

DEFENCE REFORM ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Defence Procurement

Section 1: Arrangements for providing defence procurement services

11. *Section 1* sets out the circumstances when Part 1 will apply, namely, when the Secretary of State makes initial and (when required) follow-on arrangements for a contractor (“the contractor”) to provide “defence procurement services” to the Secretary of State under contract. “Contractor” is defined in section 1(8) as meaning a company which provides (or is to provide) defence procurement services to the Secretary of State under contract by virtue of the arrangements, or a company which, by making premises, property and employees available, enables (or is to enable) those defence procurement services to be provided. “Defence procurement” and “defence procurement services” are also defined in section 1(8). These are the services that are currently provided by DE&S. The provisions in Part 1 of the Act will not apply to any services which the contractor provides to anyone other than the Secretary of State.
12. *Subsection (1)* provides that Part 1 applies where the contractor acquires rights over premises and property (in the form of leases or tenancy agreements) used by DE&S and becomes the employer of civil servants working in or in connection with DE&S.
13. *Subsection (2)* provides that Part 1 also applies if arrangements are made at a later date (“the new arrangements”) and the new arrangements are the successor to the old arrangements, although the contract with the former contractor in respect of the old arrangements may not have terminated.
14. *Subsections (3) and (4)* explain when the new arrangements are the successor to the old arrangements. This could arise in a number of situations, for example, where the new contractor is the same as the old contractor (*subsection (3)(a)*); or where under the contract the property, rights or liabilities of the old contractor are to be or have been transferred to the new contractor (*subsection (3)(b)*); or where property, rights or liabilities are to be or have been transferred to a new contractor by means of a transfer scheme made under section 10 (*subsection (3)(b)*); or where property, rights or liabilities of the old contractor have been transferred to the Secretary of State (whether under the terms of the contract or by a transfer scheme) and the new contractor acquires rights in premises from the Secretary of State to be used for the new arrangements and becomes the employer of civil servants carrying out defence procurement (*subsection (4)*).
15. Arrangements for a contractor to provide defence procurement services may take effect in phases over a period of time (*subsection (5)*). A contractor may be a publicly owned company, as defined in section 12.
16. *Subsection (7)* provides that the arrangements may permit a contractor to exercise to any extent any discretion of the Secretary of State in connection with the exercise by the Secretary of State of a function involving defence procurement. The Secretary of State

will remain responsible for defence procurement but, given the scale of the activities that the contractor may be required to undertake under the arrangements, it may be necessary for the contractor to exercise a discretion of the Secretary of State in respect of the Secretary of State's procurement functions.

Section 2: Financial assistance

17. This section provides that the Secretary of State may provide financial assistance to a contractor in the form of loans, guarantees, indemnities or other financial assistance on terms and conditions as he thinks appropriate.

Section 3: Financial claims against contractors or former contractors

18. **Section 3** provides that the MOD is liable for financial claims made against a current or former contractor, whether claims are brought in the UK or in a foreign court, subject to certain exceptions. The exceptions are where a claim is made by an "excluded person" or a claim is an "excluded claim" as defined in *subsection (7)*. A person is excluded if it is a contractor under an old arrangement bringing a claim against a contractor under a new arrangement, or in a two company structure, one contractor bringing a claim against another; or the claim is brought against the contractor by a government department or a government Minister (i.e. where the MOD has a claim against the contractor, or where the contractor has carried out services for another government department). Claims which are excluded are those relating to services the contractor provides to anyone other than the Secretary of State for Defence; employment claims; claims relating to provision of services to the contractor (e.g. the provision of IT services); those relating to health and safety; and claims relating to the time before or after a company was a contractor. Because liability will only transfer in respect of financial claims, the contractor will remain liable for, for example, claims brought against it for specific performance or injunctive relief.
19. The Secretary of State may make payments to settle claims (*subsection (2)*). A contractor (or former contractor) must provide the Secretary of State with assistance in connection with the claim and that obligation imposed on a company to provide assistance is enforceable as if contained in a contract between the Secretary of State and the contractor (*subsections (3), (4) and (5)*). This section does not affect any provision the Secretary of State may make in a contract with a contractor for the contractor to compensate the Secretary of State for any liability which transfers to the Ministry of Defence or in respect of any payment which the Secretary of State may make to settle a claim (*subsection (8)*).

Section 4 and Schedule 1: Exemptions relating to premises used by a contractor

20. **Section 4** gives effect to Schedule 1, which makes provision exempting the contractor from some legislative obligations and enforcement regimes where the Crown, and therefore MOD, is currently exempt. These are particularly relevant to DE&S because DE&S manages safety and environmental functions and currently occupies a wide range of sites for the purpose of carrying out its functions. Exemptions may only be given to a contractor in respect of the sites which will be used by it for carrying out defence procurement services for the Secretary of State under the section 1 arrangements.
21. The exemption in respect of the Landlord and Tenant Act 1954 ensures that when the lease or tenancy of any premises let by the Secretary of State to a contractor has come to an end, the contractor cannot claim a statutory right to a new lease or tenancy on relevant sites. Similarly, any subtenant of the contractor in relation to such premises will also not have security of tenure.
22. The exemption from the Nuclear Installations Act 1965 will enable the Secretary of State to designate a site used by the contractor as a site to be treated as one used by a government department. That site would otherwise require a nuclear site licence.

*These notes refer to the Defence Reform Act 2014 (c.20)
which received Royal Assent on 14 May 2014*

23. Under paragraph 4 of the Schedule, in relation to the Health and Safety at Work etc Act 1974, the Secretary of State can exempt a contractor from the enforcement provisions in Part 1 of the 1974 Act. Further, the Secretary of State can exempt a contractor from any other provisions in Part 1 in the interests of the safety of the State. An exemption would be conferred by a negative resolution statutory instrument.
24. There are a number of areas where MOD has the benefit of Crown exemptions from subordinate legislation and the Secretary of State will have the power under paragraph 7 to extend such exemptions to the contractor where required. This will be done by means of a negative resolution statutory instrument. This provision gives the Secretary of State flexibility to consider on a case by case basis whether to extend an exemption to the contractor.

Section 5: Jurisdiction of the Ministry of Defence Police

25. This section provides authority for the MOD Police (MDP) to continue to exercise its police powers on premises used by the contractor for the purpose of providing defence procurement services to the Secretary of State under the section 1 arrangements. This also ensures that MDP powers extend to any new site utilised by the contractor for those purposes and that MDP officers are able to investigate effectively allegations of fraud and other criminal offences relating to the provision of defence procurement services. Since any contracts between the contractor and third party contractors will be publicly funded, it also extends the MDP's jurisdiction so MDP officers are able to exercise police powers to investigate any potential crime, fraud or thefts in relation to contracts between these parties.

Section 6: Status of contractor

26. This section applies in relation to contracts entered into by the Secretary of State before the vesting date. The vesting date is defined in section 12 as a day appointed by the Secretary of State by order made by statutory instrument.
27. A procurement or support contract made prior to the vesting date may be silent on whether a contractor is permitted to carry out the contract on behalf of the Secretary of State. Therefore this section provides that any right or power of the Secretary of State under any such contract may be exercised by the contractor on behalf of the Secretary of State and any duty or liability of the Secretary of State may be discharged by the contractor on behalf of the Secretary of State. The Secretary of State cannot be prevented or penalised for arranging for the contractor to exercise his rights or powers or discharge his duties or liabilities under any such contract.

Section 7 and Schedule 2: Restrictions on disclosure or use of information

28. **Section 7** gives effect to Schedule 2, which contains provisions to overcome restrictions on the disclosure to and use by the contractor of confidential information (currently held by MOD and DE&S). Confidential information may be contained in, for example, technical/design information, tender documentation, contracts, performance data, and quotations. The contractor will need this information in order to carry out defence procurement services under the section 1 arrangements.
29. These provisions allow the Secretary of State to provide the contractor with access to confidential information ("relevant information") obtained under or in connection with a contract (the "relevant contract") with a third party entered into for the purposes of defence procurement before the vesting date (as defined in section 12). The contract itself may have come to an end before the vesting date but an obligation of confidence may nevertheless continue.
30. **Paragraph 2(1)** provides that the Secretary of State will not be prevented from or penalised for disclosing relevant information to a contractor or a service provider to a contractor (defined in paragraph 6 as someone who performs ancillary services for

the contractor); a contractor will not be prevented from or penalised for disclosing that information to his employees or service provider; and, in a two company structure, between one company and the other and their employees or service providers, where it is necessary or expedient for the purpose of the arrangement. Paragraph 2(2) permits disclosure of relevant information by a former contractor or its employees or service providers to the Secretary of State, or to a new contractor or its own employees or service providers, if that disclosure is necessary for the purposes of arrangements made under section 1. Paragraph 2(3) permits the use of relevant information by a contractor, employees or service providers if the Secretary of State could have used the information and if the use of the information is necessary or expedient for the purposes of the section 1 arrangements.

31. Paragraph 3 ensures that a contractor, its employees or its service providers are not prevented by any obligations of confidence from disclosing relevant information for audit purposes.
32. Paragraphs 4 and 5 make provision to deal with unauthorised disclosures and unauthorised use of information by a contractor. Paragraph 4 provides that where a person discloses information otherwise than in accordance with paragraphs 2 and 3, that is an unauthorised disclosure and the person making that disclosure will be treated as if he were subject to the original obligation of confidence. If he is an employee of a contractor or service provider, the contractor or service provider will be treated as having made the unauthorised disclosure. Paragraph 5 makes the same provision in respect of unauthorised use of information.

Section 8: Intellectual property rights

33. This section relates to protected works, which are defined in *subsection (4)* as copyright or database rights as further defined in that subsection. Databases are a collection of independent works, data or other materials which are arranged in a systematic or methodical way, and are individually accessible by electronic or other means. DE&S hold a large number, the majority of which will have been provided to the Secretary of State from contractors.
34. *Subsection (1)* allows the Secretary of State to provide a protected work to a contractor or a service provider to a contractor in certain circumstances without infringing copyright or database rights. The circumstances are where the Secretary of State has acquired the right to use the work in connection with a contract entered into before the vesting date (as defined in section 12) and where it is necessary or expedient for a contractor to be provided with the work for the purposes of the section 1 arrangements. This section also enables a protected work to be copied for the purposes of providing it to a person (*subsection (5)*).
35. *Subsection (2)* allows a contractor or former contractor or a service provider who has received a protected work under this section to provide it to another contractor or service provider or the Secretary of State where it is necessary or expedient for the purposes of the section 1 arrangements.
36. *Subsection (3)* allows a contractor or service provider to use the protected work to the same extent that the Secretary of State is entitled to as long as it is necessary or expedient for the purposes of the section 1 arrangements.

Section 9: Transfer of employees: application of TUPE regulations

37. This section ensures that the Transfer of Undertakings (Protection of Employment) Regulations 2006¹ (“TUPE regulations”) apply to the transfer of DE&S staff from their employment in the civil service to employment by a contractor.

¹ SI 2006/246.

38. *Subsection (2)* ensures that the TUPE regulations apply to relevant employees where the contractor is a two company entity i.e. where the Secretary of State makes arrangements with a management company for the provision of defence procurement services, whilst a separate operating company is responsible for delivery of those services.

Section 10 and Schedule 3: Transfer schemes

39. *Subsection (1)* gives the Secretary of State the power to make a scheme to transfer property, rights and liabilities (a “transfer scheme”) in two circumstances. First, where a contractor is in breach of a services contract (defined in *subsection (6)* as a contract for the provision of defence procurement services by virtue of the section 1 arrangements) where the breach occurs in certain circumstances or is of a certain specified kind. Or second, where the contract has come to an end e.g. where the term has expired.
40. *Subsection (2)* provides that property, rights and liabilities may be transferred to the Crown, the Secretary of State, or another contractor providing defence procurement services.
41. *Subsection (3)* provides that the property, rights and liabilities which may be included in a transfer scheme are property, rights and liabilities of a contractor, securities in a contractor and any property, or rights of a third party acquired from a contractor and any liabilities of third parties relating to such property or rights.
42. *Subsection (4)* provides that the Secretary of State may agree in the terms of the contract with a contractor that certain property, rights and liabilities are not to be included in a transfer scheme.
43. *Subsection (5)* gives effect to Schedule 3, which contains supplementary provisions relating to transfer schemes. Paragraph 1 makes further provision for the effect of a transfer scheme and for what the things that may be transferred under a transfer scheme may include. Paragraph 2 provides that a transfer scheme may make certain kinds of provisions. Paragraph 3 provides that a transfer scheme may contain provision for payment of compensation by the Secretary of State to any person whose interests are adversely affected by it. Paragraph 4 makes provision to address the situation where a transfer scheme transfers foreign property or a foreign right or liability. Paragraph 5 provides that a transfer scheme may make incidental, supplementary and consequential provisions. Paragraph 6 provides that the Secretary of State may modify a transfer scheme but if a transfer under the scheme has taken effect, any modification requires the agreement of the person affected by the modification.

Section 11: Financial provisions

44. This section gives the Secretary of State authority to make payments out of money provided by Parliament for certain expenditure which may be incurred in respect of the establishment of section 1 arrangements or in taking on liabilities of a contractor should the arrangements come to an end.