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THE PROCUREMENT BILL

Essential guide

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Foreword

Seen as a bonfire of red-tape and regulation, the transformation of the public procurement legal framework commenced even before the UK left the European Union with the publication of the consultation paper, "Transforming Public Procurement" in December 2020. Constrained by the UK's membership of the World Trade Organisation's Agreement on Government Procurement, the reform of public procurement in the UK was never going to start from a blank sheet of paper.

Those who may have been hoping for a more radical reform agenda will inevitably be disappointed. Nevertheless, there are significant changes within the clauses of the Bill. When those changes are considered beside the significant stylistic and linguistic differences of the proposed legislation (due to the difference between our domestic statutory language and the previous "copy-out" approach of the European Directive(s)), it will take a committed reader, possessing an eagle eye and a pre-existing knowledge of the public procurement landscape, some significant time to plough their way through the Procurement Bill.

Trowers & Hamlins LLP is committed to helping our clients, contacts and colleagues across the public sector implement the new public procurement regime to best effect. We have been working alongside the Cabinet Office, professional bodies, clients and colleagues across the public and private sectors from the outset of the proposals, helping to deliver meaningful change and progress the public procurement conversation across the industry.

As part of this work, we have produced our Essential Guide to the Bill as it makes its way through Parliament. This Essential Guide aims to provide an overview of the key elements of the proposed legal changes. Whilst the Essential Guide covers the Bill as it currently stands, we still await further secondary legislation and guidance to flesh the regime out further. However, we hope that this will help interested readers to get to grips with the new regime.

We will issue updates to the Essential Guide as the Bill proceeds through Parliament and we welcome feedback on its current format and content. The key aim is to keep the conversation going; to raise the profile of public procurement and its importance across the public sector and for those that tender to the public sector and to ensure that those working with public procurement remain abreast of the developments during this time of change.

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Introduction

On 11 May 2022, the UK Government introduced the much-anticipated Procurement Bill (the Bill) into the House of Lords, where it received its first reading. The Bill was accompanied by supporting documents including Explanatory Notes to the Bill, an Impact Assessment, an Equality Impact Assessment and a Delegated Powers Memorandum.

The Bill received its second reading on 25 May 2022 and is now, at the date of publication, at the Committee Stage of its passage through Parliament.

The Bill follows an extensive consultation process on procurement reform following the UK's withdrawal from the European Union. The Bill represents the Government's post-Brexit approach to the proposed procurement regime as set out in its earlier Green Paper on Transforming Public Procurement published in December 2020, and the subsequent Government Response to the consultation, published in December 2021.

Whilst not all of the proposals trailed in the Green Paper have made their way into the Bill, this marks a major change to the existing procurement landscape. There are numerous stylistic and linguistic differences in the Bill compared to what we are used to under the current rules.

In this Essential Guide to the Bill, we have summarised the key concepts that have been brought forward by the Government into the proposed legislation.

This Essential Guide only refers to the Bill and the Government's proposed amendments. The Marshalled List of amendments to the Bill, including proposed amendments from the Opposition, can be found here. We have focused on comparisons between the Bill and the current Public Contracts Regulations 2015 (the PCR), and not the wider landscape of other procurement legislation.

Commencement provisions

Clause 114 confirms that the Bill extends to England and Wales, Scotland and Northern Ireland, and clause 115 sets out the commencement provisions of the Bill. The General provisions contained in Part 13 will come into effect on the day the Bill becomes an Act (i.e. when it achieves Royal Assent).

The remaining parts of the Bill will not come into force until such times as a Minister of the Crown by regulations may appoint. This accords with the Government's stated intention of a six month "go live" period following the Bill becoming law.

Part 1: Key definitions

Part 1 of the Bill sets out the key definitions relating to the new regime, as well as rules governing the valuation of public contracts and mixed procurements.

Contracting authority

Clause 1 sets out the new definition of "contracting authority", which the Government has sought to simplify. While the Cabinet Office has confirmed that the intention is for coverage under the Bill to remain as it currently is (i.e. there is no change to the scope of organisations and bodies currently caught by the PCR), there are some areas in this essential definition that require clarification.

Of particular note, the definition of contracting authority is now somewhat circular and refers to the concept of a "public authority" being an "authority with functions of a public nature". It is not immediately clear from the Bill whether "public nature" is limited to statutory functions (e.g. those functions that a body is required to carry out pursuant to a piece of legislation), or whether this is cast more widely across the public sector (e.g. functions carried out in a charitable or other social purpose due to a market failure or similar). Additionally, the meaning of "authority" itself is key to understanding the definition of contracting authority, and further guidance on this point will be needed.

While we wait for further guidance, those organisations considered "contracting authorities" under the existing procurement regime should proceed on the basis that they will remain "contracting authorities" under the new procurement regime.

Public contract

Clause 2 provides a definition for a "public contract" under the Bill, and includes any above threshold contract which is:

- for the supply, for pecuniary interest, of goods, services or works to a contracting authority; and
- is not an exempted contract.

Additionally a public contract within the meaning of the Bill also includes above-threshold (and not exempted) framework agreements and concession contracts. This is a structural change under the new Bill. Under the PCR, framework agreements and concession contracts are, in certain circumstances, treated as "public contracts", but their actual status is "other". The inclusion of frameworks and concessions as "public contracts" results in a few oddities explained below.

In a change from the current approach to publishing threshold amounts, the Bill sets out the current thresholds in Schedule 1. This is a departure from the usual publication of thresholds on a bi-annual basis through Procurement Policy Notes. We understand that the intention is for procurement thresholds to be aligned to the World Trade Organisation Agreement on Government Procurement (the WTO GPA), which will require amendment to primary legislation to give effect to future changes.

Exempted contracts

Additionally, Schedule 2 sets out what is considered an "exempted contract" under the Bill, and is the replacement for the current list of exempted service contracts in regulation 10 of the PCR. Schedule 2 also includes the new replacement tests for the current Teckal and Hamburg Waste exemptions under regulation 12 of PCR, which cover awards between linked contracting authorities (referred to as "vertical arrangements" and "horizontal arrangements" respectively).

In respect of vertical arrangements, the Bill links the definition of a controlling authority to the Companies Act 2006 in an attempt to simplify the existing definition that is drawn from the European Directive and numerous judgments of the Court of Justice of the European Union (the CJEU). As originally drafted, the vertical arrangements set out in Schedule 2 (Exempted Contracts) only allowed for a single contracting authority to be the controlling authority for the purposes of the new test, removing the possibility for jointly controlled Teckal entities, and potentially causing issues for (for example) Local Authority Trading Companies.

The Marshalled List of amendments to the Bill has addressed this issue by way of a proposed Government Amendment, and seeks to clarify when the vertical arrangement exemption will be available for contracting authorities. The exiting "joint Teckal" provisions are retained in the proposed Government amendment, which confirms that vertical arrangements will be available for contracts between a contracting authority and a person that is controlled by:

- the contracting authority;
- the contracting authority acting jointly with one or more other contracting authorities;
- another contracting authority, where that authority also controls the contracting authority entering into the contract with the controlled entity; and
- another contracting authority acting jointly with one or more other contracting authorities, where the authorities acting jointly also control the contracting authority entering into the contract with the controlled entity.

Value of public contracts

Clause 3 sets out the rules to be taken into account when estimating the value of a public contract. The definition of "estimated value" is an example of where a "brevity is best" approach to drafting may create unintended confusion.

Under the current regime the contracting authority must estimate the value of a contract at the date the contracting authority would have sent the call for competition (above threshold) or commenced a procurement process for below threshold contracts (see regulation 6(7) of PCR). However, under this new test, there is no definitive date that a contracting authority can identify either before or after the need to make that valuation, meaning that a contracting authority could decide on one day that the contract is below threshold and proceed on that basis, but have its procurement timetable completely scuppered due to shifting market conditions (or other circumstances not within its control) if the contract value tips above the threshold by a couple of pounds: which date is to be deemed as "the time being"?

Clause 3 also links to Schedule 3 of the Bill which sets out more detailed rules on estimating values. Notably, the Bill is missing important concepts that have been developed through case-law regarding how to value an opportunity (including the concepts developed by the CJEU in Roanne, and adopted by the then Office of Government Commerce) regarding payment from third parties, where it was held that for the purposes of deciding whether a contract exceeds the works threshold, the total value from the point of view of the tenderer is the relevant figure, including any sums to be received from third parties. We have requested further guidance on this point from the Government.

Schedule 3 also brings into the Bill the rules on aggregation that exist under the current regime, in the context of anti-avoidance rules. That is, if a contracting authority artificially sub-divides a contract, then the value of each individual sub-divided contract is taken to be the total combined value of all of the underlying contracts.

Additionally, Schedule 3 sets out that where it is not possible to estimate the value

of a contract (for example, where the duration of a contract is unknown, such as for rolling contracts like audit services), contracting authorities must treat the contract as being above threshold. This is a simple device and the "above threshold" presumption has removed the need for the lengthier, more complex, rules on valuation under the current regime.

Clause 4 of the Bill replaces the existing rules under regulation 4 of the PCR regarding how to deal with mixed procurements. The intention seems to be to simplify the current regime, and to remove the consideration of the "main subject-matter" of the contract when considering which procurement regime a public contract falls into. Instead, the only test now seems to be one of value. The provisions are simplified so as to simply refer to whether the constituent elements of a mixed contract could "reasonably be supplied under a separate contract". Further guidance would be helpful to set out how this provision would treat, for example, services that are incidental to works.

Utilities, defence and security contracts, concession contracts and light-touch contracts

Clauses 5 and 6 set out further definitions in the Bill relating to "Utilities" and "Defence and Security" contracts (respectively), and clause 7 sets out further definitions relating to concession contracts. The definition of concession contract has been simplified to refer to a contract for the supply, for pecuniary interest, 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 the contract the supplier is exposed to a real operating risk.

Further guidance or worked through examples of the meaning of "operating risk" will be important to fully understand what, if any, changes result due to the change in the language of the definition.

Clause 8 retains the concept of "light touch contracts", although further regulations will be published in due course to specify the services that are caught by this regime. Light touch contracts are those that are covered by the current "light touch regime", a specific set of rules for certain service contracts which have tended to be of less cross-border interest pre-Brexit, and included certain social, health and education services.

Clause 9 sets out additional rules for mixed procurements on the award of a "special regime contract" where certain elements of that contract could reasonably be supplied under a separate contract and which would not, by themselves, have been a special regime contract or a below-threshold contract. Examples here include concession contracts, a defence and security contract, light touch contracts and utilities contracts. In these circumstances, the position under clause 9 is that the contract in question should not be treated as a special regime contract, except where the contract is a defence and security contract and where the contracting authority had good reasons not to award separate contracts.

Part 2: Principles and objectives

The Government has proposed several amendments to this Part, most notably to introduce the concept of "procurement" and "covered procurement" into the Bill. Under the new proposed definitions, a "procurement" will mean the award, entry into and management of a contract, whereas a "covered procurement" will refer to the award, entry into and management of a public contract.

Part 2 of the Bill originally provided that any "procurement" must be carried out by a contracting authority in accordance with the Procurement Act, with procurement defined to include any part of both the award and also the management of a public contract, and including, where relevant, the termination of a procurement prior to award.

The Government has put forward amendments to change this requirement so that contracting authorities carrying out a "covered procurement" must do so in in accordance with the Procurement Act. The Government amendments seek to distinguish between "procurement" and "covered procurement" and also seek to limit the procurement objectives in clause 11 (see below) so that they only apply to "covered" procurements.

Clause 10 (as amended by the Lords in Grand Committee) sets out that a contracting authority may not enter into a public contract unless it is awarded in accordance with one of the following: clause 18 (competitive award); clause 40 (direct award in special cases); clause 42 (direct award after switching procedures); and clause 44 (award under frameworks).

Of note, clause 10 is silent in respect of Dynamic Markets (the replacement for Dynamic Purchasing Systems under the PCR). This can be explained by the processes under clause 34 (Competitive award by reference to dynamic markets) which is considered below, but broadly speaking, an award of a public contract in accordance with a Dynamic Market is covered by clause 18 and is therefore included in the general rule set out in clause 10.

The Bill covers contracting authorities procuring directly for themselves, jointly with other contracting authorities, or through another entity, including "centralised procurement authorities".

Clause 11 sets out the objectives that a contracting authority must have regard to in a procurement, being:

- delivering value for money;
- maximising public benefit;
- sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decision; and
- acting, and being seen to act, with integrity.

In addition a contracting authority must treat all suppliers the same unless a distinction between them justifies different treatment, in which case the authority must take all reasonable steps to ensure it does not give rise to any unfair advantage or disadvantage. This appears to equate to the current principle of equal treatment of bidders.

Clause 12 provides for the publication of the Government's National Procurement Policy Statement (NPPS) and the review, amendment and/or replacement of the same. A contracting authority must have regard to the NPPS, save for certain exceptions including the award of a contract under a framework, and in relation to Welsh and Northern Irish procurement arrangements. Clause 13 contains similar

provisions for the publication of the Wales Procurement Policy Statement which subject to certain exceptions applies to devolved Welsh authorities and procurement arrangements.

Whilst the current NPPS remains relevant for the time being, it is unclear what status the existing NPPS will have once the Bill becomes legislation (i.e. whether the NPPS in its current form will be adopted as the NPPS under clause 12). Further guidance will be needed on this point in due course.

Part 3: Award of public contracts

Part 3 of the Bill covers the award of public contracts and the procedures which contracting authorities must comply with.

Part 3 is made up of the following six chapters:

- Chapter 1: Preliminary Steps;
- Chapter 2: Competitive Award;
- Chapter 3: Direct Award;
- Chapter 4: Award under Frameworks;
- Chapter 5: After award, standstill periods and notices; and
- Chapter 6: General provisions about award and procedures.

The provisions of greatest interest to practitioners will no doubt include: the new "competitive flexible procedure" combining the many separate procedures set out under the PCR; the new concept of "open frameworks"; the revised timescales for procurement procedures; and the introduction of a debarment list requiring contracting authorities to exclude certain suppliers.

Chapter 1: Preliminary steps

The Bill sets out the preliminary steps that contracting authorities may voluntarily take when conducting a procurement exercise.

Clause 14 (Planned procurement notices) introduces the concept of a "planned procurement notice" confirming the contracting authority's intention to publish a tender notice. If a planned procurement notice is published at least 40 days but not more than 12 months before the tender notice is published, it will be deemed a "qualifying planned procurement notice." Accordingly, reduced tendering periods may apply (see the table set out below in relation to Chapter 6 for further details of the reduced periods). The planned procurement notice seems to be a replacement for the current Prior Information Notice (PIN), but contracting authorities should note that under the Bill, such a notice cannot be used as a call for competition in the same way that a PIN can under the current rules. Given that the purpose of this planned procurement notice will be limited to simply notifying of an intention to procure, there is some debate as to the usefulness and practicality of the notice (particularly given that there is a separate notice to use in relation to pre-market engagement activity).

Clause 15 of the Bill provides that contracting authorities may engage with suppliers and others by way of "preliminary market engagement". A contracting authority may voluntarily issue a "preliminary market engagement notice" pursuant to clause 16 confirming its intention to conduct a "preliminary market engagement" but is not obliged to do so. The Bill sets out the purposes for which preliminary market engagement may be undertaken, for example, development of specifications, designing the appropriate procurement procedure, award criteria and procurement documents and building capacity among suppliers in relation to the contract being awarded. Contracting authorities engaging in preliminary market engagement must take steps to ensure those participating are not put at an unfair advantage and competition is not distorted. If a supplier is put at an unfair advantage that cannot be avoided due to preliminary market engagement the supplier must be treated as an "excludable supplier" (see clause 54, Meaning of excluded and excludable supplier) in relation to the relevant contract award.

The Bill also includes a mandatory preliminary step at clause 18, imposing a duty on contracting authorities to consider, prior to issue of a tender notice, whether the subject matter of the contract could be supplied under more than one contract and whether such contracts could be awarded by way of lots. If the contract could be so supplied or awarded, the contracting authority must proceed on such a basis or provide reasons for not doing so. As this relates to a mandatory step in the procurement, we would recommend that contracting authorities record this decision with accompanying reasons.

Chapter 2: Competitive award

Terms of a procurement

Clause 18 of the Bill requires contracting authorities to award contracts to the "most advantageous tender". The new "most advantageous tender" (rather than the "most economically advantageous tender" required under the PCR) is the tender which "best satisfies the award criteria". This is a much anticipated amendment to the existing approach to evaluation, and aligns with the terminology adopted under the WTO GPA.

In assessing tenders, clause 18(3) provides that contracting authorities must disregard any tender that does not satisfy the conditions of participation and/or materially breaches a procedural requirement set out in the tender documents. There is also a discretionary right for contracting authorities to disregard a tender from a supplier that is not a UK or Treaty state supplier (defined in clause 81(1) of the Bill as a supplier that is entitled to benefit from the international agreements set out at Schedule 9 of the Bill) or if the supplier intends to sub-contract to such a supplier.

Clause 19 sets out the new rules concerning competitive tendering procedures. The Bill replaces the numerous competitive procedures under the PCR with two main competitive tendering procedures which can either be an "open procedure" (single-stage, open to all) or "such other competitive procedure as the contracting authority considers appropriate for the purposes of awarding the public contract" (the "competitive flexible procedure").

Clause 19 sets out the following characteristics of a competitive tendering procedure:

- must be a proportionate means to award the contract considering nature, complexity and cost (clause 19(3));
- may limit numbers of participants (generally or per round) (clause 19(4)(a));
- may allow for award criteria to be refined (clause 19(4)(b));
- must restrict participation by bidders who did not participate in or were excluded from an earlier round (clause 19(4)(c));
- may provide for the exclusion of suppliers by reference to an intermediate assessment of tenders against the award criteria (i.e. may allow for the deselection of tenderers in stages by reference to the evaluation of initial or subsequent tenders) (clause 19(5)(b) and clause 19(6)); and
- may limit the number of lots that a supplier can submit a tender for (clause 19(7)).

Contracting authorities should note that there do not appear to be any rules around the minimum numbers of tenderers who are able to be shortlisted under a competitive tendering process which makes use of a shortlist (e.g. under the PCR, the minimum number of bidders for a Restricted Procedure is 5, or for a Competitive Dialogue or Competitive Procedure with Negotiation is 3, if numbers allow). With this in mind, contracting authorities should carefully design their procedures to ensure that they retain competitive tension in the procurement process, and ensure that a suitable number of tenderers are shortlisted to ensure genuine competition.

Clause 21 sets out the various conditions of participation in procurement exercises. Of note, contracting authorities may set conditions that a supplier must satisfy to be awarded the contract. The conditions must be a proportionate means of ensuring the supplier has the legal, financial and technical capacity to perform the contract. If the conditions of participation are not satisfied either by the supplier themselves or by a supplier associated with the supplier (as defined in the Bill), a contracting authority may exclude the supplier from progressing through the competitive procedure. The Bill sets out several restrictions on the requirements that can be stated as conditions of participation e.g. qualifications but not their equivalents.

The rules regarding award criteria are now set out in clause 22, which sets out that the award criteria which tenders may be assessed against must relate to the subject matter of the contract, be sufficiently clear, measurable, specific and proportionate. There is a departure from the previously explored position under the Green Paper to break the link between the subject-matter of the contract and the award criteria in certain, prescribed, circumstances, and this is not a feature which has been carried through into the Bill. While the proposed provision would not create a significant change in everyday procurement practice, there are certain procurements where a clear ability to take into account general policy or practice would have been useful.

Contracting authorities must describe how tenders are assessed against the award criteria and confirm if a criterion is mandatory (e.g. and that failure to satisfy it will result in disqualification) and indicate the importance of criteria (weightings, rankings etc.) The Bill sets out at clause 22(5) a non-exhaustive list of things included in the "subject matter" of a contract, namely:

- the goods, services or works to be supplied under the contract, including in respect of any aspect of their production, trading or other stage in their life-cycle;
- how or when those goods, services or works are to be supplied;
- the qualifications, experience, ability, management or organisation of staff where those factors are likely to make a material difference to the quality of goods, services or works being supplied;
- price, other costs or value for money in all the circumstances.

Additionally, clause 23 sets out that award criteria and their relative importance can be refined as part of the competitive procedure provided that:

- the tender notice/documents allow for refinement;
- suppliers are yet to submit tenders for assessment for contract award; and
- the refinement would not, if made earlier, have allowed for other suppliers to progress beyond an earlier point in the tender process.

Clause 24 sets out that technical specifications must not refer to a design, a particular licencing model or description of characteristics where they could (instead) appropriately refer to performance and functional requirements. Specifications should not be too prescriptive, thereby risking the contracting authority restricting access to the process (and therefore competition) where it is unnecessary to do so. Contracting authorities' requirements should not refer to UK standards, trademarks, trade names, patent, design or type, place of origin or producer/supplier unless it is necessary and the exceptions set out in clause 24 of the Bill are satisfied (which shows wider international constraints placed upon UK procurement and the practical limitations of the post-Brexit ability to "Buy British").

Clause 25 (Sub-contracting specifications) provides that where a contracting authority could procure the relevant goods, services or works by way of "direct award in special cases" in accordance with clause 40, the contracting authority may require that the supplier sub-contracts the supply to such particular supplier (see clause 25).

For the provisions in clause 25 to apply, one of the direct award justifications in clause 40 must apply. In respect of a supplier who is not an "excluded" supplier, this relates to the justifications in Schedule 5 (Direct award justifications). In respect of an "excluded" supplier, it is possible to make a direct award only where there is an overriding public interest in awarding the contract to that supplier. Clause 40(5) specifies that there is only such an overriding public interest in very limited circumstances, including in relation to the construction, maintenance or operation of critical national infrastructure, or for defence and intelligence contracts.

Exclusions and modifications

Clause 26 of the Bill introduces various rules regarding "excluded suppliers" (those who must be disregarded) and "excludable suppliers" (those who may be disregarded at the discretion of the contracting authority). If a supplier is excluded/excludable by virtue of an associated supplier (supplier relied on by the bidding supplier in order to satisfy the conditions of participation) or a subcontractor only, the contracting authority must allow reasonable opportunity to replace the associated supplier or subcontractor (see below for further details).

Clause 31 provides that the terms of a procurement may be modified prior to the deadline for submitting tenders (for the open procedure) or the deadline for submitting a request to participate or, where there has been no invitation for such request, the deadline for submitting the first tender (for other competitive tender procedures). Modifications can be made after these deadlines provided they are not "substantial" (as defined in clause 31(3) of the Bill) or the procurement relates to the award of a light touch contract. Contracting authorities must consider revising applicable tender deadlines if a modification is made. This is a useful clarification of modification principles for pre-award changes.

Reserving contracts to certain suppliers

Clause 32 (Reserving contracts to supported employment providers) permits contracting authorities to design a competitive flexible procedure in order that it provides for the exclusion of any supplier who is not a supported employment provider. Clause 32(4) explains that a supported employment provider is an organisation that operates for the purpose of providing employment or employment-related support to disabled or disadvantaged individuals and where at least 30% of that organisation's workforce is made up of disabled or disadvantaged individuals.

Clause 33 (Reserving contracts to public service mutuals) permits contracting authorities to design a competitive flexible procedure in order that it provides for the exclusion of any supplier who is not a qualifying public service mutual (defined in clause 33(5) as a public service mutual who has not been award a comparable contract in the three years preceding the award of the contract).

Clause 33(6) defines a public service mutual as a body that operates for the purpose of delivering public services and mainly for the purpose of delivering one or more reservable light touch services (which may be defined in further regulations). Additionally, a public service mutual must be run on a not-for-profit basis (or provide for the distribution of profits only to its members), and must be under the management and control of its employees.

For the purposes of clause 33(5), a comparable contract is defined in clause 33(7) as a contract that was:

- a contract for the same kind of services;
- awarded by the same contracting authority; and
- awarded pursuant to a reserved procurement in accordance with clause 33.

Awarding contracts by reference to dynamic markets

Clause 35 (Dynamic markets: establishment) of the Bill provides that arrangements can be established for the award of public contracts by reference to suppliers' membership to a "dynamic market". These provisions replace the current dynamic purchasing systems under the PCR). There is no requirement expressly set out in the Bill for the dynamic market to be operated electronically (as there is in the current legislation). The Bill also provides for the use of "utilities dynamic markets" subject to compliance with clause 35.

Contracting authorities may provide for the exclusion of a supplier during a competitive flexible procedure if the supplier is not part of a particular dynamic market or particular part of a dynamic market. In other words, it can use a dynamic market as its sole route to market. Before excluding a supplier for not being part of a dynamic market, a contracting authority should consider any application for membership submitted from those who have submitted a tender unless, due to exceptional circumstances resulting from the complexity of the procurement or a contracting authority being unable to consider the application before the deadline for submitting a request to participate (or, where there is no invitation for requests, the deadline for submitting the first tender).

Conditions for membership of a dynamic market (or part of it) can be set provided they are a proportionate means of ensuring that the supplier has legal and financial capacity and technical ability to perform the contract awarded, by reference to the market.

Applications for membership to a dynamic market must be accepted at all times during the term of the market and be considered within a reasonable period. If the conditions are satisfied and the supplier is not an excluded/excludable supplier, it should be admitted to the market as soon as reasonably practicable. There should be no limit set by a contracting authority to the number of suppliers that can be admitted to a dynamic market (or part of it). Conditions for membership should not be modified during the term of the market. Members can be removed from a dynamic market if the contracting authority who lets the dynamic market considers that the supplier is an excluded supplier, an excludable supplier or they do not satisfy the conditions for membership. Presumably, these rules regarding removal of members do not extend to the contracting authority accessing the dynamic market if it has been set up by a centralised procurement authority.

Clause 38 sets out that fees may be charged to suppliers that are awarded contracts by reference to membership of a dynamic market. The fee must be a fixed percentage of the estimated value of the awarded contract. Charging of fees must be set out in the documentation used to establish the dynamic market. For utilities dynamic markets, fees may be charged in connection with obtaining and maintaining membership to the market. There is currently no reference to the anticipated requirement for fees to be used solely for the public good, and this is another example of a proposal under the Green Paper that has not been fully taken forward in the Bill.

Before establishing a dynamic market, clause 39(2) provides that a contracting authority must publish a notice confirming that it intends to establish the dynamic market (along with any further information which may be specified in further regulations).

Clause 39 (Dynamic market notices) sets out a series of other notices (each a "dynamic market notice) that contracting authorities will be required to publish in respect of any dynamic market that they establish, including:

- A notice setting out that the dynamic market has been established (clause 39(3));
- A notice setting out any modifications to the dynamic market (clause 39(4); and
- A notice confirming once the dynamic market has ceased to operate (clause 39(5)) (although this does not apply to private utilities).

The notices referred to in clauses 39(3) to (5) must be published as soon as reasonably practicable following the relevant event referred to in those sub-sections.

Chapter 3: Direct award

Clause 40 sets out certain special cases where a direct award of a public contract may be permitted, i.e. where a contracting authority may award a public contract directly without having followed a competitive award process. Where a "direct award justification" applies, a contracting authority can award a contract directly to a supplier who is not excluded. "Direct award justifications" are set out in Schedule 5 of the Bill and include:

- Prototypes and development – where the public contract concerns the production of a prototype, or the supply of other novel goods or services, and for the purpose of testing the suitability of the goods or services, researching the viability of producing or supplying those goods or services, or for other research, experiment study or development.
- Single suppliers – where only one supplier is capable of performing the public contract for any of the following reasons:
    - the public contract relates to the creation or acquisition of a unique work of art or artistic performance;
    - due to the supplier having unique intellectual property rights or other exclusive rights, only that supplier can supply the goods, services or works and there are no other reasonable alternatives to the goods, services or works; or
    - due to an absence of competition for technical reasons, only a particular supplier can supply the goods, services or works and there are no other reasonable alternatives to the goods, services or works.
- Additional or repeat goods – where:
    - the public contract relates to the provision of goods, services or works from the existing supplier as an extension, or partial replacement, to the existing goods, services or works, and where a change in supplier would result in differences or incompatibility with the existing goods, service or works which would also result in disproportionate technical difficulties in maintenance or operation; or
    - where the public contract relates to the provision for goods, services or works by an existing supplier that are similar to those already provided, and where those goods, services or works were provided under a contract that was awarded pursuant to a competitive tendering procedure in the previous five years, and where the original tender notice or supporting documents set out the contracting authority's intention to carry out a subsequent procurement for similar goods, services or works in accordance with this direct award justification.
- Commodities – where the public contract concerns goods purchased on a commodity market.

- Advantageous terms on insolvency – where the public contract will ensure terms that are particularly advantageous to the contracting authority due to the fact that the supplier is undergoing insolvency proceedings.
- Urgency – where the goods, services or works are strictly necessary for reasons of extreme urgency and where the public contract cannot be awarded pursuant to a competitive tendering procedure (i.e. where the normal time limits cannot be complied with).
- Necessary to protect life – see clause 41 below.
- User choice contracts – where the public contract relates to the supply of user choice services - either services specified as being "light touch" pursuant to further regulations, which are supplied for the benefit of a particular individual, or where the contracting authority is required by statute to have regard to the views of an individual or their carer in respect of who supplies the services), and where the following conditions are met:
    - the individual or their carer has expressed a preference as to who should supply the services, or only one supplier is capable of providing the services as a result of the nature of the services; and
    - the contracting authority considers it is not in the best interest of the individual to award a contract pursuant to a competitive tendering procedure.
- Defence and security – where the public contract relates to specific defence and security contracts, including circumstances where a new contract would be a "qualifying defence contract" under section 14(2) of the Defence Reform Act 2014.

If a contracting authority considers that there is an overriding public interest in doing so, it may directly award a public contract to an excluded supplier. The Bill sets out at clause 40(5) what is to be considered in the overriding public interest. A selection process or other preliminary steps may be undertaken as deemed appropriate in the circumstances.

Additionally, clause 41 introduces the concept of direct awards to protect life. If a Minister of the Crown considers it necessary to protect human, animal or plant life or health or, to protect public order and safety, the Minister may (by way of regulations) provide that certain contracts may be awarded as if a "direct award justification" applies. As the Explanatory Notes to the Bill provide, this clause is deemed to cover procurement during an emergency event (such as a pandemic) where the circumstances leading to the event are foreseeable, thereby possibly ruling out the application of Schedule 5 (Direct award justifications). These transparency notices set out information yet to be confirmed in secondary legislation.

A direct award may also be made under the Bill to a non-excluded supplier if the contracting authority invited suppliers to submit tenders or requests to participate as part of a competitive tender procedure, did not receive any suitable responses and it therefore deems that a competitive tender procedure is not possible for award of the contract. The Bill provides guidance at clause 42(2) as to what would render a tender or request unsuitable, for example, it does not satisfy award criteria or the price is abnormally low (it is notable that this is: the only place in the Bill where abnormally low prices are mentioned).

Clause 43 (Transparency notices) sets out a mandatory requirement for contracting authorities to publish transparency notices where they intend to make direct awards pursuant to either clause 40 or clause 42, apart from where such a direct award is justified by virtue of paragraph 16 of Schedule 5 (direct award of user choice contracts).

Chapter 4: Award under frameworks

A public contract may be awarded in accordance with a framework. A "framework" is a contract between a contracting authority and one or more suppliers, that provides for future award of public contracts to those suppliers. Clause 44(5) sets out in detail what information a framework must include, as follows:

- a description of goods, services or works to be provided under contracts awarded in accordance with the framework;
- the price payable, or the mechanism for determining the price payable, under such contracts;
- the estimated value of the framework;
- the selection process for awarding contracts in accordance with the framework;
- the term of the framework;
- which contracting authorities are entitled to award public contracts in accordance with the framework; and
- whether the framework is awarded pursuant to clause 47 (Open frameworks).

Of note, the new definition for "public contracts" includes framework agreements. This suggests that the ability to award public contracts under a framework also permits the award of a framework within a framework - a concept which is not permitted under the current rules. We expect further clarification and guidance on this point to be addressed at Committee Stage while the Bill progresses through the House of Lords.

A framework may allow for the future award of public contracts pursuant to its terms by way of a competitive selection process (clause 44(3)) or, in certain circumstances, without competition (clause 44(4)). A public contract may be awarded under a framework without further competition if:

- there is only one supplier on the framework; or
- the framework sets out the core terms of the public contract and an objective mechanism for supplier selection.

If provided for in the relevant framework, fees can be charged representing a fixed percentage of the estimated value of the contract awarded under the framework (clause 44(7)). As above (in relation to dynamic markets), the concepts trailed in the Green Paper for such fees to be proportionate and used solely in the public interest have not been taken forward into the Bill.

As a general rule, clause 45 states that the term of a framework must not exceed 4 years (or 8 years for a "defence and security framework" or "utilities framework"). A framework may have a longer term if the contracting authority considers that the "nature" of the goods, services and works to be supplied means a longer term is required. Reasons for a longer term must be set out in the tender notice or transparency notice for the framework (clause 45(3)).

Clause 46 (Frameworks: implied terms) confirms that there is a term implied into every framework that a contracting authority may exclude a supplier that is an excluded supplier, or who has become an excludable supplier since the framework was awarded, from participating in any call-off procedure run under the framework.

Clause 47 (Open frameworks) of the Bill provides for the new concept of "open frameworks." An open framework provides for the award of successive frameworks, as part of a 'scheme' of frameworks, on substantially the same terms (capable of being made by reference to the same tender or transparency notice without "substantial modification"). Given this, the framework is not so much a single open framework, as a number of individual frameworks let one after another. Whether this has significant utility and flexibility remains to be seen.

Open frameworks must provide for the award of a framework at least once during:

- the period of 3 years following the award of the first framework; and
- each period of 5 years following award of the second framework.

Each open framework in a scheme will expire on the award of the next framework. The final open framework must expire 8 years following the award of the first framework. An open framework awarded to only one supplier must expire 4 years following contract award.

An open framework may be awarded to an existing supplier by way of reference to a tender relating to an earlier award or relating to the current award. If there is no limit on the number of suppliers that can be party to a framework, a contract may be awarded to an existing supplier merely due to the fact that the supplier has been awarded a previous framework under the same scheme. Whether this will happen in practice, or whether suppliers (and contracting authorities) will want to take the opportunity to refresh pricing and proposals is likely to depend on the details of the individual frameworks.

Chapter 5: After award, atandstill periods and notices

Clause 48 (Contract award notices and assessment summaries) of the Bill provides that before entering into a public contract, contracting authorities must (unless an exception set out in clause 48(6) applies):

- provide an "assessment summary" to each supplier who submitted a tender, comprising information regarding the authority's assessment of the supplier's tender and the assessment of the winning tender). We read this as two separate sets of feedback, rather than a comparative exercise as is currently required by the provision of the "characteristics and relative advantages" of the winning bid;
- publish a "contract award notice" (confirming that the authority intends to enter into a contract);
- wait for the "mandatory standstill period" to end (8 working days starting on the date that the contract award notice is published) or, if later, any other standstill period provided for in the contract award notice (clause 49, Standstill periods on the award of contracts); and
- pursuant to clause 50 (Key performance indicators), if the contract value exceeds £2 million, set at least 3 key performance indicators in respect of the contract (subject to any exceptions set out in clause 50(5) e.g. framework agreements).

Once a public contract is entered into, clause 51 (Contract details notices and publication of contracts) provides that a "contract details notice" must be published confirming the same within 30 days of the contract being entered into (120 days for light touch contracts). If the estimated value of the contract exceeds £2 million, the authority must publish a copy of the contract (contracting authorities will need to carefully consider which elements of the contract should be redacted).

The Bill refers throughout to a range of notices that contracting authorities must or may issue during a procurement process. We have set out such notices below with confirmation as to whether they are compulsory or voluntary. All notices are subject to additional regulations that may be made under clause 86 (Notices, documents and information: regulations) regarding the form, content, method of issue and publication requirements or notices under the Bill.

Notice	Clause	Compulsory / Voluntary
Pipeline notice	84	Compulsory for contracting authorities who consider that they will pay more than £100m under relevant contracts in the coming financial year
Planned procurement notice	14	Voluntary
Preliminary market engagement notice	16	Voluntary
Tender notice	20	Compulsory where a contracting authority intends to award a public contract pursuant to clause 18
Contract award notice	48	Compulsory before entering into a public contract (which does not appear to include call-offs awarded under a framework or contracts concluded under a dynamic market)
Contract details notice	51	Compulsory
Procurement termination notice	53	Compulsory – to be published as soon as reasonably possible after making a decision not to award a contract following the publishing of a tender or transparency notice.
Contract change notice	70	Compulsory (except where exemptions in clause 70(2) apply)
Contract termination notice	73	Compulsory – to be published within 30 days of the termination of a public contract, including discharge; expiry; termination by a party; recission; or set aside by Court order
Dynamic market notice	39	Compulsory where a dynamic market is to be established
Transparency notice	43	Compulsory where there is a direct award within the meaning of clause 40 or clause 42
Payments compliance notice	64	Compulsory
Below-threshold tender notice	79	Compulsory where a contracting authority intends to advertise for the purpose of inviting tenders for a below threshold procurement

Chapter 6: General provision about award and procedures

Time limits

Clause 52 (Time limits) provides that all time limits set by a contracting authority for a procurement process must be the same for all suppliers (equal treatment provision). Additionally, when setting time limits, contracting authorities must have regard to:

- the nature and complexity of the contract or any modification to the tender notice/associated documents;
- the need for site visits, physical inspection, other practical steps or subcontracting;
- the nature and complexity of any modification made to the tender notice or associated tender documents; and
- the importance of avoiding unnecessary delay.

Clause 52 also sets out the following minimum time limits which must be adhered to during the "participation period" and "tender period" of a procurement process:

Participation Period (day following invitation to submit requests to participate until day of deadline for submission):

Circumstance	Minimum period
Light Touch Contract	No minimum
State of urgency making 25 days impractical	10 days
Standard	25 days

Participation Period (day following invitation to submit requests to participate until day of deadline for submission):

Circumstance	Minimum period
Light Touch Contract	No minimum
Qualifying planned procurement notice issued	10 days
State of urgency making other minimum periods impractical	10 days
Tenders submitted electronically and tender notice and associated tender documents are all provided at the same time.	25 days
Tenders submitted electronically and tender notice and associated tender documents are not all provided at the same time.	30 days
Tenders not submitted electronically and tender notice and associated tender documents are all provided at the same time.	30 days
Tenders not submitted electronically and tender notice and associated tender documents are not all provided at the same time.	35 days

Excluded and excludable suppliers

Clause 54 (Meaning of excluded and excludable suppliers) sets out the definition for "excluded" and "excludable" suppliers.

Suppliers are excluded if the contracting authority considers that a mandatory exclusion (set out at Schedule 6 of the Bill) applies to the supplier or an "associated supplier" (defined in clause 26(4) as a supplier that the supplier tendering for a contract is relying on to meet the conditions of participation for the procurement) and the circumstances giving rise to the mandatory exclusion are likely to occur again; or the supplier or an associated supplier is on the "debarment list" due to a mandatory exclusion ground.

The broad headings of mandatory exclusion grounds have been recast according to UK-specific grounds and read much more easily than the previous grounds under the PCR. They are set out in Schedule 6 and include:

- Corporate manslaughter or homicide;
- Terrorism;
- Theft, fraud, bribery etc.;
- Labour market, slavery and human trafficking offences;
- Organised crime;
- Tax offences;
- Cartel offences;
- Ancillary offences (including aiding, abetting, counselling or procuring the commission of an offence otherwise set out in Schedule 6);
- Offences committed outside the United Kingdom which would otherwise have been an offence under Schedule 6;
- Misconduct in relation to tax; and
- Competition law infringements.

In respect of the mandatory exclusion grounds in Schedule 6, there is a difference in approach to the timings that are currently set out in the PCR. Whilst the general rule is that the mandatory exclusion ground should have occurred in the preceding five years, there are some mandatory exclusion grounds that now only need to have occurred in the preceding three years (set out in Paragraph 42(4) of Schedule 6), including (among others) blackmail, fraud and fraudulent trading, and labour market offences. Additionally, Paragraph 42(3) sets out various mandatory exclusion grounds that are to be disregarded to the extent that they occurred before the coming into force of Schedule 6.

Given the change in approach to timings, contracting authorities will need to familiarise themselves with the new mandatory exclusion periods to ensure that they apply the exclusion grounds appropriately on a case-by-case basis.

Suppliers are excludable if the contracting authority considers that a discretionary exclusion (set out at Schedule 7 of the Bill) applies to the supplier or an associated supplier and the circumstances giving rise to the discretionary exclusion are likely to occur again; or the supplier or an associated supplier is on the "debarment list" due to a discretionary exclusion ground. The broad headings of the discretionary exclusion grounds set out in Schedule 7 include:

- Labour market misconduct;
- Environmental misconduct;
- Insolvency, bankruptcy etc.;
- Potential competition infringements;
- Professional misconduct;

- Breach of contract and poor performance of a contract to which a contracting authority, a public authority, or an equivalent authority outside of the UK are a party to;
- Acting improperly in procurement; and
- Posing a threat to national security.

Again, these have been re-cast for UK-specific circumstances, but also address some of the previous frustrations of UK contracting authorities in applying the previous regime of exclusions, including settlement agreements under the ground for breach of contract.

Clause 55 (Considering whether a supplier is excluded or excludable) sets out the matters that contracting authorities should consider in determining the likelihood of circumstances occurring again including steps taken to prevent reoccurrence, time elapsed and evidence that the supplier took the circumstances seriously. This is the new version of "self-cleaning" in the Bill, and the process here is the same for both "excluded" and "excludable" suppliers. Clause 55 also includes requirements for contracting authorities to allow representations and evidence from suppliers prior to making a decision. For a private utility, excluded suppliers are to be regarded as excludable.

Debarment

A key policy area under the Green Paper was the introduction of a centrally managed debarment list, with the intention being that the exclusion rules would be used to tackle unacceptable behaviour in public procurement.

The Government set out its intention to establish the centrally managed debarment list, with suppliers falling within one of the mandatory exclusion grounds being added to the list, streamlining the process of identifying suppliers who have relevant convictions under the mandatory exclusion grounds. The concept of the debarment list has been taken forward into the Bill (see clause 59 below), and where a supplier is included on the list they should be excluded from procurements (on the basis that are an "excluded" supplier (although they can apply to be removed from the debarment list following suitable self-cleaning).

Contracting authorities are obligated under clause 56 (Notification of exclusion of supplier) to notify the relevant appropriate authority within 30 days of a supplier being disregarded, excluded, or replaced due to a relevant exclusion. Contracting authorities must also provide notice if proceedings are brought under Part 9 relating to the disregard or exclusion of a supplier within 30 days of the proceedings being commenced or determined.

A Minister of the Crown can investigate, at any time whether a supplier is an excluded or excludable supplier due to a relevant exclusion ground. The Minister of the Crown must follow the procedural requirements set out in clause 57 (Investigations of supplier: exclusion grounds) including the issue of a notice to the supplier relating to the investigation. An investigating Minister can request by notice, documents and other assistance from contracting authorities and the supplier. In accordance with Clause 58, a Minister is required to prepare a report following an investigation under clause 57 and may be required to publish or issue to the supplier the report (or part of it) pursuant to clause 58.

Clause 59 (Debarment list) provides for the new concept of a "debarment list" first explored in the Green Paper (and the policy of which is considered above). This allows a Minister of the Crown to enter the name of a supplier as an excluded or excludable supplier on a list following an investigation under clause 57 by the Minister. An entry on the debarment list must confirm which exclusion grounds apply to the supplier, if they are mandatory or discretionary and when the Minister expects

the ground(s) to no longer apply (and the supplier's name be removed from the debarment list). A Minister of the Crown:

- must publish the debarment list and any amends;
- must consult with Welsh Ministers and Northern Ireland Department before entering or removing a supplier form the list;
- must keep the list under review;
- may amend the list at any time; and
- must remove an entry if it is satisfied that the supplier is not an excludable or excluded supplier.

A supplier may apply to a Minister of the Crown, at any time, for removal of their name from the debarment list (clause 60, Debarment list: application for removal). The application must only be considered by a Minister if there has been a material change in circumstances since the supplier was listed or since the supplier's last application for removal or, the application is supported by significant information that has not previously been considered by the Minister.

Clause 61 provides for appeals by suppliers against a decision to enter their names on the debarment list or not to remove their name from the list following an application under clause 60. The procedure for bringing and determining such appeals is to be set out in secondary legislation.

Part 4: Management of public contracts

Part 4 of the Bill refers to the management of public contracts, covering three key areas of procurement practice that will be of great interest to procurement practitioners. First, new implied terms that will be deemed to be incorporated into all public contracts. Second, and mostly controversially, are new requirements for contracting authorities to publish information about payments and supplier performance and clauses governing the interaction with sub-contractors, representing a radical change to on-going contract performance management with significant potential impacts on bidder's rights to participate in future opportunities. Third, are clauses governing the modification of existing contracts, replacing Regulation 72 of the PCR.

Terms implied into public contracts

The Bill sets out a series of terms that are to be implied into every public contract which have the following effects:

- Contracting authorities must accept and process electronic invoices that meet certain minimum requirements – set by reference to standards adopted by the British Standards Institution (clause 62, Electronic invoicing: implied term).
- Contracting authorities must make payment within 30 days of receiving an invoice from a supplier (clause 63, Implied payment terms in public contracts). This payment period does not apply where the invoice is disputed, to concession contracts or utilities contracts awarded by a private utility or to contracts awarded by a maintained school, academy or sixth form college. However, parties remain at liberty to agree shorter payment periods (clause 63(7)).

Any term included in a public contract which purports to restrict or override these terms will not have legal effect (clause 62(5)) or are "without effect" (clause 63(6)).

Notices about payments and performance

Clause 64 (Payments compliance notices) creates a new obligation for contracting authorities to publish a "payments compliance notice". This notice must be published every six months (with a reporting period ending 1 March or 30 September, as appropriate) and should set out information detailing that contracting authority's compliance with its obligation to make payments within 30 days of invoices (see clause 63 above). This clause does not apply to private utilities.

Clause 65 (Information about payments under public contracts) creates a further obligation for contracting authorities to publish information on a quarterly basis about any single large payment (over £30,000) made in the previous quarter (although the financial threshold and time limit for publication may subsequently be changed by secondary legislation). The information must be published within 30 days of the end of quarter in which the payment has been made. This clause does not apply to utilities, concession contracts, or contracts awarded by a maintained school, academy or sixth form college

The requirements for the exact contents of these notices will be set out in secondary legislation under clause 86. At this stage, it is clear that these will be an additional administrative burden for contracting authorities, but the full extent will only be known once the detailed regulations are published.

A further publication requirement is set by clause 66 (Assessment of contract performance). Where a contracting authority has set and published Key Performance Indicators (KPIs) in compliance with clause 50 (which requires at least three KPIs

to be published for contracts worth more than £2m), it must publish information annually about the supplier's compliance with those KPIs.

Clause 66(5) also requires contracting authorities to publish information about a supplier's breaches of contract where that breach leads to termination, damages or an agreed settlement. Full details of the contents of these notices will be specified in regulations. Relevant information must be published within 30 days of the date when clause 66(5) first applied (for example, the date when the public contract was terminated, the date that damages were awarded, or the date of a settlement agreement).

The discretionary exclusion grounds (set out in Schedule 7) include circumstances where a contracting authority has published information under clause 66(5) about a suppliers' breach or poor performance of a contract. Another discretionary exclusion ground is where a supplier has failed to improve performance after being given an opportunity to do so when they are not performing to the contracting authority's satisfaction. This is an extension of the existing discretionary exclusion ground for poor past performance under the PCR which was narrowly drafted and not widely used (notably as contracting authorities often struggled to gather enough information to confidently rely on the exclusion ground). The setting and monitoring of KPIs for higher value contracts and the general performance by suppliers under all contracts will undoubtedly take on much greater significance under the new rules. Clause 66 does not apply to private utilities.

Sub-contracting

Clause 67 (Sub-contracting: directions) creates a new power for contracting authorities to insist that suppliers enter into legally binding arrangements with sub-contractors who are to fulfil parts of a public contract. If a supplier fails to do so, having been directed by the contracting authority, the contracting authority can refuse to award the public contract (or, if the public contract has already been entered into, terminate it).

Clause 68 (Implied payment terms in sub-contracts) creates implied payment terms in "public sub-contracts" that are equivalent to those implied into the "tier 1" or "main" public contract as set out in clause 63. This means that payments by suppliers to sub-contractors must be made within 30 days of invoice, regardless of what the sub-contract actually says (see clause 68(3)). In practice, it will be interesting to see the extent to which sub-contractors feel able to enforce this against lead suppliers.

Modifying public contracts

Clause 69 (Modifying a public contract) and Schedule 8 (Permitted contract modifications) set out the situations in which a public contract may be modified. It also introduces a new concept – the "convertible contract" – which is a contract that will become a public contract as a result of a modification.

Modifications of either a public contract or a convertible contract are allowed where they are permitted modifications (within the meaning set out in Schedule 8, Permitted contract modifications), where the modification is not substantial (clause 69(3)), or where the modification is below threshold (clause 69(4).

The permitted contract modifications in Schedule 8 provide that public contracts can be modified in the following circumstances:

- Provided for in the contract: where this is unambiguously provided for in the awarded contract and the tender documents, and where this does not change the overall nature of the contract.

- Urgency and the protection of life, etc: where the purpose could otherwise be achieved via direct award (under clause 40) by reference to paragraph 13 of Schedule 5 (extreme and unavoidable urgency) or to clause 41 (direct award to protect life, etc).
- Unforeseeable circumstances: where the modification is required in response to circumstances that were not reasonably foreseeable at the time that the contract was awarded and does not change the overall nature of the contract or increase the contract value by more than 50%.
- Materialisation of a known risk: where the modification is required in response to a "known risk" that has prevented the contract from being performed as required, goes no further than necessary to address the "known risk", does not increase the contract value by more than 50% and where awarding a different contract would not be in the public interest. A known risk is one that has been identified in the procurement documents but, due to its nature, could not be addressed in the contract as awarded.
- Additional goods, services or works: where the modification is required for additional goods, services or works of the kind supplied in the original contract where using a different supplier would result in different or incompatible goods, services or works that would cause disproportionate technical difficulties or substantial inconvenience and substantial duplication of costs. Such a modification cannot increase the value of the contract by more than 50%.
- Transfer on corporate restructuring: where the modification is required to novate a contract following a corporate restructuring or similar circumstance.
- Defence authority contracts: where the modification is required to a defence authority contract to enable the contracting authority to respond to developments in technology and continuous supply of those goods, services or works is necessary to maintain the operational capabilities of the Armed Forces.

A modification is not substantial (and therefore permitted) within the meaning of clause 69(3) where the modification does not:

- increase or decrease the term by more than 10% of the original period (e.g. a 5 year contract will only be able to be varied by 6 months);
- change the overall nature or material scope of the contract; or
- materially change the economic balance of the contract in favour of the supplier.

A modification is below threshold (and therefore permitted) within the meaning of clause 69(4) where the modification does not:

- alter the value of the contract by more than 10% for a goods or services contract or 15% for a works contract;
- result in the aggregated value of the contract (i.e. the value of the contract following its modification) exceeding the relevant procurement threshold (or any series of modification do not, in total, exceed the relevant threshold); and
- change the scope of the contract.

Clause 69(2) also provides that a contracting authority is permitted to modify a light touch contract.

Clause 70 (Contract change notices and publication of modifications) sets out a requirement to publish a "contract change notice" if the contracting authority is relying on the "permitted modification" grounds set out in Schedule 8. Clause 70 also requires the publication of a contract change notice if a series of modifications to a contract, when taken together, would no longer count as not substantial or below threshold as described above.

Clause 70(2) sets out that a contract change notice will not be required if the modification:

- increases or decreases the value of the contract by 10% or less for goods or services contracts, or 15% or less for works contracts;
- increases or decreases the term of the contract by 10% or less of the maximum term provided for on award; or
- relates to a light touch contract.

However, where the modification falls within (a) or (b) above, and the contracting authority considers that it could reasonably have been made together with another modification which itself requires a contract change notice, a further contract change notice will be required in respect of that modification (clauses 70(4) and 70(5)).

Additionally, pursuant to clause 70(6), where a contracting authority makes a qualifying modification (defined by clause 70(7) as a modification which modifies, or results in, a public contract with an estimated value of more than £2m), the contracting authority must publish a copy of the contract (as modified) within 90 days of the modification.

Clause 71 (Voluntary standstill period) provides that contracting authorities are able to impose voluntary standstill periods in respect of contract modifications and, where such a voluntary standstill period has been included in the contract change notice, the contracting authority is not permitted to complete the modification until that standstill period has elapsed. As set out earlier in respect of Part 3 of the Bill, the standstill period is a period of 8 working days beginning on the date of publication of the contract change notice.

Terminating public contracts

Clause 72 creates further implied contractual terms enabling a contracting authority to terminate a public contract if any the following grounds apply:

- the contract was awarded or modified in material breach of the Procurement Act or regulations made under it;
- the supplier has, since the award of the contract, become an excluded supplier or the contracting authority discovers that, at the time of contract award, the supplier was an excludable supplier (including by reference to an associated supplier); or
- a sub-contractor to the supplier has, since the award of the contract, become an excluded supplier or an excludable supplier – but only where the contracting authority has requested information in relation to sub-contractors under clause 28(1) (Excluding suppliers by reference to sub-contractors) and did not know that the supplier intended to use a sub-contractor that is excluded or excludable.

Pursuant to clause 72(4), before terminating a public contract under this implied term, the contracting authority must notify the supplier of its intention to terminate and the termination ground that applies. The supplier must be given a reasonable opportunity to make representations in response. If the proposed termination is due to a sub-contractor being excluded or excludable, the supplier must be given reasonable opportunity to cease sub-contracting and find alternative provision.

Clause 73 (Contract termination notices) contains a new requirement for contracting authorities to publish a "termination notice" within 30 days of a public contract's expiry, recission, discharge, termination by a party, or set aside by a court. The termination notice must specify that the contract has ended and include any other details required by regulations. It will be interesting to see whether, in practice, contracting authorities will remember to publish termination notices, particularly as they will inevitably coincide with the mobilisation of the newly procured contract.

Part 5: Conflicts of interest

Part 5 of the Bill addresses conflicts of interest and how to identify them, mitigate the impact of any conflicts and carry out conflict assessments. Although the PCR includes high level measures at Regulation 24 to tackle conflicts of interest, Part 5 of the Bill goes into more detail in respect of what comprises a conflict, including a duty to exclude a supplier if it cannot be managed and a more onerous requirement to prepare a conflicts assessment prior to publishing a tender notice or transparency notice.

Duty to identify

Clause 74 (Conflicts of Interest: duty to identify) provides that a contracting authority must take all reasonable steps to identify and keep under review any conflict of interest or potential conflict of interest in relation to a procurement. A conflict of interest can arise in respect of a person (or Minister) acting for or on behalf of a contracting authority in relation to a procurement. Such person is "acting in relation to a procurement" if they influence a decision made by or on behalf of a contracting authority in relation to a procurement (see clause 74(3)). An "interest" is defined as a personal, professional or financial interest and may be direct or indirect (see clause 74(4)).

Duty to mitigate

Clause 75 (Conflicts of interest: duty to mitigate) provides that a contracting authority must take all reasonable steps to ensure that a conflict of interest does not put a supplier at an unfair advantage or disadvantage in respect of a procurement. This may include the contracting authority asking a supplier to take reasonable steps to ensure that it is not put at an unfair advantage (see clause 75(3)).

If a contracting authority considers that a conflict of interest puts a supplier at an unfair advantage in relation to the award of a contract, and either the advantage cannot be avoided or the supplier will not take steps that the contracting authority considers necessary, the supplier must be treated as an excluded supplier.

Conflict assessments

Clause 76 (Conflicts assessments) provides that before publishing a tender or transparency notice or publishing a dynamic market notice, a contracting authority must prepare a conflicts assessment in relation to a procurement. A conflicts assessment must include details of any actual or potential conflicts of interest the contracting authority has identified (defined in the Bill as the "duty to identify") and any steps that the contracting authority has taken to mitigate such conflicts in accordance with clause 75 (defined in the Bill as the "duty to mitigate"). Details must also be included where a contracting authority is aware of circumstances that might cause a reasonable person to wrongly believe that there is an actual or potential conflict of interest and the steps it has taken to address such a perception.

A contracting authority must keep any conflict assessments under review, revise such assessments as necessary and when publishing any notices, confirm that a conflicts assessment has been prepared and revised (see clause 76(5)).

Part 6: Below-threshold contracts

Clause 77 (Regulated below-threshold contracts) defines a regulated below-threshold contract as a contract which has an estimated value that is below the relevant threshold as set out in Schedule 1 to the Bill and which is not:

- exempted under Schedule 2 to the Bill;
- a concession contract; or
- a utilities contract.

Clause 77(2) provides that Part 6 of the Bill regarding below-threshold contracts does not apply to a contracting authority that is a maintained school, Academy or sixth form college, nor does it apply in relation to the award and subsequent management of a contract awarded by a transferred Northern Ireland authority unless the contract is let under a reserved procurement arrangement or a devolved Welsh procurement arrangement. Part 6 also does not apply to a contract awarded under a transferred Northern Ireland procurement arrangement.

Clause 78 (Regulated below-threshold contracts: procedure) sets out the procedure to be adopted for the procurement of below-threshold contracts, and sets out that where a contracting authority intends to procure a regulated below-threshold contract, it may not restrict submission of tenders on the basis of a supplier's legal and financial capacity or technical ability. This is equivalent to regulation 111 of the PCR that prohibits the use of a pre-qualification stage for below-threshold contract opportunities.

There is an exception to this prohibition in respect of works contracts with an estimated value of over £138,760 in respect of central government authorities or £213,477 in respect of any other contracting authority.

This prohibition in clause 78(1) also does not apply in relation to the award of contracts by a devolved Welsh authority (unless awarded under a reserved procurement arrangement), under a devolved Welsh procurement arrangement, or for call-off contracts awarded in accordance with a framework.

Below-threshold tender notice

Clause 79 (Regulated below-threshold contracts: notices) relates to the notification requirements for regulated below-threshold contracts, and provides that such contracts must be notified to the market in a below-threshold tender notice if they have an estimated value of:

- in the case of contracts to be awarded by a central government authority, not less than £12,000, or
- in the case of contracts to be awarded by any other contracting authority, not less than £30,000.

These contracts are called "notifiable below-threshold contracts".

If a contracting authority intends to procure a notifiable below-threshold contract, it must first publish a below-threshold tender notice before it advertises for the purposes of inviting tenders. While the Bill is silent on where such advertisement might be placed, we understand this to be the equivalent of the current regulation 110 in the PCR which prohibits the advertisement of below-threshold opportunities which exceed specified values until a contract notice has been published to the Find a Tender Service. The requirement to publish does not apply if the contracting authority only invites tenders from particular or pre-selected suppliers and does not advertise the opportunity elsewhere.

The required content of a below-threshold tender notice is yet to be published and will follow in secondary legislation.

Any time limits included in a below-threshold tender notice must be reasonable and the same for all suppliers (clause 79(6)).

Contract details notice

The contracting authority must publish a "contract details notice" as soon as reasonably practicable after entering into a notifiable below-threshold contract (see clause 79(3)). This is the new equivalent to the Contract Award Notice under the PCR and is in addition to the new "contract award notice" under the Bill (although a contracting authority seems not to need to publish a contract award notice under this Bill for a notifiable below-threshold contract, only a contract details notice).

The required content of a contract details notice is yet to be published and will follow in secondary legislation.

Clause 80 (Regulated below-threshold contracts: implied payment terms) implies payment terms into every regulated below-threshold contract entered into by a contracting authority, providing for:

- sums due from the contracting authority to be paid within 30 days of the date of receipt of a valid and undisputed invoice (clause 80(2)(a)) or (if later) the date on which the sum first became due in accordance with such invoice (clause 80(2)(b)); and
- the contracting authority to notify the supplier without undue delay if it receives an invoice which it considers to be invalid (clause 80(4)(a)) or which it disputes (clause 80(4)(b)).

Pursuant to clause 80(7), invoices are considered to be valid if they meet the requirements of the contract, and set out:

- the name of the invoicing party,
- a description of the goods, services or works supplied,
- the sum requested, and
- a unique identification number.

Clause 80(8) provides that terms equivalent to the above payment terms will be implied into any sub-contract, supply agreement or other contract which is wholly or substantially for the purpose of performing (or contributing to the performance of) the regulated below-threshold contract.

Clauses 80(10) and 80(11) provide that parties to a regulated below-threshold contract cannot contract out of these payment terms, although they can agree that sums must be paid earlier than the prescribed 30 days.

Part 7: Implementation of international obligations

'Excludable' bidders – non-UK and non-treaty state suppliers

In accordance with clause 18(3) of the Bill (Award of public contracts following a competitive procedure), contracting authorities may exclude non-UK suppliers and non-treaty state suppliers.

What is a treaty state supplier?

Clause 81 introduces a new term of "treaty state supplier". This is distinct from a "United Kingdom supplier" (which is described below), and a treaty state supplier is a supplier that is "entitled to the benefits" of one (or more) of the international agreements listed in the Bill's Schedule 9.

The specified international agreements currently listed in Schedule 9 (in chronological order) include the WTO GPA, the EU-UK Trade and Cooperation Agreement (the TCA), and 22 other free trade agreements, strategic partnerships and other agreements providing for economic cooperation. Regulations may be brought forward to amend Schedule 9 from time to time.

Clause 81(1) provides that a treaty state supplier is entitled to the benefit of an international agreement set out in Schedule 9 (Treaty state suppliers (specified international agreements)).

For the purposes of clause 81(1), being "entitled to the benefit" means being entitled to access to the relevant market-place, and being entitled to a right to enforce the provisions of that international agreement in respect of the same.

The rationale for the provisions contained in Part 7 relate to the United Kingdom's post-Brexit trade discussions, and the need to establish our own network of Free Trade Agreements (FTAs), and this was trailed as one of the key benefits of being a sovereign state outside of the European Union.

As part of each FTA that the United Kingdom has signed up to, an agreement is made to allow suppliers in the relevant state access to certain parts of our market (and vice versa). Not all FTAs will provide the same market access conditions, and in complying with the obligations under each FTA it will be necessary to understand which suppliers have access to which markets under each agreement (for example, whether the FTA only grants access to services markets, or whether it grants full market access).

Clause 81(2) of the Bill specifically addresses this issue, clarifying that a supplier is only a treaty state supplier to the extent that the FTA to which it is entitled to the benefit of in relation to the procurement being carried out or challenged (i.e. it has access under its relevant FTA to the specific market for the relevant procurement).

A treaty state can be a sovereign state, territory or organisation of states (but not the UK) that is party to a Schedule 9 international agreement with the UK.

Clause 82 (Treaty state suppliers: non-discrimination) sets out that a "United Kingdom Supplier" must be established in, controlled from or mainly funded from the UK (including British Overseas Territories or Crown Dependencies), but cannot be a treaty state supplier.

Further, a supplier cannot claim to be a treaty state supplier if it is entitled to the benefit of an international agreement solely due to the UK being a party to that agreement.

Additionally, clause 82 sets out the general prohibition on contracting authorities discriminating against a treaty state supplier in carrying out a procurement. This prohibition catches situations where a treaty state supplier is treated less favourably than any UK or other treaty state supplier by virtue of:

- association with a particular treaty state; or
- lack of association with the UK or any other treaty state.

This general prohibition aligns with the World Trade Organisation's Most Favoured Nation principle, whereby members must accord the most favourable treatment given to any one member to all other members (i.e. it is not permitted under those international obligations to discriminate in favour of UK based suppliers).

As originally drafted, this non-discrimination principle was not enforceable in civil proceedings in respect of below-threshold procurements or international organisation procurements. However, the Government has proposed an amendment during the House of Lords Committee Stage to clarify that this non-discrimination principle is enforceable in civil proceedings in the case of covered procurements.

Part 8: Information and notices: General provision

Part 8 relates to the requirements to provide information in relation to any significant anticipated procurement spend and the use of electronic communication. It provides for regulations to be made to specify what should be included in any relevant notices and how they should be published. This Part also provides a power for further regulations to be made to support the sharing of procurement related information through a single electronic portal.

Pipeline notices

Clause 84 (Pipeline notices) provides that where any contracting authority considers that it will spend more than £100 million under "relevant contracts" in the coming financial year, it must publish what is known as a 'pipeline notice' to notify the market of its anticipated spend. Contracts for the supply of goods, services or works (above and below-threshold and other than exempted contracts) will count towards the £100 million threshold.

The pipeline notice must be published within 56 days of the beginning of the relevant financial year.

The pipeline notice must provide information about any public contract with an estimated value of more than £2 million in respect of which the contracting authority intends to publish either a tender notice or a transparency notice within the next 18 months.

There will be additional mandatory information that should be included in the pipeline notice, but the details of this (and the requirements of any other notices under the Act, including how they should be published) will be introduced by way of regulations made under clause 86 in due course.

It is anticipated that the relevant financial thresholds for publishing a pipeline notice will change from time to time by regulations.

The requirement to publish a pipeline notice will not apply to private utilities.

Exemptions to the pipeline notices requirement

Clause 85 (General exemptions from duties to publish or disclose information) makes clear that there are circumstances where a contracting authority is not required to provide the information anticipated in a pipeline notice and may withhold or otherwise redact the information. Those are where the contracting authority is satisfied that:

- withholding the information envisaged in a pipeline notice is necessary for the purpose of safeguarding national security, or
- the information is sensitive commercial information and there is an overriding public interest in it being withheld from publication. This will include information that amounts to a trade secret, or which would be likely to prejudice the commercial interests of any person (including legal persons such as companies and partnerships) if it were to be published.

In the event that either of those two conditions are met, the contracting authority should publish:

- the fact that the information is being withheld; and
- the basis on which it is being withheld.

If the contracting authority is satisfied that publishing that information alone would be contrary to the interests of national security, then it does not need to do so (clause 85(4)).

Clause 86 (Notices, documents and information: regulations) sets out that an "appropriate authority" (defined in clause 111 as a Minister of the Crown, the Welsh Ministers or a Northern Ireland department) may make further regulations to govern the form and content of notices, documents and other information to be published or provided under the new regime, and which set out how such notices or documents are to be published, provided or revised.

Given the numerous publication requirements under the Bill, this provision is a key piece of the legislative jigsaw, and further regulations will need to be made pursuant to this provision.

Electronic communications

Clause 87 (Electronic communications) provides that, so far as practicable when carrying out a procurement, the contracting authority must communicate with suppliers electronically and take steps to ensure that suppliers participating in a procurement do likewise.

However, in doing so, a contracting authority may only use, or require the use of, systems that are free of charge and readily accessible, general available (or operate alongside generally available systems), and are accessible to people with disabilities.

Clause 87(4) provides that where the contracting authority is satisfied that communicating in this way poses a particular security risk in the circumstances, then it does not need to do so.

Information relating to a procurement

Clause 88 (Information relating to a procurement) relates to the requirement to share "information" relating to procurements. Full details will be set out in secondary legislation which are intended to support the creation of a 'single electronic portal' for the sharing of procurement related information. Information is widely defined by clause 88(5) as "information shared under or for a purpose relating to the Procurement Act".

The requirement to share through the specified system may apply to both contracting authorities and suppliers, and is likely to be in line with the Open Contracting Data Standard (OCDS) principles and processes supported in the Green Paper. The Green Paper sets out that the OCDS is a free, non-proprietary, open data standard for public contracting which has been implemented by over 30 governments globally.

The OCDS explains how data and documents are to be published at all stages of the contracting process, and the Green Paper highlighted the intention for the new procurement regime to legislate in order to require all contracting authorities to publish procurement and contracting data throughout the entire commercial lifecycle in a format that adheres to the OCDS. Whilst the Bill has not yet gone this far, it is likely that further regulations will adopt this principle.

In addition, Clause 88 requires a contracting authority to keep records of communications between it and suppliers that relate to procurement process, although it does not specify how those records should be kept.

Part 9: Remedies for breach of statutory duty

Clause 90 (Automatic suspension of the entry into or modification of contracts) relates to the automatic suspension which prohibits the entry into or modification of contracts where a procurement challenge has been commenced in relation to that contract and the contracting authority has been notified of that fact. It is broadly reflective of the current rules regarding the automatic suspension (except that the automatic suspension now also applies to the modification of existing public contracts).

One notable difference under clause 90(4) is that the automatic suspension does not apply where the contracting authority has been notified of the challenge after the expiry of any applicable standstill period. This seems to reflect the general direction of travel set out in the Green Paper, which seeks to focus on pre-contract remedies.

Interim remedies

Clause 91 (Interim remedies) sets out the interim remedies that are available for the domestic courts to make in proceedings under Part 9, and includes the following orders:

- an order lifting or modifying the automatic suspension;
- an order extending the automatic suspension or imposing a similar restriction;
- an order suspending the effect of any decision made or action taken by the contracting authority carrying out the procurement;
- an order suspending the procurement or any part of it;
- an order suspending the entering into or performance of a contract; and/or
- an order suspending the making of a modification of a contract or performance of a contract as modified.

In making any of the orders identified in clause 91, the Court must have regard to the interest of suppliers (including whether damages are an adequate remedy) and the public interest in, amongst other things:

- upholding the principle that public contracts should be awarded and modified in accordance with the law;
- avoiding delay in the supply of goods, services or works in public contracts or modifications.

The Court must also have regard to any other matters that the Court considers appropriate.

Pre-contractual remedies

Clause 92 (Pre-contractual remedies) sets out the various pre-contractual remedies for procurement challenges (i.e. remedies that are available before the contract has been entered into or before a contract has been modified) and includes the following orders:

- an order setting aside the decision or action;
- an order requiring the contracting authority to take any action;
- an order for the award of damages; and/or
- any other order that the Court considers appropriate.

Post-contractual remedies

Clauses 93 (Post-contractual remedies) and 94 (Post-contractual remedies: set aside conditions) provide for "set aside orders", replacing declarations of ineffectiveness under the current regime.

Courts must make a set aside order where the conditions in clause 94 are met (see below), unless there is an "overriding public interest" in not doing so.

In the context of set aside orders, clause 94(5) sets out that in considering the overriding public interest, the court may have regard to the financial consequences of setting aside the contract or modification only in exceptional circumstances, and must disregard costs that are associated with the contracting authority having to award the contract to a different supplier, a delay in the performance of the contract (or the contract as modified), or any legal obligations arising from setting aside the contract or modification.

The Courts can potentially consider the financial consequences of setting aside, however, they cannot take into account costs directly associated with having to award another contract or to a different supplier, delays in performance or complying with legal obligations.

If the contract is not set aside, the Court can reduce the term or scope of the contract.

Clause 94 deals with the set aside conditions. In general terms, the set aside conditions will be met if the Court is satisfied that the supplier has been denied a proper opportunity to seek a pre-contractual remedy. That will be where:

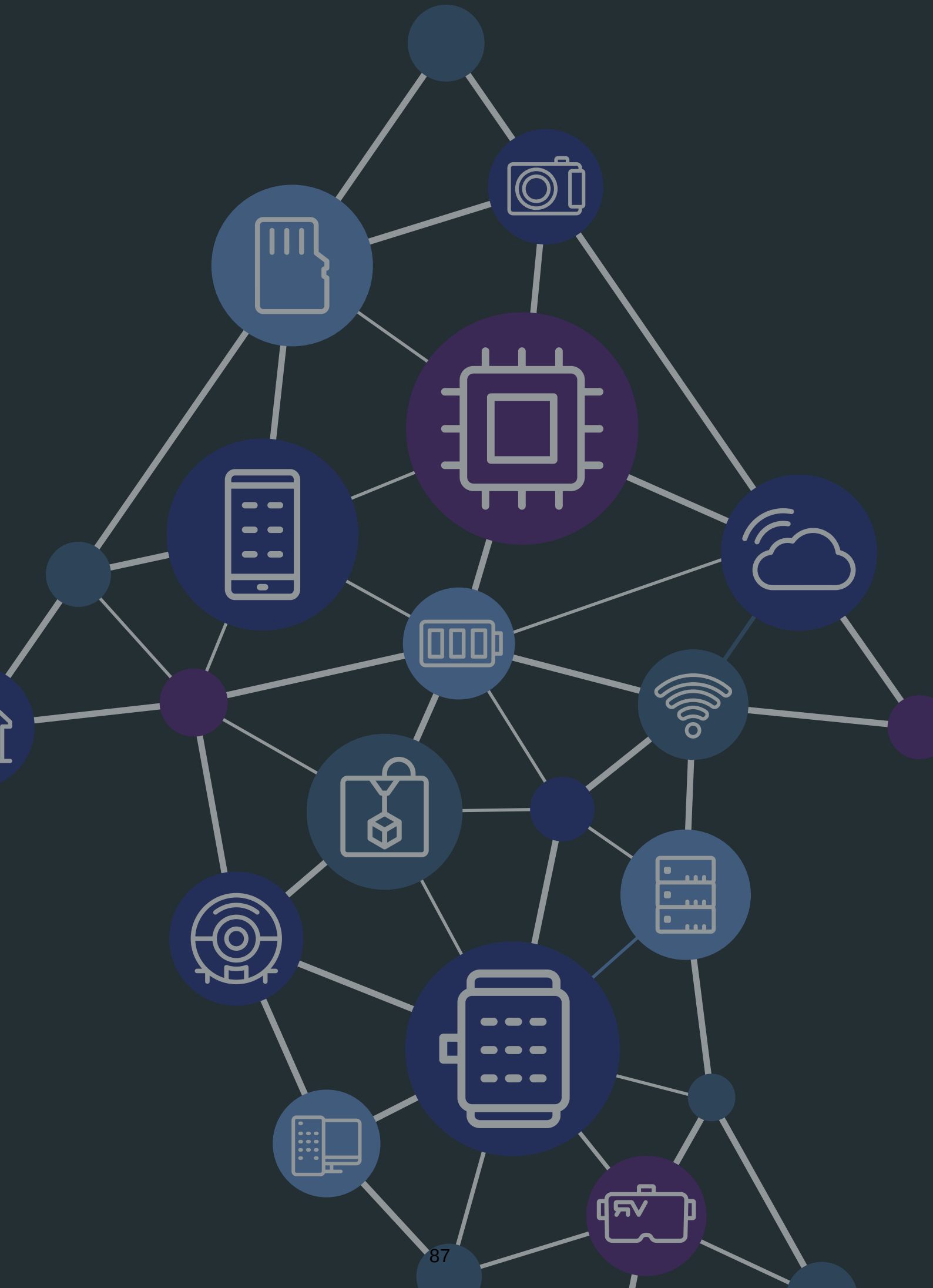
- Contract award notices are not published (including publication of a notice that does not contain accurate information);
- The contract is entered into or modified before the expiry of any relevant standstill period;
- The contract is entered into or modified when the automatic suspension is in place;
- The breach only becomes apparent in certain instances, e.g. on publication of the contract award notice or contract change notice (unless those notices provide for a standstill period and the contract is not entered into or modified before expiry of that standstill period);
- The breach only becomes apparent after the contract is entered into or modified.

Time limits on claims

Clause 95 (Time limits on claims) provides that a supplier must commence proceedings before the end of the period of 30 days beginning with the day on which the supplier first knew or ought to have known, about "the circumstances giving rise to the claim". This time limit can be extended by a court to 3 months where there is good reason for doing so.

With regard to the remedy of set aside, where a contracting authority has not published a contract details notice, the time limit will be the earlier of (i) 30 days from knowledge of the circumstances giving rise to the claim or (ii) 6 months, starting with the day on which the contract was entered into or modified.

As with the existing rules, the Court can extend time limits for good reasons and, in a departure from the current rules around declarations of ineffectiveness (where time limits could not be extended beyond six months), the time limit for commencing claims for set aside can seemingly also be extended for good reasons. Where the court considers there to be good reasons for an extension, it is not permitted to extend for any longer than three months from when the challenger first knew or ought to have known of the grounds for challenge (see clause 95(6)).



Part 10: Procurement oversight

Part 10 relates to investigations which an appropriate authority (namely, Ministers, Welsh Ministers or a Northern Ireland department) may undertake to investigate a contracting authority's compliance with the Procurement Act. An appropriate authority can require contracting authorities to provide relevant documents or other assistance as part of the investigation and, upon the outcome of investigations, make recommendations with a view to ensuring compliance. The type of activity to be investigated under Part 10 is likely to include series or patterns of procurement breaches, and not just individual claims in isolation.

This Part also provides for an appropriate authority to publish guidance and lessons learned following an investigation, which other contracting authorities must have regard to when conducting their own procurements.

Procurement investigations

Clause 96 (Procurement investigations) provides that an appropriate authority may investigate a "relevant" contracting authority's compliance with the requirements of the Procurement Act. An appropriate authority is a Minister of the Crown, a Welsh Minister or a Northern Ireland department.

Clause 96 also sets out that a procurement investigation may not be undertaken into an appropriate authority itself or into a private utility, and the limitation of procurement investigations into a relevant contracting authority's compliance raises questions as to how central government will be held to account. It is odd that a government department cannot be investigated given the value of central government spend.

There is currently no guidance on what circumstances will justify the use of a procurement investigation by an appropriate authority. We hope that subsequent guidance and/or regulations will be provided to clarify this further.

As part of a procurement investigation under clause 96, an appropriate authority may require, by notice, that a relevant contracting authority:

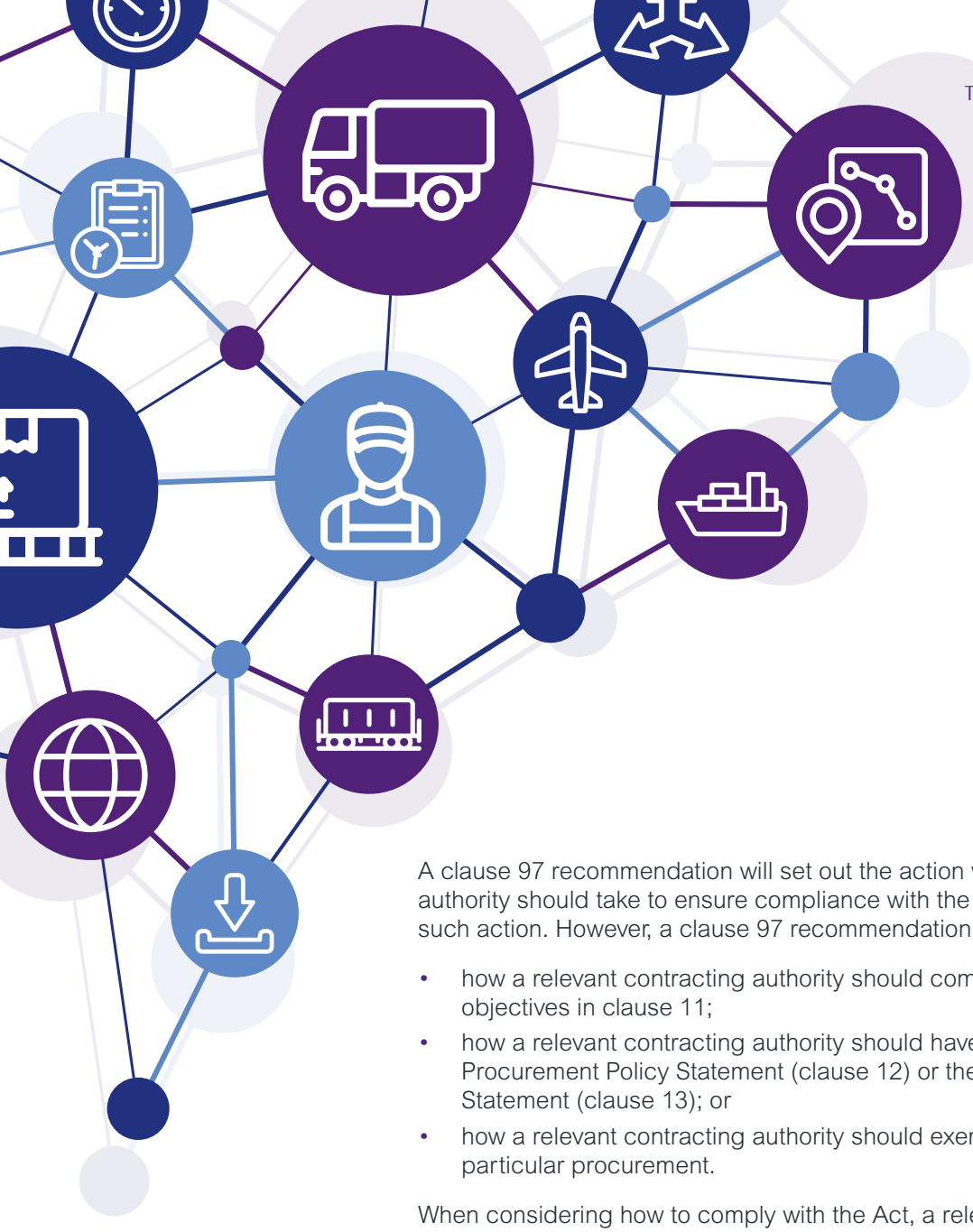
- provide such relevant documents as the appropriate authority may reasonably require for the purposes of the procurement investigation (such documents to include those specified in the notice or those which are in the possession or control of the relevant contracting authority).
- provide such other assistance in connection with the investigation as is reasonable in the circumstance and as specified in the notice.

A relevant contracting authority must comply with a notice from the appropriate authority within the period specified in the notice (which must be at least 30 days).

Following the conclusion of the investigation, the appropriate authority may publish the results, including any clause 97 recommendation issued (see below).

Clause 97 recommendations and progress reports

Where an appropriate authority has conducted a procurement investigation pursuant to clause 96 and considers, in light of the results of that investigation, that a relevant contracting authority is engaging in action which gives rise, or is likely to give rise, to a breach of the Act, a "clause 97 recommendation" may be issued.



A clause 97 recommendation will set out the action which the relevant contracting authority should take to ensure compliance with the Act, together with the timing of such action. However, a clause 97 recommendation must not relate to:

- how a relevant contracting authority should comply with the procurement objectives in clause 11;
- how a relevant contracting authority should have regard to the National Procurement Policy Statement (clause 12) or the Wales Procurement Policy Statement (clause 13); or
- how a relevant contracting authority should exercise a discretion in relation to a particular procurement.

When considering how to comply with the Act, a relevant contracting authority should consider any clause 97 recommendation issued to it. Further, if required by the clause 97 recommendation, a relevant contracting authority should submit a progress report to the appropriate authority setting out what action it has taken as a result of the recommendation or, if no action has been taken, a statement to that effect. Where no action is taken, or different action is taken to that which was recommended, reasons should be provided in the progress report.

The appropriate authority may also submit a progress report or, if the contracting authority itself fails to submit one, notice of that fact. We would expect such progress reports to be made publicly available, as per the current Public Procurement Review Service, but further detail on this point is required.

Guidance

Clause 98 (Guidance following procurement investigations) provides that, following a procurement investigation, an appropriate authority may also publish guidance of the lessons learnt for compliance with the Act. Contracting authorities must have regard to any such guidance published when considering how to comply with the Act. Whether this guidance will be sustainable or not remains to be seen.

Part 11: Appropriate authorities and cross-border procurement

Part 11 sets out further detail in relation to 'appropriate authorities' within the devolved administrations of the United Kingdom. This Part has been carefully worded and includes areas where Westminster would need the consent of the Welsh Ministers or a Northern Ireland department to make further regulations.

Wales

Clause 99 (Welsh Ministers: restrictions on exercise of powers) provides that Welsh Ministers' powers under the Bill are limited to:

- devolved Welsh authorities;
- contracting authorities that are "treated as" devolved Welsh authorities; and/or
- the award of contracts under a devolved Welsh procurement arrangement, or the management of such contracts.

While devolved Welsh authorities are defined in accordance with the Government of Wales Act 2006 (GWA), a contracting authority may find itself treated as such under the Bill if:

- its functions are exercisable wholly or mainly in relation to Wales and wholly or mainly not relating to "reserved matters" (as also defined in the GWA); and
- the contracting authority awarding or managing a contract for the purposes of exercising a function wholly in relation to Wales.
- A public undertaking or private utility is subject to a slightly different test, being that:
- its functions are exercisable only in relation to Wales; and
- its activities are wholly or mainly not relating to "reserved matters" (defined in the GWA).

Northern Ireland

Clause 100 (Northern Ireland department: restrictions on the exercise of powers) sets out provisions in relation to Northern Ireland departments, namely that exercisable powers under the Bill are limited to:

- contracting authorities that are transferred Northern Ireland authorities;
- public undertakings or private utilities that are not transferred Northern Ireland authorities, but for the purposes of the Procurement Act are treated as transferred Northern Ireland authorities; and/or
- the award or management of contracts under a transferred Northern Ireland procurement arrangement.

"Transferred Northern Ireland authorities" (for the purposes of the Procurement Act) are those whose functions are exercisable only in or as regards Northern Ireland and are wholly or mainly functions that do not relate to reserved or excepted matters within the meaning given in the Northern Ireland Act 1998.

Cross-border procurement

Clause 101 (Minister of the Crown: restrictions on the exercise of powers) and Clause 103 (Powers relating to procurement arrangements) navigate the powers exercisable by Westminster in relation to certain cross-border procurements.

Clause 101 limits the powers of a Minister of the Crown in relation to a devolved Welsh authority in that the Minister may only exercise a power under the Bill in relation to:

- the award of contracts under a reserved procurement arrangement or a transferred Northern Ireland procurement arrangement; or
- the management of such contracts.

Clause 103 provides that a Minister of the Crown may make provision to regulate the award and management of contracts by devolved Scottish authorities under:

- reserved procurement arrangements;
- devolved Welsh procurement arrangements; or
- transferred Northern Ireland procurement arrangements.

Expanding on certain definitions

A “procurement arrangement” under the Bill refers to when a contract is awarded:

- in accordance with a framework (or similar, e.g. as defined in the current Scottish regime that will not be changing or aligning with the Bill);
- in accordance with a dynamic market (or similar);
- to a centralised procurement authority; or
- following a procedure or selection carried either jointly by two or more authorities or by a centralised procurement authority (or similar).

Further definitions are provided in order to identify devolved Welsh, transferred Northern Ireland and/or devolved Scottish procurement arrangements (see clause 102 (Definitions relating to procurement arrangements)).

Part 12: Amendments and repeals

Part 12 sets out various provisions regarding amendments and repeals to the existing legislative landscape.

Of particular note, clause 104 (Disapplication of duty in section 17 of the Local Government Act 1988) introduces the much anticipated ability for a Minister of the Crown to disapply section 17 of the Local Government Act 1988 relating to the exclusion of non-commercial considerations. This is an area of particular interest for local authorities who will want to monitor how this provision develops as the Bill makes its way through Parliament. We note that section 17 has already been disapplied insofar as it applies to the termination of Russian contracts and prevention of Russian companies being included in procurement processes in light of the current war in Ukraine pursuant to the Local Government (Exclusion of Non-commercial Considerations) (England) Order 2022.

The provision sets a path for the government to legislate to remove the prohibition on taking non-commercial considerations into account, and, in the event that such regulations are made, local authorities can expect to be able to avail themselves of the ability to reserve below-threshold contracts by supplier location (as provided for in PPN 11/20: Reserving below threshold procurements).

Clause 107 (Repeals etc) and Schedule 11 (Repeals and revocations) of the Bill will repeal various enactments relating to public procurement, including the existing secondary legislation governing the procurement regime (including the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016, the Utilities Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011).

Schedule 11 also repeals the following primary legislation:

- Paragraphs 9(9)(d) and 11(6)(b)(ix) of Schedule 7B to the Government of Wales Act 2006 (relating to proposed amendments under the Trade (Australia and New Zealand) Bill regarding no requirement for consent to Senedd Cymru);
- Sections 39 and 40 of the Small Business, Enterprise and Employment Act 2015 (dealing with the existing Public Procurement Review Service); and
- An Act of Parliament resulting from the Trade (Australia and New Zealand) Bill that was introduced into the House of Commons on 11 May 2022.

Finally, Schedule 11 also repeals various Decisions of the European Commission relating to utilities procurement that are currently retained EU law (for example, the Commission decision that Article 30(1) of the 2004 Directive coordinating procurement procedures of entities operating in the waste, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales), as well as Commission Implementing Decision (EU) 2017/1870 implementing a common European standard on electronic invoicing.

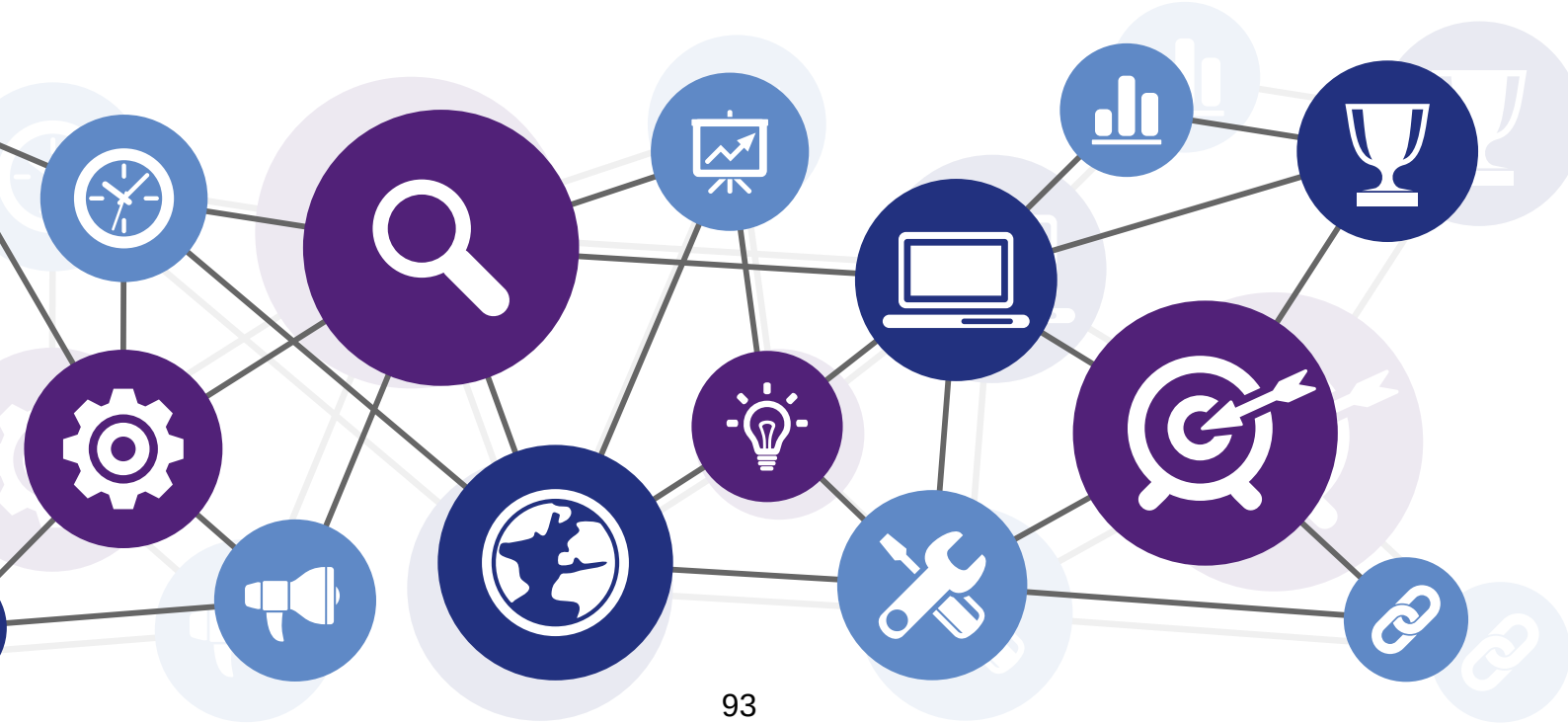
Part 13: General

Part 13 introduces several general provisions about the application and interpretation of the Bill.

Clause 108 (Power to disapply this Act in relation to procurement by NHS in England) provides a power for a Minister of the Crown to disapply by regulations any provision set out in the Bill which relates to any procurement which is covered by supplier selection rules that may be brought into force pursuant to section 12ZB of the National Health Service Act 2006 (as amended by the Health and Care Act 2022). Clause 108 has proved unpopular in the first stages of the Bill's passage through Parliament with it being noted in the Second Reading in the House of Lords that the NHS should be exposed to more competitive procurement, and that this is a missed opportunity to align NHS procurement with wider public sector procurement.

Clause 110 (Regulations) sets out the procedure to be adopted in implementing any further regulations as provided for under the Bill, and sets out which regulations will be subject to the affirmative procedure and which shall be subject to the negative procedure. A statutory instrument laid under the negative procedure becomes law on the day the Minister signs it and automatically remains law unless a motion to reject that statutory instrument is agreed by either House within 40 sitting days. The affirmative procedure is subject to increased scrutiny in comparison to the negative procedure, as a statutory instrument laid under the affirmative procedure must be actively approved by both house of Parliament.

Clauses 111 (Interpretation) and 112 (Index of defined expressions) are interpretive aids, and set out various defined expressions in the Bill, as well as an index of where other expressions have previously been defined. The index of terms in clause 112 is a particularly helpful tool given the stylistic and linguistic differences between the Bill and the current procurement regimes and will be invaluable in aiding interpretation of the provisions set out in the Bill.



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