

**PROCUREMENT BILL**  
**Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee**

**A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Procurement Bill (“the Bill”). The Bill was introduced in the House of Lords on 11 May 2022. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

**B. PURPOSE AND EFFECT OF THE BILL**

2. The procurement of goods, services and works by public bodies and some utilities is an area of law previously governed by EU Directives (on public contracts, utilities, concessions and certain defence matters). The Procurement Bill will remove the Regulations which implemented this regime<sup>1</sup> and create a new public procurement regime, which builds on greater flexibility outside the EU to make procurement quicker, simpler and more transparent.
3. The Bill regime builds on a range of principles (non-discrimination and fair treatment) and objectives (value for money, maximising public benefit, transparency and integrity). It also creates a set of more flexible procurement rules, with a greater emphasis on transparency in the procurement process. It will regulate procurements from inception to termination, meaning from the point at which a covered body (referred to as a “contracting authority”) is considering whether and what to procure, through the process of procurement and contract signature, up to the point at which the resulting contract ends.
4. Substantial differences from the current regime include greater powers for Ministers (including in the devolved administrations) to investigate non-compliance; a new emergency procurement process to be used in extremely urgent situations and a new debarment list, which will preclude entities included on it from access to the UK procurement regime.
5. Procurement is covered by a number of the UK’s international trade agreements and the WTO’s Agreement on Government Procurement (referred to as “the GPA”). The Bill regime will be compliant with these obligations and will allow a degree of future-proofing through some targeted delegated powers (exercisable through Regulations) to update the regime in the event that new agreements are signed.

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<sup>1</sup> The Defence and Security Public Contracts Regulations 2011 (SI 2011/1848); the Public Contracts Regulations 2015 (SI 2015/102); the Concessions Contracts Regulations 2016 (SI 2016/273); and the Utilities Contracts Regulations 2016 (SI 2016/274).

6. The Bill covers defence and security procurement and provides for a number of derogations from the main regime.
7. The Bill also covers procurement by devolved contracting authorities in Wales and Northern Ireland (though with some derogations from the full regime), but does not cover all entities in Scotland.
8. **Part 1** establishes the key concepts upon which the Bill is based. This includes the nature of a public contract, regulating the award and management of which is the predominant aim of the regime. It also sets out the different bodies that are regulated by the regime, collectively referred to as “contracting authorities”, which includes some private utilities (in general where they are former monopoly service providers like water).
9. It also establishes the different types of contracts that can be public contracts and which have procedural requirements for their procurement. These include private utilities, in respect of which a less burdensome regime is created; concessions contracts, where part of the payment is in the exploitation of the thing provided (eg building and operating a toll bridge); a light touch regime where certain services can be procured, subject to less onerous procedures; and defence and security contracts, in respect of which there are a number of carve outs from the regime.
10. **Part 2** establishes the principles and objectives of the regime. Contracting Authorities are required only to procure public contracts in accordance with the Bill regime. When they carry out functions under this Bill they must have regard to the obligations and objectives set out in clause 11.
11. This Part also makes provision for a Minister of the Crown to produce a national procurement policy statement which applies to contracting authorities, responsibility for which is not devolved. It also makes provision for Welsh Ministers to produce a Wales procurement policy statement, which applies to devolved Welsh authorities (and bodies treated as such). These are akin to a statutory code of practice and allow relevant Ministers to set out strategic policies in relation to public procurement, to which contracting authorities must have regard.
12. These “have regard” obligations take effect in relation to all functions under the Bill. They start at the point of inception that a contract may be required and govern any preliminary market engagement that might take place. They continue through the process of procurement and remain in place for the purposes of management, amendment and termination of any subsequently awarded contract.
13. **Part 3** sets out the procedures under which procurements can take place. Provisions on preliminary steps cover limitations on the publishing of and carrying out of preliminary market engagement along with obligations to ensure it does not impact the fairness of any subsequent procurement process. The Bill also requires that large contracts are broken down into smaller ones in order to open up government procurement to a greater range of bidders, in particular SMEs.
14. Provisions on competitive award set out the discretion afforded to a contracting authority in establishing the process under which it will carry out individual procurements. Procurements are generally started by the publication of a tender notice (sometimes with

subsequent “tender documents”) which sets out essential information in relation to the procurement (to be determined in regulations). It allows for multi-stage tendering where initial stages require potential bidders to satisfy certain conditions for participation. They will also set out award criteria which will be used in the final assessment of bids to determine the “most advantageous tender” to whom the contract must be awarded.

15. It also addresses the circumstances in which limited types of contracts can be reserved for certain types of supplier, for example public service mutuels and supported employment schemes. It also covers dynamic markets, which allow for a certain degree of prequalification of suppliers allowing for swifter procurement from suppliers in the market.
16. Certain circumstances justify the award of a contract without a competitive procedure (see schedule 5 (direct award justifications)) and are sometimes referred to as “direct awards”. These include:
  - a. Prototypes and development of novel goods and services;
  - b. Where the award can only be made to one supplier;
  - c. A limited quantity of additional or repeat goods and services;
  - d. Goods purchased on a commodity market;
  - e. Goods purchased on particularly advantageous terms following an insolvency;
  - f. Urgency;
  - g. Where necessary to protect life etc (see more detail below);
  - h. User choice contracts (where another statutory regime makes provision for user choice, for example health); and
  - i. Defence and security contracts.
17. In these circumstances the contracting authority must alert the market by publishing a “transparency notice”. A new ground for direct award is being created by clause 41 which allows Ministers to set out in regulations (subject to the made affirmative procedure) that certain contracts may be procured directly and not subject to a competition due to the need to address a particular emergency.
18. This Part also makes provision for certain types of collective procurement. This includes through framework agreements, where a limited number of suppliers can be put on a list and certain types of contracts (specified in the framework procurement) can be awarded more easily.
19. This Part also provides that where a contracting authority intends to award a contract following certain types of procedure it must publish a notice setting out that intention so that aggrieved bidders can challenge the final decision. This commences a “standstill” period in which the proposed contract cannot be signed. There are also greater obligations in this regime as to the publication of information relating to the contract to be signed the performance of the supplier against certain key performance indicators and in relation to large contracts (those over £2million) an obligation to publish the contract itself, subject to redactions for national security and commercial sensitivity.

20. The Bill also sets out a regime for the exclusion of certain suppliers who are deemed not suitable to be bidding for public contracts. There are a range of mandatory and discretionary exclusionary grounds (see in particular Schedules 6 (mandatory exclusion grounds) and 7 discretionary exclusion grounds). This includes provision for a debarment regime, which allows Ministers to make a decision to bar individual suppliers from access to the procurement regime entirely.
21. **Part 4** regulates what contracting authorities can do in relation to the management of public contracts once they have been awarded. It imposes a range of obligations around the provision and acceptance of electronic invoices, payment terms (including how these must flow down into chains of subcontracts), publication of information on money spent on public contracts and performance of them.
22. This part also regulates how public contracts can be modified. It limits the range of modifications that can be made, so that public contracts cannot be amended to avoid the regime and sets out obligations as to publication in relation to certain modifications that are made.
23. **Part 5** sets out how contracting authorities are to identify and avoid conflicts of interest, including allowing for the exclusion of any supplier in respect of which no less invasive measure can be taken to avoid a conflict. These provisions require contracting authorities to carry out an assessment in respect of both actual and potential conflicts.
24. **Part 6** sets out certain limited obligations on contracting authorities when procuring contracts which fall below the value thresholds that would see them regulated under the substantive regime.
25. **Part 7** makes provision for the implementation of the UK's international obligations relating to procurement. This creates a single free-standing obligation not to discriminate against suppliers that are covered by an international agreement. It also creates a power to amend the list of agreements by regulations, allowing for some degree of future proofing.
26. **Part 8** makes general provision around the publication of notices. The procurement regime set out in this Bill is intended to be more transparent than the current system and there is a significantly greater degree of notices, documents and other information that need to be published or shared. This Part sets out powers to regulate those obligations. This includes provision that allows for the creation of a supplier registration system along with the power to create obligations that can be placed on contracting authorities only to use certain information if drawn from that system.
27. **Part 9** creates the remedies regime which allows the challenge of perceived deficiencies on the part of contracting authorities (including the potential for damages for breach of statutory duty). The regime is broadly similar to the existing regime, though it is anticipated that combined with a degree of procedural rules reform (not addressed in this Bill) and greater up front transparency, that this will have the effect of reducing the time taken to resolve legal challenges and allow contracting authorities to proceed to award public contracts.

28. **Part 10** establishes powers for relevant Ministers (being a Minister of the Crown, Welsh Ministers and a Northern Ireland Department) to investigate allegations of breach of the regime by contracting authorities. The Bill provisions allow Ministers, acting as overseer, to issue guidance to individual contracting authorities where they take the view that the regime has not been followed. They can also issue more general guidance to contracting authorities at large.
29. **Part 11** makes provision for the overlap in functions between UK Ministers, Welsh Ministers and Northern Ireland Departments, including divisions as to the exercise of regulation-making powers.
30. It also provides powers for regulations to be made which will enable continued access by Scottish authorities to purchasing arrangements (such as frameworks and dynamic markets) established by bodies covered by the Bill and for such bodies to access arrangements established by Scottish authorities.
31. **Part 12** sets out amendments and repeals including the amendments made in Schedule 10 (single source defence contracts) which makes provision amending Part 2 of the Defence Reform Act 2014 (the “DRA”). The changes relate to single source contracts (SSCs), which are contracts for goods, works or services entered into for defence purposes by the Secretary of State and which have not been the subject of competitive tendering processes.
32. The absence of market pressures in single source procurement creates challenges for MOD in obtaining value for money while ensuring that contractors receive a fair and reasonable price. The DRA and Single Source Contract Regulations 2014 (S.I. 2014/3337) (the “2014 Regulations”) introduced the first legislative framework around SSCs and sought to address the challenge by way of three key features:
  - a. Clear rules on how SSCs can be priced, for both the profit element and the costs, with an obligation placed on suppliers to demonstrate that costs in such contracts are ‘appropriate, attributable to the contract, and reasonable’;
  - b. Greater transparency and record-keeping requirements, from the beginning of an SSC to its completion, including a suite of mandatory reports; and
  - c. The creation of an arms-length body, the Single Source Regulations Office (the “SSRO”), to issue guidance on application of the SSCRs and arbitrate between the MOD and suppliers.
33. The DRA applies to qualifying defence contracts (a “QDC”) and to qualifying sub-contracts (a “QSC”), which are defined in section 14(2) and section 28(2) of the DRA. The DRA contains multiple provisions to make regulations (single source contract regulations or “SSCRs”), which set out most of the detail of the legislative regime that applies to SSCs.
34. **Part 13** sets out general provisions normally found at the end of a Bill, including extent, commencement etc.

## **C. DELEGATED POWERS**

35. The Bill includes the following delegated powers:

### **Clause 6 Defence and security contracts**

*Power conferred on:* Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

#### **Context and Purpose**

36. Clause 6 confers upon the Minister a power to make regulations which specify that a contracting authority is a “defence authority”. Defence and security contracts entered by such a defence authority are called defence authority contracts. Defence authority contracts are not caught by the obligation to publish Contract Change Notices, set out in clause 70 (contract changes notices and publication of modifications) and may be modified without competition in the two additional cases set out in paragraphs 10 and 11 of Schedule 8 (permitted contract modifications). Certain defence authority contracts can also be directly awarded in the circumstances set out in paragraph 21 of Schedule 5 (direct award justifications). This is to reflect the particular nature of defence contracts. Accordingly, a contracting authority may only be specified if the Minister considers that the main purpose for which the authority exercises functions is to protect national security.

#### **Justification for Taking the Power**

37. The intention in taking the power is to allow for machinery of government changes without needing to amend the primary legislation.

#### **Justification for the procedure**

38. The Affirmative procedure appropriately recognises the relatively broad scope of the power and its effect, which is to derogate from provisions of the Bill which would otherwise be applicable.

### **Clause 8 Light touch contracts**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

#### **Context and Purpose**

39. This clause confers a power to make regulations to specify which categories of contracts can benefit from the 'light touch regime' provisions in the new Bill. The light touch regime is a facet of the existing rules (see for example regulation 77 et seq of, and Schedule 3 to the Public Contracts Regulations 2015) and has fewer rules regulating how a procurement is conducted for these contracts. This is reflected in the Bill by a series of exceptions of obligations under the procurement regime for the relevant contracts.
40. The category of contracts that can benefit from the light touch regime are identified by Common Procurement Vocabulary (CPV) codes; international agreements use Central Product Classification (CPC). CPCs are high level category codes that are used by nations in international agreements (for example the GPA and bilateral trade agreements). CPV codes were introduced by the EU<sup>2</sup> to categorise procurement opportunities, so they go to more granular detail than CPCs. The CPV codes are used in required notices and in practice for searching opportunities, tracking spend data etc. CPV codes are well used and understood in the market, so the UK has continued to use these codes post EU exit.
41. This power also needs to be read with clause 107 (power to disapply this Act in relation to procurement by NHS in England) which allows a Minister of the Crown to carve certain healthcare and associated contracts, for certain bodies out of the scope of the Bill regime (see paragraphs 293-299 below). It should also be read with clause 32 (reserving contracts to supported employment providers) which allows for the reservation of certain contracts to certain classes of suppliers, within the scope of the light touch regime and paragraphs 16-18 of Schedule 5 (direct award justifications) which covers direct award in circumstances of "user choice".

#### Justification for taking the power

42. Whilst the scope of what is to be included in the power is known, it is not practicable for the Bill to include a long list of detailed CPV codes to indicate which categories of contracts may benefit from the light touch regime. In addition, both CPC and CPV codes may evolve over time, which would (absent a power) require amendment to the Bill. The power will be used to ensure that the scope of what is included with the light touch regime does not extend beyond what is permitted for the UK by reference to the GPA and/or other international trade agreements.

#### Justification for the procedure

43. This power does allow for amendment to the regime set out in the Bill to the extent that it allows certain services to be procured in accordance with a less onerous regime. We therefore take the view that the affirmative procedure is the appropriate procedure for such Regulations to follow.

## **Clause 12 The national procurement policy statement**

*Power conferred on:* Minister of the Crown.

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<sup>2</sup> Regulation 2195/2002 of the European Parliament and of the Council: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R2195&qid=1643887019058&from=EN>.

*Power exercised by:* publication of a document akin to a code of practice

*Parliamentary Procedure:* procedure akin to the negative procedure i.e. 40-day period for which the statement sits in Parliament and may be brought into force if it is not voted against in that time.

#### Context and Purpose

44. Clause 12 (the national procurement policy statement) confers upon a Minister of the Crown a power to publish a National Procurement Policy Statement (“NPPS”) and creates an obligation for contracting authorities to have regard to that NPPS. The purpose of the NPPS is to set out the Government’s national priorities of strategic importance to which contracting authorities should have regard in the way they procure goods and services. Each time new priorities are made a new NPPS will be published, replacing the previous one.
45. The NPPS is aimed at influencing procurement by bodies that are outside central government. The power is not intended to go so far as to impose HMG’s political priorities on bodies normally beyond its direct control. It is, though, to ensure that there is a consistent set of procurement priorities that permeates across the public sector and expenditure of public money on procurement, this ensures that all contracting authorities consider the same core priorities when undertaking procurement activities.
46. The obligation on contracting authorities to “have regard” means that the NPPS cannot overwrite obligations created by the Bill or regulations made under it. But where a contracting authority has discretion as to how to exercise its functions the NPPS will influence those decisions.
47. The NPPS does not bind devolved bodies in Wales and Northern Ireland or private utilities.

#### Justification for taking the power

48. The power is being taken in order to ensure the NPPS is a relevant consideration for those contracting authorities required to have regard to it, including those outside central government. Currently, Government’s procurement guidance is typically published in the form of Procurement Policy Notes (often referred to as “PPNs”). Central Government contracting authorities must have regard to these, but there are no such obligations on contracting authorities outside central government. Taking this power will ensure that all contracting authorities must have regard to the NPPS. This assists in ensuring that the expenditure of public money can be used in a way that best reflects developing and ongoing societal needs.

#### Justification for the procedure

49. The procedure sought here is similar to the negative procedure, which we consider to be appropriate in light of what the NPPS seeks to achieve, i.e. only to influence not to control behaviours. In addition, there are codes of practice and other precedents on the statute book that have followed a similar procedure.

## **Clause 13 The Wales Procurement Policy Statement**

*Power conferred on:* Welsh Ministers

*Power exercised by:* publication of a document akin to a code of practice

*Parliamentary Procedure:* procedure akin to the negative procedure i.e. 40-day period for which the statement sits in the Senedd and may be brought into force if it is not voted against in that time.

### Context and Purpose

50. Clause 13 (Wales procurement policy statement) confers upon Welsh Ministers a power to publish a Wales Procurement Policy Statement (“WPPS”) and creates an obligation for devolved Welsh authorities (but not Utilities) to have regard to that WPPS. The purpose of the WPPS is to set out the Welsh Government’s priorities of strategic importance to which devolved Welsh authorities should have regard in the way they procure goods and services. Each time new priorities are made a new WPPS will be published, replacing the previous one.
51. The WPPS is aimed at influencing procurement by devolved Welsh authorities. The power is not intended to go so far as to impose the Welsh Government’s political priorities on bodies normally beyond its direct control. It is, though, to ensure that there is a consistent set of procurement priorities that permeates across the Welsh public sector and expenditure of public money on procurement in Wales. This ensures that all contracting authorities consider a core of the same priorities when undertaking procurement activities.
52. The obligation on contracting authorities to “have regard” means that the WPPS cannot overwrite obligations created by the Bill or regulations made under it. But where a devolved Welsh authority has discretion as to how to exercise its procurement functions the WPPS will influence those decisions.
53. The WPPS does not bind private utilities or bodies that are not devolved Welsh authorities (or bodies treated as such).

### Justification for taking the power

54. The power is being taken in order to ensure the WPPS is a relevant consideration for devolved Welsh authorities, which currently are not obliged to have regard to any guidance. This assists in ensuring that the expenditure of public money can be used in a way that best reflects developing and ongoing societal needs. Taking this power will ensure that all devolved Welsh authorities must have regard to the WPPS.

### Justification for the procedure

55. The procedure sought here is similar to the negative procedure, which we consider to be appropriate in light of what the WPPS seeks to achieve, i.e. only to influence not to control behaviours. In addition, there are codes of practice and other precedents on the statute book that have followed a similar procedure.

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

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

### Context and Purpose

56. Contracting authorities are to be entitled to reserve certain contracts only to be bid for by public service mutuals. Clause 33(8) confers a power to make regulations which specify the services in respect of which this reservation may apply. Even where these reservations do apply they are options to be explored at the discretion of the contracting authority, they are not mandatory.
57. The categories of services in respect of which the power may be exercised are limited to those that are already within the light touch regime (see clause 8 (light touch contracts)).

### Justification for taking the power

58. The intention in reserving contracts for public service mutuals is to support public sector mutuals by providing them with a more protected environment in which to compete. This gives mutuals the opportunity to gain experience of delivering a public contract before being exposed to full competition. The nature of mutual societies also means that organisations providing the qualifying services have at their heart the delivery of those services and are therefore more attuned to the services to be provided. A competition will still be required, following the procedures set out for the Light Touch Regime, but the competition will only be between public service mutuals.
59. The only contracts which might be reserved are those which form part of the Light Touch Regime, either a subset of these services or all of these. As the scope of the Light Touch Regime will be set out in regulations it follows that the scope of the Reservable Light Touch Regime Contracts must also be set out in regulations. The Reservable Light Touch Regime services may be changed, via regulations, from time-to-time and may also require amendment if the scope of the Light Touch Regime is changed.

### Justification for the procedure

60. The Affirmative procedure appropriately recognises the relatively broad scope of the power to amend the services that can be subject to Reservable Light Touch Regime Contracts.

## **Clause 41 Direct award to protect life, etc**

*Power conferred on:* Minister for the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* 'Made affirmative' procedure

### Context and Purpose

61. This clause confers a power to specify that certain public contracts (Including certain classes of public contracts) may be procured without running a competition, referred to as "direct award". Such a specification may only be made where the contracts are necessary either to protect human, animal or plant life or health or to protect public order or safety. The procurement of PPE during another pandemic might be one example of such circumstances.
62. Contracts within the scope of the statutory instrument would benefit from the provisions in clause 40 (direct award in special cases) which are the general provisions that permit 'direct award' in special cases. In other words, contracting authorities would be able to directly award public contracts identified in the statutory instrument (i.e. those contracts necessary to address the threat).

### Justification for taking the power

63. This power will exist to be able to deal more effectively with a situation akin to Covid-19. One of the difficulties encountered by contracting authorities during the Covid-19 pandemic was that limited tendering in emergency circumstances could only be used for circumstances that were unforeseeable or unattributable to the authority (see regulation 32(2)(c) of the Public Contracts Regulations 2015, similar provision to which is included in Bill). After a while the need for PPE was foreseeable, but there was still a rolling urgency to secure PPE supplies quickly and contracting authorities could not be certain that emergency provisions were applicable such that there was no breach of the existing regulations (i.e. due to the concern that the need for PPE is foreseeable at the time of contract placement and/or urgency exacerbated by a lack of planning to run a competition in time).
64. This power will ensure that contracts necessary to protect public health (and the other matters set out in the provision) can be placed during such events, even if the specific circumstance leading to the need for the individual contract is foreseeable or attributable to the contracting authority. It is only envisaged to be used for rare circumstances, where there is a need to 'override' these important caveats for use of 'extreme urgency' justifications in the new Bill.
65. Ministers may only make Regulations where they consider it "necessary" to provide for certain contracts to be awarded without competition (which is the effect of the limited tendering procedure - permitting contracts to be awarded absent competitive process). This approach does not allow contracting authorities to make decisions as to whether or not a specific contract is "necessary", but retains that decision with the

Minister (albeit contracting authorities will need to determine whether their particular contract falls within the scope of the statutory instrument).

66. The power has also been limited in duration to the extent that subsection (4) requires that the Minister must keep the regulations under review and revoke them when they cease to be necessary (as defined in that provision).

#### Justification for the procedure

67. The Made Affirmative procedure allows the relevant statutory instrument to be effective immediately, but with a requirement that it must be affirmed by Parliament within a specified period (usually 28 days), otherwise it will lapse. It is necessary for the Regulations to come into force immediately as they are, by definition, necessary to deal with circumstances requiring an immediate response and this will avoid any delay in placing contracts. It does, though, make provision for Parliamentary oversight of the propriety of the Regulations and we consider this to be a suitable balance between constitutional propriety in the process of making Regulations and addressing urgent and potentially life-threatening circumstances.

#### **Clause 50 Key Performance Indicators**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative

#### Context and Purpose

68. This clause makes provision for the setting of 'key performance indicators' ('KPIs') in certain public contracts (see subsection (2) for circumstances where this does not apply). A KPI is a method of measuring contract performance, and contracting authorities will be required to set and publish a minimum of three per public contract where the estimated value of that contract is more than £2 million.
69. Contracting authorities will subsequently be required to report, at least once every 12 months, on how well the supplier is performing against the nominated KPIs, and to publish this information in a contract performance notice (see clause 66 (assessment of contract performance)).
70. Subsection (4) allows an appropriate authority to make regulations to amend the financial threshold above which a contracting authority must set and publish the KPIs required by subsection (1).

#### Justification for taking the power

71. The threshold will need to be amended over time to take account of inflation and other such economic changes. In addition, as contracting authorities adjust to the administrative burdens of publishing contracts, the expectation is that over time the threshold may be lowered to increase transparency. Finally, it is likely that experience will determine that some types of contracts and some types of contracting authority benefit from a higher or lower threshold. This power will therefore allow Regulations to set a more targeted and appropriate threshold, based on experience as the regime develops.

#### Justification for the procedure

72. While the power does allow the amendment of a threshold established on the face of the Bill relating to the publication of KPIs, it is a narrow power and only gives rise to limited potential impact on contracting authorities. As the proposed changes relate only to the ability to change the threshold above which a contracting authority has to set and report their KPIs, we take the view that this does not justify substantial use of Parliamentary time. We have therefore taken the view that the negative procedure is the most appropriate procedure.

### **Clause 51 Contract details notices and publication of contracts**

*Power conferred on:* A Minister of the Crown or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative

#### Context and Purpose

73. Subsection (3) requires a contracting authority (except for a devolved Welsh authority) that enters into a public contract with an estimated value of over £2,000,000 to publish a copy of the contract. This is subject to certain redactions set out in clause 85 (general exemptions from duties to publish or disclose information).

74. Subsection (5) confers on a Minister of the Crown or a Northern Ireland Department the power to make regulations that amend that financial threshold. The power may be exercised to either increase or decrease the threshold.

#### Justification for taking the power

75. The threshold will need to be amended over time to take account of inflation and other such economic changes. In addition, as contracting authorities adjust to the administrative burdens of publishing contracts, the expectation is that over time the threshold may be lowered to increase transparency. Finally, it is likely that experience will determine that some types of contracts and some types of contracting authority benefit from a higher or lower threshold. This power will therefore allow Regulations to set a more targeted and appropriate threshold, based on experience as the regime develops.

#### Justification for the procedure

76. Whilst the power does allow the amendment of thresholds established on the face of the Bill, it is a very narrow and targeted amendment. It relates only to the threshold above which a contracting authority must publish contracts, which gives rise to only very limited potential impact on contracting authorities. We do not think that this justifies the use of significant Parliamentary time to oversee and therefore consider that the negative procedure is the appropriate procedure.

#### **Clause 61 Debarment decisions: appeals**

*Powers conferred on:* Minister of the Crown.

*Power exercised by:* Regulations

*Parliamentary procedure:* Affirmative

#### Context and Purpose:

77. The Debarment List will be a published list of suppliers which the Minister for the Cabinet Office considers may be unfit to bid for public contracts, because they meet either a mandatory or discretionary ground for exclusion and have failed to take sufficient action to ensure the circumstances giving rise to the misconduct will not happen again.
78. This clause confers a power for a Minister of the Crown to make regulations providing for a statutory appeal mechanism for suppliers to appeal debarment decisions.
79. A statutory appeal mechanism is necessary because debarment decisions by the Minister will be made outside of individual procurements and, as such, will not be subject to the procurement remedies regime.

#### Justification for taking the power:

80. This power will provide appropriate flexibility to establish and then adjust aspects of the appeals regime to account for potential changes in use of the debarment regime and evolving trends in judicial practice. These aspects may include the position on interventions by interested parties, the time period for an appeal to be lodged, the grounds for appeal and how damages are calculated.

#### Justification for the procedure:

81. Given the breadth of the power, we consider the affirmative resolution procedure to be appropriate.

#### **Clause 62 Electronic Invoicing: implied term**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative.

#### Context and Purpose

82. This provision requires contracting authorities to accept and process electronic invoices and that those invoices must meet certain minimum technical standards. These are set out in subsection (3) by reference to certain British Standards requirements, as they exist from time to time.
83. Subsection (6) provides that an appropriate authority can make regulations to vary the requirements that an electronic invoice must meet to be considered to have been issued in the required electronic form.
84. Before making regulations to vary electronic invoicing requirements, the relevant Minister must consult such persons as they consider appropriate. Whilst a Minister of the Crown can make Regulations which cover devolved contracting authorities in this area, they can only do so with the consent of the relevant Administration.

#### Justification for taking the power

85. The purpose of the power is to allow flexibility with respect to the minimum standards that an electronic invoice must meet, in order to meet the standard of an electronic invoice that a contracting authority has to accept and process. This will develop over time as technology and commercial practice develop. For example regulations would allow movement away from the BSI standard if the BSI standard ceases to be the European standard.

#### Justification for the procedure

86. This power is limited to varying the requirements to be met for electronic invoicing. Whilst this is a flexible power it is limited to narrow and technical specifications for the submission and receipt of data. We do not think that consideration of information at this level of technical detail is necessarily the best use of Parliamentary time and as such think that the negative procedure is appropriate.

### **Clause 63 Implied payment terms in public contracts**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure.

#### Context and Purpose

87. This clause imposes a number of obligations on some contracting authorities as regards the terms of the public contracts they sign. One of these obligations (set out in subsection (2)) requires contracting authorities to pay money due, within 30 days of receipt of a valid invoice and this is mirrored in relation to subcontracts signed down the supply chain (see clause 68 (implied payment terms in sub-contracts)).
88. Subsection (10) confers a power to amend the 30 day period.
89. These obligations do not apply to concession contracts, contracts signed by private utilities or those awarded or managed by a maintained school, an Academy or a sixth form college corporation.

#### Justification for taking the power

90. The requirement to pay valid invoices within a maximum period is intended to help make public contracts more accessible to businesses, specifically SMEs. We anticipate that it may be appropriate in the future to reduce the maximum payment term from 30 days, either as a result of changes in contracting authority behaviour or as a result of technological changes affecting how payments are managed, or both. The power is constrained so that the maximum payment term will not exceed 30 days. The power to reduce, or increase back up (but no more than 30 days) will provide greater flexibility to drive prompt payment standards through legislation and adapt to any fast moving digital technologies in the future.

#### Justification for the procedure

91. This is a narrow and technical power which relates only to the ability to change the number of days that a contracting authority (and suppliers in the chain, in their payment of subcontractors) has to pay their suppliers. This power is limited on the basis that it may only be used to change the maximum number of days in which a contracting authority must make payment, and that the number of days may be reduced and increased (but to no more than 30 days maximum). The negative procedure reflects these limited parameters.

### **Clause 64 Payments compliance notices**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative Procedure

### Context and Purpose

92. This clause sets out that for each financial year (described in the clause as a “reporting period”) every contracting authority must publish certain information relating to the payments made or due to be made within that period. That is to be published in a “payments compliance notice”. This requirement is intended to support compliance with the prompt payment rules including a way of recognising those contracting authorities who consistently out-perform what is required of them by legislation and identify those who are consistently performing poorly to challenge and drive improvements.
93. Subsection (4) confers a power on an appropriate authority to make regulations concerning the content, form and publication of such a notice. This includes provision requiring that the notice must be approved by a person of a description specified in those regulations.

### Justification for taking the power

94. It is intended that these notices will in the longer term be published on a single digital platform to enable transparency and visibility of public sector payment performance in one location. In the short term, these notices will be published online (which is currently the practice under the PCRs). The content, form and methodology will change over time as the central digital system is developed, but also as best practice evolves and regulations provide a more appropriate vehicle for updating this than primary legislation. This is particularly important to ensure consistency with private sector payment reporting processes and practices. This includes requirements as to the capability, seniority or responsibility of the person signing off these notices.

### Justification for the procedure

95. The power is as constrained as possible in that regulations may only make provision about the preparation, form and publication of a single notice for payments compliance. However the power is broad in nature and, consistent with the approach taken in clause 86 (notices, documents and information: regulations) we have taken the view that the affirmative procedure is appropriate.

## **Clause 65 Information about payments under public contracts**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative

### Context and Purpose

96. This clause requires that where a contracting authority makes a payment of £30,000 or more under a public contract then it must publish a notice setting out that the payment has been made and certain other information to be prescribed in regulations made under clause 86 (notices, documents and information: regulations). These notices must be published within 30 days of the last day of the quarter in which the payment was made. The obligation does not apply to concession contracts, utilities contracts or certain schools.
97. Subsection (3) confers a power on an appropriate authority to make regulations amending either the financial threshold set out in subsection (1) or the period of time allowed for publication set out in subsection (2) or both.

#### Justification for taking the power

98. The threshold will need to be amended over time to take account of inflation and other such economic changes. In addition, as contracting authorities adjust to the administrative burdens of publishing payment information, the expectation is that over time the threshold may be lowered to increase transparency. This power will therefore allow regulations to set a more targeted and appropriate threshold, based on experience as the regime and payment systems develop.
99. Similarly as digital and other solutions reduce the amount of time in which it is appropriate to publish these notices, this power allows the procurement regime to adapt to reflect that.

#### Justification for the procedure

100. The threshold at which the contract payment notice is to be reported on and the period of time allowed for that report to take place are established on the face of the Bill. However, this power to amend that threshold and the reporting period is a narrow one and gives rise to limited potential impact on contracting authorities. We do not think that this justifies the use of significant Parliamentary time to oversee and therefore consider that the negative procedure is the appropriate one.

### **Clause 70 Contract change notices and publication of modifications**

*Power conferred on:* a Minister of the Crown.

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure

#### Context and Purpose

101. This clause requires that before making certain amendments (which is any amendment other than one set out in subsection (2)) to a public contract a contracting authority must publish a contract change notice.

102. In addition to that, the clause requires that where the amendment either changes a contract worth more than £2 million or changes a contract worth less than that into one with more than that then it must publish a copy of the contract (subject to certain redactions)

103. These obligations do not apply to contracting authorities within the regulatory ambit (under this Bill) of Northern Ireland Ministers.

104. Subsection (11) contains a power to change the value threshold, over which a contracting authority must publish a contract change notice, and the value threshold, over which a contracting authority must publish a (redacted) copy of the contract.

#### Justification for taking the power

105. It is anticipated that the threshold which dictates the requirement to publish the contract change notice and publication of modification will be lowered as contracting authorities adjust to the administrative burdens of publishing a contract as part of a contract change notice; to increase transparency. This power will therefore allow Regulations to set a more targeted and appropriate threshold, based on experience as the regime and contract management systems develop.

#### Justification for the procedure

106. The thresholds relating to the publication of contract change notices and modifications are set out on the face of the Bill. This power is limited to amending these thresholds and as such is a very limited power with limited potential impact on contracting authorities. We do not think that this justifies the use of significant Parliamentary time to oversee and therefore consider that the negative procedure is the appropriate procedure.

### **Clause 78 Regulated below-threshold contracts: procedure**

*Power conferred on:* A Minister of the Crown or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised.

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative

#### Context and Purpose

107. The majority of the Bill will apply only to procurements in respect of contracts the estimated value of which equals or exceeds particular thresholds (see clause 3 (valuation of contracts) and schedule 3 (estimating the value of a contract)). However, a limited number of requirements are to apply to contracts whose value is below those thresholds, including obligations relating to transparency and the assessment of prospective suppliers ("the below-threshold obligations" - see Part 6).

108. These below-threshold obligations apply only to works contracts whose value also equals or exceeds certain "lower" thresholds set out at subsection (3), namely: (i)

where the contracting authority is a central government authority, £138,760; and (ii) otherwise, £213,477.

109. Subsection (4) provides a power for an appropriate authority to amend these “lower” thresholds.

#### Justification for taking the power

110. The power is needed to adjust the lower thresholds to take into account both inflation and also interaction with the upper thresholds as they themselves are amended over time.

#### Justification for the procedure

111. While this power does allow the amendment of thresholds established on the face of the Bill, it is a very narrow and targeted amendment. It relates only to the threshold above which a contracting authority must publish the advertisement of the opportunity and subsequent award details for a below-threshold contract, which gives rise to only very limited potential impact on contracting authorities. We do not think that this justifies the use of significant Parliamentary time to oversee and therefore consider that the negative procedure is the appropriate one.

### **Clause 79 Regulated below-threshold contracts: notices**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative

#### Context and Purpose

112. The majority of the Bill will apply only to procurements in respect of contracts the estimated value of which equals or exceeds particular thresholds (see clause 3 (valuation of contracts) and schedule 3 (estimating the value of a contract)). However, a limited number of requirements are to apply to contracts whose value is below those thresholds, including obligations relating to transparency and the assessment of prospective suppliers (“the below-threshold obligations” - see Part 6).

113. These below-threshold obligations apply only to contracts whose value also equals or exceeds certain “lower” thresholds set out at subsection (4), namely: (i) where the contracting authority is a central government authority, £12,000; and (ii) otherwise, £30,000.

114. Subsection (7) provides a power for an appropriate authority to amend these “lower” thresholds.

#### Justification for taking the power

115. The power is needed to adjust the lower thresholds to take into account both inflation and also interaction with the upper thresholds as they themselves are amended over time.

#### Justification for the procedure

116. While this power does allow the amendment of thresholds established on the face of the Bill, it is a very narrow and targeted amendment. It relates only to the threshold above which a contracting authority must publish the advertisement of the opportunity and subsequent award details for a below-threshold contract, which gives rise to only very limited potential impact on contracting authorities. We do not think that this justifies the use of significant Parliamentary time to oversee and therefore consider that the negative procedure is the appropriate one.

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

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure.

#### Context and Purpose

117. This clause imposes a number of obligations on some contracting authorities as regards the terms of the below threshold contracts they sign. One of these obligations (set out in subsection (2)) requires contracting authorities to pay money due, within 30 days of receipt of a valid invoice.

118. Subsection (12) confers a power to amend the 30 day period.

119. This power mirrors clause 63 (Implied payment terms in public contracts) which applies to certain contracts above threshold.

#### Justification for taking the power

120. The requirement to pay valid invoices within a maximum period is intended to help make public contracts more accessible to businesses, specifically SMEs. We anticipate that it may be appropriate in the future to reduce the maximum payment term from 30 days, either as a result of changes in contracting authority behaviour or as a result of technological changes affecting how payments are managed, or both. The power is constrained so that the maximum payment term will not exceed 30 days. The power to reduce, or increase back up (but no more than 30 days) will provide greater flexibility to drive prompt payment standards through legislation and adapt to any fast moving digital technologies in the future.

#### Justification for the procedure

121. This is a narrow and technical power which relates only to the ability to change the number of days that a contracting authority (and suppliers in the chain, in their payment of subcontractors) has to pay their suppliers. This power is limited on the basis that it may only be used to change the maximum number of days in which a contracting authority must make payment, and that the number of days may be reduced and increased (but to no more than 30 days maximum). The negative procedure reflects these limited parameters.

## **Clause 81 Treaty state suppliers**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure

### Context and Purpose

122. The UK is signatory to a number of international agreements which create obligations on the UK to ensure that certain contracting authorities (including some private utilities) extend to the goods, services and suppliers of counterparty States an entitlement to “no less favourable treatment” as compared with UK goods, services and suppliers. Schedule 9 (treaty state suppliers (specified international agreements)) sets out a list of the agreements under which such entitlements are created and clause 82 (treaty state suppliers: non-discrimination) establishes and imposes on contracting authorities the relevant obligations as to non-discrimination.

123. Over time, the market access aspects of the procurement elements of these agreements change. This can happen, for example, where there are machinery of government changes and the agreements need to be updated with new entities to ensure that the coverage levels remain the same.

124. Subsection (3) of this clause establishes a power to amend the list of international agreements set out in that Schedule, by Regulations.

125. When new trade agreements are signed including procurement obligations on the UK, the power will be used to add the relevant agreements to the Schedule. This ensures that UK Contracting Authorities will treat suppliers from those countries in the same way as UK ones and ensures the UK is compliant with its international obligations. It will also be used to ensure that those agreements which the UK already has in place can be kept up to date, ensuring the UK’s continued compliance with its international obligations.

126. The power has the effect only of extending to the goods, services and suppliers covered by those agreements, the right to benefit from the UK procurement regime,

including the right to seek remedies under it. The power does not allow for changes to the Bill regime, even where required by one of those agreements. If such changes were required a different legislative vehicle would be needed.

#### Justification for taking the power

127. This power will allow the UK to respond swiftly to updates to the procurement elements of our existing (and future) trade agreements where that needs to be done. Technical updates to the agreements, for example in relation to machinery of government changes, would otherwise need to find a primary legislative slot to be implemented, leaving the UK at risk of allegations that it is not complying with its international commitments. This Regulation making power allows for a swift update to the Schedule listing the agreements, which would implement any necessary updates.

128. The power will also allow the implementation of the procurement elements of new international agreements. Although this allows for the implementation of future obligations negotiated under trade agreements, it only allows for the extension of the existing procurement regime. It does not allow for changes to that regime. It is therefore not capable of being used to implement rule changes that might affect matters like food standards, environmental standards or control over the health service.

#### Justification for the procedure

129. Although the power is only capable of being used to extend the UK procurement regime (unamended) to cover the goods, services and suppliers of other States, this does amount to a power to be able to implement as yet unidentified future procurement obligations. It is also a power to amend primary legislation. We have therefore taken the view that the affirmative procedure is appropriate.

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

*Power conferred on:* a Minister of the Crown or Scottish Ministers

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure

#### Context and Purpose

130. The power set out in clause 81 (treaty state suppliers) is limited to procurement matters covered by this Bill, which does not apply to all contracting authorities in Scotland. The power set out in this clause allows equivalent provision to be made in relation to procurement in Scotland by bodies not covered by the Bill, as that power allows in relation to the matters covered by this Bill.

131. The power is exercisable concurrently by both a Minister of the Crown or Scottish Ministers, meaning that in the course of implementing international obligations under the Bill, a Minister of the Crown could also implement obligations for the whole of Scotland.

132. Subsection (3) of that clause allows for the amendment of primary legislation. Whilst there is limited primary legislation in Scotland on procurement (it is predominantly regulated through a series of Regulations which implement the EU Procurement Directives) it seems likely that at some point in the future the Scottish Parliament will need to pass primary legislation in this field. This aspect ensures that this power can continue to be used to ensure the full implementation of the UK's procurement obligations.

Justification for taking the power

133. The justifications for needing this power are the same as those for clause 81 (treaty state suppliers) as this is a mirror provision for Scotland.

Justification for the procedure

134. The justifications for needing this power are the same as those for clause 81 (treaty state suppliers) as this is a mirror provision for Scotland.

**Clause 84 Pipeline notices**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative

Context and Purpose

135. This provision requires contracting authorities with a large annual spend (over £100,000,000) on procurement to publish a notice early in the financial year, giving notice to the market about any high value contracts (£2,000,000) that they intend to tender for that year. Details on what is to be included in that power will be set out in regulations made under clause 86 (notices, documents and information: regulations).

136. Subsection (5) allows an appropriate authority to make Regulations amending either the figure that represents a large annual spend or a high value contract. Neither of those terms are specifically used in the provision, but are used here for descriptive purposes.

Justification for taking the power

137. The thresholds will need to be amended over time to take account of inflation and other such economic changes. In addition, as both suppliers and contracting authorities adjust to the new regime, the expectation is that over time the thresholds may be amended to support specific areas in a more targeted way. This power will therefore allow Regulations to set a more targeted and appropriate threshold, based on experience as the regime develops.

### Justification for the procedure

138. Whilst the power does allow for the amendment of the thresholds for pipeline notices, which are established on the face of the Bill, it is a narrow power and does not allow for wider amendment to the regime. We do not think that this justifies the use of significant Parliamentary time to oversee and therefore consider that the negative procedure is the appropriate procedure.

### **Clause 86 notices, documents and information: regulations**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure

### Context and Purpose

139. This Bill seeks to bring greater transparency to procurement than the existing regime. To that end it creates a number of different obligations to publish or produce notices, documents and other information. The relevant provisions in the Bill establish the circumstances under which the notice must be published and the effect of publication. In some instances they also set out certain information that must be included in that specific notice. In general though, they leave the content of such notices, etc to be set out in Regulations made under this power.

140. As well as establishing what the content of the notices, etc must be, the power is broad enough to make provision as to the place of publication. Once constructed, this will be a central digital platform for procurement, supporting greater transparency and easier access to information about procurement in the UK. At this time, though, the platform does not exist.

141. The power allows for different provision to be made for different purposes, even within the same type of notice. This is to ensure the necessary flexibility to be able to give contracting authorities the freedom to determine their own contracting procedures, which is one of the hallmarks of the new regime.

142. The notices in respect of which this power can be exercised are the:

- a. planned procurement notice (Clause 14),
- b. preliminary market engagement notice (Clause 16),
- c. tender notice and associated tender documents (Clause 20),
- d. dynamic market notice (Clause 39(2), (3), (4), (5) and (6)),
- e. transparency notice (Clause 43),
- f. contract award notice (Clause 48(2)),
- g. contract details notice (Clause 51),
- h. exclusion notice (Clause 56(2)),

- i. notices in relation to a debarment investigation (Clause 57(3)),
- j. notices to a supplier about being put on the debarment list (Clause 59(5)(c)),
- k. contract payments notice (Clause 65),
- l. contract performance notices (both in relation to the publication of key performance indicators and circumstances where a contracting authority considers them not to have been met) (Clause 66),
- m. contract change notice (Clause 70),
- n. contract termination notice (Clause 73),
- o. below threshold tender notice (Clause 79), and
- p. pipeline notice (Clause 84).

#### Justification for taking the power

143. The Bill sets out a broad power to regulate the publication and providing of notices, documents and other information. Obligations around the content of notices, etc the electronic form and technical requirements and the location of publication are detailed and technical matters which we consider to be better suited to delivery through secondary legislation than through the more time consuming scrutiny inherent in having obligations on the face of the Bill.

144. In addition, these matters are likely to evolve over time as experience of the regime increases and commercial practice continues to evolve. In particular, flexibility will be needed around the form in which information needs to be communicated so the central platform can keep pace with technological change. The platform has not yet been constructed and so flexibility is needed around the designation and evolution of that platform. This all suggests that some kind of delegated power is necessary.

145. Whilst some obligations are possible to determine now, for example, those required by the UK's membership of the WTO's Agreement on Government Procurement ("the GPA"), we think that having obligations split between the Bill and various regulations would be unhelpful to users of the procurement system. Having all the provisions about the required content of notices in regulations will ease the administrative burden for contracting authorities which will have to consult only one document, rather than having to consult both the Bill and regulations. As these regulations are detailed and technical, this is considered a positive step to support administration of public procurement.

#### Justification for the procedure

146. This broad power to set out the details relating to the publication of notices is set out as an affirmative process to ensure that sufficient scrutiny is applied to the highly changeable nature of the technical aspects of the transparency of public procurement data.

### **Clause 88 Information relating to a procurement**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in

respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

#### Context and Purpose

147. This power allows regulations made by an appropriate authority to set out minimum requirements for how contracting authorities receive information as part of the procurement process. It is sought to allow for the creation of a single register of suppliers. This register will be the single place where suppliers register all of their details, lodge information (such as insurance certificates) and record important details about their beneficial ownership, such that they have only to set it out once and it is re-used by contracting authorities. This approach will save suppliers time and duplication of effort, reducing barriers in particular for SMEs. The regulations will require contracting authorities to take information from the register of suppliers in every case, creating a single source of procurement identifiers which will allow the data to reduce duplicative effort and work effectively for future analysis.

#### Justification for taking the power

148. The register of suppliers is a new part of the central digital platform and as a technical solution, there needs to be a power that allows for the creation and development of the register and allow for iteration over time to improve performance and keep pace with the technological changes. It is not possible to define the register in more detail and maintain the flexibility required to create refined and up to date regulations that ensure that the technological need is met across the life of this Act.

#### Justification for the procedure

149. Although the power has a clearly understood and technical use, it is on the face of it quite broad in order to encompass the flexibility to adapt to technical changes inherent in both digital and commercial systems. As such we consider that the affirmative procedure confers a suitable quantity of Parliamentary oversight.

### **Clause 97 Recommendations following procurement investigations**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Recommendations (to which specific contracting authorities must have regard)

*Parliamentary Procedure:* No procedure

#### Context and Purpose

150. Clause 96 (procurement investigations) confers a power upon a Minister of the Crown to investigate the exercise by a contracting authority of its procurement functions to which this Bill relates. In the course of such investigations, the Minister may identify non-compliance by contracting authorities with requirements under this Bill.

151. Where a Minister identifies incidences of non-compliance by a contracting authority, or has identified a practice or policy of the contracting authority that is likely to result in future breaches of the provisions of the Bill, the Minister may issue “recommendations” as to how to prevent future non-compliance. This might include recommendations to change faulty or unclear guidance, or recommendations that a contracting authority undertake training. Where a recommendation is issued, the Contracting Authority must have regard to the terms of the recommendation when exercising its powers under the Bill.

152. Subsection (5) specifically allows a recommendation to require that the contracting authority that is the subject of the recommendation must submit a progress report to the Minister.

#### Justification for taking the power

153. We are conscious that in general terms the Delegated Powers and Regulatory Reform Committee is critical of powers to issue guidance to which certain bodies are required to have regard. However, in these circumstances the Minister in question is acting in a regulatory capacity and we consider that in those circumstances powers to issue guidance on regulatory compliance are commonplace and justifiable. It would be possible to create a more invasive set of regulatory powers for the Minister to be able to exercise (as most regulatory bodies have) but that is not consistent with the lighter touch regulatory approach that we are adopting in this regime. It is important to keep in mind that most of the bodies being regulated are themselves public bodies and as such a lighter touch approach to regulation is appropriate.

154. The purpose of the power is to improve future compliance with procurement law only. The range of possible recommendations is not set out in the Bill, as there may be a variety of reasons why non-compliance may occur and the Minister needs flexibility to address these on a case-by-case basis. The power, however, is limited in several ways.

155. The power to issue recommendations is limited to addressing “institutional” non-compliance only, i.e. seeking changes or improvement of general behaviours, policies, practices, or beliefs (e.g. about what the procurement law entails) of the contracting authority. The power cannot be used to make recommendations about particular procurement decisions in the context of particular procurements. The Minister could not recommend, for example, that a contract be awarded to a particular supplier.

156. Recommendations may also only be used to address possible future non-compliance with procurement law. The power to issue recommendations cannot be used to make recommendations to improve “commercial outcomes”, where no technical non-compliance has occurred or is likely to occur. In particular, recommendations may not be made in pursuit, or furtherance of, the procurement principles or objectives alone,

or how a contracting authority is to have regard to the national procurement policy statement or the Wales procurement policy statement. Recommendations should only be used to address non-compliance of specific rules set out in the Bill. For example, if a contracting authority complied with duties under the Bill to publish contract award notices on the new procurement transparency platform (and all other similar duties that relate to transparency), the Minister should not be able to make recommendations for further publications by the authority simply on the basis that such further publications would further the transparency objective. Similarly, the Minister cannot issue statutory recommendations on the basis that, in the Minister's opinion, it would be likely to achieve better "value for money" (an objective of procurement to be set out in the Bill) than a contracting authority's existing practice.

157. Where the contracting authority takes alternative action to that set out by the recommendation, or no action at all, it must explain its reasons for doing so in a progress report submitted to the Minister.

#### Justification for the procedure

158. The nature of the recommendations is limited to addressing general behaviours (by individual contracting authorities) and does not regulate the exercise of powers or discretion in individual circumstances. In addition, the recommendations are not binding as to action, allowing contracting authorities to explain why they have taken alternative action to the recommendations of the Ministers.

159. As set out above, this is consistent with the approach that most regulators take to their industries and no Parliamentary procedure is required.

160. We therefore consider it appropriate that the issuance of recommendations is not subject to parliamentary procedure.

### **Clause 98 Guidance following procurement investigations**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Guidance (to which contracting authorities generally must have regard)

*Parliamentary Procedure:* no procedure

#### Context and Purpose

161. In the course of numerous investigations (see clause 96 (procurement investigations)), a Minister may also identify common errors and examples of "systemic" non-compliance. This clause allows the Minister to issue guidance to which all contacting authorities must have regard. The purpose of the guidance is to ensure that all contracting authorities – including those not subject to an investigation or

recommendations – are able to learn from the non-compliance identified in the course of the investigation, with a view to preventing future non-compliance.

#### Justification for the power

162. Whilst we accept the prevailing view of the Delegated Powers and Regulatory Reform Committee, that powers to require bodies to have regard to guidance need to be carefully justified, for all of the reasons set out in relation to the power in clause 97 (recommendations following procurement investigations) we consider that this power is justified here. Particular regard should be had to the regulatory context in which the Minister is exercising powers.

163. In respect of the guidance, it is considered reasonable to require contracting authorities to have regard to guidance and learn from the practices by, and recommendations issued to, other contracting authorities. Other authorities will not be bound to give effect to recommendations that have not been issued to it specifically, and the guidance is not strictly required to be followed.

#### Justification for the procedure

164. As the nature of the guidance is limited to addressing general behaviours that may result in non-compliance, and contracting authorities are not required to strictly comply with it, it is considered appropriate that the issuance of the guidance is not subject to parliamentary procedure.

165. As set out above, this is consistent with the approach that most regulators take to their industries.

### **Clause 103 Powers relating to procurement arrangements**

*Power conferred on:* A Minister of the Crown in respect of subsections (1) and (2) and a Minister of the Crown and Scottish Ministers in respect of subsection (3).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

#### Context and Purpose

166. The Bill will extend to each of the jurisdictions of the UK and apply to all procurement in England, Wales and Northern Ireland. For Scotland, the Bill will extend to procurement by bodies whose functions are exercisable only in or as regards Scotland and none of which, or some of which, relate to reserved matters and to procurement by certain utilities bodies whose functions which operate only in or as regards Scotland and none of which, or some of which relate to reserved matters.

167. The powers in subsection (1) are to make regulations for Scottish bodies which are not covered by the Bill to access procurement arrangements established under the Bill (namely frameworks and dynamic markets) and to undertake joint procurements with bodies within the scope of the Bill.

168. Subsection (3) allows for regulations to make amendments to the Scottish regulations to allow all bodies within the scope of the Bill to access procurement arrangements established under the Scottish regulations and to undertake joint procurements with Scottish bodies which are not covered by the Bill. It is intended that this power will be used to apply the Scottish regulations to such procurements.

169. The powers in subsection (2) are to disapply provisions of the Bill in respect of procurements within subsection (3). It is intended that these powers will be used to apply the relevant Bill provisions to such procurements.

#### Justification for taking the power

170. These powers are necessary to make it clear which rules apply where bodies covered by the Scottish regulations use procurement arrangements established under the Bill and where bodies covered by the Bill use procurement arrangements established in Scotland. This is to facilitate intra-UK cross border procurements and to ensure such procurements can continue when the Bill comes into force.

171. Such provisions are not necessary under current domestic law because the UK and Scottish regulations all implement EU Directives, which means there is limited divergence between the rules. Following the Bill coming into force, there will be increased divergence between the rules applicable to procurements within the scope of the Bill and those under the Scottish regulations. It is therefore necessary to be clear which rules apply in which scenario to enable bodies across the UK to benefit from all available procurement arrangements.

#### Justification for the procedure

172. As this power amends the scope of the Bill, and the Scottish regulations, in a potentially significant way, we are of the view that the affirmative procedure is the appropriate one to follow.

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

*Power conferred on:* A Minister of the Crown or Welsh Ministers

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

#### Context and Purpose

173. Section 17 of the Local Government Act 1988 limits the matters that certain contracting authorities can take into consideration when carrying out a procurement. This risks cutting across certain provisions in this Bill, in particular around the National Policy Statement and the extent to which social value can be considered as part of the expenditure of public funds on procurement.

174. Article 19 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 (S.I. 1992 No. 810 (N.I. 6)) contains similar provisions to those in section 17 of the 1988 Local Government Act 1988.

175. This clause confers a power to make regulations to disapply these prohibitions on a case-by-case basis.

#### Justification for the power

176. Powers are required to enable domestic policy considerations to be applied effectively in England and Wales. Such policy might include that for which provision could be made under clauses 12 (national procurement policy statement) or 13 (Wales procurement policy statement). The inherent flexibility of those obligations means that it would be impossible to set out with clarity on the face of the Bill how those provisions need to be disapplied so this power allows more individual consideration.

#### Justification for the procedure

177. Given the broad manner in which this power is capable of being used to amend existing primary legislation we take the view that the affirmative procedure is appropriate.

### **Clause 107 Power to disapply this Act in relation to procurement by NHS in England**

*Power conferred on:* Minister of the Crown

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

#### Context and Purpose

178. The Health and Care Act 2022 includes at section 77 (procurement regulations) powers to make provision for procurement of certain healthcare services (and associated goods) by certain NHS bodies. DHSC only intends regulations made under that power to cover a certain number of services, to be defined by reference to CPV codes. As the light touch regime in (Regulations made under) the Bill will cover health care services to some degree, this will create an impossible overlap between the Bill regime and Regulations made under the Health and Care Act 2022.

179. In order to manage this overlap, this power seeks to disapply the Bill provisions in relation to matters covered by the DHSC regulations, ie procurements by a defined series of bodies under a defined series of CPV codes. Once DHSC have settled the ambit of the Regulations they are intending to make under the power in the Health and Care Act, Cabinet Office will use this power to disapply this regime in those areas.

180. Although the Health and Care Bill only applies in relation to England, this power is conferred on an appropriate authority. This is to allow Welsh Ministers and Northern Ireland Ministers to exempt contracts for Wales and Northern Ireland where a Minister of the Crown has exempted an equivalent contract for England only. This is

to reflect potential changes that the devolved administrations may wish to make to healthcare in their own territories.

#### Justification for taking the power

181. This power is necessary to avoid an impossible regulatory overlap between the regime set out in this Bill and that to be established under the DHSC's Health and Care Act 2022. It has not been possible to set out on the face of that Act the scope of procurement Regulations made under it, so this Bill needs to be able to make provision to manage the overlap.

182. That provision needs to be flexible in order to respond to the scope of the Regulations under the Health and Care Act when they come into effect. It will also need to allow for future amendment to that regime as experience of it allows it to evolve in the future.

183. The intention of this power is not to allow it to deregulate aspects of procurement in the healthcare sector. It is only to remove the application of this Bill where procurement is to be regulated under the healthcare regime, going forward.

#### Justification for the procedure

184. As this power amends the scope of the Bill in a potentially significant way, we are of the view that the affirmative procedure is the appropriate one to follow.

### **Clause 108 Power to amend this Act in relation to private utilities**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* affirmative procedure

#### Context and Purpose

185. "Private utilities" are non-public sector entities that carry out utility activities on the basis of special or exclusive rights granted to them; an example of a private utility is a water company providing drinking water to the general public. Private utilities are generally covered by the Bill in the same way as public sector utilities.

186. Private utilities are already subject to regulatory oversight by appropriate industry regulator bodies and required to operate and conduct themselves in compliance with relevant industry rules and guidelines. Additionally, as private businesses, private utilities are incentivised to carry out procurements efficiently.

187. Given the existing regulatory oversight and inherent efficiencies in private utility businesses, Cabinet Office considers it is unnecessary for private utilities to be subject

to additional procurement regulation and therefore wishes to exempt them from the Bill to the extent practical.

188. This clause provides a power for an appropriate authority to, by way of regulations, amend the rules applicable to private utilities in order to remove regulations that are unnecessarily burdensome for these private entities.

#### Justification for taking the power

189. Given that private utilities are already incentivised by industry regulation and competition to act properly and competitively in the market, an additional layer of procurement regulation imposes costs on private utilities that will be passed on to customers. In some cases, such costs may lead some private utilities exiting the market, or may discourage entry into the market by entrepreneurial start-ups, all of which can lead to a less competitive marketplace.

190. In a rapidly evolving commercial market it is not possible to set out on the face of the Bill those aspects of regulation that could most usefully be removed from private utilities. On more detailed consideration of each sector, it might also be that different sectors would benefit from deregulation in different ways. This power will deliver deregulation in as targeted and flexible a way as possible.

191. Private utilities are within scope of the UK-EU Trade and Cooperation Agreement and a number of other international agreements and as such, when carrying out a utility activity, their procurements must be conducted in compliance with those international agreements. The exercise of this power will be constrained by the need for regulation to remain sufficient to comply with the UK's obligations under international agreements.

#### Justification for the procedure

192. Given that regulations will be to amend primary legislation, the affirmative procedure is appropriate.

### **Clause 112 Power to make consequential, etc, provision**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative (affirmative where amending primary legislation)

#### Context and Purpose

193. The Bill will extend to each of the jurisdictions of the UK and apply to some degree in relation to public procurement in each of them. Some of the provisions in the Bill (for example relating to transparency obligations and how authorities that are set up by statute are to procure goods, services and works) will supersede existing provisions in

other primary and secondary legislation. These superseded provisions will either need to be amended or repealed when the Bill comes into force, either because they conflict directly, or because the Bill contains provisions which overlay them.

194. This clause creates a power to allow regulations to be made to repeal or modify those legislative provisions that will be in effect amended by the Procurement Bill.

195. The power also allows the appropriate authority to make regulations concerning transitional provision.

#### Justification for taking the power

196. The power is necessary to ensure there is clarity, and limit confusion as to which conflicting or overlaying provision takes primacy, or which regime applies.

197. The power to make regulations concerning transitional provisions is necessary to provide clarity as to when the provisions of the Procurement Bill will come into effect, and when, for example, the Utilities Contracts Regulations 2016, Procurement Contracts Regulations 2015, Concessions Contracts Regulation 2016, etc will be revoked.

#### Justification for the procedure

198. As this is a narrow and technical power which gives effect to what has already been agreed (by passage of the Bill itself), we consider the negative procedure to be appropriate where we are amending secondary legislation.

199. When amending primary legislation we consider that it is appropriate to use the affirmative procedure.

### **Schedule 1 threshold amounts, paragraphs 2 and 3**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative procedure for amendments implementing or mirroring GPA thresholds (paragraph 2); Affirmative procedure for other amendments (paragraph 3).

#### Context and Purpose

200. In general, the rules relating to the procurement in the Bill are to apply only when the estimated value of a contract equals or exceeds particular thresholds. The thresholds are set out in paragraph 1 of this Schedule and fall into three categories.

201. The first category comprises the majority of the thresholds in the table, which align with thresholds established pursuant to the UK's international obligations under the WTO's

Agreement on Government Procurement (“the GPA”). While the UK is party to other international agreements relating to procurement, the applicable thresholds in those agreements reflect, or are greater than, the thresholds in the GPA.

202. Under the GPA, the UK is required to review and update the thresholds that apply to the UK every two years. The GPA<sup>3</sup> sets the process and methodology for calculating the thresholds applicable. The review is required to be undertaken in the autumn, following which the UK informs the GPA Committee of the new thresholds. The updated thresholds must take effect from 1 January immediately following the review.

203. The thresholds might also change if there were a wider renegotiation of the GPA and its thresholds. Following the UK’s withdrawal from the European Union, the UK adopted the same thresholds as had applied to the EU. The UK may wish to adopt bespoke thresholds. New thresholds may also be sought to take into account inflation.

204. The second category comprises thresholds applicable to the “light touch regime” (“LTR”, see clause 8 (light touch contracts)). In general these thresholds do not reflect procurement covered by the UK’s international agreements such as the GPA, save for a limited number of procurements specified under the Trade and Cooperation Agreement with the EU<sup>4</sup>. In respect of the LTR thresholds, a regulation-making power should also be exercisable by an appropriate authority to amend those thresholds.

205. The third category comprises thresholds for defence and security contracts, which are not tied to the GPA.

206. Paragraphs 2 and 3 of this Schedule each provide a power to amend these thresholds: a negative power at paragraph 2 to amend the GPA-related thresholds and also the defence and security thresholds, *where the latter are tracking the GPA thresholds*; and also an affirmative power at paragraph 3 to amend the LTR thresholds and also the defence and security thresholds, *where the latter are not tracking the GPA thresholds*.

#### Justification for taking the power

207. Where the threshold in the GPA changes, the GPA-corresponding thresholds in the Bill will also need to be amended in order to reflect the UK’s international obligations. Given that the review of the GPA thresholds takes place every two years, it would be impracticable to bring forward primary legislation every two years to update the corresponding thresholds in domestic legislation.

208. The Bill provides a regulation-making power at paragraph 2 to be exercised by an appropriate authority (using the negative procedure) to amend the Bill thresholds to reflect the thresholds in the GPA following such a review. The power is limited only to amending the thresholds in domestic law to reflect the thresholds that apply under the GPA. The review and updating of thresholds in the GPA is itself tightly constrained by methodology set under the GPA.

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<sup>3</sup> This is set by the Decision of the Committee on Government Procurement dated 27 February 1996 (published 5 March 1996).

<sup>4</sup> Paragraph 2 of Subsection B2 to Annex 25 to the TCA.

209. This same power will also be used to update the defence and security thresholds in certain circumstances. Historically, these thresholds have always been updated at the same time as, and in line with, the GPA thresholds, though there is no obligation in the GPA to do so, as these procurements are not covered by the GPA. The intention going forward is for the defence and security thresholds to continue to track the GPA in the same way as they have done thus far.

210. In respect of the LTR thresholds, the Bill also provides a regulation-making power at paragraph 3, exercisable by an appropriate authority (using the affirmative procedure), to amend those thresholds. This is in order to ensure the thresholds are adjusted over time to take into account inflation and/or appropriately adjusted to take into account relative changes to the other (GPA-corresponding) thresholds, although the power is not constrained by reference to any particular international agreements as there is no single source of reference to regulate this.

211. This same power may be used to update the defence and security thresholds if a decision is made in future to depart from the policy of tracking the GPA for these thresholds.

#### Justification for the procedure

212. The power in paragraph 2 to amend the GPA-corresponding thresholds is to be subject to the negative resolution. As the thresholds are to be set out on the face of the Bill, it is recognised that this would amount to a Henry VIII power and that guidance from the DPPRC recommends the affirmative procedure for such powers. It is considered, however, that the negative procedure is appropriate in this context for the following reasons.

213. Following the biennial review of the GPA thresholds, there will be only a short period within which to make amendments to the GPA-corresponding thresholds in the Bill and give effect to changes in the GPA that come into effect on 1 January following the review. It will be necessary to ensure that regulations, and amendments to the Bill, come into force on 1 January in line with the UK's international obligations.

214. Although capable of amending primary legislation, the power will be tightly constrained by its purpose to align the thresholds in the Bill with the thresholds applicable to the United Kingdom under the GPA. Changes to the thresholds are themselves governed by a strict methodology set out by decisions of the GPA Committee, which the UK - and Ministers - will be required to follow. As a result, the power provides limited discretion as to the nature of the amendments the Minister may make. It is therefore considered that the negative procedure is justified in this scenario.

215. Likewise, where the policy persists of linking defence and security thresholds to those in the GPA, such that they 'automatically' track any GPA changes, the negative procedure is considered appropriate for the same reasons.

216. In respect of thresholds applicable to the LTR, the power in paragraph 3 provides more policy discretion, as the UK is less constrained by international obligations (the GPA

does not apply to LTR thresholds). Accordingly, the affirmative procedure is considered more appropriate here.

217. This would apply also to the defence and security thresholds, if a decision were made in future to move away from the policy of linking them to GPA thresholds. In such a scenario, where the appropriate authority would be exercising more discretion, the affirmative procedure would be the appropriate course of action.

### **Schedule 1 threshold amounts, paragraph 5**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* affirmative procedure

### Context and Purpose

218. The Bill as a whole makes provision for the procurement by a class of bodies called “contracting authorities”, defined in clause 1 (contracting authorities). Some of these bodies are “central government authorities” and some are “sub-central government authorities”. The thresholds above which the substantive procurement rules apply are different for these different sorts of body and this reflects the UK’s international commitments, which draw a distinction between the two categories.

219. This paragraph confers a power to make regulations establishing a list of entities that are to be considered central government entities. Any contracting authority that is not a central government authority is considered a sub-central government authority.

### Justification for taking the power

220. The list of entities that are central government entities will change over time as new public bodies are created and others change or cease to exist. In addition provision will need to be made for amendments in the event that there are machinery of government changes. Without taking a power to amend the definition of “central government entity” it is likely that the procurement regime would quickly become out of step with our international agreements, leaving the UK at risk of challenge.

221. This is not a power to amend the scope of the substantive Bill regime, so it cannot determine whether a body falls inside or outside the regime and it cannot be used to effectively exempt bodies from their obligations under the regime. Its only function is to determine whether the bodies within the regime are to be considered central government authorities or sub-central government authorities.

222. We have therefore taken the view that this power is limited in nature and justifiable in the circumstances.

### Justification for the procedure

223. As this power has material impacts on the coverage of the substantive Bill regime we take the view that the affirmative procedure is the appropriate procedure.

### **Schedule 1 threshold amounts, paragraph 5**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* affirmative procedure

### Context and Purpose

224. The Bill lists various categories of contracts to which its provisions apply, including contracts for the supply of “works” among others. Different thresholds apply to the different categories of contract, as set out in the table in paragraph 1 of schedule 1 (threshold amounts). A “works contract” is defined in paragraph 4 of the schedule, by reference to the concepts of “works” and a “complete work”. The latter is defined in paragraph 5, where a power is also given to set out in regulations the meaning of “works”.

225. Regulations made under this power will establish a list of types of activity that count as “works”. Works are currently defined by reference to Schedule 2 to the Public Contracts Regulations 2015/102, where the relevant types of activity are listed according to two complementary systems of categorisation codes (NACE Rev 1 and CPV - as used for the light touch regime (see clause 8 above (light touch contracts))).

### Justification for taking the power

226. While the scope of what is to be included in regulations made under this power is known, it is not practical for the Bill to include a long list of detailed NACE Rev 1 and CPV codes to indicate which categories of contracts may benefit from the higher thresholds applicable to works contracts. In addition, both NACE Rev 1 and CPV codes may evolve over time, which would (absent a power) require amendment to the Bill. The power will be used to ensure that the scope of what is included as a works contract does not extend beyond what is permitted for the UK by reference to the GPA and/or other international trade agreements.

### Justification for the procedure

227. This power does in theory allow for amendment to the regime set out in the Bill to the extent that it permits contracts relating to the provision of certain activities to be procured outside the main regime in the Bill, unless they fall above the higher thresholds applicable to works contracts. We therefore take the view that the affirmative procedure is the appropriate procedure for such regulations to follow.

## **Schedule 2 exempted contracts, paragraphs 2 and 3**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

### Context and Purpose

228. Paragraphs 2(4) and 3(3) of this Schedule confer upon the Minister a power to make regulations which provide for provision about how a determination as to the percentage of activities carried out by a person is to be made for the purposes of Paragraph 2 sub-paragraph (2)(d) and the equivalent provision in Paragraph 3 sub-paragraph (2)(b).

### Justification for the Power

229. The intention in taking the power is to allow for technical detail of the method of calculating turnover or costs of a particular activity so as to benefit from this exemption.

### Justification for the procedure

230. While the power allows the development of a narrow methodology on a technical subject area, the consequence of this calculation will determine whether or not certain contracting authorities are subject to the regime, ultimately shaping the scope of the regime. As a result we consider it appropriate that Parliament has the opportunity to scrutinise this methodology via the affirmative procedure.

## **Schedule 2 exempted contracts, paragraph 17**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

### Context and Purpose

231. Whilst the provision of passenger transport networks to the public is a utility activity, the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016 provide an exemption for public passenger transport services by rail and metro. This is because procurement in these areas is regulated by other legislation, notably

retained EU law. If we were to reflect the current exemption, we would need to either refer to the retained EU law in the Bill or transpose it into the Bill. This would involve provision for a number of complexities in UK legislation and retained EU law and how they interact.

232. The regulation of public passenger transport services is also the subject of forthcoming changes following the Williams Shapps Review. To transpose the retained EU law into the Bill would also only be a short term position, since the reforms would impact any such provision. We are therefore providing for the exemption to be shaped by a regulation making power which can be exercised when the landscape is more settled and Cabinet Office has had the opportunity to consult further with DfT and other stakeholders.

#### Justification for the Power

233. The intention in taking the power is to enable “public passenger transport services” to be described in regulations rather than by way of reference to multiple primary legislation, particularly at a time when the domestic regulatory landscape is changing. This will allow the procurement regime to describe the interaction between the two regimes clearly and in a way that can better be understood by stakeholders.

234. A regulation-making power will also allow flexibility to adapt to changes that are known to be coming, without knowing sufficient detail to be able to make that provision at this time.

#### Justification for the procedure

235. The affirmative procedure appropriately recognises the broad scope of the power and its effect, which is to allow the Minister to specify the types of public passenger transport for the purpose of exempting those contracts from the Bill.

### **Schedule 2 exempted Contracts, paragraph 32**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

#### Context and Purpose

236. Paragraph 32(4) of this Schedule confers upon an appropriate authority a power to make regulations about how a person’s affiliated turnover amount and total turnover amount are for the purpose of sub-paragraph (3).

#### Justification for the Power

237. The intention in taking the power is to allow for technical detail of the method of calculating turnover of a person so as to benefit from this exemption.

#### Justification for the procedure

238. While the power allows the development of a narrow methodology on a technical subject area, the consequence of this calculation will determine whether or not certain utilities are subject to the regime, ultimately shaping the scope of the regime. As a result we consider it appropriate that Parliament has the opportunity to scrutinise this methodology via the affirmative procedure.

### **Schedule 2 exempted contracts, paragraph 34**

*Power conferred on: An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

#### Context and Purpose

239. A concession contract is a contract for the supply of works or services to a contracting authority where at least part of the consideration for that supply is a right for the supplier to exploit the works or services and under which the supplier is exposed to a real operating risk. Certain types of concession contracts are exempt from the Bill.

240. Paragraph 34(2) confers upon the Minister a power to make regulations which provide for the description of a “qualifying air carrier” for the purpose of paragraph 35(1). Concession contracts for air services provided by such a qualifying air carrier are exempt from the Bill.

#### Justification for the Power

241. The intention in taking the power is to enable a “qualifying air carrier” to be described in regulations rather than in primary legislation and to control the types of air carriers which can award concession contracts which are exempt from the regime.

#### Justification for the procedure

242. The affirmative procedure appropriately recognises the broad scope of the power and its effect, which is to allow the Minister to specify the types of qualifying air carriers for the purpose of exempting concession contracts for air services from the Bill.

### **Schedule 4 utility activities, paragraph 1**

*Power conferred on: An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in*

respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure

#### Context and Purpose

243.Paragraph 1(3) confers upon an appropriate authority a power to make regulations as to how to calculate the turnover amount associated with the amount of gas and heat supplied to a network by a person for the purpose of sub-paragraph (2)(c).

#### Justification for the Power

244.The intention in taking the power is to allow for technical detail of the method of calculating turnover of a person so as to benefit from this exemption.

#### Justification for the procedure

245.While the power allows the development of a narrow methodology on a technical subject area, the consequence of this calculation will determine whether or not certain utilities are subject to the regime, ultimately shaping the scope of the regime. As a result we consider it appropriate that Parliament has the opportunity to scrutinise this methodology via the affirmative procedure.

### **Schedule 4 utility activities, paragraph 2**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure

#### Context and Purpose

246.Paragraph 2(3) confers upon an appropriate authority a power to make regulations as to how to calculate the turnover amount associated with the amount of electricity supplied against all energy supplied by a person for the purpose of sub-paragraph (2)(d).

#### Justification for the Power

247.The intention in taking the power is to allow for technical detail of the method of calculating turnover of a person so as to benefit from this exemption.

#### Justification for the procedure

248.While the power allows the development of a narrow methodology on a technical subject area, the consequence of this calculation will determine whether or not certain

utilities are subject to the regime, ultimately shaping the scope of the regime. As a result we consider it appropriate that Parliament has the opportunity to scrutinise this methodology via the affirmative procedure.

### **Schedule 4 utility activities, paragraph 3**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure

#### Context and Purpose

249. Paragraph 3(5) confers upon an appropriate authority a power to make regulations as to how to calculate the amount of drinking water supplied by a person for the purpose of sub-paragraph (3)(d).

#### Justification for the Power

250. The intention in taking the power is to allow for technical detail of the method of calculating turnover of a person so as to benefit from this exemption.

#### Justification for the procedure

251. While the power allows the development of a narrow methodology on a technical subject area, the consequence of this calculation will determine whether or not certain utilities are subject to the regime, ultimately shaping the scope of the regime. As a result we consider it appropriate that Parliament has the opportunity to scrutinise this methodology via the affirmative procedure.

### **Schedule 4 utility activities, paragraphs 7 and 8**

*Power conferred on:* An appropriate authority, which means a Minister of the Crown, Welsh Ministers or a Northern Ireland Department, depending upon the contracting authority in respect of which the power is exercised (see clause 110 (interpretation), read with clause 101 (Minister of the Crown: restrictions on the exercise of powers)).

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure

#### Context and Purpose

252. The Cabinet Office does not wish to over-regulate the utilities sector given it is already subject to regulatory oversight and in many instances utilities operate in a commercial market.

253.Regulation 35 of the Utilities Contracts Regulations 2016, which was omitted following exit from the EU, set out the procedure for exempting particular utility activities where they operate in competitive markets. Given the nature of utility markets can change over time, Cabinet Office has included in the Bill a similar mechanism whereby a determination can be made to exempt a particular utility activity. The mechanism extends to revoking and revising exemption determinations.

254.Paragraph 7 of this Schedule provides a power for an appropriate authority to determine and set out in regulations the procedure to be followed when making a determination to exempt a particular utility activity and when revoking and revising an exemption determination. The regulations may, in particular, set out the factors to be taken into account when making a decision, specify who is responsible for making determinations and who can apply for an exemption determination. In the case of revocations and revisions, the regulations may also include matters such as notification requirements and rights of representation for affected parties.

255.Paragraph 8 provides that Decisions of the European Commission that currently provide exemptions for utility activities that operate in a commercial market are repealed on commencement of the paragraph, although the effect of the Decisions (the exemptions) are retained. These exemptions may be amended or revoked in accordance with the regulations made under the power set out at Schedule 4, paragraph 7.

#### Justification for taking the power

256.Although Cabinet Office wishes to implement a similar mechanism to Regulation 35 of the Utilities Contracts Regulations 2016, it has not fully determined the detail of the procedure, which, unlike Regulation 35, also extends to revocations. The Bill therefore includes a power for an appropriate authority to determine the procedure. The decision on whether to exempt a particular utility activity or revise or revoke an exemption determination will not be subject to parliamentary scrutiny.

#### Justification for the procedure

257.The procedure to be determined is not simply administrative and will need to include matters such as the criteria to be met for a utility to be exempted from the regime and, in the case of revocations/revisions of exemption decisions, matters such as notification requirements and rights of representation. As such, the affirmative procedure is appropriate.

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

#### **Schedule 10 Single source defence contracts, paragraph 2(3) inserting new subsection 14(5A) into the Defence Reform Act the “DRA”)**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

### Context and Purpose

258. An issue which has practical significance to the operation of Part 2 of the DRA is whether an agreement to enter into new work is a new contract for the purposes of the DRA or an amendment to an existing contract. Under the current legislation, where an amendment to an existing contract which is not already a QDC is agreed, agreement between the Secretary of State and the contractor is required for the agreement to be a QDC. See in particular sections 14(4)(d) and (5)(d). A contract which is not an amendment to a contract does not require such consent to be a QDC. Whether or not an agreement for additional goods, works or services is to be regarded as an amendment to an existing contract or a new contract in its own right can be a matter of some uncertainty. Currently, it would be a matter for the SSRO (upon referral) and ultimately the Court (if an SSRO decision was challenged) to decide whether an agreement was a new contract or an amendment to an existing contract. The practical effect is that it is not possible to know if a purported amendment to an existing contract will be a QDC.

259. Section 14(5A) of the DRA (inserted by Schedule 10, paragraph 2(3)) confers a power to make SSCRs specifying circumstances in which an agreement 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 section 14(2) of the DRA. As a consequence, it would be clear in law whether a purported amendment is a new contract for the purposes of the DRA and SSCRs and hence whether be subject to subsection 14(3) of the DRA rather than subsection 14(4) or 14(5), the latter two of which require the agreement of Secretary of State and the primary contractor that the contract will become a QDC.

260. It is anticipated that the SSCRs may specify that an agreement would be a new contract by reference to such criteria as the relationship between the new work and the scope of work under the existing contract, and in particular whether it would be possible for the parties to contract for the new work through a standalone contract without necessitating any change to the existing contract.

### Justification for taking the power

261. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

262. It is appropriate to specify the circumstances in SSCRs, rather than set them out in primary legislation, because it is necessary to have flexibility to adjust the circumstances in which an agreement is treated as a new contract without having to seek an amendment to primary legislation should commercial circumstances change, a particular approach does not achieve the intended effect or there be unintended consequences requiring a change.

### Justification for the procedure

263. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs

is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

264. SSCRs specifying circumstances in which an agreement entered into by the Secretary of State with a primary contractor is not to be treated as amending an existing contract between those parties would be made under powers that are not markedly different in nature to other regulation making powers in the DRA. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

### **Schedule 10 Single source defence contracts, paragraph 2(4) inserting new subsection 14(8A) into the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

#### Context and Purpose

265. At present, for a contract to be a QDC it must be one under which the Secretary of State procures goods, works or services for defence purposes from another person. One of the proposed amendments to the DRA (in paragraph 2(2) of Schedule 10) is an amendment to section 14(2)(a) DRA under which a contract would be a QDC “*if it is a contract under which the Secretary of State procures goods, works or services wholly or substantially for defence purposes from another person*”. This amendment would permit cross Government contracts which are substantially for defence purposes to be QDCs.

266. Paragraph 2(4) of Schedule 10 inserts a new section 14(8A) into the DRA. Section 14(8A) confers a power to make SSCRs to specify when a contract is to be treated as substantially for defence purposes. It is anticipated that a contract might be substantially for defence purposes based on a percentage value of the contract or whether the defence part of the contract is more than specified a value.

#### Justification for taking the power

267. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

268. Whether a contract is substantially for defence purposes should be defined in SSCRs, rather than in primary legislation because it is difficult to predict with accuracy the effect that a particular definition of “*substantially for defence purposes*” will have on the pricing of QDCs and QSCs. It is necessary to have flexibility to adjust the definition of “*substantially for defence purposes*” without having to seek an amendment to primary legislation should commercial circumstances change, a particular approach does not achieve the intended effect or there be unintended consequences requiring a change.

### Justification for the procedure

269. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

270. SSCRs defining whether a contract is substantially for defence purposes would be made under powers that are not markedly different in nature to other regulation making powers in the DRA. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

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

#### **Schedule 10 Single source defence contracts, paragraph 3(3) substituting subsection 15(2) and inserting new subsections (2A) and (2B) into the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

### Context and Purpose

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

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

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

273. In pricing SSCs, it has been found in practice that the formula set out in subsection (4) does not work well for some types of contract, or, in particular, for some components of a contract price. There is an increasing number of contracts, such as those for software licences, where the cost of production may be relatively low, but the supplier needs to recoup significant initial and ongoing development costs through the unit price. In other cases, such as support for some aircraft engines, the MOD requirement may be a small part of the supplier’s business, and the supplier may have a set of prices determined by market forces which it uses for both their commercial and their defence business. Moreover, it is possible to get adequate assurance on value for money because both profit and costs are determined by market forces. There are other instances where it might be useful to secure assurance that prices are fair other than by use of the pricing formula, such as where they are regulated by other means

(such as utilities) or where work was priced and completed prior to a contract being converted to a QDC.

274. The amendment in paragraph 3(3), substituting section 15(2) and inserting new subsections (2A) and (2B) into the DRA confers a power to make SSCRs to specify circumstances in which a method other than the formula prescribed in section 15(4) may be used to determine the price payable under a QDC and to specify that a particular method may be required to be used to price the contract (or component) in certain of those circumstances. The Secretary of State may only make such SSCRs if satisfied that such methods ensure that (a) good value for money is obtained in government expenditure on QDCs and (b) persons (other than the Secretary of State) who are parties to QDCs are paid a fair and reasonable price under those contracts.

#### Justification for taking the power

275. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

276. The power to make SSCRs to specify that a particular method may be used to determine the price of a QDC should be defined in regulations, because it is necessary to have flexibility to specify that new pricing methods may be used without having to seek an amendment to primary legislation. Changes in commercial circumstances may mean that it is necessary or desirable to prescribe new methods for pricing such contracts. A particular approach to pricing might not achieve the intended effect or there may be unintended consequences requiring a change

#### Justification for the procedure

277. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

278. SSCRs specifying that a particular method may be used to determine the price of a QDC would be made under powers that are not markedly different in nature to other regulation making powers in the DRA. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

### **Schedule 10 Single source defence contracts, paragraph 3(8) inserting new section 15(7) into the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

#### Context and Purpose

279. The effect of section 15 of the DRA is that currently, at the point of contract award, a single profit rate needs to be applied to the entirety of each QDC, even though that

QDC might be comprised of different elements having different risk profiles. In practice application of a single profit rate across the various elements of the contract means that the profit might be too high on some elements and too low on others. It is unlikely that the legislation currently permits the use of more than one CPR at contract award when determining the price for the contract, or to agree more than one price for the contract.

280. In addition, should a different pricing method be used for different elements of the contract then it is appropriate that a different profit rate should be applied to each element.

281. The concept of a QDC having distinct '*components*' already exists in the SSCRs. For example, the contract price of a QDC can be amended to add a new component for additional goods, works or services, and that additional component may be priced using a different profit rate from that used for the remainder of the contract. So, the parties could have a firm price QDC with a profit rate of, say, 12%. After placing the contract, the parties could agree to amend the contract to add a new cost-plus component to the scope of the contract. The profit rate for that cost-plus component might be 8%. However, the DRA does not currently permit the parties to agree at contract award that the contract will have more than a single component.

282. Paragraph 3(8) of Schedule 10 inserts a new section 15(7) into the DRA conferring a power to make regulations specifying circumstances in which certain parts of a QDC may or may not be treated distinctly from other parts of the same contract.

283. Consequential amendments are made by Schedule 10 to the DRA to make provision for existing delegated powers in the DRA to apply to QDCs and components of QDCs.

#### Justification for taking the power

284. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

285. The power to make SSCRs specifying circumstances in which certain parts of a QDC may or may not be treated distinctly from other parts of the same contract should be defined in regulations, because it is necessary to have flexibility (for example to deal with changes to commercial circumstances) to adjust the detail of how components are identified without having to seek an amendment to primary legislation.

#### Justification for the procedure

286. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is "*first time affirmative*". Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

287. SSCRs specifying circumstances in which certain parts of a QDC may or may not be treated distinctly from other parts of the same contract would be made under powers that are not markedly different in nature to other regulation making powers in the DRA.

The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

**Schedule 10 Single source defence contracts, paragraph 4(3) inserting new section 16(4) and (5) into the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

Context and Purpose

288. It is possible that the Secretary of State will propose a pricing method for a QDC or a component of a QDC and that contractors will dispute such proposals. This situation might arise for example if the contractor considers that it would achieve a higher CPR if a different method was used.

289. Paragraph 4(3) inserts new sections 16(4) and (5) into the DRA conferring a power to make regulations providing that the SSRO:

- a. must, on an application by the Secretary of State, an authorised person (a person authorised by the Secretary of State) or the primary contractor, determine whether the method used to determine the price payable under a qualifying defence contract, or a component of that contract was appropriate; and
- b. in consequence of such a determination, determine that the price payable under the contract is to be adjusted by an amount which the SSRO specifies.

Justification for taking the power

290. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

Justification for the procedure

291. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

292. SSCRs permitting the SSRO to make determinations relating to the choice of pricing methods would be made under powers that are not markedly different in nature to other regulation making powers in the DRA. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

**Contract Profit Rate**

**Schedule 10 Single source defence contracts, paragraph 8(3)(a) amending section 17(2) of the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

### Context and Purpose

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

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

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

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

296.Paragraph 8(3)(a) amends section 17(2) of the DRA conferring a power to make SSCRs providing that the BPR may be adjusted to reflect 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.

Justification for taking the power

297.The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

Justification for the procedure

298.With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

299.SSCRs providing that the BPR may be adjusted to reflect all of the financial risks to the primary contractor would be made under powers that are not markedly different in nature to the delegated power it replaces. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

**Schedule 10 Single source defence contracts, paragraph 8(3)(c) amending section 17(2) of the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

Context and Purpose

300.Step 5 of section 17(2) will be re-numbered step 3 as a result of steps 3 and 4 being repealed. Step 5 (as it is currently numbered) gives the Secretary of State discretion to adjust the BPR to give the contractor a particular incentive as regards the performance of provisions of the contract or component (as amended) specified by the Secretary of State.

301.Paragraph 8(3)(c) amends section 17(2) of the DRA conferring a power to make regulations providing for how an incentive adjustment needs to be applied. This amendment would allow the regulations to give contractors and the Secretary of State clarity on how this adjustment must be used, should it be decided that an incentive adjustment will be applied. It is anticipated that the SSCRs will specify the characteristics and features of an incentive adjustment.

Justification for taking the power

302.The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

### Justification for the procedure

303. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

304. SSCRs relating to incentive adjustments would be made under powers that are not markedly different in nature to the delegated power that are amended. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

### **Schedule 10 Single source defence contracts, paragraph 9(5) amending section 18(3)(a) of the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

### Context and Purpose

305. Section 18(3) and (4) of the DRA currently provide that SSCRs may be made which permit either party to ask the SSRO to determine whether the amount of an adjustment under step 2, 3 or 6 of section 17(2) was appropriate (section 18(3)(a)). Where the SSRO determines that an adjustment under step 2, 3 or 6 was not appropriate, it may determine that the price payable under the contract is to be adjusted by an amount specified by the SSRO (section 18(3)(b)).

306. Paragraph 9(5) amending section 18(3)(a) of the DRA confer a power to make SSCRs permitting either party to apply to the SSRO to make a determination in relation to all of the contract profit steps set out in section 17. In relation to step 1, whilst the BPR is fixed for a particular year, disputes do arise as to which BPR should be applied and the amended provision would allow SSCRs to be made so that the SSRO could make a determination on this issue on a referral from any party to the contract.

307. In relation to step 5 (as it is currently numbered), disputes arise as to whether the criteria specified for the incentive adjustment have been met. The amended provision would allow SSCRs to be made so that the SSRO would be able to determine, on a referral from any party to the contract, whether the adjustment made under step 5 is in accordance with any regulations made about that step.

### Justification for taking the power

308. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

### Justification for the procedure

309. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

310. SSCRs permitting the SSRO to make determinations relating to the CPR are not markedly different in nature to the delegated power that are amended. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

### **Allowable costs**

#### **Schedule 10 Single source defence contracts, paragraph 11(3) inserting new section 20(2A) and (2B) into the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

#### Context and Purpose

311. Step 3 (as it is currently numbered) of subsection 17(2) (contract profit rate) is known as the “*profits on costs once*” or “*POCO*” adjustment. A POCO adjustment is necessary because contractors frequently sub-contract parts of the requirement within their own group of companies. The POCO adjustment is intended to ensure that profit is only recovered once on the true cost of the contract.

312. Step 3 is to be repealed from section 17(2). Instead, the POCO adjustment will be made under section 20 as an appropriate adjustment to allowable costs. This approach is more transparent than the current provision.

313. Paragraph 11(3) inserts new section 20(2A) into the DRA conferring a power to make SSCRs providing that the requirement in section 20(2)(a) that a cost is appropriate is not met in relation to a cost arising from profits made by a person connected with the primary contractor. Section 20(2B) provides that SSCRs may specify the circumstances in which a person is connected with the primary contractor.

#### Justification for taking the power

314. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

#### Justification for the procedure

315. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

316. SSCRs enabling a POCO adjustment to be made as a cost are the same in principle to existing powers to make SSCRs, which would be made by the negative resolution procedure. There is no change to the principle of the POCO adjustment. The SSCRs are likely to be technical in nature, and not likely to be contentious or of interest to Parliament.

## **Reports**

### **Schedule 10 Single source defence contracts, paragraph 12(2) substituting section 25(3)(a) of the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

### Context and Purpose

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

318. The obligation to provide reports under section 25 applies for a financial year where the designated person, or any person with whom the designated person is associated, has one or more ongoing QDCs above a specified value in which there are outstanding obligations to provide goods, works or services (section 25(1) and (5)). The reason that the designated person is the ultimate parent undertaking in the case of group companies is to ensure that these reports are provided only once for each group of companies.

319. For some suppliers, particularly those based overseas, much of the work undertaken by the ultimate parent will have little relevance to the pricing or performance of UK single source contracts. Also, future direction of some overseas contractors is likely to be mainly determined by their assumptions about future requirements from their own governments, which they may not be able to share with the UK.

320. Paragraph 12(2) substitutes section 25(3)(a) of the DRA conferring a power to make SSCRs permitting the Secretary of State to agree, in relation to a report mentioned in section 25(2), that another person associated with the primary contractor is to be the designated person. This provision will allow flexibility in deciding which undertaking in a group of companies is best placed to provide the report to the Secretary of State.

### Justification for taking the power

321. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

Justification for the procedure

322. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

323. SSCRs permitting the Secretary of State to agree to a change in the person who has a reporting obligation are not likely to be contentious or of interest to Parliament.

**Qualifying sub-contracts**

**Schedule 10 Single source defence contracts, paragraph 14(2) and (3) inserting section 29(2)(c) and (4)(c) of the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

Context and Purpose

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

325. Section 29(3) and (4) make equivalent provision in respect of prospective QSCs.

326. Paragraph 14(2) and (3) insert new subsections (2)(c) and (4)(c) into the DRA conferring a power to make SSCRs providing that if a contractor makes a negative assessment (i.e. that the prospective sub-contract does not meet the conditions to be a QSC) then the contractor must notify the Secretary of State, an authorised person and the prospective sub-contractor of that assessment and give reasons for that assessment.

Justification for taking the power

327. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

Justification for the procedure

328. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

329. SSCRs requiring a primary contractor to report that a proposed sub-contract is not likely to be a QSC is not likely to be contentious or of interest to Parliament.

## **Schedule 10 Single source defence contracts, paragraph 15 amending section 30(4)(a) of the DRA**

*Power conferred on:* the Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution

### Context and Purpose

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

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

332. Paragraph 15 amends section 30(4)(a) of the DRA so that SSCRs may provide that the primary contractor may give notice to the SSRO that in its opinion Part 2 of the DRA and the SSCRs should cease to apply to the qualifying sub-contract.

### Justification for taking the power

333. The proposed power is not different in nature to other powers to make SSCRs. Taking this power is consistent with the scheme of the DRA.

### Justification for the procedure

334. With the exception of powers set out in section 14(2), (6), or (8) and section 33 (relating to the amount of a penalty) of the DRA, the procedure in the DRA for making SSCRs is “*first time affirmative*”. Subsequent use of the power in the DRA to make SSCRs is by way of negative resolution.

335. SSCRs requiring a primary contractor to report that a proposed sub-contract has ceased to be a QSC is not likely to be contentious or of interest to Parliament.

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

## **Schedule 10 Single source defence contracts, paragraph 18 inserting a new section 35A into the DRA**

*Power conferred on:* the SSRO

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

### Context and Purpose

336. Currently the following provisions in Part 2 of the DRA relate to express or implicit powers or duties on the SSRO to issue guidance:

- a. Section 18(1) – the Secretary of State or an authorised person, and the primary contractor, must have regard to guidance issued by the SSRO in relation to any of the steps set out in section 17(2);
- b. Section 20(1) - the SSRO must issue guidance about determining whether costs are allowable costs under QDCs;
- c. Section 24 (relating to reports on QDCs) – the SSCRs may require a contractor to have regard to guidance issued by the SSRO in preparing reports;
- d. Section 25 (Reports on overheads and forward planning) – subsection (6), the SSCRs may require designated persons to have regard to guidance issued by the SSRO in preparing reports; and
- e. Section 33 (Penalties) – Subsections (3) and (4) - in determining the amount of a penalty under section 32, the Secretary of State must have regard to guidance issued by the SSRO.

337. Paragraph 18 inserts a new section 35A into the DRA enabling the SSRO to issue such guidance as it considers appropriate in relation to the application or interpretation of Part 2 of the DRA or the SSCRs where it considers such guidance might be useful to the Secretary of State or industry.

### Justification for taking the power

338. The proposed amendment is to make clear that the SSRO has the power to issue non-binding guidance.

### Justification for the procedure

339. There is no requirement for a Parliamentary procedure.

**Cabinet Office**  
**Date 11th May 2022**