

SSRO

Single Source
Regulations Office

**Guidance on determining
the amount of a penalty
Response to Consultation**

Introduction

1. Background

The Defence Reform Act 2014 provides a legislative basis for the Single Source Procurement Framework. The Act makes the Single Source Regulations Office (SSRO) responsible for issuing statutory guidance on determining the amount of a penalty.

The draft guidance produced by the SSRO is for use by the Secretary of State in determining the amount of a penalty for qualifying defence contracts and qualifying sub-contracts. Section 33(4) of the Act states that the SSRO must publish guidance issued under subsection (3), determining the amount of penalty, in such a manner as it deems appropriate.

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

2. Our Approach

In producing the draft guidance on determining the amount of a penalty, the SSRO took the following approach:

- reviewing all relevant sections of the Act, Regulations and Single Source Procurement Framework, and the background to these;
- researching penalty guidance from a wide spectrum of regulators;
- reviewing the responses to the SSRO's consultation exercise on determining the amount of a penalty;
- reflecting on the process of producing and consulting on the SSRO's guidance on Allowable Costs;
- commissioning a legal review to ensure consistency with the Act and Regulations; and
- drafting the document around a logical structure based on factors to consider.

The aim of the guidance is to establish principles ensuring that:

- (a) a penalty notice is fair and proportionate; and
- (b) the factors that will determine a penalty are transparent.

The Consultation

3. Consultation Process

On 20 February 2015, the SSRO issued draft statutory guidance on determining the amount of a penalty. This was brought forward from 27 February 2015 in order to allow stakeholders more time to respond.

In carrying out this consultation we sought to ensure that as many people and groups as possible had the opportunity to contribute their views. The SSRO publicised the consultation on its website (<https://www.gov.uk/government/consultations/single-source-statutory-guidance-on-determining-penalty-amount>) and directly emailed its stakeholder contacts. To aid the consultation process, we provided a consultation response form for stakeholders to complete.

In total, we invited 88 stakeholders to respond to the consultation, including government bodies, defence industry contractors, trade associations, think tanks, academics, media and regulatory bodies.

The consultation closed on 13 March 2015. This document summarises the feedback we received and the action we have taken.

4. Breakdown of Responses

We are grateful to everybody who responded to the consultation. In total we received 18 responses from a wide range of stakeholders. The breakdown of respondents can be seen in Table 1.

Whereas the majority of respondents used the consultation form provided, some elected to provide feedback in an alternative format. We have considered all feedback received.

Table 1

	Government	Industry	Regulators/ Other Government Bodies	Trade and Professional Associations and Think Tanks	Research/ Academics	Other	Media	Total
Number of Stakeholders invited to comment	1	68	6	7	3	0	3	88
Total Number of Responses received	1	11	0	1	0	3	0	16
Percentage of responses received	100	16	0	14	0	n/a	0	18

The responses gave the SSRO an understanding of individuals' and organisations' views on the draft guidance. It has not been possible to include our response to every comment received in this document, but we have tried to include as many as possible by grouping together the main themes.

As indicated on our consultation response form, replies will be published on the SSRO's website.

5. Key issues raised by the respondents

The responses included views on the consultation questions on the draft guidance's structure and clarity, as well as some other areas shown below.

Issue	Section	Description of Issue	Response
Transitional Arrangement	8	Varied concerns. Mainly focused around whether the first three contracts were the most appropriate to apply the transitional arrangements to, whether this promoted a no compliance attitude, and if this should be applied at Qualifying Business Unit level.	We have clarified the transitional arrangements to show our understanding of the changes resulting from the Act, Regulations and Guidance. Factors that the SSRO will consider for an adjusted penalty amount include: efforts made by persons to comply and familiarity with the new legislation, regulations and guidance.
Contractor/ Person	3, 4, 6, 7, 8, 9, 10	Use of "contractor" has been replaced with "person" in accordance with the Act and Regulation.	We have replaced "contractor" with "person" where applicable.
Worked example		Many respondents stated that a worked example would be useful.	When practicable and necessary data is available, we will provide a worked example applying our principles. We will also publish all determinations made.
Reference to opinions	10	Respondents considered that the use of "opinion" was confusing.	Agreed. We have removed "opinions" within the title of section 10.
Overview of penalties		Respondents replied that a more expansive context surrounding penalties as a whole would be useful.	While we have noted that more in depth information around timings of submitting reports and the duties bound by persons of a qualifying defence contracts and the specific contraventions would be useful, this guidance as set out in 33(4) of the Act, states that we must publish guidance on determining the amount of a penalty. Further guidance on penalties as a whole may be provided in the future.
Additional factors to determine	3	A few respondents expressed a need for the value of the actual qualifying defence contract or qualifying defence contract as an additional principle.	Agreed. We have provided an additional principle in section 3 to include the actual value of the qualifying defence contract or qualifying sub-contract.
Application of this Guidance	2	A few respondents believed it would be useful to state when a penalty notice can be issued.	In section 2.2 we have added information about when the Secretary of State may issue a person a penalty notice.

6. Overall response to feedback

We were grateful for all feedback we received. In making its decision about whether to make any changes to the statutory guidance on determining the amount of a penalty, the SSRO considered the intention behind penalty notices within the Act, Regulations and Single Source Procurement Framework. The principles are that the amount of the penalty should:

- act as a deterrence from contravention;
- act as an incentive to comply;
- be fair and proportionate; and
- have regard to the seriousness of the contravention.

The feedback received was helpful. We have taken a balanced approach to our revised guidance to ensure that we uphold the intentions of penalty notices stated above.

Most stakeholders were in favour of a principle-based system, with some responding that as determinations are made by the SSRO, this will result in more clarity on penalty amounts. Generally, stakeholders stated that they agreed with the principles of determining the amount of a penalty while some offered additional principles to be considered.

Where relevant, we have made minor amendments to the guidance as suggested by respondents.

We understand the changes and new reporting requirements resulting from the Act, Regulations, and Guidance could impact on the ability of industry to comply and, as a result, we are offering a transitional period to take this into account. This was the subject of 14.5 per cent of the responses from stakeholders. We have amended the proposed “transitional arrangements” to reflect our opinion on the responses made. Whilst we recognise the challenges of the new system we fully expect persons to make every effort to comply with all requirements under the Act, Regulations and applicable statutory guidance.

All comments received were considered, and those of relevance have led to amendments to the document – especially where it was apparent that possible confusion could arise from the original wording.

Overall, we are confident that the statutory guidance on determining the amount of a penalty is a more robust document, with clearer guidance on the factors to determine a penalty that should assist the Ministry of Defence in determining a penalty and provide transparency for contractors if they receive a penalty notice.

Next Steps

The statutory guidance on determining the amount of a penalty was published as 'Final' on 27 March 2015.

The SSRO will formally review the guidance on an annual basis to take into consideration any lessons learnt and will provide supplementary guidance setting

out examples of determinations or other issues on determining the amount of a penalty as they materialise. Any updates will be published on the SSRO's website.

Any determinations made will be published on the SSRO's website.

