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Regulations Office

**Guidance on determining
the amount of a penalty**

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Introduction

1. About this Guidance

- 1.1 Amongst its other statutory and non-statutory functions, Sections 33(3) and (4) of the Act provide for the publication by the SSRO of guidance on determining the amount of a penalty, stating that:

In determining the amount of a penalty, the Secretary of State must have regard to guidance issued by the SSRO.

The SSRO must publish guidance issued under subsection (3) [determining the amount of penalty] in such a manner as it thinks appropriate.

2. Application of this Guidance

- 2.1 This is statutory guidance issued by the SSRO under Section 33(3) of the Act. It applies to all qualifying defence contracts and qualifying sub-contracts (subject to the restrictions set out in the Act and Regulations).

Determining the amount of penalty

3. Factors to determine amount of penalty

3.1 When issuing a penalty notice, the Secretary of State should consider all the circumstances in order to determine a fair and proportionate penalty. The central objective of imposing a penalty should be deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement.

3.2 The Secretary of State must consider the following factors when determining the amount of penalty:

1. impact of the contravention:

- (a) what harm has the contravention caused the Secretary of State;
- (b) what benefit has the contractor gained with the contravention; and
- (c) duration of the contravention.

2. nature of the contravention:

- (a) was the contravention deliberate;
 - (i) was the contractor aware that their action or inaction would or could result in a contravention;
- (b) was the contravention reckless;
- (c) on occasions when a report was not fully completed, was the report materially incomplete,

3. previous penalty notices and general compliance history of the contractor:

- (a) is it the first offence;
- (b) how frequently have previous contraventions occurred (repeated contraventions may lead to significantly increased penalties); and
- (c) is the current violation the same or similar to prior violation(s),

4. the size and turnover of the contractor.

4. Factors tending to decrease the level of any penalty

4.1 Factors may include:

- 1. has the contractor taken steps to mitigate and prevent the contravention and future contraventions;
- 2. the extent and timeliness of any steps taken to end the contravention in question, and any steps taken to mitigate the consequences of the contravention; and
- 3. co-operation with the Secretary of State.

5. Repeated and persistent offence

5.1 As specified in Regulation 50 (3), in a case where

- (a) *the Secretary of State gives a person a penalty notice in respect of a contravention within section 31(3)(a)(ii), (failure to comply*

with reporting requirements), and
 (b) *within the 12 months immediately preceding the date on which the Secretary of State gives the person that penalty notice, at least five other penalty notices for contraventions within section 31(3)(a)(ii) have been given to the person (or any person or persons associated with that person),*

the amount specified for the purposes of section 33(1) (maximum penalty) is the amount prescribed for that contravention, plus 20% of that amount.

5.2 Any penalty notice which has been cancelled by the SSRO as a result of a determination shall be disregarded when determining a persistent offence.

6. Final amount of penalty

6.1 Having had regard to any representations the contractor may wish to make and having considered the factors listed above (to the extent that they are relevant) and any other circumstances relevant to that particular case, the Secretary of State should determine a fair and proportionate penalty. In doing so he will ensure that the amount does not exceed the maximum penalty for the particular type of contravention.

6.2 The final amount of the penalty must be stated in the penalty notice.

7. Discount for early settlement

7.1 For breaches of the duty to keep accounting and other records, contravention 31(3)(a)(i), the penalty amount will be reduced if the contractor makes a settlement within the time specified in the Table 1.

Table 1

| Number of days after penalty notice | Per cent of full penalty payable |
|-------------------------------------|----------------------------------|
| Within 1 month | 25 |
| Within 3 months | 50 |

8. Transitional arrangements

8.1 The SSRO will allow a transitional period exempting contractors from receiving penalties for failures in reporting.

8.2 This exemption will apply to each contractor's:

- first qualifying defence contract; and
- the first three reports which are required to be submitted for that qualifying defence contract.

9. Public reporting of penalty notice

9.1 The SSRO will publish a compliance report each year that will specify contractors who have been issued with penalty notices.

9.2 A contractor's name will not be published in the compliance report if the SSRO has notified the contractor that their qualifying defence contract may benefit from the transitional period or if a determination is outstanding.

10. Opinions and determination

10.1 Matters in respect of which the contractor may apply to the SSRO for a determination are:

- (a) whether the contractor has contravened section 31 of the Act or failed to take the steps specified in a compliance notice (or both);
- (b) whether the contractor had a reasonable excuse for contravening section 31 of the Act or failing to take the steps specified in a compliance notice (or both); and
- (c) the amount of the penalty.

10.2 When a contractor applies to the SSRO for a determination of a matter mentioned above the penalty notice is not payable until a determination has been made.

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- 10.3 In determining the matter, the SSRO may:
- (a) substitute its own decision for any decision of the Secretary of State;
 - (b) vary the amount of the penalty;
 - (c) cancel the penalty notice; and
 - (d) state the date by which the penalty must be paid (unless the penalty notice is cancelled).
- 10.4 The SSRO's determination is final.

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Appendix A: Maximum Penalty Amounts

The maximum penalties are specified in Regulation 50. The amounts specified in the regulations are the upper limits and not an indication that every penalty issued should be set at that amount.

The maximum financial penalties which can be issued are stated below:

1. For the following breaches of record-keeping and reporting duties:
 - (a) failure to keep relevant records;
 - (b) refusal to allow the Secretary of State to examine relevant records;
 - (c) refusal to explain relevant records to the Secretary of State.

| Value of qualifying defence contract | Maximum Penalty |
|--------------------------------------|-----------------|
| Less than or equal to £50m | £20,000 |
| >£50m but ≤£200m | £100,000 |
| >£200m but ≤£500m | £250,000 |
| >£500m but ≤£1bn | £375,000 |
| >£1bn | £500,000 |

2. In cases where a contractor has failed to assess or failed to correctly assess whether a sub-contract is a qualifying sub-contract or has failed to notify the relevant parties prior to signing the sub-contract:

| Value of qualifying defence contract | Maximum Penalty |
|--------------------------------------|-----------------|
| Less than or equal to £50m | £50,000 |
| >£50m but ≤£200m | £250,000 |
| >£200m but ≤£500m | £500,000 |
| >£500m but ≤£1bn | £750,000 |
| >£1bn | £1,000,000 |

3. In cases where a contractor has failed to submit by the relevant due date the following reports required by section 24 and section 25 of the Act and Part 5 and Part 6 of the Regulations:
- (a) Contract reporting plan;
 - (b) Contract notification report
 - (c) Quarterly contract report;
 - (d) Interim contract report
 - (e) Contract completion report
 - (f) Contract costs statement
 - (g) On-demand contract report
 - (h) Actual rates claim report
 - (i) QBU actual cost analysis report
 - (j) Estimated rates claim report
 - (k) QBU estimated cost analysis report
 - (l) Rates comparison report
 - (m) Strategic industry capacity report
 - (n) Small or medium enterprises (“SME”) report

| Value of qualifying defence contract | Maximum Penalty |
|--------------------------------------|-----------------|
| Less than or equal to £50m | £20,000 |
| >£50m but ≤£200m | £100,000 |
| >£200m but ≤£500m | £250,000 |
| >£500m but ≤£1bn | £375,000 |
| >£1bn | £500,000 |

4. In cases for failures to submit a completed contract pricing statement required under Regulation 23 and the estimated rates agreement pricing statement required under Regulation 38 in time:

| Value of qualifying defence contract | Maximum Penalty |
|--------------------------------------|-----------------|
| Less than or equal to £50m | £50,000 |
| >£50m but ≤£200m | £250,000 |
| >£200m but ≤£500m | £500,000 |
| >£500m but ≤£1bn | £750,000 |
| >£1bn | £1,000,000 |

If a penalty notice is issued in relation to a contravention concerning the submission of misleading reports under section 31(3)(b) of the Act or in relation to a failure to notify the Secretary of State of the occurrence of a relevant event, circumstance, or information under section 31(3)(c) of the Act, then the amount of the penalty is to be calculated as if the contravention were a breach of contract (and is to be calculated in accordance with the general law of contract having effect in England and Wales).

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