perform the contract. 20
- (2) The reference to a supplier’s suitability to perform the contract includes a reference to a supplier’s— 25
- (a) legal and financial capacity;
 - (b) technical ability.
- (3) Subsection (1) does not apply in relation to a works contract if the contract has an estimated value of— 30
- (a) in the case of a contract to be awarded by a central government authority, not less than £138,760, or
 - (b) otherwise, not less than £213,477.
- (4) An appropriate authority may by regulations amend this section for the purpose of amending the financial thresholds.
- (5) This section does not apply in relation to— 35
- (a) the award of a contract by a devolved Welsh authority, unless it is awarded under a reserved procurement arrangement,
 - (b) the award of a contract under a devolved Welsh procurement arrangement, or
 - (c) the award of a contract in accordance with a framework. 40

79 Regulated below-threshold contracts: notices

- (1) A contracting authority may not advertise for the purpose of inviting tenders in relation to the award of a notifiable below-threshold contract without first publishing a below-threshold tender notice.
- (2) Subsection (1) does not apply where a contracting authority advertises only for the purpose of inviting tenders from particular or pre-selected suppliers. 5
- (3) As soon as reasonably practicable after entering into a notifiable below-threshold contract, a contracting authority must publish a contract details notice.
- (4) A “notifiable below-threshold contract” is a regulated below-threshold contract with an estimated value of – 10
 - (a) in the case of a contract to be awarded by a central government authority, not less than £12,000, or
 - (b) otherwise, not less than £30,000.
- (5) A “below-threshold tender notice” is a notice setting out – 15
 - (a) that the contracting authority intends to award a contract, and
 - (b) any other information specified in regulations under section 86.
- (6) Any time limits provided for in a below-threshold tender notice must be –
 - (a) reasonable, and
 - (b) the same for each supplier. 20
- (7) An appropriate authority may by regulations amend this section for the purpose of amending the financial thresholds.

80 Regulated below-threshold contracts: implied payment terms

- (1) The terms in subsections (2) to (5) are implied into every regulated below-threshold contract entered into by a contracting authority. 25
- (2) Any sum due to be paid under the contract by the contracting authority must be paid before the end of the period of 30 days beginning with –
 - (a) the day on which an invoice is received by the contracting authority in respect of the sum, or
 - (b) if later, the day on which the sum first became due in accordance with the invoice. 30
- (3) The term in subsection (2) does not apply if the contracting authority –
 - (a) considers the invoice invalid, or
 - (b) disputes the invoice.
- (4) On receiving an invoice from a payee, the contracting authority must notify the payee without undue delay if – 35
 - (a) it considers the invoice invalid, or
 - (b) it disputes the invoice.
- (5) A contracting authority may rely on a payment made by a third party to satisfy the term in subsection (2) only with the agreement of the payee. 40
- (6) For the purposes of the terms in subsections (2) to (5), an invoice is valid if it sets out the minimum required information and meets any other requirement set out in the contract.

- (7) The minimum required information is –
- (a) the name of the invoicing party,
 - (b) a description of the goods, services or works supplied,
 - (c) the sum requested, and
 - (d) a unique identification number. 5
- (8) The terms in subsections (2) to (5) are also implied into any contract that is wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of the contract referred to in subsection (1).
- (9) But for the purpose of subsection (8), references in those terms to the contracting authority are to be read as references to the person to whom goods, services or works are supplied for the purpose of performing (or contributing to the performance of) the whole or any part of the contract referred to in subsection (1). 10
- (10) Any term purporting to restrict or override the terms implied by this section is without effect. 15
- (11) But nothing in this section prohibits the parties to a contract from agreeing that a sum due under the contract must be paid earlier than would be required by the term in subsection (2).
- (12) An appropriate authority may by regulations amend this section for the purpose of changing the number of days referred to in subsection (2), but the number of days may not be more than 30 days. 20
- (13) In this section, “payee” means the person due to be paid under the invoice concerned.

PART 7 25

IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS

81 Treaty state suppliers

- (1) In this Act, a “treaty state supplier” means a supplier that is entitled to the benefits of an international agreement specified in Schedule 9.
- (2) But a supplier is a treaty state supplier only to the extent that it is entitled to the benefits of an international agreement specified in Schedule 9 in relation to the procurement, below-threshold procurement or international organisation procurement being –
- (a) carried out, or
 - (b) challenged. 35
- (3) An appropriate authority may by regulations amend Schedule 9 for the purpose of –
- (a) specifying an international agreement to which the United Kingdom is a signatory, or
 - (b) removing, or amending a reference to, an international agreement. 40
- (4) In subsection (3)(a), the reference to being a signatory to an international agreement includes a reference to having –
- (a) exchanged instruments, where the exchange constitutes the agreement;

- (b) acceded to the agreement.
- (5) In this Part—
- (a) a “below-threshold procurement” means the award or management of a below-threshold contract, including any steps taken for the purpose of awarding or managing a below-threshold contract; 5
- (b) an “international organisation procurement” means the award or management of, and any steps taken for the purpose of awarding or managing, a contract that—
- (i) is not a public contract only by virtue of an exemption in paragraph 20 or 26 of Schedule 2 (contracts subject to the procurement rules of international organisations), and 10
- (ii) is to be, or was, awarded following a competitive tendering procedure without restriction on who can, or could, submit an initial tender;
- (c) a reference to a supplier being entitled to the benefits of a treaty includes a reference to a supplier being entitled by virtue of the place of origin of goods or services supplied. 15
- (6) In this Act—
- (a) a reference to a treaty state supplier does not include a reference to a supplier that is entitled to the benefits of an international agreement only by reference to the United Kingdom being party to that agreement; 20
- (b) a reference to a state or territory being party to an agreement include a reference to a state or territory being part of an organisation of states or territories that is party to an agreement.
- 82 Treaty state suppliers: non-discrimination** 25
- (1) A contracting authority may not, in carrying out a procurement, below-threshold procurement or international organisation procurement, discriminate against a treaty state supplier.
- (2) A contracting authority discriminates against a treaty state supplier if it treats the supplier less favourably than it treats, or would treat, a United Kingdom supplier or other treaty state supplier because of— 30
- (a) the supplier’s association with the supplier’s treaty state, or
- (b) the supplier’s lack of association with—
- (i) the United Kingdom, or
- (ii) another treaty state. 35
- (3) On a comparison of cases for the purposes of subsection (2), there must be no material difference between the circumstances relating to each case.
- (4) In this section, a “treaty state” means a state, territory or organisation of states or territories that is party to an international agreement specified in Schedule 9, other than the United Kingdom. 40
- (5) And, in 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 party to the agreement.
- (6) In this Act, “United Kingdom supplier” means a supplier that is—
- (a) established in, or controlled or mainly funded from, the United Kingdom, a British Overseas Territory or a Crown Dependency, and 45

- (b) is not a treaty state supplier.

83 Treaty state suppliers: non-discrimination in Scotland

- (1) A Minister of the Crown or the Scottish Ministers may by regulations make provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements. 5
- (2) In this section “devolved procurement” means the award or management of contracts, including any steps taken for the purpose of the award or management of contracts, by a devolved Scottish authority.
- (3) Regulations under subsection (1) may modify primary legislation (whenever passed). 10

PART 8

INFORMATION AND NOTICES: GENERAL PROVISION

84 Pipeline notices

- (1) This section applies in relation to any contracting authority that considers that, in the coming financial year, it will pay more than £100 million under relevant contracts. 15
- (2) A contracting authority must publish a pipeline notice before the end of the period of 56 days beginning with the first day of the financial year referred to in subsection (1).
- (3) A “pipeline notice” means a notice setting out specified information about any public contract with an estimated value of more than £2 million in respect of which the contracting authority intends to publish a tender notice or transparency notice during the reporting period. 20
- (4) In this section –
 “financial year” means – 25
 (a) the period of twelve months beginning with the 1 April following the day on which this section comes into force, and
 (b) each successive period of 12 months;
 “relevant contracts” means any contracts for the supply of goods, services or works to the contracting authority other than exempted contracts; 30
 “reporting period” means the period of 18 months beginning with the first day of the financial year referred to in subsection (1);
 “specified information” means information specified in regulations under section 86.
- (5) An appropriate authority may by regulations amend this section for the purpose of changing the financial thresholds. 35
- (6) This section does not apply to private utilities.

85 General exemptions from duties to publish or disclose information

- (1) A contracting authority is not required to publish or otherwise disclose information under this Act if the authority is satisfied that – 40

- (a) withholding the information from publication or other disclosure is necessary for the purpose of safeguarding national security, or
 - (b) the information is sensitive commercial information and there is an overriding public interest in its being withheld from publication or other disclosure. 5
- (2) “Sensitive commercial information” is information which –
 - (a) constitutes a trade secret, or
 - (b) would be likely to prejudice the commercial interests of any person if it were published or otherwise disclosed.
- (3) If a contracting authority withholds information under this section, the authority must publish or notify anyone to whom the information would otherwise be provided of – 10
 - (a) the fact that information is being withheld, and
 - (b) whether it is being withheld under subsection (1)(a) or (1)(b).
- (4) A contracting authority is not required to publish or notify someone under subsection (3) if the authority is satisfied that it would be contrary to the interests of national security to do so. 15

86 Notices, documents and information: regulations

- (1) An appropriate authority may by regulations make provision about – 20
 - (a) the form and content of notices, documents or other information to be published or provided under this Act;
 - (b) how such notices or documents are, or information is, to be published, provided or revised.
- (2) Regulations under subsection (1) may for example – 25
 - (a) require a notice or document to contain specified information;
 - (b) require publication on a specified online system.
- (3) Regulations under subsection (1) may – 30
 - (a) make different provision for different kinds of notice, document or information;
 - (b) make different provision for the same kind of notice, document or information for different purposes.

See also section 110(3).

87 Electronic communications

- (1) In carrying out a procurement, a contracting authority must so far as practicable – 35
 - (a) communicate with suppliers electronically, and
 - (b) take steps to ensure that suppliers participating in a procurement communicate electronically.
- (2) In carrying out a procurement, a contracting authority may only use, or require the use of, electronic communication systems that are – 40
 - (a) free of charge and readily accessible to suppliers,
 - (b) generally available, or interoperable with other generally available systems, and
 - (c) accessible to people with disabilities.

- (3) Subsection (1) does not apply if the contracting authority is satisfied that electronic communication poses a particular security risk in the circumstances.
- (4) In this section, “electronic communication system” includes any electronic system used for the purpose of communication with suppliers.

88 Information relating to a procurement 5

- (1) An appropriate authority may by regulations make provision requiring certain information to be shared in a particular way, including through a specified online system.
- (2) An appropriate authority may make arrangements to establish and operate an online system for the purposes of sharing information. 10
- (3) Regulations under subsection (1) may require a contracting authority to—
- (a) share information in a particular way, or
 - (b) take steps to ensure that suppliers participating in a procurement share information in a particular way.
- (4) A contracting authority must keep records of any communication between the authority and a supplier that is made for the purposes of, or in connection with, a procurement under this Act. 15
- (5) In this section, “information” means information shared under, or for a purpose relating to, this Act.

PART 9 20

REMEDIES FOR BREACH OF STATUTORY DUTY

89 Duties under this Act enforceable in civil proceedings

- (1) A contracting authority’s duty to comply with Parts 1 to 5, 7 and 8 is enforceable in civil proceedings under this Part.
- (2) For the purposes of this Part, the duty is owed to any supplier that is— 25
- (a) a United Kingdom supplier, or
 - (b) a treaty state supplier.
- (3) Proceedings under this Part may be brought in the court by a supplier that—
- (a) is a United Kingdom or treaty state supplier, and
 - (b) has suffered, or is at risk of suffering, loss or damage in consequence of a breach of the duty. 30
- (4) See section 95 for time limits applicable in respect of claims under this Part.
- (5) A contracting authority’s duty to comply with section 82 (treaty state suppliers: non-discrimination) in relation to a below-threshold procurement or international organisation procurement is not enforceable in civil proceedings under this Part. 35
- (6) This Part applies irrespective of section 2(2) and 21 of the Crown Proceedings Act 1947.
- (7) In this Part— 40
- “claimant”—

- (a) in relation to a claim in Northern Ireland, means plaintiff;
 - (b) in relation to a claim in Scotland, means pursuer;
- “the court” means –
- (a) in England and Wales, the High Court,
 - (b) in Northern Ireland, the High Court, and
 - (c) in Scotland, the Court of Session.
- (8) In this section “below-threshold procurement” and “international organisation procurement” have the meanings given in section 81.

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90 Automatic suspension of the entry into or modification of contracts

- (1) A contracting authority may not enter into a public contract, or modify a public contract or a convertible contract, if –
- (a) proceedings under this Part have been commenced in relation to the contract, and
 - (b) the contracting authority has been notified of that fact.
- (2) The court may lift or modify the restriction in subsection (1) by order under section 91.
- (3) The restriction in subsection (1) does not apply if the contracting authority was notified of the commencement of proceedings after the end of any applicable standstill period (see sections 49 and 71).
- (4) The restriction in subsection (1) does not apply if –
- (a) the proceedings at first instance have been determined, discontinued or otherwise disposed of, and
 - (b) the court has not made an order to extend the restriction.
- (5) In this section “convertible contract” has the meaning given in section 69.

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91 Interim remedies

- (1) In proceedings under this Part, the court may make one or more of the following orders –
- (a) an order lifting or modifying the restriction in section 90(1);
 - (b) an order extending the restriction or imposing a similar restriction;
 - (c) an order suspending the effect of any decision made or action taken by the contracting authority in carrying out the procurement;
 - (d) an order suspending the procurement or any part of it;
 - (e) an order suspending the entering into or performance of a contract;
 - (f) an order suspending the making of a modification of a contract or performance of a contract as modified.
- (2) In considering whether to make an order under subsection (1), the court must have regard to –
- (a) the public interest in, among other things –
 - (i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law;
 - (ii) avoiding delay in the supply of the goods, services or works provided for in the contract or modification (for example, in

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- respect of defence or security interests or the continuing provision of public services);
- (b) the interests of suppliers, including whether damages are an adequate remedy for the claimant;
 - (c) any other matters that the court considers appropriate. 5
- (3) An order under subsection (1) may not permit a contract to be entered into or modified before the end of any applicable standstill period (see sections 49 and 71).
- (4) An order under subsection (1) may provide for undertakings or conditions.
- 92 Pre-contractual remedies 10**
- (1) This section applies if the court is satisfied that a decision made, or action taken, by a contracting authority breached the duty referred to in section 89(1) and –
- (a) the contract in relation to which the breach occurred has not been entered into, or 15
 - (b) where the breach occurred in relation to a modification of a contract, the modification has not yet been made.
- (2) The court may make one or more of the following orders –
- (a) an order setting aside the decision or action;
 - (b) an order requiring the contracting authority to take any action; 20
 - (c) an order for the award of damages;
 - (d) any other order that the court considers appropriate.
- 93 Post-contractual remedies**
- (1) This section applies if the court is satisfied that a decision made, or action taken, by a contracting authority breached the duty referred to in section 89(1) and – 25
- (a) the contract in relation to which the breach occurred has already been entered into, or
 - (b) where the breach occurred in relation to a modification of a contract, the modification has already been made. 30
- (2) The court –
- (a) must, if a set aside condition in section 94 is met, make an order setting aside the contract or modification, and
 - (b) may, in any case, make an order for the award of damages.
- (3) The duty in subsection (2)(a) does not apply if the court is satisfied that there is an overriding public interest in not setting aside the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services). 35
- (4) In which case, the court may make an order reducing – 40
- (a) the term of the contract;
 - (b) the goods, services or works to be supplied under the contract.
- (5) In considering whether there is an overriding public interest in not setting aside a contract or modification, the court –

- (a) may have regard to the financial consequences of setting aside the contract or modification only in exceptional circumstances, and
- (b) must in any event disregard costs that are directly associated with—
 - (i) the contracting authority having to award another contract or enter into a contract to a different supplier, 5
 - (ii) a delay in the performance of the contract or the contract as modified, or
 - (iii) any legal obligations arising from setting aside the contract or modification.
- (6) If a contract or modification is set aside, it is to be treated as without effect from the date of the order. 10
- (7) An order setting aside a framework or modification of a framework may not operate to set aside contracts already awarded under the framework.
- (8) An order setting aside or reducing the term of, or supplies under, a contract may make provision for restitution and other consequential or supplementary matters. 15

94 Post-contractual remedies: set aside conditions

- (1) A set aside condition is met if the court is satisfied that the claimant was denied a proper opportunity to seek a remedy under section 92 (pre-contractual remedies) because—
 - (a) a required contract award notice was not published;
 - (b) the contract was entered into or modified before the end of any applicable standstill period (see sections 49 and 71);
 - (c) the contract was entered into or modified during a period of automatic suspension under section 90 or in breach of a court order; 25
 - (d) in the case of a contract of a kind described in section 49(3) (exceptions to mandatory standstill), the breach became apparent only on publication of a contract award notice;
 - (e) in the case of a modification under section 69, the breach became apparent only on publication of a contract change notice; 30
 - (f) the breach became apparent only after the contract was entered into or modified.
- (2) Subsection (1)(d) does not apply if—
 - (a) the contract award notice provided for a standstill period, and
 - (b) the contract was not entered into before the end of that standstill period. 35
- (3) Subsection (1)(e) does not apply if—
 - (a) the contract change notice provided for a standstill period, and
 - (b) the modification was not made before the end of that standstill period.
- (4) References in this section to a notice not being published include references to a notice that, though published, did not provide accurate information in respect of the contract as entered into. 40

95 Time limits on claims

- (1) A supplier must commence any proceedings under this Part 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 circumstances giving rise to the claim, unless subsection (4) applies. 5
- (2) Subsection (4) applies where –
- (a) the proceedings are brought to set aside a public contract under section 93(2), and
 - (b) the contracting authority did not publish a contract details notice in respect of the contract in accordance with section 51. 10
- (3) Subsection (4) also applies where the proceedings are brought to set aside a modification of a contract under section 93(2).
- (4) The supplier must commence the proceedings before the earlier of the following –
- (a) the end of the period mentioned in subsection (1); 15
 - (b) the end of the period of 6 months beginning with the day the contract was entered into or modified.
- (5) The court may make an order extending a time limit referred to in subsection (1) or (4) if it considers there to be a good reason for doing so.
- (6) An order under subsection (5) may not permit proceedings to be commenced after the end of the period of 3 months beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim. 20

PART 10

PROCUREMENT OVERSIGHT 25

96 Procurement investigations

- (1) An appropriate authority may investigate a relevant contracting authority's compliance with requirements of this Act.
- (2) An appropriate authority conducting a procurement investigation may by notice require a relevant contracting authority –
- (a) to provide such relevant documents as the appropriate authority may reasonably require for the purposes of the procurement investigation, in the form or manner specified in the notice; 30
 - (b) to give such other assistance in connection with the procurement investigation as is reasonable in the circumstances and is specified in the notice. 35
- (3) The relevant contracting authority must comply with a notice under subsection (2) before the end of –
- (a) the period specified in the notice (which must be at least 30 days beginning with the day on which the notice is given), or 40
 - (b) such longer period as the appropriate authority may agree to.
- (4) The appropriate authority may publish the results of a procurement investigation, including any section 97 recommendation issued.

- (5) In this section—
- “procurement investigation” means an investigation under subsection (1);
 - “relevant contracting authority” means a contracting authority other than—
 - (a) a Minister of the Crown or a government department; 5
 - (b) the Welsh Ministers;
 - (c) a Northern Ireland department;
 - (d) a private utility;
 - “relevant documents” means documents or other information that—
 - (a) are specified or described in a notice under subsection (2), and 10
 - (b) are in the possession or control of the relevant contracting authority to which the notice is given.

97 Recommendations following procurement investigations

- (1) This section applies where an appropriate authority—
 - (a) has conducted a procurement investigation under section 96, and 15
 - (b) considers, in light of the results of that procurement investigation (whether alone or in conjunction with the results of other such investigations), that a relevant contracting authority is engaging in action giving rise, or that is likely to give rise, to a breach of any requirement of this Act. 20
- (2) The appropriate authority may issue a recommendation (a “section 97 recommendation”) to the relevant contracting authority as to—
 - (a) the action the relevant contracting authority should take with a view to ensuring that it complies with the requirements of this Act specified in the recommendation; 25
 - (b) the timing of such action.
- (3) A section 97 recommendation must not relate to how the relevant contracting authority should—
 - (a) comply with section 11 (procurement objectives),
 - (b) have regard to the national procurement policy statement (see section 12) or the Wales procurement policy statement (see section 13); 30
 - (c) exercise a discretion in relation to a particular procurement.
- (4) In considering how to comply with the requirements of this Act, a relevant contracting authority must have regard to a section 97 recommendation issued to it. 35
- (5) A relevant contracting authority to which a section 97 recommendation has been issued must, where the recommendation so specifies, submit a progress report to the appropriate authority at such intervals as may be specified.
- (6) A “progress report” is a report setting out—
 - (a) what action (if any) the relevant contracting authority has taken as a result of the recommendation, or 40
 - (b) if the authority has taken no such action, a statement to that effect.
- (7) Where the relevant contracting authority has taken no action as a result of the section 97 recommendation, or has taken different action to that recommended, the progress report must also include the authority’s reasons for doing so. 45

- (8) The appropriate authority may publish a progress report or, where the relevant contracting authority fails to submit one, notice of that fact.
- (9) In this section –
 “action” includes acts and omissions;
 “procurement investigation” and “relevant contracting authority” have the meanings given in section 96. 5

98 Guidance following procurement investigations

- (1) Where an appropriate authority has conducted a procurement investigation under section 96, the authority may publish guidance setting out what the authority considers to be the lessons of the matters considered in the procurement investigation for compliance with the requirements of this Act by contracting authorities generally. 10
- (2) In considering how to comply with the requirements of this Act, a contracting authority must have regard to guidance published under subsection (1).

PART 11 15

APPROPRIATE AUTHORITIES AND CROSS-BORDER PROCUREMENT

99 Welsh Ministers: restrictions on the exercise of powers

- (1) The Welsh Ministers may only exercise a power under this Act for the purpose of regulating –
- (a) contracting authorities that are devolved Welsh authorities (within the meaning given in section 157A of the Government of Wales Act 2006), 20
 - (b) contracting authorities that –
 - (i) are not devolved Welsh authorities, but
 - (ii) for the purposes of this Act, are to be treated as devolved Welsh authorities, or 25
 - (c) the award of contracts under a devolved Welsh procurement arrangement, or the management of such contracts (see section 102).
- (2) A contracting authority that is a public undertaking or private utility is to be treated as a devolved Welsh authority for the purposes of this Act if –
- (a) it operates only in relation to Wales, and 30
 - (b) its activities are wholly or mainly activities that do not relate to reserved matters.
- (3) Otherwise, a contracting authority is to be treated as a devolved Welsh authority for the purposes of this Act if –
- (a) the authority’s functions are – 35
 - (i) exercisable wholly or mainly in relation to Wales, and
 - (ii) are wholly or mainly functions that do not relate to reserved matters, and
 - (b) the authority is –
 - (i) awarding a contract for the purpose of exercising a function wholly in relation to Wales, or 40
 - (ii) managing a contract awarded for that purpose.

- (4) Other than in this section, a reference in this Act to a devolved Welsh authority includes a reference to an authority that is to be treated as a devolved Welsh authority for the purposes of this Act.
- (5) In this section a reference to the award or management of a contract includes a reference to any steps taken for the purpose of, awarding or managing a contract and a reference to terminating a procurement before award. 5
- (6) In this section –
 - “reserved matters” has the meaning given in the Government of Wales Act 2006;
 - “Wales” has the meaning given in section 158 of the Government of Wales Act 2006 (when read by reference to section 157A(9) of that Act). 10

100 Northern Ireland department: restrictions on the exercise of powers

- (1) A Northern Ireland department may only exercise a power under this Act for the purpose of regulating –
 - (a) contracting authorities that are transferred Northern Ireland authorities, 15
 - (b) contracting authorities that are public undertakings or private utilities that –
 - (i) are not transferred Northern Ireland authorities, but
 - (ii) for the purposes of this Act, are to be treated as transferred Northern Ireland authorities, or 20
 - (c) the award of contracts under a transferred Northern Ireland procurement arrangement or the management of such contracts.
- (2) For the purposes of this section, an authority is a “transferred Northern Ireland authority” if its functions – 25
 - (a) are exercisable only in or as regards Northern Ireland, and
 - (b) are wholly or mainly functions that do not relate to reserved or excepted matters (within the meaning given in the Northern Ireland Act 1998).
- (3) A contracting authority that is a public undertaking or private utility is to be treated as a transferred Northern Ireland authority for the purposes of this Act if – 30
 - (a) it operates only in or as regards Northern Ireland, and
 - (b) its activities are wholly or mainly activities that do not relate to reserved or excepted matters. 35
- (4) Other than in this section, a reference in this Act to a transferred Northern Ireland authority includes a reference to an authority that is to be treated as a transferred Northern Ireland authority for the purposes of this Act.
- (5) In this section, a reference to the award or management of a contract includes a reference to any steps taken for the purpose of, awarding or managing a contract and a reference to terminating a procurement before award. 40

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

- (1) A Minister of the Crown may exercise a power under this Act for the purpose of regulating a contracting authority that is a devolved Welsh authority only in relation to – 45

- (a) the award of contracts under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement, or
 - (b) the management of such contracts.
- (2) Subsection (1) does not apply in relation to a power under section 62 (electronic invoicing). 5
- (3) A Minister of the Crown may not make regulations under section 62 (electronic invoicing) for the purpose of regulating a devolved Welsh authority without the consent of the Welsh Ministers, unless the regulations relate to—
 - (a) the award of contracts under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement, or 10
 - (b) the management of such contracts.
- (4) A Minister of the Crown may not make regulations under this Act for the purpose of regulating a transferred Northern Ireland authority without the consent of a Northern Ireland department, unless the regulations relate to—
 - (a) the award of contracts under a reserved procurement arrangement or a devolved Welsh procurement arrangement, or 15
 - (b) the management of such contracts.
- (5) Subsections (1) and (4) do not apply in relation to a power under—
 - (a) section 81 (treaty state suppliers);
 - (b) section 83 (non-discrimination in Scotland); 20
 - (c) section 113 (consequential provision), or
 - (d) section 115 (commencement).
- (6) In this section a reference to the award or management of a contract includes a reference to any steps taken for the purpose of, awarding or managing a contract and a reference to terminating a procurement before award. 25

102 Definitions relating to procurement arrangements

- (1) In this Act, a reference to a contract being awarded under a procurement arrangement is a reference to a contract being awarded—
 - (a) in accordance with a framework or similar arrangement,
 - (b) by reference to a dynamic market or similar arrangement, 30
 - (c) to a centralised procurement authority or equivalent body, or
 - (d) following a procedure or other selection process carried out—
 - (i) jointly by two or more authorities, or
 - (ii) by a centralised procurement authority or equivalent body.
- (2) A procurement arrangement is a devolved Welsh procurement arrangement if—
 - (a) the framework was awarded by a devolved Welsh authority,
 - (b) the dynamic market was established by a devolved Welsh authority,
 - (c) the centralised procurement authority is a devolved Welsh authority, 40
 - or
 - (d) a devolved Welsh authority is designated the lead authority in the tender or transparency notice.
- (3) A procurement arrangement is a transferred Northern Ireland procurement arrangement if—

- (a) the framework was awarded by a transferred Northern Ireland authority,
 - (b) the dynamic market was established by a transferred Northern Ireland authority,
 - (c) the centralised procurement authority is a transferred Northern Ireland authority, or
 - (d) a transferred Northern Ireland authority is designated the lead authority in the tender or transparency notice. 5
- (4) A procurement arrangement is a devolved Scottish procurement arrangement if – 10
- (a) the framework or similar arrangement was awarded by a devolved Scottish authority,
 - (b) the dynamic market or similar arrangement was established by a devolved Scottish authority,
 - (c) the centralised procurement authority or equivalent body is a devolved Scottish authority, or
 - (d) a devolved Scottish authority was designated the lead authority in respect of the procedure or selection process. 15
- (5) A procurement arrangement is a reserved procurement arrangement if it is not – 20
- (a) a devolved Welsh procurement arrangement,
 - (b) a transferred Northern Ireland procurement arrangement, or
 - (c) a devolved Scottish procurement arrangement.
- (6) In this section –
- “equivalent body” means, in relation to a centralised procurement authority, a body carrying out functions of a kind described in section 10(4) (centralised procurement authorities); 25
 - “framework” includes a framework within the meaning given in Scottish procurement legislation;
 - “similar arrangement” includes, in relation to a dynamic market, a dynamic purchasing or qualification system. 30

103 Powers relating to procurement arrangements

- (1) A Minister of the Crown may by regulations make provision, including provision amending this Act, for the purpose of regulating –
- (a) the award of contracts by devolved Scottish authorities under – 35
 - (i) reserved procurement arrangements,
 - (ii) devolved Welsh procurement arrangements, or
 - (iii) transferred Northern Ireland procurement arrangements, and
 - (b) the management of such contracts.
- (2) A Minister of the Crown may by regulations amend this Act for the purpose of disapplying provision so far as it relates to – 40
- (a) the award of contracts under devolved Scottish procurement arrangements, and
 - (b) the management of such contracts.

- (3) A Minister of the Crown or the Scottish Ministers may by regulations amend Scottish procurement legislation for the purpose of applying it in relation to –
- (a) the award of contracts under devolved Scottish procurement arrangements by contracting authorities, and
 - (b) the management of such contracts. 5
- (4) In this section, “Scottish procurement legislation” means –
- (a) the Public Contracts (Scotland) Regulations 2015 (S.S.I. 2015/446),
 - (b) the Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49),
 - (c) the Concession Contracts (Scotland) Regulations 2016 (S.S.I. 2016/65), and 10
 - (d) any legislation which modifies or replaces those regulations (including an Act of the Scottish Parliament).

PART 12

AMENDMENTS AND REPEALS

- 104 Disapplication of duty in section 17 of the Local Government Act 1988** 15
- (1) In section 17 of the Local Government Act 1988 (exclusion of non-commercial considerations), in subsection (11), after “imposed on it by” insert “the Procurement Act 2022 or”.
- (2) A Minister of the Crown or the Welsh Ministers may by regulations make provision disapplying the duty under section 17(1) of the Local Government Act 1988 (“the 1988 Act”) as it relates to a relevant authority. 20
- (3) The regulations may disapply the duty as it relates to –
- (a) all relevant authorities or those that are specified;
 - (b) all functions that are regulated by section 17 of the 1988 Act (see subsection (4) of that section) or those that are specified; 25
 - (c) contracts of all types mentioned in section 17(1) of the 1988 Act, or of those types that are specified;
 - (d) all non-commercial matters (see section 17(5) of the 1988 Act) or those that are specified.
- (4) In this section – 30
- “relevant authority” means an authority to which section 17 of the 1988 Act applies other than a devolved Scottish authority;
 - “specified” means specified, or of a description specified, in regulations under this section.
- 105 Single source defence contracts** 35
- Schedule 10 makes amendments to Part 2 of the Defence Reform Act 2014 (single source contracts).
- 106 Concurrent powers and the Government of Wales Act 2006**
- In Schedule 7B to the Government of Wales Act 2006 (general restrictions on devolved competence) – 40
- (a) at the end of paragraph 9(8)(b)(vi), omit “or”,

- (b) in paragraph 9(8)(b)(vii), at the end insert “or
“(viii) the Procurement Act 2022.”,
 - (c) at the end of paragraph 11(6)(b)(vii), omit “or”, and
 - (d) in paragraph 11(6)(b)(viii), at the end insert “or
“(ix) the Procurement Act 2022.”
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107 Repeals etc

- (1) The enactments set out in Schedule 11 are repealed or revoked.
 - (2) The following regulations apply only in relation to devolved Scottish authorities—
 - (a) the Public Contracts (Scotland) Regulations 2015 (S.S.I. 2015/446);
 - (b) the Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49);
 - (c) the Concession Contracts (Scotland) Regulations 2016 (S.S.I. 2016/65).
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PART 13

GENERAL

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

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- (1) A Minister of the Crown may by regulations make provision disapplying any provision of this Act in relation to—
 - (a) the award or management of a contract for the supply of services or goods to which health procurement rules apply;
 - (b) a relevant authority, to the extent it is carrying out activities within paragraph (a).
 - (2) In subsection (1)—
 - “health procurement rules” means provision made by regulations under section 12ZB of the National Health Service Act 2006 (procurement of healthcare services etc for the health service in England);
 - “relevant authority” has the meaning given in that section.
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109 Power to amend this Act in relation to private utilities

- (1) An appropriate authority may by regulations amend this Act for the purpose of reducing the regulation of private utilities under this Act.
 - (2) The regulations may, for example, make provision—
 - (a) disapplying requirements under this Act in relation to private utilities;
 - (b) modifying requirements under this Act as they apply in relation to private utilities so as to reduce any burden, or the overall burdens, for private utilities resulting directly or indirectly from this Act.
 - (3) Before making regulations under this section an appropriate authority must consult—
 - (a) persons appearing to the authority to represent the views of private utilities, and
 - (b) such other persons as the authority considers appropriate.
 - (4) In this section “burden” includes—
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- (a) a financial cost;
- (b) an administrative inconvenience;
- (c) an obstacle to efficiency, productivity or profitability.

110 Regulations

- | | |
|---|----|
| (1) Any power to make regulations under this Act— | 5 |
| (a) so far as exercisable by a Minister of the Crown or the Welsh Ministers is exercisable by statutory instrument, | |
| (b) so far as exercisable by a Northern Ireland department, is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 (S.I. 1979/1573 (N.I. 12)). | 10 |
| (2) For regulations made under this Act by the Scottish Ministers, see also section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) (Scottish statutory instruments). | |
| (3) Regulations under this Act may— | |
| (a) make different provision for different purposes or areas; | 15 |
| (b) make provision generally or only in relation to specified cases; | |
| (c) make incidental, supplementary or consequential provision; | |
| (d) make transitional, transitory or saving provision. | |
| (4) A statutory instrument containing (whether alone or with other provision) regulations made by a Minister of the Crown under any of the following provisions may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament— | 20 |
| (a) section 6 (defence and security contracts); | |
| (b) section 8 (light touch contracts); | |
| (c) section 33 (reserving contracts to public service mutuals); | 25 |
| (d) section 61 (debarment decisions: appeals); | |
| (e) section 64 (payment compliance notices); | |
| (f) section 70 (contract change notices and publication of modifications); | |
| (g) section 81 (treaty state suppliers: international agreements); | |
| (h) section 83 (treaty state suppliers: non-discrimination in Scotland); | 30 |
| (i) section 86 (notices, documents and information); | |
| (j) section 88 (information relating to a procurement); | |
| (k) section 103 (powers relating to procurement arrangements); | |
| (l) section 104 (disapplication of section 17 of Local Government Act 1988); | |
| (m) section 108 (disapplication of Act: NHS procurement in England); | 35 |
| (n) section 109 (amendment of Act in relation to private utilities); | |
| (o) section 113 (consequential provision), if the regulations made under it modify primary legislation; | |
| (p) paragraph 3 or 5 of Schedule 1 (threshold amounts); | |
| (q) Schedule 2(exempted contracts); | 40 |
| (r) Schedule 4 (utility activities). | |
| (5) A statutory instrument containing regulations made by a Minister of the Crown under section 41 must be laid before Parliament after being made. | |
| (6) Any other statutory instrument containing regulations made by a Minister of the Crown under any provision of this Act, except section 115 | 45 |

- (commencement), is subject to annulment in pursuance of a resolution of either House of Parliament.
- (7) Regulations contained in a statutory instrument laid before Parliament under subsection (5) cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved by a resolution of each House of Parliament. 5
- (8) In calculating the period of 28 days, no account is to be taken of any whole days that fall within a period during which –
- (a) Parliament is dissolved or prorogued, or
 - (b) either House of Parliament is adjourned for more than four days. 10
- (9) If regulations cease to have effect as a result of subsection (7), that does not –
- (a) affect the validity of anything previously done under the regulations, or
 - (b) prevent the making of new regulations.
- (10) A statutory instrument containing (whether alone or with other provision) regulations made by the Welsh Ministers under any of the following provisions may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, Senedd Cymru – 15
- (a) section 8 (light touch contracts);
 - (b) section 33 (reserving contracts to public service mutuals); 20
 - (c) section 64 (payment compliance notices);
 - (d) section 81 (treaty state suppliers: international agreements);
 - (e) section 86 (notices, documents and information);
 - (f) section 88 (information relating to a procurement);
 - (g) section 104 (disapplication of section 17 of Local Government Act 1988); 25
 - (h) section 109 (amendment of Act in relation to private utilities);
 - (i) section 113 (consequential provision), if the regulations made under it modify primary legislation;
 - (j) paragraph 3 or 5 of Schedule 1 (threshold amounts);
 - (k) Schedule 2 (exempted contracts); 30
 - (l) Schedule 4 (utility activities).
- (11) Any other statutory instrument containing regulations made by the Welsh Ministers under this Act is subject to annulment in pursuance of a resolution of Senedd Cymru.
- (12) Regulations of a Northern Ireland department under any of the following provisions (whether alone or with other provision) may not be made unless a draft of the regulations has been laid before, and approved by a resolution of, the Northern Ireland Assembly – 35
- (a) section 8 (light touch contracts);
 - (b) section 33 (reserving contracts to public service mutuals); 40
 - (c) section 64 (payment compliance notices);
 - (d) section 81 (treaty state suppliers: international agreements);
 - (e) section 86 (notices, documents and information);
 - (f) section 88 (information relating to a procurement);
 - (g) section 109 (amendment of Act in relation to private utilities); 45
 - (h) section 113 (consequential provision), if the regulations made under it modify primary legislation;

- (i) paragraph 3 or 5 of Schedule 1 (threshold amounts);
 - (j) Schedule 2 (exempted contracts);
 - (k) Schedule 4 (utility activities).
- (13) Any other regulations of a Northern Ireland department under this Act are subject to negative resolution within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954 as if they were a statutory instrument within the meaning of that Act. 5
- (14) Regulations of the Scottish Ministers under sections 83 (treaty state suppliers: non-discrimination) and 103 (powers relating to procurement arrangements) are subject to the affirmative procedure (see Part 2 of the Interpretation and Legislative Reform (Scotland) Act 2010). 10

111 Interpretation

- (1) In this Act –
- “appropriate authority” means –
 - (a) a Minister of the Crown, 15
 - (b) the Welsh Ministers, or
 - (c) a Northern Ireland department;
 - “enactment” includes primary legislation and legislation made under primary legislation;
 - “Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975; 20
 - “modify”, in relation to enactments, includes amend, repeal or revoke;
 - “Northern Ireland legislation” has the meaning given in section 24(5) of the Interpretation Act 1978;
 - “primary legislation” means – 25
 - (a) an Act of Parliament,
 - (b) an Act of the Scottish Parliament,
 - (c) an Act or Measure of Senedd Cymru, or
 - (d) Northern Ireland legislation;
 - “VAT” means value added tax; 30
 - “working day” means a day other than –
 - (a) a Saturday or Sunday, or
 - (b) a day which is a bank holiday in any part of the United Kingdom under the Banking and Financial Dealings Act 1971.
- (2) In this Act, a reference to an amount payable under a contract includes a reference to any amount referable to VAT. 35

112 Index of defined expressions

In this Act the expressions listed in the left-hand column of the table have the meaning given by, or are to be interpreted in accordance with, the provisions listed in the right-hand column. 40

| <i>Expression</i> | <i>Provision</i> |
|-------------------|------------------|
| Academy | section 63 |

| <i>Expression</i> | <i>Provision</i> | |
|---|------------------|----|
| appropriate authority | section 111 | |
| associated supplier | section 26 | |
| associated tender document | section 20 | |
| award criteria | section 22 | 5 |
| below-threshold contract | section 4 | |
| central government authority | Schedule 1 | |
| centralised procurement authority | section 10 | |
| concession contract | section 7 | |
| condition of participation | section 21 | 10 |
| connected person | Schedule 6 | |
| contract award notice | section 48 | |
| contract change notice | section 70 | |
| contract details notice | section 51 | |
| contracting authority | section 1 | 15 |
| defence and security contract | section 6 | |
| defence authority contract | section 6 | |
| devolved Scottish authority | section 1 | |
| devolved Scottish procurement arrangement | section 102 | 20 |
| devolved Welsh authority | section 99 | |
| devolved Welsh procurement arrangement | section 102 | |
| discretionary exclusion ground | Schedule 7 | |
| dynamic market | section 35 | 25 |
| enactment | section 111 | |
| estimated value | section 3 | |
| excludable supplier | section 54 | |
| excluded supplier | section 54 | |
| exempted contract | Schedule 2 | 30 |
| framework | section 44 | |
| light touch contract | section 8 | |

| <i>Expression</i> | <i>Provision</i> | |
|--|------------------|----|
| maintained school | section 63 | |
| mandatory exclusion ground | Schedule 6 | |
| Minister of the Crown | section 111 | |
| modify | section 111 | 5 |
| open framework | section 47 | |
| primary legislation | section 111 | |
| private utility | section 5 | |
| a procurement | section 10 | |
| public contract | section 2 | 10 |
| public undertaking | section 1 | |
| reserved procurement arrangement | section 102 | |
| Scottish procurement legislation | section 103 | |
| sixth form college corporation | section 63 | 15 |
| tender notice | section 20 | |
| threshold amount | Schedule 1 | |
| transferred Northern Ireland authority | section 100 | |
| transferred Northern Ireland procurement arrangement | section 102 | 20 |
| transparency notice | section 43 | |
| treaty state supplier | section 81 | |
| United Kingdom supplier | section 82 | |
| utilities contract | section 5 | 25 |
| utility activity | section 5 | |
| VAT | section 111 | |
| working day | section 111 | |
| works | Schedule 1 | |
| works contract | Schedule 1 | 30 |

113 Power to make consequential, etc, provision

- (1) An appropriate authority may by regulations make supplementary, incidental or consequential provision in connection with any provision of this Act.
- (2) Regulations under subsection (1) may modify primary legislation.

114 Extent

5

This Act extends to England and Wales, Scotland and Northern Ireland.

115 Commencement

- (1) This Part comes into force on the day on which this Act is passed.
- (2) The remaining provisions of this Act come into force on such day as a Minister of the Crown may by regulations appoint; and different days may be appointed for different purposes. 10
- (3) Regulations under subsection (2) may make transitional, transitory or saving provision.

116 Short title

This Act may be cited as the Procurement Act 2022.

15

SCHEDULES

SCHEDULE 1

Section 2

THRESHOLD AMOUNTS

- 1 (1) The threshold amount for a contract of a type referred to in the second column of the table below is as set out in the corresponding row of the third column. 5

| | <i>Type of contract</i> | <i>Threshold amount</i> | |
|----|---|-------------------------|----|
| 1 | Defence and security contract that is a works contract | £5,336,937 | |
| 2 | Defence and security contract that is a concession contract | £5,336,937 | 10 |
| 3 | Defence and security contract not within row 1, 2 or 8 | £426,955 | |
| 4 | Utilities contract that is a works contract | £5,336,937 | |
| 5 | Utilities contract that is a light touch contract | £884,720 | 15 |
| 6 | Utilities contract not within row 3, 4 or 5 | £426,955 | |
| 7 | Light touch contract that is a concession contract | £5,336,937 | |
| 8 | Light touch contract not within row 5 or 7 | £663,540 | 20 |
| 9 | Concession contract not within row 2, 6 or 7 | £5,336,937 | |
| 10 | Works contract not within row 1, 4 or 9 | £5,336,937 | |

| | <i>Type of contract</i> | <i>Threshold amount</i> | |
|----|--|-------------------------|---|
| 11 | Contract for the supply of goods, services or works to a central government authority not within any other row | £138,760 | |
| 12 | Contract for the supply of goods, services or works to a sub-central government authority not within any other row | £213,477 | 5 |

(2) See section 6(3) in relation to the application of the thresholds in the table to certain contracts concerning defence and security.

- 2 An appropriate authority may by regulations amend this Schedule for the purpose of amending the threshold amount for – 10
- (a) a type of contract in any of rows 4, 6 or 9 to 12 of the table in order to reflect an amendment to the corresponding threshold for contracts of that type in the United Kingdom’s Coverage Schedule to the GPA;
 - (b) the type of contract in row 1 in order to reflect an amendment to the threshold amount for the type of contract in row 10; 15
 - (c) the type of contract in row 2, in order to reflect an amendment to the threshold amount for the type of contract in row 9;
 - (d) the type of contract in row 3, in order to reflect an amendment to the threshold amount for the type of contract in row 6. 20
- 3 An appropriate authority may by regulations amend this Schedule for the purpose of amending the threshold amount for –
- (a) any type of light touch contract in row 5, 7 or 8 of the table;
 - (b) any type of defence and security contract in rows 1 to 3 where the amendment is not within paragraph 2. 25
- 4 A contract is a “works contract” if its main purpose is –
- (a) the carrying out of works under the contract (whether or not resulting in a complete work), or
 - (b) to facilitate the carrying out of works otherwise than under the contract, where those works are intended to result in a complete work that complies with specifications set out in, or determined under, the contract. 30
- 5 In this Schedule –
- “central government authority” means a contracting authority specified, or of a description specified, in regulations made by an appropriate authority; 35
 - “complete work” means a functioning structure that results from the carrying out of works;
 - the “GPA” means the Agreement on Government Procurement signed at Marrakesh on 15 April 1994, as amended from time to time; 40
 - “sub-central government authority” means a contracting authority that is not –
 - (a) a central government authority, or
 - (b) a private utility or a public undertaking;
 - “works” has the meaning given by regulations made by an appropriate authority. 45

SCHEDULE 2

Section 2

EXEMPTED CONTRACTS

General

- 1 (1) A contract is an exempted contract if it is a contract of a kind listed in this Schedule. 5
- (2) But a contract is not an exempted contract if –
- (a) the goods, services or works representing the main purpose of the contract could be supplied under a separate contract, and
 - (b) that contract would not be a contract of a kind listed in this Schedule.

Vertical arrangements 10

- 2 (1) A contract between a contracting authority (“A”) and –
- (a) a controlled person in relation to A,
 - (b) another contracting authority (“B”) in relation to whom A is a controlled person, or
 - (c) another controlled person in relation to B. 15
- (2) A person is a “controlled person” in relation to a contracting authority if –
- (a) the person is in the position of a subsidiary undertaking of that authority within the meaning given in section 1162 of the Companies Act 2006, whether or not either the authority or the person is an undertaking within the meaning given in section 1161(1) of that Act, 20
 - (b) no person other than the authority exerts, or can exert, a decisive influence on the activities of the person (either directly or indirectly),
 - (c) there are no shares in the person that are held directly by a person other than a public authority, and
 - (d) more than 80 per cent of the activities carried out by the person are carried out for or on behalf of the contracting authority, or for or on behalf of other controlled persons in relation to the authority. 25
- (3) For the purposes of sub-paragraph (2)(b), a person does not exercise a decisive influence on the activities of a person only by reason of being a director, officer or manager of the person acting in that capacity. 30
- (4) An appropriate authority may by regulations make provision about how a calculation as to the percentage of activities carried out by a person is to be made for the purposes of sub-paragraph (2)(d).

Horizontal arrangements

- 3 (1) A contract between contracting authorities only that relates to a horizontal arrangement between those authorities. 35
- (2) A “horizontal arrangement” means an arrangement –
- (a) entered into –
 - (i) with the aim of achieving objectives the authorities have in common in connection with the exercise of their public functions; 40
 - (ii) solely in the public interest;

- (b) in which no more than 20 per cent of the activities contemplated by the arrangement are intended to be carried out other than for the purposes of the authorities’ public functions.
- (3) An appropriate authority may by regulations make provision about how a calculation as to the percentage of activities carried out by a person is to be made for the purposes of sub-paragraph (2)(b). 5

Land and buildings etc

- 4 (1) A contract –
 - (a) for the acquisition, by whatever means, of land, buildings or any other complete work, or of an interest in or right over any of them, or 10
 - (b) which concerns an interest in or right over any of them.
- (2) In this paragraph “complete work” has the meaning given in Schedule 1.

Broadcasting

- 5 A contract for the acquisition, development, production or co-production of material intended for broadcast (by any means) by a contracting authority to the general public. 15
- 6 A contract for the broadcast (by any means) by a contracting authority to the general public of material (including, for example, a programme or an advertisement) supplied by the supplier.

Electronic communications services 20

- 7 A contract the main purpose of which is facilitating the provision by a contracting authority to the general public of an electronic communications service (within the meaning given in section 32 of the Communications Act 2003).
- 8 A contract the main purpose of which is permitting a contracting authority to provide, maintain or use a public electronic communications network (within the meaning given in section 151 of the Communications Act 2003). 25

Alternative dispute resolution

- 9 A contract for the provision to a contracting authority of arbitration, mediation or conciliation services, or of any other similar services. 30

Legal services

- 10 (1) A contract for the provision of exempt legal services to a contracting authority.
- (2) The following services are “exempt legal services” –
 - (a) legal representation by a lawyer in judicial proceedings or other dispute resolution proceedings, whether in or outside the United Kingdom; 35
 - (b) the giving of legal advice by a lawyer in connection with, or in contemplation of, any such proceedings;
 - (c) document certification or authentication services provided by a notary in circumstances where the certification or authentication is 40

- required under an enactment or other rule of law to be performed by a notary;
- (d) services involving the carrying out of any legal activity provided by a person required to provide them under an enactment or an order of a court or tribunal. 5
- (3) In this paragraph –
- “judicial proceedings” includes proceedings before a court, tribunal or public authority;
- “lawyer” means –
- (a) a person who is an authorised person or an exempt person in relation to a reserved legal activity for the purposes of the Legal Services Act 2007 (see sections 18 and 19 of that Act); 10
- (b) a solicitor or advocate in Scotland;
- (c) a solicitor or barrister in Northern Ireland;
- (d) a person who is a member, and entitled to practise as such, of a legal profession regulated in a jurisdiction outside the United Kingdom; 15
- “legal activity” has the same meaning as in the Legal Services Act 2007 (see section 12 of that Act);
- “other dispute resolution proceedings” includes arbitration, mediation and conciliation. 20

Financial services

- 11 A contract for the lending of money in any currency to a contracting authority.
- 12 (1) A contract for the provision or carrying out of an investment service or activity, or of an ancillary service, in relation to a financial instrument by an investment firm or a qualifying credit institution. 25
- (2) In this paragraph –
- “ancillary service” means a service listed as such in Part 3A of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544); 30
- “financial instrument”, “investment firm” and “qualifying credit institution” have the meanings given in Article 3 of that Order;
- “investment service or activity” means a service or activity listed as such in Part 3 of Schedule 2 to that Order. 35
- 13 A contract for the provision of services by the Bank of England.

Employment

- 14 A contract of employment or a worker’s contract (each as defined in section 230 of the Employment Rights Act 1996).
- 15 Any other contract between a contracting authority and an individual for the remuneration or compensation of that individual where they are appointed to a public office by the contracting authority, including as a – 40
- (a) non-executive director of a public authority, or
- (b) member of a public inquiry.

Emergency services

- 16 A contract for the provision by an organisation or association not run for profit of one or more of the following services –
- (a) services relating to the promotion of fire safety;
 - (b) fire extinguishing services; 5
 - (c) services for the protection of life and property in the event of fires;
 - (d) search and rescue services;
 - (e) civil defence services;
 - (f) nuclear safety services;
 - (g) ambulance services provided in respect of medical emergencies. 10

Public passenger transport services

- 17 A contract for the provision of public passenger transport services of a kind specified in regulations made by an appropriate authority.

Research and development services

- 18 (1) A contract for the provision of research and development services to a contracting authority, where –
- (a) the services are intended by the authority to be for, or to result in, benefit to the public, and
 - (b) the contract does not also provide for the provision of goods or works. 20
- (2) In this paragraph, “research and development services” means services that consist of one or more of the following activities –
- (a) research to acquire new scientific or technical knowledge without any particular application or use in view;
 - (b) research directed mainly at generating scientific or technical knowledge for the purposes of a particular objective; 25
 - (c) development which uses existing knowledge to initiate the manufacture of new materials or products, establish new processes, systems or services, or to achieve a substantial improvement in existing materials, products, processes, systems or services; 30
 - (d) the manufacture and testing of prototypes.
- (3) But services are not “research and development services” if they include –
- (a) the production of tools for manufacture, or
 - (b) the development of industrial processes to manufacture goods or works arising from research or development. 35

International agreements and organisations

- 19 A contract awarded under a procedure specified in an international agreement of which the United Kingdom is a signatory relating to –
- (a) the stationing of military personnel, or
 - (b) the implementation of a joint project between the signatories to that agreement. 40
- 20 A contract awarded under a procedure –

| | | |
|---------------------------------------|---|----|
| | (a) adopted by an international organisation of which the United Kingdom is a member, and | |
| | (b) that is inconsistent in any material respect with the procedure for the award of the contract in accordance with this Act. | |
| | But this paragraph does not apply to a defence and security contract (as to which, see paragraph 26). | 5 |
| <i>National security</i> | | |
| 21 | A contract that the contracting authority determines should not, in the interests of national security, be subject to this Act or a part of this Act. | |
| <i>Intelligence activities</i> | | |
| 22 | A contract for the purposes of carrying out, facilitating or supporting intelligence activities. | 10 |
| <i>Defence and security contracts</i> | | |
| 23 | A defence and security contract where – | |
| | (a) the supplier is located in an area outside the United Kingdom in which the armed forces are deployed, and | 15 |
| | (b) the operational needs of the armed forces require the contract to be awarded to that supplier. | |
| 24 | A defence and security contract where – | |
| | (a) the supplier is located in a state or territory outside the United Kingdom in which the armed forces maintain a military presence, | 20 |
| | (b) that state or territory requires, in connection with that presence, that the supplier supplies the goods, services or works to which the contract relates. | |
| 25 | (1) A defence and security contract where the supplier is the government of another state or territory. | 25 |
| | (2) In this Schedule “government” includes – | |
| | (a) any governing authority; | |
| | (b) the government of a region or locality within a state or territory. | |
| 26 | A defence and security contract awarded under a procedure adopted by an international organisation of which the United Kingdom is a member. | 30 |
| 27 | A defence and security contract awarded under an arrangement between the United Kingdom and one or more other states or territories, where the purpose of that arrangement is, or is in connection with – | |
| | (a) the joint development of a new product by or on behalf of the parties to the arrangement, or | 35 |
| | (b) the exploitation of that product once developed. | |
| <i>Utilities contracts</i> | | |
| 28 | (1) A utilities contract for the supply of goods, services or works to a utility other than one acting as a centralised procurement authority, where – | 40 |
| | (a) the purpose of the contract is to allow the further sale or lease of those goods, services or works to a third party, | |

-
- (b) the utility does not have a special or exclusive right, within the meaning given by section 5(5), to sell or lease those goods, services or works, and
- (c) other persons may sell or lease those goods, services or works under the same conditions as the utility. 5
- (2) In this Schedule, “utility” means –
- (a) a public authority, or public undertaking, that carries out a utility activity;
- (b) a private utility.
- 29 A utilities contract for the supply of water to a utility carrying out a utility activity referred to in paragraph 3(1)(a) or (b) of Schedule 4. 10
- 30 A utilities contract for the supply of energy, or fuel for the production of energy, to a utility carrying out a utility activity referred to in paragraph 1, 2, or 6 of Schedule 4.
- 31 (1) A utilities contract between a utility and a relevant joint venture to which that utility is party, where – 15
- (a) the joint venture was formed for the purpose of carrying out a utility activity for at least three years, and
- (b) the parties to the joint venture are committed, by way of a written agreement, to continue to be parties to the joint venture for a period of three years following the date of that agreement. 20
- (2) In this Schedule, “relevant joint venture” means a joint venture –
- (a) formed for the purpose of carrying out a utility activity;
- (b) where each party to the joint venture is a utility.
- 32 (1) A utilities contract awarded for the supply of goods, services or works – 25
- (a) by a utility to a person affiliated with the utility, or
- (b) where the utility in question is a relevant joint venture, by the utility to a person affiliated with any member of the joint venture, but only if the turnover test is met by the affiliated person in relation to goods, services or (as the case may be) works. 30
- (2) A person is “affiliated” with another if the person is in the position of a group undertaking of the other person, within the meaning given in section 1161(5) of the Companies Act 2006, whether or not either of them is an undertaking within the meaning given in section 1161(1) of that Act.
- (3) The “turnover test” is met in relation to goods, services or works if the affiliated person’s turnover deriving from the supply of goods, services or (as the case may be) works to the utility and other persons affiliated with the utility (their “affiliated turnover amount”) exceeds 80 per cent of their total turnover amount deriving from the supply of goods, services or works. 35
- (4) An appropriate authority may by regulations make provision about how to calculate a person’s affiliated turnover amount and total turnover amount for the purposes of sub-paragraph (3). 40
- (5) The regulations may, in particular, make provision –
- (a) for those amounts to be calculated by reference to –
- (i) an average amount for a period specified in the regulations; 45
- (ii) another reasonable method so specified;

- (b) to secure that, in calculating those amounts in relation to a person (“A”), turnover of a person who is an affiliated person in relation to A is to be treated as part of A’s turnover.

Concession contracts

- 33 A concession contract for the carrying out of a utility activity within paragraph 3(1) or (2) of Schedule 4 (water services), ignoring for this purpose the effect of paragraph 3(4) of that Schedule. 5
- 34 (1) A concession contract for air services provided by a qualifying air carrier.
(2) In sub-paragraph (1)–
(a) “air services” means a flight, or a series of flights, carrying passengers or cargo (including mail); 10
(b) “qualifying air carrier” has the meaning given by regulations made by an appropriate authority.
- 35 A concession contract for the provision of public passenger transport services. 15

SCHEDULE 3

Section 3

ESTIMATING THE VALUE OF A CONTRACT

General rule

- 1 (1) A contracting authority must estimate the value of a contract as the maximum amount it could expect to pay under the contract including, where applicable, amounts already paid. 20
- (2) The amount a contracting authority could expect to pay includes the following–
(a) the value of any goods, services or works provided by the contracting authority under the contract other than for payment; 25
(b) amounts that would be payable if an option in the contract to supply additional goods, services or works were exercised;
(c) amounts that would be payable if an option in the contract to extend or renew the term of the contract were exercised;
(d) amounts representing premiums, fees, commissions or interest that could be payable under the contract; 30
(e) amounts representing prizes or payments that could be payable to participants in the procurement.
- (3) In estimating the value of a contract, a contracting authority must take into account all of the facts which are material to the estimate and available to the authority at the time it makes the estimate. 35
- (4) This paragraph is subject to the rest of this Schedule.

Frameworks

- 2 (1) 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.
- (2) In the case of a framework awarded under an open framework, the value of the framework is to be treated as including the value of all frameworks awarded, or to be awarded, under the open framework. 5
- (3) In this Schedule, “framework” has the meaning given in section 44(2).

Concession contracts

- 3 (1) Paragraph 1 does not apply to the estimation of the value of a concession contract. 10
- (2) A contracting authority must estimate the value of a concession contract as the maximum amount the supplier could expect to receive under or in connection with the contract including, where applicable, amounts already received. 15
- (3) The amount a supplier could expect to receive includes the following –
- (a) amounts representing revenue (whether monetary or non-monetary) receivable pursuant to the exploitation of the works or services to which the contract relates (whether from the contracting authority or otherwise); 20
 - (b) the value of any goods, services or works provided by the contracting authority under the contract other than for payment;
 - (c) amounts that would be receivable if an option in the contract to supply additional services or works were exercised;
 - (d) amounts that would be receivable if an option in the contract to extend or renew the term of the contract were exercised; 25
 - (e) amounts representing premiums, fees, commissions or interest that could be receivable under the contract;
 - (f) amounts received on the sale of assets held by the supplier under the contract. 30

Anti-avoidance

- 4 (1) Sub-paragraph (2) applies where –
- (a) a contracting authority estimates the value of two or more contracts, and
 - (b) the goods, services or works to be supplied under the contracts could reasonably be supplied under a single contract. 35
- (2) The contracting authority must estimate the value of each of the contracts as including the value of all of the contracts, unless the authority has good reasons not to do so.

Cases where estimate not possible 40

- 5 If a contracting authority is unable to estimate the value of a contract in accordance with this Schedule (for example because the duration of the contract is unknown), the authority is to be treated as having estimated the

value of the contract as an amount of more than the threshold amount for the type of contract.

SCHEDULE 4

Section 5

UTILITY ACTIVITIES

| | |
|---|----|
| <i>Gas and heat</i> | 5 |
| 1 (1) The following are utility activities – | |
| (a) the provision or operation of a fixed network for the provision of a service to the public in connection with the production, transport or distribution of gas or heat; | |
| (b) the supply of gas or heat to such a network. | 10 |
| (2) But the supply of gas or heat to a network is not a utility activity if – | |
| (a) the person supplying it (the “operator”) is a private utility or a public undertaking, | |
| (b) the production of gas or heat by the operator is a necessary consequence of carrying out an activity other than a specified activity, and | 15 |
| (c) the amount of gas or heat supplied to the network represents not more than 20 per cent of the operator’s turnover amount. | |
| (3) An appropriate authority may by regulations make provision about how to calculate an amount referred to in sub-paragraph (2)(c). | 20 |
| (4) The regulations may, in particular, make provision for such an amount to be calculated by reference to – | |
| (a) an average amount for a period specified in the regulations; | |
| (b) another reasonable method so specified. | |
| <i>Electricity</i> | 25 |
| 2 (1) The following are utility activities – | |
| (a) the provision or operation of a fixed network for the provision of a service to the public in connection with the production, transport or distribution of electricity; | |
| (b) the supply of electricity to such a network. | 30 |
| (2) But the supply of electricity to a network is not a utility activity if – | |
| (a) the person supplying it (the “operator”) is a private utility or a public undertaking, | |
| (b) the operator produces electricity because it needs electricity to carry out an activity other than a specified activity, | 35 |
| (c) the supply consists only of electricity that was produced by the operator as mentioned in paragraph (b) but which it has not consumed, and | |
| (d) the amount of electricity supplied represents not more than 30 per cent of the amount of energy produced by the operator. | 40 |
| (3) An appropriate authority may by regulations make provision about how to calculate an amount referred to in sub-paragraph (2). | |

- (4) The regulations may, in particular, make provision for such an amount to be calculated by reference to –
- (a) an average amount for a period specified in the regulations;
 - (b) another reasonable method so specified.

Water 5

- 3 (1) The following are utility activities –
- (a) the provision or operation of a fixed network for the provision of a service to the public in connection with the production, transport or distribution of drinking water; 10
 - (b) the supply of drinking water to such a network.
- (2) The following are utility activities to the extent that they are carried out by a person who also carries out activities within sub-paragraph (1) –
- (a) any activity connected with a hydraulic engineering project, irrigation or land drainage in circumstances where the condition in sub-paragraph (3) is met; 15
 - (b) any activity connected with the disposal or treatment of sewage.
- (3) The condition is that a person carrying out the activity would reasonably expect that more than 20 per cent of the water made available by the project, irrigation or land drainage is to be supplied as drinking water to a network within sub-paragraph (1)(a). 20
- (4) The supply of drinking water as mentioned in sub-paragraph (1)(b) is not a utility activity if –
- (a) the person supplying it (the “operator”) is a private utility or a public undertaking,
 - (b) the operator produces drinking water because it needs drinking water to carry out an activity that is not a specified activity, 25
 - (c) the supply consists only of drinking water that was produced by the operator as mentioned in paragraph (b) but which it has not consumed, and
 - (d) the amount of drinking water supplied represents not more than 30 per cent of the amount of drinking water produced by the operator. 30
- (5) An appropriate authority may by regulations make provision about how to calculate an amount referred to in sub-paragraph (4).
- (6) The regulations may, in particular, make provision for such an amount to be calculated by reference to –
- (a) an average amount for a period specified in the regulations;
 - (b) another reasonable method so specified. 35

Transport

- 4 (1) An activity is a utility activity if it relates to the provision or operation of a network for the provision of a service to the public for transport, whether by rail, tram, bus or other means. 40
- (2) There is a network for the purposes of sub-paragraph (1) if the provision of a service on the network is subject to requirements imposed by a regulator, including requirements as to –
- (a) the routes to be served; 45

- (b) the capacity of the service;
- (c) the frequency of the service.

Ports and airports

- 5 (1) An activity relating to the exploitation of a geographical area for the following purposes is a utility activity – 5
- (a) the provision of an airport to carriers of passengers or goods by air;
 - (b) the provision of a port or other terminal facilities to carriers of passengers or goods by sea or inland waterway.
- (2) In this paragraph “airport” has the same meaning as in Part 1 of the Civil Aviation Act 2012 (see section 66 of that Act). 10

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

- 6 An activity relating to the exploitation of a geographical area for the following purposes is a utility activity –
- (a) extracting oil or gas;
 - (b) searching for or extracting coal or other solid fuels. 15

Utility activities exposed to competition

- 7 (1) An activity is not to be treated as within any of paragraphs 1 to 6 if an exemption determination has been made in relation to the activity.
- (2) An “exemption determination” is a determination made in accordance with regulations made by an appropriate authority that – 20
- (a) there is fair and effective competition in the market in which the activity is carried out, and
 - (b) entry to that market is unrestricted.
- (3) The regulations may, in particular, make provision – 25
- (a) specifying who is responsible for making exemption determinations (the “decision-maker”);
 - (b) about the amendment or revocation of exemption determinations by the decision-maker;
 - (c) about who can apply for an exemption determination, or its amendment or revocation, and the procedure for making an application; 30
 - (d) about the evidence and other information that must accompany any such application (including the form in which it must be provided);
 - (e) for circumstances in which the decision-maker may, of their own motion, make, amend or revoke an exemption determination; 35
 - (f) about the factors to be taken into account in, and the procedure for, making, amending or revoking exemption determinations;
 - (g) in relation to the publication of applications and decisions as to whether or not to make, amend or revoke exemption determinations;
 - (h) for appeals in relation to decisions of the decision-maker. 40
- (4) A reference in this paragraph to an activity includes a reference to an activity so far as it is carried out only in a particular part of a sector or a particular part of the United Kingdom.

- 8 (1) Sub-paragraph (2) applies to an activity that was, immediately before the coming into force of this paragraph, covered by any of the following Commission Decisions (which are revoked by this Act) –
- (a) Commission Decision 2006/211/EC (electricity generation in England, Scotland and Wales); 5
 - (b) Commission Decision 2007/141/EC (supply of electricity and gas in England, Scotland and Wales);
 - (c) Commission Decision 2010/192/EU (exploration for and exploitation of oil and gas in England, Scotland and Wales).
- (2) An exemption determination is to be treated as having been made in relation to the activity on the coming into force of this paragraph and, accordingly, such a determination may be amended or revoked in accordance with regulations under paragraph 7. 10

Interpretation of Schedule

- 9 In this Schedule – 15
- “specified activity” means an activity specified in paragraph 1(1), 2(1), 3(1) or 4(1);
 - “supply” includes –
- (a) production, but not the production of gas in the form of extraction (as to which, see paragraph 6), and 20
 - (b) generation and wholesale or retail sale.

SCHEDULE 5

Section 40

DIRECT AWARD JUSTIFICATIONS

- 1 This Schedule contains the direct award justifications.

Prototypes and development 25

- 2 The public contract concerns the production of a prototype, or supply of other novel goods or services, for the purpose of –
- (a) testing the suitability of the goods or services,
 - (b) researching the viability of producing or supplying the goods or services at scale and developing them for that purpose, or 30
 - (c) other research, experiment, study or development.

- 3 In paragraph 2, “novel goods or services” means goods or services designed or developed at the request of the contracting authority.

Single suppliers

- 4 The public contract concerns the creation or acquisition of a unique work of art or artistic performance. 35
- 5 The following conditions are met in relation to the public contract –

| | | |
|--|--|----|
| | (a) due to a particular supplier having intellectual property rights or other exclusive rights, only that supplier can supply the goods, services or works required, and | |
| | (b) there are no reasonable alternatives to those goods, services or works. | 5 |
| 6 | The following conditions are met in relation to the public contract – | |
| | (a) due to an absence of competition for technical reasons, only a particular supplier can supply the goods, services or works required, and | |
| | (b) there are no reasonable alternatives to those goods, services or works. | 10 |
| <i>Additional or repeat goods, services or works</i> | | |
| 7 | The public contract concerns the supply of goods, services or works by the existing supplier which are intended as an extension to, or partial replacement of, existing goods, services or works in circumstances where – | 15 |
| | (a) a change in supplier would result in the contracting authority receiving goods, services or works that are different from, or incompatible with, the existing goods, services or works, and | |
| | (b) the difference or incompatibility would result in disproportionate technical difficulties in operation or maintenance. | 20 |
| 8 | The public contract concerns the supply of goods, services or works by the existing supplier that are similar to existing goods, services or works where – | |
| | (a) the existing goods, services or works were supplied under a public contract that was awarded in accordance with a competitive tendering procedure within the period of five years ending with the day on which the transparency notice is published, and | 25 |
| | (b) the tender notice or any tender document in respect of that earlier contract set out – | |
| | (i) the contracting authority’s intention to carry out a subsequent procurement of similar goods, services or works in reliance on this direct award justification, and | 30 |
| | (ii) any other information specified in regulations under section 86. | |
| 9 | In paragraphs 7 and 8 – | 35 |
| | “existing goods, services or works” means goods, services or works already supplied, or contracted to be supplied, to the contracting authority; | |
| | “existing supplier” means the supplier that has already supplied, or contracted to supply, the existing goods, services or works. | 40 |

Commodities

10 The public contract concerns goods purchased on a commodity market.

Advantageous terms on insolvency

11 The award of the public contract to a particular supplier will ensure terms particularly advantageous to the contracting authority due to the fact that a 45

| | | |
|----|--|----|
| | supplier, whether or not the one to whom the contract is to be awarded, is undergoing insolvency proceedings. | |
| 12 | A supplier is “undergoing insolvency proceedings” if it has – | |
| | (a) become bankrupt or, in Scotland, the estate of the supplier has been sequestrated, | 5 |
| | (b) become subject to insolvency or winding-up proceedings, | |
| | (c) had its assets subject to administration or receivership, including by a liquidator or court, | |
| | (d) entered into an arrangement with its creditors, | |
| | (e) become subject to a petition or application for any such procedures or arrangements, or | 10 |
| | (f) in any jurisdiction, been subject to a procedure or an application that corresponds to any procedure or application mentioned in paragraphs (a) to (e). | |
| | <i>Urgency</i> | 15 |
| 13 | Where – | |
| | (a) the goods, services or works to be supplied under the public contract are strictly necessary for reasons of extreme and unavoidable urgency, and | |
| | (b) as a result the public contract cannot be awarded on the basis of a competitive tendering procedure. | 20 |
| 14 | For the purpose of paragraph 13, urgency is unavoidable if it – | |
| | (a) is not attributable to any act or omission of the contracting authority, and | |
| | (b) could not have been foreseen by the contracting authority. | 25 |
| | <i>Necessary to protect life, etc</i> | |
| 15 | The public contract falls within regulations made under section 41. | |
| | <i>User choice contracts</i> | |
| 16 | The public contract is a contract for the supply of user choice services and the conditions in paragraph 18 are met. | 30 |
| 17 | In paragraph 16, “user choice services” means services – | |
| | (a) that are of a kind specified in regulations under section 8 (light touch contracts), | |
| | (b) that are supplied for the benefit of a particular individual, and | |
| | (c) in respect of which a contracting authority would, in awarding a contract for their supply, be required under an enactment to have regard to the views of the individual, or a person providing care to the individual (their “carer”), in relation to who should supply the services. | 35 |
| 18 | The conditions are that – | 40 |
| | (a) the individual to whom the services are to be supplied or their carer has expressed a preference as to who should supply the services, or the nature of the services to be supplied is such that only one supplier is capable of providing them, and | |

- (b) the contracting authority considers that it is not in the best interests of the individual to award the contract under section 18.

Defence and security

- 19 The following conditions are met in relation to the public contract –
- (a) the contract is a defence and security contract, 5
 - (b) the contract relates to the supply of air or maritime transport services to the armed forces or the security services –
 - (i) while they are deployed outside the United Kingdom, or
 - (ii) in order for them to be so deployed, and
 - (c) the nature of the services is such that no reasonable supplier would be able to guarantee that all of the terms that would be contained in a tender submitted for the supply of those services by such a supplier would remain in effect for the period of 10 days beginning with the day of submission. 10
- 20 (1) The following conditions are met in relation to the public contract (the “new contract”) – 15
- (a) there is another contract between the contracting authority and the supplier (the “existing contract”),
 - (b) either of the conditions in sub-paragraphs (2) and (3) is met in relation to the new contract, and 20
 - (c) the new contract would, if awarded directly, be a “qualifying defence contract” under section 14(2) of the Defence Reform Act 2014 (regulations relating to qualifying defence contracts).
- (2) The condition in this sub-paragraph is met if, treating the new contract as a modification of the existing contract, the new contract would not be a substantial modification of the existing contract within the meaning given in section 69(2). 25
- (3) The condition in this sub-paragraph is met if, treating the new contract as a modification of the existing contract, the new contract would be a modification of the existing contract of a kind described in – 30
- (a) paragraph 4 of Schedule 8 (unforeseeable circumstances), or
 - (b) paragraph 8 of that Schedule (additional goods, services or works).
- 21 The following conditions are met in relation to the public contract –
- (a) the contract is a defence authority contract,
 - (b) the contract is not a defence and security contract only by virtue of section 6(1)(g) (or, in the case of a framework, section 6(1)(g) and (2)), and 35
 - (c) it is necessary for the contract to be awarded directly in order to enhance or maintain the operational capability, effectiveness, readiness for action, safety or security of the armed forces. 40

SCHEDULE 6

Section 54

MANDATORY EXCLUSION GROUNDS

PART 1

OFFENCES

- | | | |
|---|---|--------------------------|
| 1 | A mandatory exclusion ground applies to a supplier if the supplier or a connected person has been convicted of an offence referred to in this Part of this Schedule. | 5 |
| <i>Corporate manslaughter or corporate homicide</i> | | |
| 2 | An offence under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 (corporate manslaughter or corporate homicide). | 10 |
| <i>Terrorism</i> | | |
| 3 | An offence listed in section 41 or 42 of the Counter-Terrorism Act 2008 (terrorism offences, and offences having a terrorist connection, in respect of which the notification requirements under Part 4 of that Act apply). | |
| <i>Theft, fraud, bribery etc</i> | | |
| 4 | An offence at common law in Scotland of theft, fraud, extortion, robbery, theft by housebreaking, housebreaking with intent to steal, or reset. | 15 |
| 5 | An offence under any of the following sections of the Theft Act 1968 – (a) sections 7 to 13 (theft, robbery, burglary, etc); (b) sections 17 to 21 (fraud and blackmail); (c) sections 22 and 23 (offences relating to stolen goods); (d) section 24A (dishonestly retaining a wrongful credit); (e) section 25 (going equipped for stealing etc). | 20 |
| 6 | An offence under any of the following sections of the Theft Act (Northern Ireland) 1969 (c. 16 (N.I.)) – (a) sections 7 to 13 (theft, robbery, burglary, etc); (b) sections 17 to 20 (fraud and blackmail); (c) sections 21 and 22 (offences relating to stolen goods); (d) section 23A (dishonestly retaining a wrongful credit); (e) section 24 (going equipped for stealing etc). | 25 30 |
| 7 | An offence under section 3 of the Theft Act 1978 (making off without payment). | |
| 8 | An offence under section 5 of the Theft (Northern Ireland) Order 1978 (S.I. 1978/1407 (N.I. 23)) (making off without payment). | |
| 9 | An offence under section 58 of the Civic Government (Scotland) Act 1982 (convicted thief in possession). | 35 |
| 10 | An offence under section 113 of the Representation of the People Act 1983 (bribery of electors). | |

| | | |
|----|--|----|
| 11 | An offence under section 178 of the Road Traffic Act 1988 (taking motor vehicle without authority etc). | |
| 12 | An offence under section 327, 328 or 329 of the Proceeds of Crime Act 2002 (money laundering offences). | |
| 13 | An offence under section 2, 3, 4, 6 or 7 of the Fraud Act 2006 (fraud offences). | 5 |
| 14 | An offence under section 993 of the Companies Act 2006 (fraudulent trading). | |
| 15 | An offence under section 1, 2 or 6 of the Bribery Act 2010 (bribery offences). | |
| 16 | An offence under section 49 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (offences relating to articles for use in fraud). | 10 |

Labour market, slavery and human trafficking offences

| | | |
|----|--|----|
| 17 | An offence under the Employment Agencies Act 1973 (offences relating to employment agencies) other than an offence under section 9(4)(b) of that Act. | |
| 18 | An offence under the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981 (S.I. 1981/839) (N.I. 20) (offences relating to employment agencies) other than an offence under Article 7B(11) of that Order. | 15 |
| 19 | An offence under section 31(1) of the National Minimum Wage Act 1998 (refusal or wilful neglect to pay the national minimum wage). | 20 |
| 20 | An offence under the Gangmasters (Licensing) Act 2004 (offences relating to gangmasters). | |
| 21 | An offence under section 1, 2, 4 or 30 of the Modern Slavery Act 2015 (slavery and human trafficking offences). | |
| 22 | An offence under section 1, 4 or 32 of the Human Trafficking and Exploitation (Scotland) Act 2015 (asp 12) (slavery and human trafficking offences). | 25 |
| 23 | An offence under section 1, 2 or 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (c. 2) (N.I.), or paragraph 16 of Schedule 3 to that Act (slavery and human trafficking offences). | 30 |
| 24 | An offence under section 27 of the Immigration Act 2016 (failure to comply with labour market enforcement order). | |

Organised crime

| | | |
|----|---|----|
| 25 | An offence under section 28 of the Criminal Justice and Licensing (Scotland) Act 2010 (agreeing to become involved in serious organised crime). | 35 |
| 26 | An offence under section 45 of the Serious Crime Act 2015 (participating in activities of organised crime group). | |

Tax offences

| | | |
|----|--|----|
| 27 | An offence at common law of cheating the public revenue. | 40 |
|----|--|----|

- | | | |
|----|---|---|
| 28 | An offence under section 170 of the Customs and Excise Management Act 1979 (fraudulent evasion of duty etc). | |
| 29 | An offence under section 72 of the Value Added Tax Act 1994 (fraudulent evasion of VAT etc). | |
| 30 | An offence under section 45 or 46 of the Criminal Finances Act 2017 (failure to prevent facilitation of tax evasion). | 5 |

Cartel offence

- | | | |
|----|---|--|
| 31 | An offence under section 188 of the Enterprise Act 2002 (cartel offence). | |
|----|---|--|

Ancillary offences

- | | | |
|----|--|----|
| 32 | In relation to an offence otherwise referred to in this Part, any of the following offences – | 10 |
| | (a) aiding, abetting, counselling or procuring the commission of the offence; | |
| | (b) in Scotland, being art and part in the commission of the offence; | |
| | (c) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to the offence; | 15 |
| | (d) inciting a person to commit the offence; | |
| | (e) attempting or conspiring to commit the offence. | |

Offences committed outside the United Kingdom

- | | | |
|----|---|----|
| 33 | (1) An offence under the law of a country or territory outside the United Kingdom which would be an offence otherwise referred to in this Part of this Schedule if the conduct constituting that offence was carried out in any part of the United Kingdom. | 20 |
| | (2) For the purposes of this paragraph, an act punishable under the law of a country or territory outside the United Kingdom constitutes an offence under that law, however it is described in that law. | 25 |

PART 2

OTHER MANDATORY EXCLUSION GROUNDS

Misconduct in relation to tax

- | | | |
|----|---|----|
| 34 | (1) A mandatory exclusion ground applies to a supplier if the supplier or a connected person has been liable to a penalty under – | 30 |
| | (a) section 69C of the Value Added Tax Act 1994 (transactions connected with VAT fraud) except where the penalty is reduced under section 70 of that Act, or | |
| | (b) section 25 of the Finance Act 2003 (evasion of tax or duty). | 35 |
| | (2) The supplier or connected person is not to be treated as having been liable to such a penalty unless HMRC has assessed the amount of the penalty and the time for any appeal or further appeal relating to the penalty has expired or, if later, any appeal or final appeal relating to it has been finally determined. | 40 |

- 35 (1) A mandatory exclusion ground applies to a supplier if a penalty has been payable by the supplier or a connected person under –
- (a) Schedule 24 to the Finance Act 2007 (errors in tax documentation), or
 - (b) Schedule 41 to the Finance Act 2008 (failure to notify and certain VAT and excise wrongdoing),
- 5
- but only where the conduct giving rise to that penalty was deliberate.
- (2) Such a penalty is not to be treated as having been payable unless –
- (a) if the penalty has been assessed, the time for any appeal or further appeal relating to the penalty has expired or, if later, any appeal or final appeal relating to it has been finally determined, or
 - (b) a contract has been made between HMRC and the supplier or connected person, under which HMRC undertook not to assess the penalty or (if it was assessed) not to take proceedings to recover it.
- 10
- 36 (1) A mandatory exclusion ground applies to a supplier if –
- (a) the supplier or a connected person has entered into or carried out a tax arrangement that is abusive, and
 - (b) an adjustment has accordingly been made by HMRC under section 209 of the Finance Act 2013 (countering tax advantages), including as it applies under section 10 of the National Insurance Contributions Act 2014.
- 15
- (2) The adjustment is not to be treated as having been made by HMRC until it can no longer be challenged, whether on appeal or otherwise.
- 20
- 37 (1) A mandatory exclusion ground applies to a supplier if the supplier or a connected person has been found by HMRC, in exercise of its powers in respect of VAT, to have engaged in an abusive practice.
- 25
- (2) The supplier or connected person is not to be treated as having been found by HMRC to have engaged in those arrangements or practices until the finding can no longer be challenged, whether on appeal or otherwise.
- 38 A mandatory exclusion ground applies to a supplier if the supplier or a connected person has incurred a defeat in respect of abusive tax arrangements, within the meaning given by paragraph 4 of Schedule 16 to the Finance (No. 2) Act 2017.
- 30

Competition law infringements

- 39 (1) A mandatory exclusion ground applies to a supplier if the CMA has made a decision under the Competition Act 1998 that the Chapter I prohibition (within the meaning given by section 2 of that Act) has been infringed by an agreement or concerted practice –
- (a) to which the supplier or a connected person was party, and
 - (b) which was a cartel (within the meaning given by paragraph 4(1) of Schedule 8A to that Act).
- 35
- 40
- (2) Sub-paragraph (1) does not apply if –
- (a) the CMA did not impose a penalty on the supplier or connected person in respect of the infringement because the supplier or connected person was an immunity recipient (within the meaning given by paragraph 14 of Schedule 8A to the Competition Act 1998), or
- 45

- (b) the CMA gave written notice to a connected person under section 190(4) of the Enterprise Act 2002 (immunity from prosecution for cartel offences) in connection with the infringement.
- (3) In this paragraph, references to the CMA include references to a regulator referred to in section 54(1) of the Competition Act 1998 in circumstances where it exercises functions concurrently with the CMA in accordance with that Act. 5

Equivalents outside the United Kingdom

- 40 A mandatory exclusion ground applies to a supplier if the supplier or a connected person— 10
- (a) has been subject to a penalty or a decision by a regulator, court or other authority outside the United Kingdom, where the conduct giving rise to that penalty or decision is conduct that would give rise to a penalty or decision referred to in any of paragraphs 34 to 39 if committed in the United Kingdom, in circumstances where the penalty or decision would be a mandatory exclusion ground, or 15
 - (b) has had a tax advantage counteracted outside the United Kingdom, in circumstances where the supplier or connected person would have incurred a defeat of the kind referred to in paragraph 38 had the tax advantage arisen in respect of tax payable in the United Kingdom. 20

Failure to cooperate with investigation

- 41 A mandatory exclusion ground applies to a supplier if—
- (a) an appropriate authority has given the supplier or a connected person notice under section 57(6) (requests for documents or other assistance in connection with investigation), 25
 - (b) the supplier or connected person has failed to comply with the notice to the satisfaction of the authority before the end of the period specified in the notice, and
 - (c) a Minister of the Crown has made a determination that the failure to do so was sufficiently serious so as to warrant constituting a mandatory exclusion ground. 30

PART 3

GENERAL

Excluded matters 35

- 42 (1) In determining whether a mandatory exclusion ground applies to a supplier, the decision-maker must ignore any event that occurred before the five-year period ending with the date on which the determination is made. This is subject to sub-paragraphs (2) to (4).
- (2) In determining whether a mandatory exclusion ground listed in any of the following paragraphs applies to a supplier, sub-paragraph (1) applies whether the event occurred before or after the coming into force of this Schedule— 40
- (a) paragraph 3 (terrorism offences);

-
- (b) paragraph 10 or 15 (bribery);
 - (c) paragraph 12 (money laundering offences);
 - (d) paragraph 21, where the ground in that paragraph applies by virtue of an offence under section 1, 2 or 4 of the Modern Slavery Act 2015 (slavery and trafficking offences); 5
 - (e) paragraph 22, where the ground in that paragraph applies by virtue of an offence under section 1 or 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 (slavery and trafficking offences);
 - (f) paragraph 23, where the ground in that paragraph applies by virtue of an offence under section 1, 2 or 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (slavery and trafficking offences); 10
 - (g) paragraph 25 or 26 (organised crime);
 - (h) paragraph 32 or 33, so far as relating to any offence that constitutes a mandatory exclusion ground listed in any of the paragraphs within paragraph (a) to (g) above (inchoate offences and corresponding offences outside the United Kingdom). 15
- (3) In determining whether a mandatory exclusion ground listed in any of the following paragraphs applies to a supplier, the decision-maker must also ignore any event that occurred before the coming into force of this Schedule— 20
- (a) paragraph 2 (corporate manslaughter or homicide);
 - (b) paragraph 4, 5(a) or (c) to (e), 6(a) or (c) to (e), 7 to 9 or 11 (theft, robbery, burglary etc);
 - (c) paragraph 32 or 33, so far as relating to any offence that constitutes a mandatory exclusion ground listed in any of the paragraphs within paragraph (a) and (b) above (inchoate offences and corresponding offences outside the United Kingdom). 25
- (4) In determining whether a mandatory exclusion ground listed in any of the following paragraphs applies to a supplier, the decision-maker must also ignore any event that occurred before the three-year period ending with the coming into force of this Schedule— 30
- (a) paragraph 5(b) or 6(b) (blackmail);
 - (b) paragraph 13, 14 or 16 (fraud and fraudulent trading);
 - (c) paragraphs 17 to 20 (labour market offences); 35
 - (d) paragraph 21, where the ground in that paragraph applies by virtue of an offence under section 30 of the Modern Slavery Act 2015 (breach of orders under that Act);
 - (e) paragraph 22, where the ground in that paragraph applies by virtue of an offence under section 32 of the Human Trafficking and Exploitation (Scotland) Act 2015 (breach of orders under that Act); 40
 - (f) paragraph 23, where the ground in that paragraph applies by virtue of an offence under paragraph 16 of Schedule 3 to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (breach of orders under that Act); 45
 - (g) paragraph 24 (breach of labour market enforcement order);
 - (h) paragraphs 27 to 30 (tax offences);
 - (i) paragraph 31 (cartel offence);

- (j) paragraph 32 or 33, so far as relating to any offence that constitutes a mandatory exclusion ground listed in any of the paragraphs within paragraphs (a) to (i) above;
- (k) paragraphs 34 to 38 (tax misconduct);
- (l) paragraph 39 (competition law infringements); 5
- (m) paragraph 40 (equivalents to tax misconduct and competition law infringements outside the United Kingdom).

Definitions

- 43 In this Schedule –
- the “CMA” means the Competition and Markets Authority; 10
 - “conduct” includes acts and omissions;
 - “connected person”, in relation to a supplier, means any of the following –
 - (a) a person with “significant control” over the supplier (within the meaning given by section 790C(2) of the Companies Act 2006 (“CA 2006”)); 15
 - (b) a director or shadow director of the supplier;
 - (c) a parent undertaking or a subsidiary undertaking of the supplier;
 - (d) a predecessor company; 20
 - (e) any other person who it can reasonably be considered stands in an equivalent position in relation to the supplier as a person within paragraph (a) to (d);
 - (f) any person with the right to exercise, or who actually exercises, significant influence or control over the supplier; 25
 - (g) any person over which the supplier has the right to exercise, or actually exercises, significant influence or control;
 - “court” includes a tribunal;
 - “decision-maker”, in relation to a supplier, means a contracting authority or an appropriate authority that is considering whether a mandatory exclusion ground applies to the supplier; 30
 - “director” has the meaning given in section 250 of CA 2006;
 - “event” means a conviction, decision, ruling, failure or other event by virtue of which a mandatory exclusion ground would apply to a supplier; 35
 - “HMRC” means Her Majesty’s Revenue and Customs;
 - “parent undertaking” and “subsidiary undertaking” have the meanings given in section 1162 of CA 2006;
 - “predecessor company” means a company which –
 - (a) became insolvent and ceased to trade, 40
 - (b) before it ceased to trade, carried on the same or substantially the same business as the supplier,
 - (c) has transferred all or substantially all of its assets to the supplier, and
 - (d) had at least one director or shadow director who is or has 45
been a director or shadow director of the supplier;
 - “shadow director” has the meaning given in section 251 of CA 2006.

SCHEDULE 7

Section 54

DISCRETIONARY EXCLUSION GROUNDS

Labour market misconduct

- 1 A discretionary exclusion ground applies to a supplier if any of the following orders has been made against the supplier or a connected person— 5
- (a) a slavery and trafficking prevention order, an interim slavery and trafficking prevention order, a slavery and trafficking risk order or an interim slavery and trafficking risk order under Part 2 of the Modern Slavery Act 2015; 10
 - (b) a trafficking and exploitation prevention order, an interim trafficking and exploitation prevention order, a trafficking and exploitation risk order or an interim trafficking and exploitation risk order under Part 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 (asp 12); 15
 - (c) a slavery and trafficking prevention order or an interim slavery and trafficking prevention order under Schedule 3 to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (c.2 (N.I.));
 - (d) a labour market enforcement order under section 18 of the Immigration Act 2016. 20
- 2 A discretionary exclusion ground applies to a supplier if the supplier or a connected person has engaged in conduct outside the United Kingdom that the decision-maker considers could result in any such order being made if the conduct occurred in the United Kingdom. 25
- 3 A discretionary exclusion ground applies to a supplier if the decision-maker considers that there is sufficient evidence that the supplier or a connected person has engaged in conduct (whether in or outside the United Kingdom) constituting (or that would, if it occurred in the United Kingdom, constitute) an offence referred to in— 30
- (a) section 1, 2, 4 or 30 of the Modern Slavery Act 2015,
 - (b) section 1, 4 or 32 of the Human Trafficking and Exploitation (Scotland) Act 2015, or
 - (c) section 1, 2 or 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, or paragraph 16 of Schedule 3 to that Act. 35

Environmental misconduct

- 4 A discretionary exclusion ground applies to a supplier if—
- (a) the supplier or a connected person has been convicted of an offence (whether in or outside the United Kingdom), and 40
 - (b) the conduct constituting the offence caused, or had the potential to cause, significant harm to the environment, including the life and health of plants and animals.

Insolvency, bankruptcy, etc

- 5 A discretionary exclusion ground applies to a supplier if the supplier or a connected person has –
- (a) become bankrupt (or, in Scotland, its estate has been sequestrated),
 - (b) become subject to insolvency or winding-up proceedings, 5
 - (c) had its assets subject to administration or receivership, including by a liquidator or court,
 - (d) entered into an arrangement with its creditors,
 - (e) become subject to a petition or application for any such procedures or arrangements, or 10
 - (f) in any jurisdiction, been subject to a procedure or an application the decision-maker considers to correspond to any procedure or application mentioned in paragraphs (a) to (e).
- 6 A discretionary exclusion ground applies to a supplier if the supplier or a connected person is – 15
- (a) in the case of a company, unable to pay its debts within the meaning given by section 123 of the Insolvency Act 1986 or Article 103 of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405) (N.I. 19),
 - (b) in the case of an individual – 20
 - (i) unable to pay their debts or with no reasonable prospects of paying their debts, each within the meaning given by section 268 of that Act or Article 242 of that Order, or
 - (ii) apparently insolvent within the meaning of section 16 of the Bankruptcy (Scotland) Act 2016 (asp 21), or
 - (c) in a corresponding position in any jurisdiction in the opinion of the decision-maker. 25
- 7 A discretionary exclusion ground applies to a supplier if the supplier or a connected person has suspended or ceased carrying on all or a substantial part of its business.

Potential competition infringements 30

- 8 (1) A discretionary exclusion ground applies to a supplier if the decision-maker considers that an agreement or concerted practice to which the supplier or a connected person is party has infringed –
- (a) the Chapter I prohibition (within the meaning given by section 2 of the Competition Act 1998), or 35
 - (b) any substantially similar prohibition applicable in a jurisdiction outside the United Kingdom.
- (2) Sub-paragraph (1) does not apply where the supplier or connected person is –
- (a) an immunity recipient (within the meaning given by paragraph 14 of Schedule 8A to that Act), or 40
 - (b) a regulator or other authority outside the United Kingdom has granted the supplier or connected person immunity from penalties in respect of the infringement.
- 9 A discretionary exclusion ground applies to a supplier if the decision-maker considers that the supplier or a connected person has infringed – 45

- (a) the Chapter II prohibition (within the meaning given by section 18 of the Competition Act 1998), or
- (b) any substantially similar prohibition applicable in a jurisdiction outside the United Kingdom.
- 10 (1) A discretionary exclusion ground applies to a supplier if – 5
- (a) the CMA has made a decision under the Competition Act 1998 that the supplier or a connected person has infringed the Chapter II prohibition, or
- (b) a regulator or other authority outside the United Kingdom has made a decision that the supplier or a connected person has infringed any substantially similar prohibition. 10
- (2) In this paragraph the reference to the CMA includes a reference to a regulator referred to in section 54(1) of the Competition Act 1998 in circumstances where it exercises functions concurrently with the CMA in accordance with that Act. 15
- 11 (1) A discretionary exclusion ground applies to a supplier if the decision-maker considers that the supplier or a connected person has engaged in conduct constituting –
- (a) an offence under section 188 of the Enterprise Act 2002 (cartel offence), or 20
- (b) a substantially similar offence under the law of a country or territory outside the United Kingdom.
- (2) Sub-paragraph (1) does not apply if –
- (a) the CMA has given written notice to the supplier or connected person under section 190(4) of the Enterprise Act 2002 (immunity from prosecution for cartel offences) in connection with the conduct, or 25
- (b) a regulator or other authority outside the United Kingdom has determined that the supplier or connected person is immune from prosecution in respect of the conduct. 30

Professional misconduct

- 12 (1) A discretionary exclusion ground applies to a supplier if the decision-maker considers that the supplier or a connected person has engaged in professional misconduct which brings into question the supplier's integrity.
- (2) A discretionary exclusion ground applies to a supplier if a court, regulator or other authority has ruled that the supplier or connected person has engaged in such professional misconduct. 35
- (3) "Professional misconduct" includes conduct involving –
- (a) dishonesty;
- (b) impropriety; 40
- (c) a serious breach of ethical or professional standards applicable to the supplier (whether those standards are mandatory or not).

Breach of contract and poor performance

- 13 (1) A discretionary exclusion ground applies to a supplier if –
- (a) the supplier has breached a relevant contract, and 45

- (b) the breach was sufficiently serious.
- (2) A discretionary exclusion ground applies to a supplier if –
 - (a) a court has ruled that the supplier breached a relevant contract, and
 - (b) the breach was sufficiently serious.
- (3) A discretionary exclusion ground applies to a supplier if the supplier – 5
 - (a) has not performed a relevant contract to the regulated authority’s satisfaction,
 - (b) was given proper opportunity to improve performance, and
 - (c) failed to do so.
- (4) A discretionary exclusion ground applies to a supplier if a contracting authority has published information under section 66(5) in respect of the supplier (information concerning either breach or poor performance). 10
- (5) For the purposes of this paragraph, a breach of a contract is “sufficiently serious” if it results in –
 - (a) termination (or partial termination) of the contract, 15
 - (b) the award of damages,
 - (c) a settlement agreement between the supplier and the regulated authority.
- (6) In this paragraph –
 - “regulated authority” means – 20
 - (a) a contracting authority,
 - (b) another public authority, or
 - (c) an authority outside the United Kingdom that the decision-maker considers to be equivalent;
 - “relevant contract” means a contract to which a regulated authority is party. 25

Acting improperly in procurement

- 14 (1) A discretionary exclusion ground applies to a supplier if a decision-maker considers that –
 - (a) the supplier has acted improperly in relation to any procurement, 30 and
 - (b) in so doing, the supplier put itself at an unfair advantage in relation to the award of a public contract.
- (2) A supplier might act improperly in relation to a procurement by –
 - (a) failing to provide information requested by the contracting authority; 35
 - (b) providing information that is incomplete, inaccurate or misleading;
 - (c) accessing confidential information;
 - (d) unduly influencing the contracting authority’s decision-making.

National security

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- 15 A discretionary exclusion ground applies to a supplier if a decision-maker determines that the supplier or a connected person poses a threat to the national security of the United Kingdom.

Excluded matters

- 16 (1) For the purpose of determining whether a discretionary exclusion ground applies to a supplier, the decision-maker must ignore any event that –
- (a) the decision-maker was aware of before the five-year period ending with the date on which the determination is made, or 5
 - (b) a reasonably well-informed decision-maker in their position would have been aware of before that period.
- This is subject to sub-paragraphs (2) and (4).
- (2) In determining whether a discretionary exclusion ground within sub-paragraph (3) applies to a supplier, the decision-maker must also ignore any event that – 10
- (a) the decision-maker was aware of before the three-year period ending with the date on which the determination is made, or
 - (b) a reasonably well-informed decision-maker in their position would have been aware of before that period. 15
- (3) The grounds are those listed in –
- (a) paragraphs 5 to 7 (insolvency, bankruptcy etc);
 - (b) paragraphs 8 to 11 (potential competition infringements);
 - (c) paragraph 12 (professional misconduct);
 - (d) paragraph 13(1) or (2) (breach of contract); 20
 - (e) paragraph 14 (acting improperly in a procurement).
- (4) In determining whether a discretionary exclusion ground listed in any of the following paragraphs applies to a supplier, the decision-maker must also ignore any event that occurred before the coming into force of this Schedule – 25
- (a) paragraphs 1 to 3 (labour market misconduct);
 - (b) paragraph 4 (environmental misconduct);
 - (c) paragraph 13(3) (poor performance);
 - (d) paragraph 15 (national security).

Definitions 30

- 17 In this Schedule –
- “decision-maker”, in relation to a supplier, means a contracting authority or an appropriate authority that is considering whether a discretionary exclusion ground applies to the supplier;
 - “information” includes evidence verifying that information. 35
- 18 Other terms used in this Schedule and defined in Schedule 6 have the meanings given in that Schedule.

SCHEDULE 8

Section 69

PERMITTED CONTRACT MODIFICATIONS

Provided for in the contract 40

- 1 A modification is a permitted modification if –

- (a) the possibility of the modification is unambiguously provided for in—
 - (i) the contract as awarded, and
 - (ii) the tender or transparency notice for the award of that contract, and
- (b) the modification would not change the overall nature of the contract.

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Urgency and the protection of life, etc

- 2 A modification is a permitted modification if—
- (a) its purpose could otherwise be achieved by the direct award of a contract under section 40, and
 - (b) such an award could be made by reference to—
 - (i) paragraph 13 of Schedule 5 (extreme and unavoidable urgency), or
 - (ii) regulations under section 41 (direct award to protect life, etc).
- 3 Assume, for the purposes of paragraph 2, that the contract would be a public contract as defined in section 2.

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Unforeseeable circumstances

- 4 (1) A modification is a permitted modification if—
- (a) the circumstances giving rise to the modification could not reasonably have been foreseen by the contracting authority before the award of the contract,
 - (b) the modification would not change the overall nature of the contract, and
 - (c) the modification would not increase the estimated value of the contract by more than 50 per cent.
- (2) Sub-paragraph (1)(c) does not apply if the contract being modified is a utilities contract.

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Materialisation of a known risk

- 5 (1) A modification is a permitted modification if—
- (a) the contracting authority considers that—
 - (i) a known risk has materialised otherwise than as a result of any act or omission of the contracting authority or the supplier,
 - (ii) because of that fact, the contract cannot be performed to the satisfaction of the contracting authority,
 - (iii) the modification goes no further than necessary to remedy that fact, and
 - (iv) awarding a further contract under Part 3 (instead of modifying the contract) would not be in the public interest in the circumstances, and
 - (b) the modification would not increase the estimated value of the contract by more than 50 per cent ignoring, for the purpose of estimating the value of the contract, the fact that the risk has materialised.

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(2) Sub-paragraph (1)(b) does not apply if the contract being modified is a utilities contract.

- 6 In paragraph 5, a “known risk” means a risk that –
- (a) the contracting authority considered –
 - (i) could jeopardise the satisfactory performance of the contract, but
 - (ii) because of its nature, could not be addressed in the contract as awarded, and
 - (b) was identified in the tender or transparency notice for award of the contract, including by reference to –
 - (i) its meeting the description in paragraph (a), and
 - (ii) the possibility of modification under paragraph 5.
- 7 In considering whether awarding a new contract would be in the public interest for the purposes of paragraph 5, a contracting authority –
- (a) must consider whether a new contract could provide more value for money, and
 - (b) may consider technical and operational matters.

Additional goods, services or works

- 8 (1) A modification is a permitted modification if –
- (a) the modification provides for the supply of goods, services or works in addition to the goods, services or works already provided for in the contract,
 - (b) 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,
 - (c) the contracting authority considers that the difference or incompatibility would result in –
 - (i) disproportionate technical difficulties in operation or maintenance or other significant inconvenience, and
 - (ii) the substantial duplication of costs for the authority, and
 - (d) the modification would not increase the estimated value of the contract by more than 50 per cent.
- (2) Sub-paragraph (1)(d) does not apply if the contract being modified is a utilities contract.

Transfer on corporate restructuring

- 9 A novation or 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.

Defence authority contracts

- 10 A modification of a defence authority contract is a permitted modification where it is necessary to enable the contracting authority to –
- (a) take advantage of developments in technology, or
 - (b) prevent or mitigate any adverse effect of those developments.

- 11 A modification of a defence authority contract is a permitted modification where –
- (a) the continuous supply of the goods, services or works supplied under the contract is necessary to ensure the ability of the Armed Forces to maintain their operational capabilities, effectiveness, readiness for action, safety, security, or logistical capabilities, and
 - (b) the modification is necessary to ensure there is continuous supply of those goods, services or works.

SCHEDULE 9

Section 81

- TREATY STATE SUPPLIERS (SPECIFIED INTERNATIONAL AGREEMENTS) 10
- 1 The Agreement on Government Procurement signed at Marrakesh on 15 April 1994, as amended on or before the day on which this Schedule comes into force.
- 2 Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Chile, signed at Santiago on 30 January 2019. 15
- 3 Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation, signed at Bern on 11 February 2019.
- 4 Trade and Partnership Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the State of Israel, signed at Tel Aviv on 18 February 2019. 20
- 5 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, signed at Castries, Saint Lucia on 22 March 2019. 25
- 6 Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the other part, signed at Quito on 15 May 2019.
- 7 Agreement Establishing an Association between the United Kingdom of Great Britain and Northern Ireland and Central America, signed at Managua on 18 July 2019. 30
- 8 Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Korea, of the other part, signed at London on 22 August 2019. 35
- 9 Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia, signed at London on 21 October 2019.
- 10 Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kosovo, signed at Pristina on 3 December 2019. 40

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| 11 | Political, Free Trade and Strategic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland and Ukraine, signed at London on 8 October 2020. | |
| 12 | Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership, signed at Tokyo on 23 October 2020. | 5 |
| 13 | Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of North Macedonia, signed at Skopje on 3 December 2020. | |
| 14 | Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada, signed at Ottawa on 9 December 2020. | 10 |
| 15 | Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Singapore, signed at Singapore on 10 December 2020. | 15 |
| 16 | Trade Continuity Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Mexican States, signed at Mexico City on 15 December 2020. | |
| 17 | Strategic Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Moldova, signed at Chisnau on 24 December 2020. | 20 |
| 18 | Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Socialist Republic of Viet Nam, signed at London on 29 December 2020. | |
| 19 | Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part, signed at Brussels and London on 30 December 2020. | 25 |
| 20 | Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Albania, signed at Tirana on 5 February 2021. | 30 |
| 21 | Partnership, Trade and Cooperation Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Serbia, signed at Belgrade on 16 April 2021. | |
| 22 | Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, signed at London on 8 July 2021. | 35 |
| 23 | Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, signed at London on 16 December 2021 and at Adelaide on 17 December 2021. | 40 |
| 24 | Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand signed at London on 28 February 2022. | |

SCHEDULE 10

Section 105

SINGLE SOURCE DEFENCE CONTRACTS

1 The Defence Reform Act 2014 is amended as follows.

Definition of qualifying defence contract

- 2 (1) Section 14 (regulations relating to qualifying defence contracts) is amended as follows. 5
- (2) In subsection (2)(a), after “goods, works or services” insert “wholly or substantially”.
- (3) After subsection (5) insert –
- “(5A) Single source contract regulations may specify circumstances in which a contract entered into by the Secretary of State with a primary contractor is or is not to be treated as amending an existing contract between those parties for the purposes of subsection (4) or (5).” 10
- (4) After subsection (8) insert –
- “(8A) The regulations may also specify when a contract is to be treated as substantially for defence purposes.” 15

Pricing of qualifying defence contracts

- 3 (1) Section 15 (pricing of qualifying defence contracts) is amended as follows.
- (2) In subsection (1), after “qualifying defence contract” insert “, and, where the contract is divided into components, each component of that contract,”. 20
- (3) For subsection (2) substitute –
- “(2) The regulations must provide for the price payable under the contract, or any component, to be determined –
- (a) in accordance with the formula in subsection (4), or
- (b) in such circumstances as may be specified in the regulations, in accordance with another method. 25
- (2A) The regulations must only specify circumstances for the purposes of subsection (2)(b) if the Secretary of State is satisfied that the factors referred to in section 13(2) may be ensured in those circumstances if another method is used. 30
- (2B) The regulations may also make provision requiring a particular method specified in the regulations to be used in certain of the circumstances specified for the purposes of subsection (2)(b).”
- (4) In subsection (3)(a) –
- (a) after “contract” insert “or each amended component of that contract,”; 35
- (b) for “the formula in subsection (4)” substitute “the method applicable by virtue of subsection (2)”.
- (5) In subsection (3)(b) for “formula” substitute “method”.
- (6) In subsection (4) – 40

- (a) after “for the contract” insert “or component”;
- (b) after “under the contract” insert “or component”.
- (7) In subsection (5), after “contract” insert “or component”.
- (8) After subsection (5) insert –
- “(6) In this Part, “component”, in relation to a contract, means a part of the contract that the parties to it agree is to be treated distinctly from other such parts in determining the price payable under the contract. 5
- (7) Single source contract regulations may specify circumstances in which certain parts of a qualifying defence contract may or may not be treated distinctly from other parts of the same contract.” 10
- 4 (1) Section 16 (pricing of contracts: supplementary) is amended as follows.
- (2) In subsection (1)(b)(i), after “contract” insert “or, where relevant, a component of that contract”.
- (3) After subsection (3) insert –
- “(4) Single source contract regulations may provide that the SSRO – 15
- (a) must, on an application by a person within subsection (5), determine whether the method used to determine the price payable under a qualifying defence contract or a component of that contract was appropriate;
- (b) may, in consequence of a determination under paragraph (a), determine that the price payable under the contract is to be adjusted by an amount specified by the SSRO. 20
- (5) The following persons are within this subsection –
- (a) the Secretary of State,
- (b) an authorised person, and 25
- (c) the primary contractor.”
- 5 After section 21(2) (final price adjustment) insert –
- “(2A) Provision made under subsection (2) may include provision dealing with how, in the case of a qualifying defence contract divided into components, the components are to be taken into account in determining the amount of any adjustments to the total price payable under such a contract.” 30
- 6 In section 22(1)(a) (recovery of unpaid amounts), after “section” insert “16(4),”.
- 7 In section 43 (interpretation etc), at the appropriate place insert – 35
- ““component” has the meaning given by section 15(6).”

Contract profit rate

- 8 (1) Section 17 (contract profit rate) is amended as follows.
- (2) In subsection (1) at the end insert “, or, where the contract is divided into components, any component of that contract”. 40
- (3) In subsection (2) –

- (a) in step 2, for the words from “the risk” to “estimated allowable costs” substitute “the financial risks to the primary contractor of entering into the contract or component, taking into account the particular type of activities to be carried out by the primary contractor under that contract or component.”; 5
 - (b) omit steps 3 and 4 (and, accordingly, renumber steps 5 and 6 as steps 3 and 4);
 - (c) in new step 3, after “determines” insert “, having taken into account any factors relevant to the determination specified in the regulations,”; 10
 - (d) in new step 3, for “4” substitute “2”;
 - (e) in new step 3, after “contract” insert “or component”;
 - (f) in new step 4, for “5” substitute “3”;
 - (g) in new step 4, after “contract”, in both places it occurs, insert “or component”. 15
- (4) In subsection (3) for “6”, in both places it occurs, substitute “4”.
- (5) In subsection (4)(b), for “6” substitute “4”.
- 9 (1) Section 18 (contract profit rate: supplementary) is amended as follows.
- (2) In subsection (2)(a) –
- (a) for “6” substitute “4”; 20
 - (b) after “paragraph” insert “, or a component of such a contract”.
- (3) In subsection (2)(b), after “contract” insert “or component”.
- (4) In subsection (2)(c), after “those contracts” insert “or components of those contracts”.
- (5) For subsection (3)(a) substitute – 25
- “(a) may, on an application by a person within subsection (4), determine whether –
 - (i) the baseline profit rate identified under step 1 in section 17(2) is correct in relation to a qualifying defence contract or a component of such a contract; 30
 - (ii) an adjustment agreed under any of steps 2 to 4 in section 17(2) is appropriate;
 - (iii) an adjustment agreed under step 3 in section 17(2) is in accordance with the regulations.”
- 10 (1) Section 19 (rates etc relevant to determining contract profit rate) is amended 35 as follows.
- (2) In subsection (1) omit “the SSRO funding adjustment”.
- (3) In subsection (2) –
- (a) omit “and the SSRO funding adjustment”;
 - (b) omit “or funding adjustment”. 40
- (4) In subsection (4) omit “, and the SSRO funding adjustment for that year,”.
- (5) In subsection (5) –
- (a) omit “or the SSRO funding adjustment”;
 - (b) omit “or funding adjustment” in both places it occurs.

- (6) In subsection (6) omit “or the funding adjustment”.

Allowable costs

- 11 (1) Section 20 (allowable costs) is amended as follows.
- (2) In subsection (2) –
- (a) after “qualifying defence contract” insert “, or, where the contract is divided into components, a component of that contract”; 5
- (b) in paragraph (b), after “contract” insert “or component”.
- (3) After subsection (2) insert –
- “(2A) Single source contract regulations may provide that the requirements set out in subsection (2)(a) to (c) are not met in relation to a cost where the cost arises from profits made by a person connected with the primary contractor. 10
- (2B) The regulations may specify the circumstances in which a person is connected with the primary contractor.”
- (4) In subsection (4) after “contract” insert “, or where the contract is divided into components, a component of that contract.”. 15
- (5) For subsection (5) substitute –
- “(5) Where a person within subsection (5A) applies to the SSRO for such a determination, the SSRO must determine –
- (a) the extent to which a cost is or would be an allowable cost under a qualifying defence contract or a component of such a contract, or 20
- (b) the extent to which a method which is used or may be used to determine a cost under a qualifying defence contract or a component of such a contract would result in that cost being an allowable cost under such a contract or component. 25
- (5A) The following persons are within this subsection –
- (a) the Secretary of State;
- (b) an authorised person;
- (c) a primary contractor under a qualifying defence contract; 30
- (d) a potential primary contractor.”
- (6) In subsection (6), for “the contract”, in the first place it occurs, substitute “a qualifying defence contract”.

Reports

- 12 (1) Section 25 (reports on overheads and forward planning etc) is amended as follows. 35
- (2) For subsection (3)(a) substitute –
- “(a) where P is associated with one or more other persons –
- (i) the ultimate parent undertaking in relation to P and those other persons, or 40
- (ii) where permitted under the regulations in relation to a report mentioned in subsection (2), another person associated with P which that undertaking and the

Secretary of State have agreed is to be a designated person in relation to that report, and”.

(3) After subsection (8) insert –

“(8A) In this section, “financial year” means a year beginning with 1 April or a year beginning with such other date as may be agreed between the Secretary of State and a designated person.” 5

13 In section 43 (interpretation etc), in the definition of “financial year”, at the end insert “(but see section 25(8A) for the different meaning of “financial year” in that section)”.

Qualifying sub-contracts 10

14 (1) Section 29 (determining whether a contract is a qualifying sub-contract) is amended as follows.

(2) After subsection (2)(b) insert –

“(c) where the assessment is that the proposed contract would not be a qualifying sub-contract if it were entered into, to give notice in writing of that fact, and of reasons for the assessment, to the Secretary of State, an authorised person and the prospective sub-contractor.” 15

(3) After subsection (4)(b) insert –

“(c) where the assessment is that the proposed sub-contract would not be a qualifying sub-contract if it were entered into, to give notice in writing of that fact, and of reasons for the assessment, to the Secretary of State, an authorised person and the prospective sub-contractor.” 20

(4) In subsection (5), in each of paragraphs (a) and (b), after “would”, insert “or would not”. 25

15 In section 30(4)(a) (application of single source contracts regime to qualifying sub-contracts) –

(a) after “for the” insert “primary contractor or”;

(b) for “the sub-contractor’s opinion” substitute “their opinion”. 30

16 In section 31(3) (compliance notices) –

(a) in paragraph (e), omit “, or”;

(b) in paragraph (f), at the end insert “, or

(g) in circumstances where P is required to give the notice mentioned in section 29(2)(c) or (4)(c) in respect of a proposed contract, P fails to give such a notice.” 35

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

17 (1) Section 35 (opinions and determinations by the SSRO) is amended as follows.

(2) In subsection (1)(a), omit “qualifying defence” in both places it occurs. 40

(3) For subsection (2)(c) substitute –

“(c) a person who has entered into a contract with the Secretary of State (a “contractor”);”

- (4) In subsection (2)(d) –
- (a) for “the”, in the first place it occurs, substitute “a”;
 - (b) omit “(in the case of a proposed contract)”.
- (5) For subsection (3) substitute –
- “(3) The SSRO may, on a reference made to it by a person mentioned in subsection (2), give an opinion on any other matter relating to the application or interpretation of this Part or single source contract regulations.” 5
- (6) In subsection (4)(a), omit “qualifying defence”.
- (7) In subsection (5), omit “primary” in both places it occurs. 10
- 18 After section 35 insert –
- “35A Guidance**
- The SSRO may issue such guidance as it considers appropriate in relation to the application or interpretation of this Part or single source contract regulations.” 15
- 19 In paragraph 10(3) of Schedule 4 (procedure of the SSRO), after “16(2)(b)” insert “or (4)”.

SCHEDULE 11

Section 107

REPEALS AND REVOCATIONS

- Primary legislation* 20
- 1 Paragraphs 9(9)(d) and 11(6)(b)(ix) of Schedule 7B to the Government of Wales Act 2006 (as inserted by an Act of Parliament resulting from the Trade (Australia and New Zealand) Bill that was introduced into the House of Commons on 11 May 2022).
 - 2 Sections 39 and 40 of the Small Business, Enterprise and Employment Act 2015. 25
 - 3 An Act of Parliament resulting from the Trade (Australia and New Zealand) Bill that was introduced into the House of Commons on 11 May 2022.
- Subordinate legislation*
- 4 The Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848). 30
 - 5 The Public Contracts Regulations 2015 (S.I. 2015/102).
 - 6 The Concession Contracts Regulations 2016 (S.I. 2016/273).
 - 7 The Utilities Contracts Regulations 2016 (S.I. 2016/274).

Retained direct EU legislation

- | | | |
|----|--|----|
| 8 | Commission Decision 2006/211/EC of 8 March 2006 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales. | 5 |
| 9 | Commission Decision 2007/141/EC of 26 February 2007 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the supply of electricity and gas in England, Scotland and Wales. | 10 |
| 10 | Commission Decision 2010/192/EU of 29 March 2010 exempting exploration for and exploitation of oil and gas in England, Scotland and Wales from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. | 15 |
| 11 | Commission Implementing Decision (EU) 2017/1870 of 16 October 2017 on the publication of the reference of the European standard on electronic invoicing and the list of its syntaxes pursuant to Directive 2014/55/EU of the European Parliament and of the Council. | 20 |

Procurement Bill [HL]

A

B I L L

To make provision about procurement.

Lord True

Ordered to be Printed, 11th May 2022.

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