

Referrals guidance review 2018/2019

Responses to the consultation

April 2019

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1. ADS Group

3. Consultation responses

3.1 The SSRO invites stakeholder views, together with supporting evidence where appropriate, on the following consultation questions:

a) Do the proposed revisions make the guidance clear?

Yes / ~~No~~ / ~~Don't know~~ (Delete as appropriate)

Comments

The proposed revisions generally improve the guidance and make it clearer. A few editorial changes are suggested, and these are shown in track change mode on the accompanying documents.

Timescales for the Opinion and Determination processes seem overly generous, particularly in the case of the former. Most of the activities shown on the flow charts are sequential and it is suggested that consideration be given to revising the processes in a manner that allow some to take parallel which should reduce timescales.

b) Do the proposed revisions make the guidance helpful?

Yes / ~~No~~ / ~~Don't know~~ (Delete as appropriate)

Comments

Nil

Determinations and opinions guidance review 2018: Consultation response form

- c) Are there any other suggestions you have on how the guidance could be clearer or more helpful for parties. Yes / ~~No~~ / ~~Don't know~~ (Delete as appropriate)

Comments

See comments on the attached in track change mode.

- d) Do you have concerns regarding any areas of significant changes in the guidance or the proposed text in the guidance itself?

~~Yes~~ / No / ~~Don't know~~ (Delete as appropriate)

Comments

Nil

Determinations and opinions guidance review 2018: Consultation response form

- e) Are there any issues in the topic areas covered in this guidance that have not been adequately addressed in the proposed guidance changes?

~~Yes~~ / No / ~~Don't know~~ (Delete as appropriate)

Comments

Nil

- f) Do you have any concerns regarding the proposed publication and application dates of the revised guidance?

~~Yes~~ / No / ~~Don't know~~ (Delete as appropriate)

Comments

Nil

SSRO

Single Source
Regulations Office

**Draft guidance for consultation on the
SSRO's referral procedures for opinions
under the Defence Reform Act 2014
(for consultation)**

10 December 2018

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1. Introduction and scope

- 1.1 The SSRO is an executive non-departmental public body, sponsored by the Ministry of Defence (MOD), which plays a key role in supporting the regulatory framework for single source defence contracts established by Part 2 of the Defence Reform Act 2014 (the Act) and the Single Source Contract Regulations 2014 (the Regulations).
- 1.2 The regulatory framework specifies how contracts that meet the requirements for being qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs) must be priced and requires transparency about those contracts and the contractors who hold them. The SSRO may be asked to give an opinion on matters related to the regulatory framework in circumstances set out in the Act and Regulations and summarised in Appendix 1.
- 1.3 This document is a guide to the procedures the SSRO will follow when giving an opinion under the Act and the Regulations. It applies to all referrals for opinions accepted from the date of this guidance. The guidance sets out:
 - the regulatory framework and role of the Single Source Regulations Office (SSRO);
 - requirements for referring matters to request an opinion to the SSRO;
 - criteria that the SSRO will apply to determine whether to accept an opinion referral;
 - the process the SSRO follows at each stage when giving an opinion; and
 - roles and expectations of all parties throughout the process.
- 1.4 When carrying out its statutory functions, the SSRO aims to ensure that good value for money is obtained for the UK taxpayer in Ministry of Defence (MOD) expenditure on QDCs, and that single source suppliers are paid a fair and reasonable price under those contracts.
- 1.5 There are additional matters that may be referred to the SSRO for a decision to which this guidance does not apply, these are:
 - determinations (s.16(2)(b), s.18(3), s.20(5) and (6), s.21(3)(b), s.32(8), s.35(1)(b), & s.35(7));
 - appeals (s.29(5)); or
 - notices of cessation (s.30(4)(b)).
- 1.6 A separate guidance document relates to determinations and is published on the SSRO website¹. Anyone seeking to appeal to the SSRO or provide it with a notice of cessation may contact us via referrals@ssro.gov.uk or **020 3771 4785 to discuss the requirements.**
- 1.7 The guidance reflects the SSRO's principal practice and procedures at the date of publication and the SSRO may depart from the guidance as it considers necessary or appropriate. The guidance may be revised from time to time to reflect changes in the law, good practice, or learning obtained from making opinions, including as a result of feedback received from parties.
- 1.8 The guidance refers to legal requirements but should not be used in substitution for the requirements themselves. Parties to a referral should rely on their own legal advice as to the application of any legal requirement.

¹ <https://www.gov.uk/government/publications/guidance-on-the-ssros-referrals-procedures-under-the-defence-reform-act-2014-and-single-source-contract-regulations-2014>

2. General conduct of referrals

- 2.1 The SSRO's opinion will be given by a three-person Referral Committee appointed on a case by case basis in accordance with the Act and the SSRO's Corporate Governance Framework. At least one member of the Committee will be an independent, i.e. neither a board member nor an employee of the SSRO. Potential conflicts of interest² will be considered before appointing the Committee.
- 2.2 The Referral Committee will be supported by a Case Team established for each opinion (the Case Team). The composition of the Case Team will depend on the matter for opinion. All parties engaged with the opinion will be provided with the contact details for the SSRO's Case Team and should use those details to communicate with the SSRO during the process.
- 2.3 The SSRO will share the contact details for all parties with each other. In most cases, one of these parties will be the Ministry of Defence, which will include senior staff involved in the contract delivery.
- 2.4 The SSRO is concerned to treat all commercially sensitive information appropriately and has published a statement on how it handles commercially sensitive information. You can read more information about how we will do this below:
<https://www.gov.uk/government/news/handling-commercially-sensitive-information>.
- 2.5 The SSRO will comply with the requirements of the Act when giving an opinion and other public law requirements, including procedural fairness.
- 2.6 If at any stage of the opinion a party feels that the SSRO is acting unfairly or has not complied with a legal requirement, then any concerns should be raised with the Case Team at the earliest opportunity. The SSRO will deal promptly with such concerns.
- 2.7 A party who is dissatisfied with the SSRO's response to an initial concern may raise a formal complaint with the SSRO through the SSRO Complaints Policy³. We aim to resolve all complaints within 20 working days of receipt. However, we understand that complaints regarding the opinion process may be time-sensitive and require a quicker conclusion. In such cases, we will set out an alternative appropriate timeframe for dealing with such complaints.

² <https://www.gov.uk/government/publications/ssro-code-of-conduct>

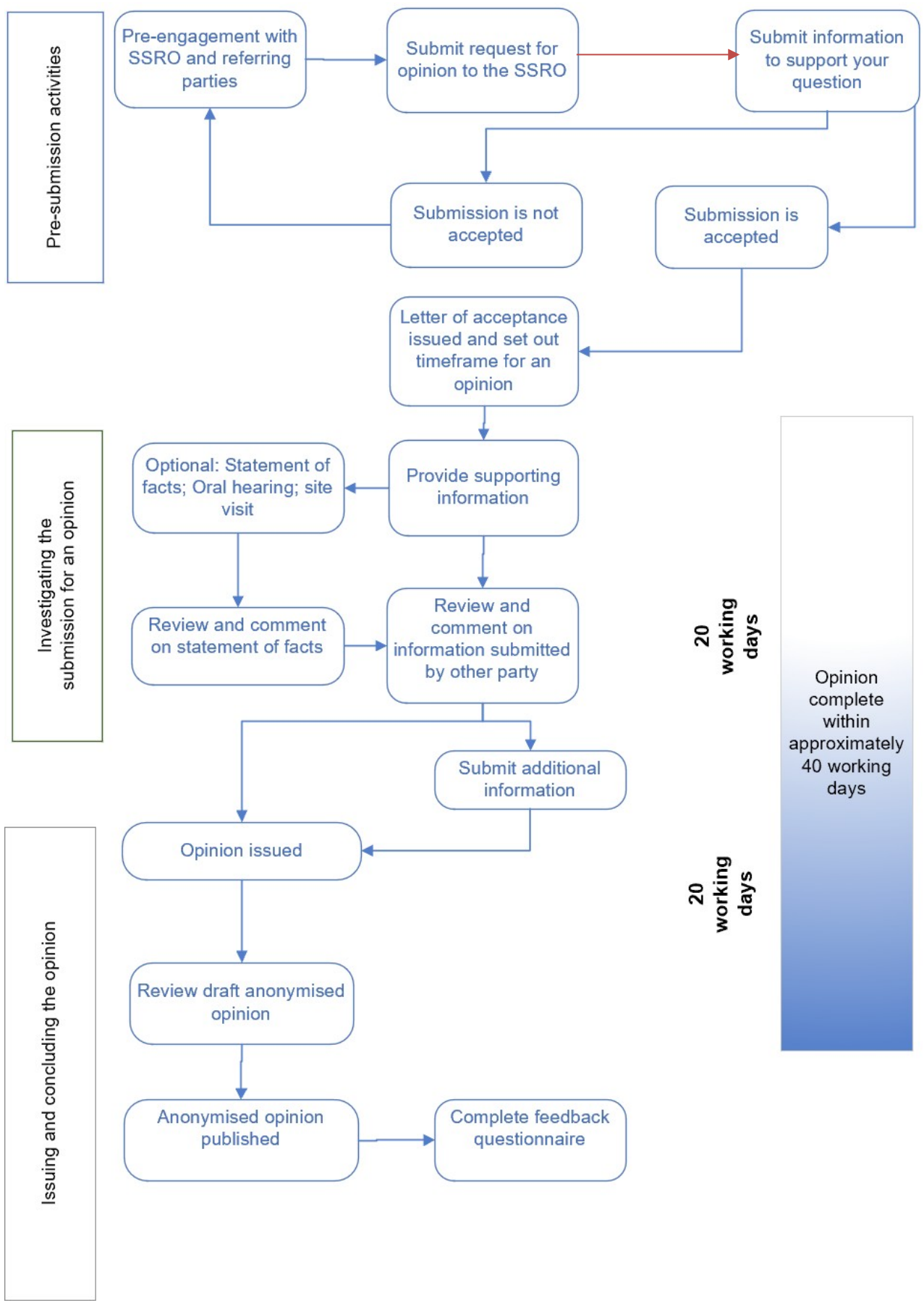
³ <https://www.gov.uk/government/publications/ssro-complaints-policy>

3. Summary of the stages in giving an opinion

3.1 The following sections of the guidance look at the key stages in the process for opinions, from the time prior to a submission being made to concluding the opinion. The various stages are examined under the following headings:

- engaging with the SSRO before referring matters for opinion (section 4);
- assessing whether to accept the request for an opinion (section 5);
- setting a timeframe (section 6);
- investigating the submission for an opinion (section 7);
- giving and publishing a final opinion (section 8); and
- concluding the referral (section 9).

3.2 This guidance sets out a broad outline of the activities in each stage. The stages and corresponding activities should be viewed as indicative, as the process may need to be adapted for the circumstances of each opinion. The diagram below illustrates the process the SSRO generally follows when giving an opinion. More detail on each of the stages is set out in sections 4 - 9.



¹ What is the difference between “Submit information to support your question” and “Provide supporting information”?

4. Engaging with the SSRO before referring matters for an opinion

Early engagement with the SSRO

- 4.1 The SSRO encourages early engagement with party or parties that are considering making a submission for an opinion. Early engagement should support the party or parties to:
- clarify the question and whether it is within the SSRO's functions;
 - outline the issues for consideration by the SSRO when setting a timescale;
 - understand requirements and expectations for each stage of the process;
 - ensure engagement at the appropriate organisational level from both parties; and
 - identify information which must be provided in support of a submission. This will prevent delays in giving the opinion and increase likelihood that the opinion question will be accepted.
- 4.2 Early engagement will also assist the SSRO plan and conduct an efficient process and deliver a timely opinion.
- 4.3 The party or parties considering requesting an opinion should contact the SSRO via referrals@ssro.gov.uk or **020 3771 4785** and must have the following information to hand:
- a description of the issues; and
 - an outline of the question which may be asked of the SSRO.

Contact with non-referring parties

- 4.4 Where a party proposes to seek the SSRO's opinion, the SSRO might, with permission, also engage with the other party or parties who may be involved in the referral.

Making a submission for an opinion

- 4.5 In making a referral for an opinion, the referring party or parties should set out clearly:
- the question on which the SSRO is asked to give an opinion, including the reasons they feel that decision is appropriate and justified;
 - the provision within the legislation under which the SSRO is being requested to give an opinion; and
 - background context to the request for the opinion including relevant statutory reports, previous measures taken to address or reach agreement on the matter referred, such as a description of any negotiations which have taken place between the parties or, in the event where the other party was unwilling to enter into negotiations, information about the steps taken by the referring party to enter into good faith negotiations.
- 4.6 The referring party or parties should provide submissions with supporting information where possible.

- 4.7 The SSRO does not prescribe the form of a request for an opinion or the form of any accompanying submissions. However, all information submitted to the SSRO should be relevant to the referral and clearly referenced to arguments laid out in the request for an opinion and accompanying submissions.
- 4.8 The nature of the information required to support the referral will vary according to the circumstances of each referral. For example, if the SSRO is asked to assess the extent to which a cost is Allowable, examples may include, but are not limited to:
- an analysis or breakdown of the cost(s);
 - extracts from the invitation to tender dealing with the issue for which the opinion is sought
 - relevant documentation of commercial negotiations or correspondence between the parties; and
 - an explanation of how it has been determined that a cost is appropriate, attributable to the contract and reasonable in the circumstances (AAR).
- 4.9 Following early engagement, the referring party or parties should have reached agreement with the SSRO on the information that must be provided in order for the it to proceed to accept the question for the opinion. The SSRO will not be able to progress the opinion until this information has been provided.

5. Assessing whether to accept the request for an opinion

Notification that the request for an opinion has been received

- 5.1 The SSRO will confirm receipt of the request for an opinion in writing within one working day. Confirmation of receipt does not indicate a formal acceptance of the referral and the timeline begins only once the question has been accepted.

Assessing whether the request for an opinion falls within the SSRO's authority

- 5.2 The SSRO will assess whether a request for an opinion falls within the SSRO's jurisdiction under the Act and the Regulations. The relevant provisions are summarised in Appendix 1.

Exercising the SSRO's discretion

- 5.3 The SSRO will consider whether it must give an opinion or whether it has discretion to do so. If the SSRO has discretion, it will consider whether to accept or refuse the referral in the circumstances and, in doing so, may take the following into account:
- any direct and indirect benefits for all parties to qualifying contracts;
 - the strategic significance of the matter referred; and
 - the resources required to carry out the investigation.

Assessing whether the request for an opinion contains the requisite information

- 5.4 The SSRO will assess whether the request for an opinion contains sufficient information on which the SSRO can proceed to deal with the request. If the SSRO does not have the requisite information, it will request this from the referring party. If the referral is one in respect of which the SSRO has discretion to give an opinion, inadequate information may be a reason for the SSRO to delay acceptance and possibly even decline to accept.
- 5.5 The SSRO may seek a meeting with the referring party or parties to obtain clarification of the question for opinion or supporting information. Such meetings may take place remotely or in person.

Accepting the question for opinion




- 5.6 When the SSRO has accepted a request for an opinion, it will notify the party or parties engaged in the referral. The timeframe for the SSRO to give the opinion will start on the date of this notice.
- 5.7 The SSRO will also communicate the following to the parties:
- the question accepted;
 - the timetable;
 - expectations during the referral process;
 - contact details for the Case Team;
 - the composition of the Referral Committee; and
 - security measures for communicating with the parties and any software required.

- 5.8 Other issues may arise during the investigation, but the opinion will be based on the question the SSRO has accepted. If the referring parties agree that the question for the opinion should be revised significantly, consideration will need to be given to re-setting the timeframe for the referral.

Publishing the opening of an opinion on the SSRO's website

- 5.9 Unless there are exceptional circumstances, the SSRO will publish the acceptance of a referral on the SSRO website setting out a brief summary of the issue. In doing so, the SSRO will anonymise the information and protect the confidentiality of the referring parties. This should promote greater understanding of the regime and facilitate engagement with the SSRO and discharge of our functions.

6. Setting a timeframe

- 6.1 The SSRO is committed to giving all opinions in a professional and timely manner. We will set a timeframe for each referral, taking into account the following:
- our general aim to give opinions within 40 working days of acceptance;
 - the circumstances of the case, including complexity, scope and urgency; and
 - the clarity and completeness of the information submitted, including the submissions, supporting information and any agreed statement of facts.
- 6.2 If there is a commercial imperative which affects the timeframe, this should be made known to the SSRO during the early engagement phase, or as soon as it arises.
- 6.3 The SSRO will encourage the parties agree a statement of the facts and provide this with the original submission along with any supporting information. This will help reduce the investigation phase timescales. 
- 6.4 The SSRO's ability to give an opinion in a planned timeframe will depend on:
- effective communication of issues;
 - timely submission of the supporting information; and
 - co-operation by the parties throughout the process.
- 6.5 In exceptional cases, the SSRO may 'stay' (or halt) the opinion process, effectively stopping the clock on the opinion timetable if for example:
-  negotiations are taking place that may resolve issues between the parties; or
 - unforeseen events prevent the SSRO from proceeding.
- 6.6 The SSRO may stay the opinion process on its own initiative or in response to an application by a party to the referral. It is for the SSRO to decide whether to stay the process and its decision  is final, although it may consult with the parties.
- 6.7 If the SSRO stays the opinion process, it will usually set a time limit after which the stay will end and the clock will start again on the timetable for giving an opinion. An overall adjustment to the timetable may or may not be required as a result.

7. Investigating the referral

7.1 The SSRO will review the information provided and investigate [what] before giving an opinion. The purpose of the investigation is to assist the SSRO in clarifying and understanding the matter referred. The extent of investigation will depend on the matter under consideration and the information already submitted by the referring party. This section should also be read in conjunction with paragraphs 4.6 to 4.8 of this guidance.

7.2 In giving an opinion, the SSRO will have regard to its own data as well as any material which is required to be considered by the Act or the Regulations. For example, when giving an opinion in relation to a prospective amendment to a contract place prior to the Defence Reform Act 2014 coming into force i.e. under "Yellow Book" rules, the SSRO must have regard to:

- a. any relevant published decisions of the Review Board for Government Contracts;
- b. the Government Profit Formula and Associated Arrangements in force at the date the contract was entered into;
- c. the terms of the contract; and
- d. representations made by the parties to the contract and, where not a party to the contract, the Secretary of State.

7.3 The SSRO uses a number of methods to obtain information, not all of which will be applicable to each opinion. The SSRO has set out below the most common ways in which information is likely to be obtained.

Meeting with parties (if necessary)

7.4 The SSRO may meet with either or both parties at anytime during the process, if it would be beneficial to the investigation, for example to clarify or explain something. These meetings can take place either in person or via conference call or video conference with the aim of assisting the SSRO to gain a detailed understanding of the matters referred. A party to the referral may propose a meeting if it considers this will assist the SSRO to give its opinion.

Information gathering

7.5 The SSRO may make requests for information to the referring party, an interested party or a relevant third party. Parties should provide prompt, complete responses to the SSRO's requests, as failure to do so may affect the timeliness and content of the SSRO's opinion.

7.6 It may be that multiple requests for information will be required before the SSRO can give an opinion. We will take a proportionate approach to the number, content and timing of information requests and may liaise with the relevant party when preparing a request.

7.7 The SSRO will set a date by which parties are expected to respond. At times, this may require a short turnaround. Parties will be invited to notify the SSRO in case of difficulty.

7.8 If a party is concerned about the content of an information request, it should contact the Case Team. The SSRO may modify an information request if it considers there is a more efficient way to obtain the information it requires to make an opinion. The final decision on whether information is required rests with the SSRO.

Circulation of the submission and other written representations to the other party where permitted and appropriate

7.9 The SSRO will share the referring party's submission, including any supporting information, with the other party or parties to the contract and will invite comments. We will share and seek comment on other submissions made by the parties, as necessary to ensure a fair process.

7.10 If a party does not want some information to be shared, then it should provide a clear written statement identifying the following at the time of submission to the SSRO:

- the information that it asks the SSRO not to share;
- the reasons why it considers the information should not be shared;
- whether a redacted or summarised version may be shared, in which case the proposed version should be provided; and
- the basis on which the party considers that the SSRO may fairly consider the submitted information if it has not been seen by all parties engaged in the process.

7.11 The SSRO will be guided by considerations of fairness in deciding whether to accept or consider information that has not been made available to one of the parties.

Statement of Facts

7.12 The SSRO is likely to confirm its understanding of the facts with the parties before it gives an opinion. The SSRO may share a statement of facts with the parties and ask them to comment on its accuracy.

Site visit

7.13 The SSRO may visit the contractor's facilities related to the referral. The purpose of the site visit is for the SSRO to obtain a greater understanding of the context for the request for an opinion, for example by visiting key facilities, hearing a presentation outlining the nature of the business or a relevant process.

7.14 

7.15 Site visits are not expected to last more than one day. The SSRO will agree an agenda with the host party prior to the site visit.

7.16 The site visit will be attended by members of the Referral Committee and Case Team. It is expected that all parties will attend the site visit and assist the SSRO by showing key facilities and processes and responding to queries. The SSRO may request named representatives from all parties engaged in the process to be in attendance.

Oral hearing

7.17 The SSRO may hold one or more oral hearings. The purpose of the oral hearing is for both parties to present their views to the SSRO on the matters referred, and to clarify existing information. The oral hearing also provides an opportunity for the SSRO Referral Committee to ask both parties questions.

7.18 The parties are expected to send representatives to the oral hearing who are familiar with the matters in issue and authorised to speak for the party. The SSRO may request that specific representatives attend. Legal advisors may attend but the Referral Committee's questions should be answered by persons with direct knowledge of the facts.

7.19 The SSRO will generally record the oral hearings and arrange a transcript, a copy of which will be provided to the parties. If a party considers there are issues of inaccuracy in respect of what was said at the oral hearing, these should be raised with the Case Team.

8. Giving and publishing an opinion

Giving an opinion

- 8.1 The opinion contains the decision of the Referral Committee. The opinion will normally be sent to the referring parties as a final document without opportunity for comment. The SSRO would not generally expect to engage further with any party after the decision is given.
- 8.2 The purpose of opinions issued by the SSRO is to inform and advise and, in this regard, they are not legally binding. It is recognised, however, that the SSRO's opinion may well affect the future conduct of the parties.
- 8.3 When giving an opinion in relation to a proposed QDC or QSC the SSRO can require the payment of appropriate costs by one party to the other (Section 35(4) and (5)) and this requirement will be binding on those parties. Where the opinion relates to a proposed QSC, the payment of costs may be payable by the proposed sub-contractor to the Secretary of State or by the Secretary of State to the proposed sub-contractor.

Publishing the opinion

- 8.4 A summary or redacted version of the opinion and its outcomes will be published on the SSRO's website. The SSRO publishes this information to contribute to the evidence base as to the operation of the regulatory framework established by Part 2 of the Act and the Regulations. This should promote greater understanding of the regime, facilitate engagement with the SSRO and inform discharge of our functions. However, opinions are contract-specific and care should be taken before applying them to other circumstances and contractual arrangements.
- 8.5 The published version of the opinion is anonymized except in cases where the SSRO believes naming a party is appropriate and in the public interest. If the SSRO considers this to be likely, the SSRO will seek representations from the parties before reaching a decision.
- 8.6 The SSRO exclude from the published version any information that may prejudice the commercial interest of one or more of the parties to the opinion. Parties will be given an opportunity to make representations on a draft prior to publication.
- 8.7 A final version will be sent to the parties shortly before publication. The SSRO's Annual Report and Accounts will also include summary details of all opinions completed in the financial year, upon which the SSRO will not seek representations.

9. Concluding the referral

Closing the referral

- 9.1 The SSRO may close a request for an opinion before a final decision is made, if:
- the legislation permits; and
- 9.2 it is satisfied in the circumstances that an opinion should not be given for example, if all parties reach a settlement when the matter is in progress and seek to withdraw the referral.

Appealing against a decision

- 9.3 The SSRO's decision is final. Once the SSRO has given its opinion, there is no appeal mechanism in the Act or the Regulations. It is open to parties to request a court to review the lawfulness of the decision through a judicial review process. It is important to note, however, that this process is not a re-run of the merits of the SSRO's decision.

Feedback

- 9.4 The SSRO welcomes face to face or written feedback about the referrals process. We will use this information to help us improve our procedures and processes on an ongoing basis.
- 9.5 Feedback can be provided during the referral process. Should any issues or concerns arise, they may be communicated to the Case Team at any point in the process.
- 9.6 On conclusion of the opinion, the SSRO will contact the parties engaged to seek feedback on the processes followed in giving the opinion. This will likely involve a short questionnaire and a meeting or telephone call to discuss feedback.

Appendix 1 Statutory grounds for opinions

Table 1 below summarises the matters the SSRO may be asked to give an opinion on and whether it has a power or a duty to do so. It identifies the person or persons who may make a reference to the SSRO and any time limits which apply.

Table 1: Matters on which the SSRO may be asked to give an opinion

Ground	Function	Referring parties	Time limit
Prescribed matters (section 35(1)(a) and Regulation 51)	<p>The SSRO must give an opinion on matters prescribed in the Regulations relating to a QDC or a proposed QDC, being:</p> <p>the appropriate amount of adjustment in steps 2, 3 or 6 of contract profit rate calculations;</p> <p>the appropriate amount of a group cost risk adjustment, group POCO adjustment, or group capital servicing adjustment;</p> <p>any question relevant to the cost recovery rates to estimate likely allowable costs; and</p> <p>the extent to which a particular cost would be an allowable cost.</p> <p>and, in respect to qualifying defence contracts only:</p> <p>whether the Secretary of State has acted unreasonably in exercising a power to require the contractor to provide information in an on-demand report</p>	<p>Secretary of State, authorised person, primary contractor (in the case of a QDC), or the person who proposes to enter into the contract with the Secretary of State (in the case of a proposed contract)</p> <p>In relation to ground (e), only the primary contractor.</p>	<p>Grounds (a) to (d): —</p> <p>In relation to ground (e), within 3 months of receiving written direction by the Secretary of State.</p>

Ground	Function	Referring parties	Time limit
Joint referral (section 35(3) and Regulation 53)	The SSRO may give an opinion on any matter relating to a QDC or proposed QDC if both the Secretary of State and the primary contractor (in the case of a QDC) or the other proposed party to the contract (in the case of a proposed QDC) make the referral	Secretary of State and primary contractor (or the other proposed party to the contract) jointly	No later than 2 years after the contract completion date
Pre-scheme referral (section 35(7) and Regulation 55)	The SSRO must give an opinion if (i) a contract was entered into before 18 December 2014 and the contract required the Review Board for Government Contracts to give an opinion in relation to any matter referred to it; and (ii) a party to the contract refers the matter for opinion after 18 December 2014.	A party to the contract	No later than 2 years after: (a) the date described in the contract as the contract completion date; or (b) if no such date is described in the contract, the date on which the contractor completes all obligations which entitle it to final payment under the contract; or (c) if the contract is terminated before either of the dates described in (a) or (b), the date that the contract is terminated.

This guidance and the grounds summarised in Table 1 apply to qualifying sub-contracts (and sub-contractors) as they apply to qualifying defence contracts (and primary contractors), but subject to the modifications set out in Regulation 64, which include that:

- in respect to the **Prescribed Matters** ground, the referring parties include the Contracting Authority (in the case of a qualifying sub-contract) and the person who proposes to enter into the qualifying sub-contract (in the case of a proposed qualifying sub-contract). In this regard “Contracting Authority” means the party which is, or would be, liable to pay the contract price under a qualifying sub-contract; and
- in respect to the **Joint referral** ground, the referring parties include the proposed sub-contractor (in the case of a proposed qualifying sub-contract) instead of the “other proposed party to the contract”.

Comments on Process Flowchart Forming Part of Section 3

No.	Current Text	Suggested Text or Change
1.		There appears to be an arrow missing between "Submit request for opinion to the SSRO" and "Submit <u>outline</u> information to support your question". Also suggest these boxes are transposed so that the process is Pre-engagement, submission of preliminary information to support request, request. If request not accepted go round the loop again, if accepted, move onto to "Letter of acceptance issued....."
2.	Provide supporting information.	Provide <u>detailed</u> supporting information. (To distinguish the information to be provided at this time from that provided during the pre-engagement phase.)
3.		The diagram indicates that it is necessary to have an oral hearing and site visit in order to "Review and comment on statement of facts". Suggest rearranging the arrows.

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SSRO

Single Source
Regulations Office

**Draft guidance for consultation on
the SSRO's referral procedures for
determinations under the Defence Reform
Act 2014 (for consultation) 10 December 2018**

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1. Scope of the guidance

- 1.1 The SSRO is an executive non-departmental public body, sponsored by the Ministry of Defence (MOD), which plays a key role in supporting the regulatory framework for single source defence contracts established by Part 2 of the Defence Reform Act 2014 (the Act) and the Single Source Contract Regulations 2014 (the Regulations).
- 1.2 The regulatory framework specifies how contracts that meet the requirements for being qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs) must be priced and requires transparency about those contracts and the contractors who hold them. The SSRO may be asked to make a determination on matters related to the regulatory framework in circumstances set out in the Act and Regulations and summarised in Appendix 1.
- 1.3 This document is a guide to the procedures the SSRO will follow when making a determination under the Act and the Regulations. It applies to all referrals for determinations accepted from the date of this guidance. The guidance sets out:
 - the regulatory framework and role of the Single Source Regulations Office (SSRO);
 - requirements for referring matters to request a determination to the SSRO;
 - criteria that the SSRO will apply to determine whether to accept a determination referral;
 - the process the SSRO follows at each stage when making a determination; and
 - roles and expectations of all parties throughout the process.
- 1.4 When carrying out its statutory functions, the SSRO aims to ensure that good value for money is obtained for the UK taxpayer in Ministry of Defence (MOD) expenditure on QDCs, and that single source suppliers are paid a fair and reasonable prices under those contracts.
- 1.5 There are additional matters that may be referred to the SSRO for a decision to which this guidance does not apply, these are:
 - opinions (s.35(1)(a), s.35(3), s.35(7) of the Act);
 - appeals (s.29(5)); or
 - notices of cessation (s.30(4)(b))
- 1.6 A separate guidance document relates to opinions and is published on the SSRO website¹. Anyone seeking to appeal to the SSRO or provide it with a notice of cessation may contact us via referrals@ssro.gov.uk or **020 3771 4785 to discuss the requirements**.
- 1.7 The guidance **but** reflects the SSRO's principal practice and procedures at the date of publication. The SSRO may depart from the guidance as it considers necessary or appropriate. The guidance may be revised from time to time to reflect changes in the law, good practice, or learning obtained from making determinations, including as a result of feedback received from parties.
- 1.8 The guidance refers to legal requirements but should not be used in substitution for the requirements themselves. Parties to a referral should rely on their own legal advice as to the application of any legal requirement.

¹ <https://www.gov.uk/government/publications/guidance-on-the-ssros-referrals-procedures-under-the-defence-reform-act-2014-and-single-source-contract-regulations-2014>

2. General conduct of referrals

- 2.1 The SSRO's determination will be given by a three-person Referral Committee appointed on a case by case basis in accordance with the Act and the SSRO's Corporate Governance Framework. At least one member of the Committee will be an independent, i.e. neither a board member nor an employee of the SSRO. Potential conflicts of interest² will be considered before appointing the Committee.
- 2.2 The Referral Committee will be supported by a Case Team established for each determination (the Case Team). The composition of the Case Team will depend on the matter for determination. All parties engaged with the determination will be provided with the contact details for the SSRO's Case Team and should use those details to communicate with the SSRO during the process.
- 2.3 The SSRO will share the contact details for all parties with each other. In most cases, one of these parties will be the Ministry of Defence, which will include senior staff involved in the contract delivery.
- 2.4 The SSRO is concerned to treat all commercially sensitive information appropriately and has published a statement on how it handles commercially sensitive information. You can read more information about how we will do this below:
<https://www.gov.uk/government/news/handling-commercially-sensitive-information>
- 2.5 The SSRO will comply with the requirements of the Act when making a determination and other public law requirements, including procedural fairness.
- 2.6 If at any stage of the determination a party feels that the SSRO is acting unfairly or has not complied with a legal requirement, then any concerns should be raised with the Case Team at the earliest opportunity. The SSRO will deal promptly with such concerns.
- 2.7 A party who is dissatisfied with the SSRO's response to an initial concern may raise a formal complaint with the SSRO through the SSRO Complaints Policy³. We aim to resolve all complaints within 20 working days of receipt. However, we understand that complaints regarding the determination process may be time-sensitive and require a quicker conclusion. In such cases, we will set out an alternative appropriate timeframe for dealing with such complaints.

² <https://www.gov.uk/government/publications/ssro-code-of-conduct>

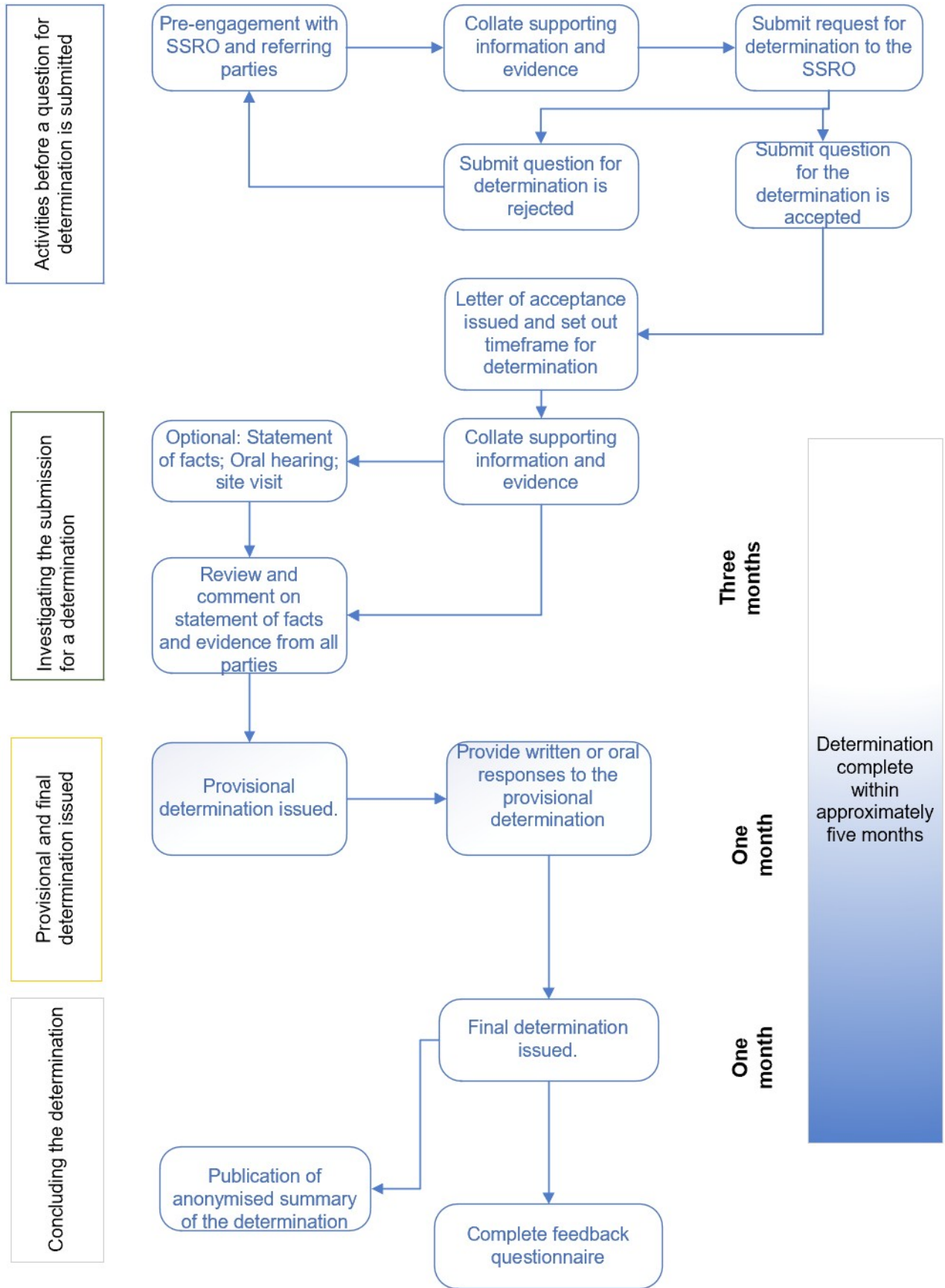
³ <https://www.gov.uk/government/publications/ssro-complaints-policy>

3. Summary of the stages in making a determination

3.1 The following sections of the guidance look at the key stages in the process for determinations from the time prior to a submission being made to concluding the determination. The various stages are examined under the following headings:

- engaging with the SSRO before referring matters for determination (section 4);
- assessing whether to accept the request for a determination (section 5);
- setting a timeframe (section 6);
- investigating the submission for a determination (section 7);
- making a provisional determination (section 8);
- making and publishing a final determination (section 9); and
- concluding the referral (section 10).

3.2 This guidance sets out a broad outline of the activities in each stage. The stages and corresponding activities should be viewed as indicative, as the process may need to be adapted for the circumstances of each determination. The diagram below illustrates the process the SSRO generally follows when making a determination. More detail on each of the stages is set out in sections 6 - 10.



4. Engaging with the SSRO before referring matters for determination

Early engagement with the SSRO

- 4.1 The SSRO encourages early engagement with party or parties that are considering making a submission for a determination. Early engagement should support the party or parties to:
- clarify the question and whether it is within the SSRO's functions;
 - outline any issues for consideration by the SSRO when setting a timescale;
 - understand requirements and expectations for each stage of the process;
 - ensure engagement at the appropriate organisational level from both parties; and
 - identify information which must be provided in support of a submission. This will help prevent delays in making the determination and increase likelihood that the determination question will be accepted.
- 4.2 Early engagement will also assist the SSRO plan and conduct an efficient process and deliver a timely determination.
- 4.3 A party or the parties considering requesting a determination should contact the SSRO via referrals@ssro.gov.uk or **020 3771 478** and the party or must have the following information to hand:
- a description of the issues; and
 - an outline of the question which may be asked of the SSRO.

Contact with non-referring parties

- 4.4 Where a party proposes to seek the SSRO's determination, the SSRO might, with permission, also engage with the other party or parties who may be involved in the referral.

Making a submission for a determination

- 4.5 In making a referral for a determination, the referring party or parties should set out clearly:
- the question on which the SSRO is asked to make a determination, including the reasons they feel that decision is appropriate and justified;
 - the provision within the legislation under which the SSRO is being requested to make a determination; and
 - background context to the request for the determination including relevant statutory reports, previous measures taken to address or reach agreement on the matter referred, such as a description of any negotiations which have taken place between the parties or, in the event where the other party was unwilling to enter into negotiations, information about the steps taken by the referring party to enter into good faith negotiations.
- 4.6 The referring party or parties should provide submissions with supporting information where possible.

- 4.7 The SSRO does not prescribe the form of a request for a determination or the form of any accompanying submissions. However, all information submitted to the SSRO should be relevant to the referral and clearly referenced to arguments laid out in the request for a determination and accompanying submissions.
- 4.8 The nature of the information required to support the referral will vary according to the circumstances of each referral. For example, if the SSRO is asked to assess the extent to which a cost is Allowable, examples may include, but are not limited to:
- an analysis or breakdown of the cost(s);
 - extracts from the contract dealing with the issue that is the subject of the referral;
 - relevant documentation of commercial negotiations or correspondence between the parties; and
 - an explanation of how it has been determined that a cost is appropriate, attributable to the contract and reasonable in the circumstances (AAR).
- 4.9 Following early engagement, the referring party or parties should have reached agreement with the SSRO on the information that must be provided in order for it to proceed to accept the question for the determination. The SSRO will not be able to progress the matter until this information has been provided.

5. Assessing whether to accept the request for a determination

Notification that the request for a determination has been received

- 5.1 The SSRO will confirm receipt of the request for a determination in writing within one working day. Confirmation of receipt does not indicate a formal acceptance of the referral and the timeline begins only once the question has been accepted.

Assessing whether the request for a determination falls within the SSRO's authority

- 5.2 The SSRO will assess whether a request for a determination falls within the SSRO's jurisdiction under the Act and the Regulations. The relevant provisions are summarised in Appendix 1.

Exercising the SSRO's discretion

- 5.3 The SSRO will consider whether it is required by the Act or the Regulations give a determination or whether it has discretion to do so. In the case of the latter, it will consider whether to accept or refuse the referral in the circumstances and, in doing so, may take the following into account:

- any direct and indirect benefits for the parties to qualifying contracts;
- the strategic significance of the matter referred; and
- the resources required to carry out the investigation.

Assessing whether the request for a determination contains the requisite information

- 5.4 The SSRO will assess whether the request for a determination contains sufficient information on which the SSRO can proceed to deal with the request. If the SSRO does not have the requisite information, it will request this from the referring party. If the referral is one in respect of which the SSRO has discretion to make a determination, inadequate information may be a reason for the SSRO to delay acceptance and possibly even decline to accept.

- 5.5 The SSRO may seek a meeting with the referring party or parties to obtain clarification of the question for determination or supporting information. Such meetings may take place remotely or in person.

Accepting the question for determination

- 5.6 When the SSRO has accepted a request for a determination, it will notify the parties engaged in the referral. The timeframe for the SSRO to give the determination will start on the date of this notice.

- 5.7 The SSRO will also communicate the following to the parties:




- the question accepted;
- the timetable;
- expectations during the referral process;
- contact details for the Case Team;
- the composition of the Referral Committee; and
- security measures for communicating with the parties and any software required.

- 5.8 Other issues may arise during the investigation, but the determination will be based on the question the SSRO has accepted. If the referring parties agree that the question for the determination should be revised significantly, consideration will need to be given to re-setting the timeframe for the referral.

Publishing the opening of a case on the SSRO's website

- 5.9 Unless there are exceptional circumstances, the SSRO will publish the acceptance of a referral on the SSRO website setting out a brief summary of the issue. In doing so, the SSRO will anonymise the information and protect the confidentiality of the referring parties. This should promote greater understanding of the regime and facilitate engagement with the SSRO and discharge of our functions.

6. Setting a timeframe

- 6.1 The SSRO is committed to making all determinations in a professional and timely manner. We will set a timeframe for each referral, taking into account the following:
- our general aim to give determinations within five months of acceptance;
 - the circumstances of the case, including complexity, scope and urgency; and
 - the clarity and completeness of the information submitted, including the submissions, supporting information and any agreed statement of facts.
- 6.2 If there is a commercial imperative which affects the timeframe, this should be made known to the SSRO during the early engagement phase, or as soon as it arises.
- 6.3 The SSRO will encourage the parties to agree a statement of the facts and provide this with the original submission along with any supporting information. This will help reduce the investigation phase timescales. 
- 6.4 The SSRO's ability to give a determination a planned timeframe will depend on:
- effective communication of issues;
 - submission of the required supporting information; and
 - timely co-operation by both parties throughout the process.
- 6.5
- 6.6 In exceptional cases, the SSRO may 'stay' (or halt) the determination process, effectively stopping the clock on the determination timetable, for example:
-  negotiations are taking place that may resolve issues between the parties; or
 - unforeseen events prevent the SSRO from proceeding.
- 6.7 The SSRO may stay the determination process on its own initiative or in response to an application by a party to the referral. It is for the SSRO to decide whether to stay the process and its  decision is final, although it may consult with the parties.
- 6.8 If the SSRO stays the determination process, it will usually set a time limit after which the stay will end and the clock will start again on the timetable for making a determination. An overall adjustment to the timetable may or may not be required as a result.

7. Investigating the referral

- 7.1 The SSRO will review the information provided and investigate [what?] before making a determination. The purpose of the investigation is to assist the SSRO in clarifying and understanding the matter referred. The extent of investigation will depend on the matter under consideration and the information already submitted by the referring party. This section should also be read in conjunction with paragraphs 4.6 to 4.8 of this guidance.
- 7.2 In making a determination, the SSRO will have regard to its own data as well as any material which is required to be considered by the Act or the Regulations. For example, when making a determination in relation to Allowable Costs, the SSRO must have regard to:
- the information that was available to each party at the time of the agreement;
 - the statutory guidance in place at the time of the agreement;
 - any provisions of the contract providing for a target cost incentive fee adjustment; and
 - whether the parties disclosed, in a timely manner, the facts and assumptions they used to determine the allowable costs or the contract profit rate.
- 7.3 The SSRO uses a number of methods to obtain information, not all of which will be applicable to each determination. The SSRO has set out below the most common ways in which information is likely to be obtained.

Meeting with parties (if necessary)

- 7.4 The SSRO may meet with either or both parties at anytime during the process. if it would be beneficial to the investigation, for example to clarify or explain something. These meetings can take place either in person or or via a conference call or video conference with the aim of assisting the SSRO to gain a detailed understanding of the matters referred. A party to the referral may propose a meeting if it considers this will assist the SSRO to give its a determination.

Information gathering

- 7.5 The SSRO may make requests for information to the referring party, an interested party or a relevant third party. Parties should provide prompt, complete responses to the SSRO's requests, as failure to do so may affect the timeliness and content of the SSRO's determination.
- 7.6 It may be that multiple requests for information will be required before the SSRO can give a determination. We will take a proportionate approach to the number, content and timing of information requests and may liaise with the relevant party when preparing a request.
- 7.7 The SSRO will set a date by which parties are expected to respond. At times, this may require a short turnaround. Parties will be invited to notify the SSRO in case of difficulty.
- 7.8 If a party is concerned about the content of an information request, it should contact the Case Team. The SSRO may modify an information request if it considers there is a more efficient way to obtain the information it requires to make a determination. The final decision on whether information is required rests with the SSRO.

Circulation of the submission and other written representations to the other party where permitted and appropriate


- 7.9 The SSRO will share the referring party's submission, including any supporting information, with the other party or parties to the contract and will invite comments. We will share and seek comment on other submissions made by the parties, as necessary to ensure a fair process.

7.10 If a party does not want some information to be shared, then it should provide a clear written statement identifying the following at the time of submission to the SSRO:

- the information that it asks the SSRO not to share;
- the reasons why it considers the information should not be shared;
- whether a redacted or summarised version may be shared, in which case the proposed version should be provided; and
- the basis on which the party considers that the SSRO may fairly consider the submitted information if it has not been seen by all parties engaged in the process.

7.11 The SSRO will be guided by considerations of fairness in deciding whether to accept or consider information that has not been made available to one of the parties.

Statement of Facts

7.12  The SSRO may confirm its understanding of the facts with the parties before it gives a determination. The SSRO may share a statement of facts with the parties and ask them to comment on its accuracy.

Site visit

7.13 The SSRO may visit the contractor's facilities related to the referral. The purpose of the site visit is for the SSRO to obtain a greater understanding of the context for the request for a determination, for example by visiting key facilities, hearing a presentation outlining the nature of the business or a relevant process.

7.14 

7.15 Site visits are not expected to last more than one day. The SSRO will agree an agenda with the host party prior to the site visit.

7.16 The site visit will be attended by members of the Referral Committee and Case Team. It is expected that all parties will attend the site visit and assist the SSRO by showing key facilities and processes and responding to queries. The SSRO may request named representatives from all parties engaged in the process to be in attendance.

Oral hearing

7.17 The SSRO may hold one or more oral hearings. The purpose of the oral hearing is for both parties to present their views to the SSRO on the matters referred, and to clarify existing information. The oral hearing also provides an opportunity for the SSRO Referral Committee to ask both parties questions.

7.18 The parties are expected to send representatives to the oral hearing who are familiar with the matters in issue and authorised to speak for the party. The SSRO may request that specific representatives attend. Legal advisors may attend but the Referral Committee's questions should be answered by persons with direct knowledge of the facts.

7.19 The SSRO will generally record the oral hearings and arrange a transcript, a copy of which will be provided to the parties. If a party considers there are issues of inaccuracy in respect of what was said at the oral hearing, these should be raised with the Case Team.

8. Making a provisional determination

- 8.1 On the basis of evidence and information gathered by the SSRO, including that made available at the oral hearing, the SSRO will produce a provisional determination. Provisional determinations issued by the SSRO should set out:
- the facts of the referral in reasonable detail;
 - assessments and findings; and
 - any action the SSRO proposes to take.

8.2 The SSRO will issue a provisional determination to the parties and provide an opportunity for them to comment on matters of factual accuracy or completeness. Parties may respond in writing or request an oral hearing. If a party does not provide a written response, the SSRO will interpret this as an acceptance of the SSRO's views and reasoning as set out in the provisional determination.

8.3 The SSRO does not normally expect the representations to include new evidence at this stage. If a party wishes to submit new information, the covering submission should explain the reasons for doing so.

Written responses to the provisional determination from parties

8.4 The SSRO will provide a deadline by which responses must be received. Written responses to the provisional determination will be circulated by the SSRO to the other party to the determination.

Oral responses to the provisional determination from parties

8.5 Parties wishing to make oral representations on the provisional determination must request an oral hearing with the SSRO stating the reasons for the request. The SSRO will decide whether an oral hearing at this stage is necessary or not. The deadline for requesting an oral hearing is specified by the SSRO in the provisional determination. If an oral hearing is held at this stage it will be recorded and a transcript issued as set out in paragraph 7.19.

8.6

8.7 The SSRO will carefully consider written and oral responses to the provisional determination. The final determination(s) will reflect the outcome(s) of the SSRO's deliberation of the representations received

9. Making and publishing a final determination

Making a determination

- 9.1 The determination contains the decision of the Referral Committee. The determination will normally be sent to the referring parties as a final document without opportunity for further comment. The SSRO will not engage further with any party after the decision is given.
- 9.2 Determinations made by the SSRO have legal consequences for the affected parties.
- 9.3 When making a determination in relation to a QDC or QSC or proposed QDC the SSRO can require the payment of costs or a proportion of costs by one party to the other (Section 35(4) and (5)) and this requirement will be binding on those parties. Where a determination relates to a QSC or proposed QSC, the payment of costs may be required by the sub-contractor (or proposed sub-contractor) to the Secretary of State or by the Secretary of State to the sub-contractor (or proposed sub-contractor).

Publishing the final determination


- 9.4 A summary or redacted version of the determination and its outcomes will be published on the SSRO's website. The SSRO publishes this information to contribute to the evidence base as to the operation of the regulatory framework established by Part 2 of the Act and the Regulations. This should promote greater understanding of the regime, facilitate engagement with the SSRO and inform discharge of our functions. However, determinations are contract-specific and care should be taken before applying them to other circumstances and contractual arrangements.
- 9.5 The published version of the determination will be anonymised except in cases where the SSRO believe naming a party is appropriate and in the public interest. If the SSRO considers this to be likely, the SSRO will seek representations from the parties before reaching a decision.
- 9.6 The SSRO will exclude from the published version any information that may prejudice to the commercial interest of one or more parties to the determination. Parties will be given an opportunity to make representations on a draft prior to publication.
- 9.7 A final version will be sent to the parties before publication. The SSRO's Annual Report and Accounts will also include summary details of all determinations completed in the financial year.

10. Concluding the referral

Closing the referral

- 10.1 In exceptional cases, the SSRO may close a request for a determination before a final decision is made, if:
- the legislation permits; and
 - it is satisfied in the circumstances that a determination should not be given for example,
- 10.2 if the parties reach a settlement when the matter is in progress and seek to withdraw the referral.

Appealing against a decision

- 10.3 The SSRO's decision is final. Once the SSRO has given its determination, there is no appeal mechanism in the Act or the Regulations. It is open to parties to request a court to review the lawfulness of the decision through a judicial review process. 

Feedback

- 10.4 The SSRO welcomes face to face or written feedback about the referrals process and will use this information to help improve procedures and processes on an ongoing basis.
- 10.5 Feedback can be provided during the referral process. Should any issues or concerns arise, they may be communicated to the Case Team at any point in the process.
- 10.6 On conclusion of the determination, the SSRO will contact parties engaged to seek feedback on the process followed in making the determination. This will likely involve a short questionnaire and a meeting or telephone call to discuss feedback.

Appendix 1 Statutory Grounds for Determinations

1. Table 1 below summarises the matters the SSRO may be asked to determine and whether it has a power or a duty to do so. It identifies the person or persons who may make a reference to the SSRO and any time limits which apply. If there are any procedural requirements that apply to a ground, these are also identified.

Table 1: Matters on which the SSRO may be asked to make a determination

Ground	Function	Referring parties	Time limit	Procedural requirements
Adjustment of price payable in a target price contract (section 16(2)(b))	The SSRO must determine the amount of any adjustment	Secretary of State, authorised person or primary contractor	—	—
Adjustment under step 2, 3 or 6 of Contract Profit Rate calculation (section 18(3) and regulation 18)	The SSRO may determine the amount of the adjustment in section 17(2) (contract profit rate) and in consequence may determine that the contract price is to be adjusted by a specified amount.	Secretary of State or primary contractor	Within two years after the contract completion date	—
Extent to which a cost is an Allowable Cost (sections 20(5), 20(6) and regulation 19)	The SSRO may determine the extent to which a particular cost is an Allowable Cost under a qualifying defence contract. Consequent to such a determination, the SSRO may determine an adjustment to the contract price	Secretary of State, authorised person or primary contractor	20 working days from date of written notice	Before a reference is made by the Secretary of State to the SSRO, a written notice must be sent to the primary contractor requiring it to show that the costs are AAR. The Secretary of State must allow at least 20 working days to elapse from the date of the notice and there must have been no response or no satisfactory response from the primary contractor. The same pre-conditions do not apply to a reference made by the primary contractor

Ground	Function	Referring parties	Time limit	Procedural requirements
<p>Final Price Adjustment (section 21(3)(b) and regulation 16)</p>	<p>The SSRO must determine the total price payable where the Secretary of State and the primary contractor are unable to agree the final price adjustment</p>	<p>Secretary of State, authorised person or primary contractor</p>	<p>After the contract completion date, but no later than 2 years after the contract completion date</p>	<p>Reference should only be made to the SSRO where the parties have been unable to agree the final price adjustment. One of the parties must have notified an intention to make a final price adjustment, which should be within 3 months of a contract costs statement being provided. The Secretary of State may have to notify a final price adjustment within 15 months of the contract completion date if that date is sooner than 3 months from provision of the contract costs statement</p>
<p>Penalty notice matters (section 32(8))</p>	<p>The SSRO must make a determination, on receipt of an application, as to: (a) whether the person has contravened section 31 or failed to take the steps specified in a compliance notice (or both); (b) whether the person had a reasonable excuse for contravening section 31 or failing to take the steps specified in the compliance notice (or both); and (c) the amount of the penalty.</p>	<p>Recipient of the penalty notice</p>	<p>Before the end of the period of 6 months from the date the penalty notice is given (section 32(6)(f))</p>	<p>—</p>

Ground	Function	Referring parties	Time limit	Procedural requirements
Prescribed matters (section 35(1)(b) and regulation 52)	The SSRO must make a determination on matters prescribed in the Regulations in relation to a qualifying contract, being the defined pricing structure and output metrics that the contractor must use in all reports provided under Part 5 of the Regulations for that contract	Secretary of State, authorised person, primary contractor (in the case of a QDC), or the person who proposes to enter into the contract with the Secretary of State (in the case of a proposed contract)	No later than 6 months after the QDC is entered into.	—
Pre-scheme referral (section 35(7) and regulation 55)	The SSRO must give a determination if (i) a contract was entered into before 18 December 2014 and the contract required the Review Board for Government Contracts to make a determination in relation to any matter referred to it; and (ii) a party to the contract refers the matter for determination after 18 December 2014.	A party to the contract	No later than 2 years after: (a) the date described in the contract as the contract completion date; (b) if no such date is described in the contract, the date on which the contractor completes all obligations which entitle it to final payment under the contract; or (c) if the contract is terminated before either of the dates described in (a) or (b), the date that the contract is terminated.	—

2. This guidance and the grounds summarised in Table 1 apply to qualifying sub-contracts (and sub-contractors) as they apply to qualifying defence contracts (and primary contractors), but subject to the modifications set out in Regulation 64, which include that:

- In respect to the **Adjustment of price payable in a target price contract** ground, the referring parties include the contracting authority and the sub-contractor, instead of the primary contractor;
- In respect to the **Prescribed Matters** ground, the referring parties include the Contracting Authority (in the case of a qualifying sub-contract) and the person who proposes to enter

into the qualifying sub-contract (in the case of a proposed qualifying sub-contract). In this regard “Contracting Authority) means the party which is, or would be, liable to pay the contract price under a qualifying sub-contract; and

- In respect to the **Adjustment under step 2, 3 or 6 of Contract Profit Rate calculation** ground, the effect of the referral is that the SSRO may determine that a payment of a specified amount must be made to or by the Secretary of State.

In addition to determinations, there are two other types of referral covered by this guidance, which are summarised in table 2 below. These are covered within the guidance because the determinations process is considered to be broadly applicable. The SSRO will apply the guidance to such referrals, subject to modification where appropriate.

Table 2: Other grounds for a determination

Grounds	Function	Referring parties	Time limit
Conduct in accessing records (section 23(6) and regulation 21)	The SSRO may on an application by the record-keeper in relation to a qualifying contract review the way in which the Secretary of State or an authorised person has acted in examining records, requiring copies of records or requesting further information or explanation relating to relevant records.	Record-keeper	No later than 3 months after the duty to keep the relevant records ends
Disapplication of requirements to give information for confidentiality (section 27(3) and regulation 47(3))	In circumstances where a person intends not to comply with a requirement to permit examination of records, to make reports or to notify relevant events, circumstances or information, the Secretary of State may refer the matter to the SSRO and the SSRO must investigate whether an obligation of confidentiality (which has been relied upon to support the non-compliance) has been entered into otherwise than for genuine commercial reasons.	Secretary of State or an authorised person	Within 40 working days of receiving the person's notice that they intend not to comply

Comments on Process Flow Chart Forming Part of Section 3

No.	Current Text	Suggested Text/Change
1.	Collate supporting information and evidence.	Change to “Submit <u>outline</u> information to support your question <u>for determination</u> ”. Also suggest these boxes are transposed so that the process is
2.	Submit question for determination is accepted.	Question for determination is accepted.
3.	Submit question for determination is rejected.	Question for determination is rejected. (Note: suggest process should be pre-engagement, submission of outline information to support request, request. If request not accepted go around the loop again, if accepted, move onto to “Letter of acceptance issued.)
4.	Collate supporting information and evidence.	Provide detailed supporting information and evidence. (To distinguish the information to be provided at this time from that provided during the pre-engagement phase.)

2. Babcock International Group PLC

BY E-MAIL

In response to the following consultation:-

Opinions and Determinations

We have no fundamental issue with the proposed changes, however we have read through the ADS response and agree that the wording changes proposed by them are helpful in terms of providing more clarity in the guidance.

Marine Naval Bases | Marine & Technology
Babcock International Group
Devonport Royal Dockyard | Plymouth | Devon | PL1 4SG

3. Boeing Defence UK Ltd

3. Consultation responses

3.1 The SSRO invites stakeholder views, together with supporting evidence where appropriate, on the following consultation questions:

a) Do the proposed revisions make the guidance clear?

Yes

Comments

The proposed revisions are basically sound.

b) Do the proposed revisions make the guidance helpful?

Yes

Comments

c) Are there any other suggestions you have on how the guidance could be clearer or more helpful for parties?

Yes

Comments

ADS has produced document mark-up identifying suggested amendments, which are mostly editorial. Boeing supports and has contributed to these ADS submissions.

Determinations and opinions guidance review 2018: Consultation response form

- d) Do you have concerns regarding any areas of significant changes in the guidance or the proposed text in the guidance itself?

Yes

Comments

See comment in the box above.

- e) Are there any issues in the topic areas covered in this guidance that have not been adequately addressed in the proposed guidance changes?

No

Comments

- f) Do you have any concerns regarding the proposed publication and application dates of the revised guidance?

No

Comments

4. Leonardo MW Ltd

3. Consultation responses

3.1 The SSRO invites stakeholder views, together with supporting evidence where appropriate, on the following consultation questions:

a) Do the proposed revisions make the guidance clear?

Yes / ~~No~~ / ~~Don't know~~ (Delete as appropriate)

Comments

b) Do the proposed revisions make the guidance helpful?

Yes / ~~No~~ / ~~Don't know~~ (Delete as appropriate)

Comments

c) Are there any other suggestions you have on how the guidance could be clearer or more helpful for parties?

Yes / ~~No~~ / ~~Don't know~~ (Delete as appropriate)

Comments

5.3 Second sentence – should the word be “it” rather than “if”? (for both opinions and determinations)

- d) Do you have concerns regarding any areas of significant changes in the guidance or the proposed text in the guidance itself?

Yes / No / Don't know (Delete as appropriate)

Comments

Determinations

Page 4 flow chart

Should the start point be “pre-engagement with the SSRO....” and remove the arrow from “submit question for determination is rejected”?

7.12 Determinations – we recommend replacing the word “may”, in both sentences with “will”.

This would ensure that information has been provided in a way that resulted in a common understanding of the facts upon which the SSRO will then base its determination. If the communication makes apparent misunderstanding remains then it gives chance for all parties to resolve the misunderstanding before the SSRO make the determination.

Opinions

Page 4 flow chart

Flow chart similar to that for determinations, but language differs?

Should the start point be “pre-engagement with the SSRO....” and remove the arrow from “submission is not accepted”?

Should there be an arrow from “submit request for opinion to the SSRO” to “submit information to support your question”?

7.12 Opinions – we recommend replacing the words “is likely” in the first sentence and “may” in the second sentence with “will”. This is for the same reason as explained above (7.12 determinations).

8.2 Opinions – Might the opinion also lead to changes to statutory guidance in some circumstances?

8.4 Opinions – Are opinions always specific to a contract? Could a referral be regarding allowable indirect costs that are included in the contractors “pricing rates”, used across all their QDC's/QSC's (DRA section 20)?

Appendix 1, Table 1, “Referring parties” and “Time limit” – “ground e” – is this regulation 53.(1)?

Determinations and opinions guidance review 2018: Consultation response form

- e) Are there any issues in the topic areas covered in this guidance that have not been adequately addressed in the proposed guidance changes?

~~Yes~~ / No / ~~Don't know~~ (Delete as appropriate)

Comments

- f) Do you have any concerns regarding the proposed publication and application dates of the revised guidance?

~~Yes~~ / No / ~~Don't know~~ (Delete as appropriate)

Comments

5. Metasums

3. Consultation responses

Please find word document attached together with this form.

Detailed comments to referrals process draft.

Introduction

SSRO will recognise that their drafts for determinations and opinions are very similar. I have therefor addressed determinations, but my comments are also applicable to opinions. Where I have specific comments in respect of opinions only then these are written in *italics*.

I note from the SSRO's website that there are reports of just 1 determination and 4 opinions given since the regulations came into effect. I am uncertain if this small quantity represents the full extent of determinations and opinions sought and completed. The harsh treatment of Rolls Royce, in the reporting of first and only determination, caused parties to consider the reputational risk of seeing expert determinations from the SSRO. Similarly, I understand that the first opinion was made difficult by SSRO seeing to extend the scope of matters to be considered during progress of the reference. The scope of each the three subsequent opinions was kept very much tighter. SSRO's draft update of the referral's procedure does not look to lessen the risk of a repeat of the experience of these two firsts.

Section 1

1.2 The wording of the first sentence is poor. “The regulatory framework specifies how contracts that meet the requirements for being qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs) must be priced and requires transparency about those contracts and the contractors who hold them.” I suggest “The regulatory framework specifies how contracts, that meet the requirements for being qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs), must be priced and ~~requires~~ transparency requirements for ~~about~~ those contracts and the contractors who hold them.” The regulatory framework does not include a general requirement for transparency. Transparency is not to the public at large but rather to The Secretary of State and for specified reports also to the SSRO. I would alter “the SSRO may be asked to make a determination on matters related to the regulatory framework in circumstances set out in the Act and Regulations and summarised in Appendix 1” to become “the SSRO must make a determination (*in certain cases it may give an opinion*), on a reference made to it by a person referred to in the Act, on matters related to the regulatory framework in circumstances set out in the Act and Regulations and summarised in Appendix 1.” It is important that the reader is reminded that agreement of the parties to consent to a binding determination is not needed where one of the parties mentioned in the Act makes a reference for an event where SSRO must (or in some events may) make a determination. I suggest deleting reference to Appendix 1 as its proposed drafting is so opaque (see later comments).

I also note that §35(3) states that “The SSRO may give an opinion on any matter relating to- (a) a qualifying contract, on a reference made to it by the Secretary of State and the contractor, (b) a proposed qualifying contract, on a reference made to it by the Secretary of State and the other proposed party to the contract.” This wording is somewhat restrictive to resolution of matters that arise between a contracting authority and its sub-contractor with a proposed or actual sub-contract. I have made reference to issues that may arise within the text that follows.

1.3 I do not agree that the final determination should be published but as the SSRO draft guidance later makes clear that facts and arguments made by the parties together with SSRO’s determination will be placed into the public domain the list does should make clear that the SSRO ‘is likely to upload onto the SSRO’s website a summary or redacted version of the determination’.

Given the public humiliation of Rolls Royce by SSRO in its publication of the Adour reference, some years ago, it is important that contractors and MoD understand the reputational risk a referral for a binding determination to the SSRO could expose them to.

The parties may prefer to an ADR confidential expert binding determination using, for example, the structure and process set out within “The Academy of Experts, Rules for Expert Determination” as this provides far greater certainty of a confidential, structured process and outcome than that provided by the SSRO’s looser, inquisitorial, stuttering, and publicly accessible outcome.

1.4 I recognise that this paragraph is unchanged from the original guidance but I’m still at a loss to understand its inclusion. There are matters that are considered within determinations that are outside the scope of ensuring that good value for money is obtained for the UK taxpayer e.g. SSRO may be asked to make a determination on a failure to agree an equitable firm price adjustment for a contract change between a sub-

contractor (QSC) and its customer (contracting authority with a QDC in circumstances where the change in the QSC was not caused by a corresponding change to the QDC. The change is necessary for the holder of the firm priced QDC to discharge its contracted SoW and there is no meat on the bone for the UK taxpayer.

If something needs to be said, and I doubt that it does, then a simple statement that 'equity and compliance with the framework is aimed for'.

1.5 Should be further considered here and/or in opinions.

i. Appeals §29(5). I can't see why appeals against assessment that a proposed contract would if entered into be a QSC should be so excluded. They should be considered to be included within §35(3). The secretary of State should support resolution of disputes between contractors as to if a pre-existing is required to convert to become a QSC on amendment through SSRO giving opinion on the same (currently excluded unless the Secretary of State is party to a joint reference. (see (b) below). Also, opinions should be given when sought on a and b below. SSRO's opinion should be underpinned by interpretation of provisions within the Act and Regulations.

a. Also, whilst not directly what is addressed in the §29(5) MoD ASG gives detailed consideration in Chapter 2 paragraphs 28 through 30 to circumstances where amendments/changes to pre-existing non-qualifying contracts could be considered to be at risk of a court finding that a contract amendment could be considered a QDC (note: application of QDC status is by reference to tests and not prior notification by the MoD).

b. SSRO gives, in FAQs, less detailed consideration to circumstances where a material amendment to a pre-existing single source sub-contract can retrospectively cause that contract to become a QSC. Although the legal framework assumes that a sub-contract cannot convert to be a QSC and the a QDC status is required to be applied to the whole contract (the pricing formula is applied to the whole contract) loose talk on MoD ASG and SSRO's FAQs suggest that there are circumstances where a party to a contract may seek SSRO to make a determination as to the status of a pricing amendment to a pre-existing non-qualifying contract. Furthermore there are circumstances where contracts have been entered into by the MoD where, to my expectation there was 'prima facie' evidence that at the time of award either; (1) the tests were not met but the delivery team insisted that the contract is a qualifying contract (the contractor prices on this basis and supplies reports to MoD and SSRO), or (2) the tests were met but the delivery team did not include DEFCON 800 in the contract, and pricing provisions within the contract were inconsistent with the regulations.

ii. I can't see why notices of cessation should be so excluded from determination as that is what R63(5) looks to require.

iii. §35(7) relates to SSRO acting as successor to Review Board for Government contracts. In this regard the Review Board issued an expert binding opinion. Not a pre-contract opinion as the right to make a reference only came into effect after the contract was entered into. Thus, these are, I believe, determinations and not opinions. I accept that the guidance should not apply as the SSRO should use the procedure last established by the Review Board for Government Contracts and

approved by The Secretary of State on behalf of Government and JRBC on behalf of industry.

1.7 This looks to add nothing and only open up questions. The SSRO should have due regard to its own guidance and only deviate where following it would result in, or significant risk of, a perverse outcome. It should not need to be said that the guidance will be updated after public consultation when conditions are appropriate. Given the wide range of matters that SSRO may have to give determinations or opinions on, it is important that the guidance sets out how these are addressed and the parties seeking a determination should be assured that the SSRO will follow its own guidance.

Section 2

2.2 The role of the 'case team' is unclear. Is the Case Team role restricted to administration or does it extend to (1) decision making, (2) establishing expert evidence, (3) decision making, (4) reviewing submissions and making recommendations to the Referral, (5) interviewing parties to the reference and giving consideration to fairness etc (5) provision of critique of evidence submitted by the parties to the Referral Committee?

2.3 The second sentence is I believe unnecessary. It looks to state the completely obvious in those circumstances where MoD is a party. Where MoD is not a party they should be anyway excluded.

2.4 This is an issue that needs to be considered where the matter relates to a dispute between contractors e.g. changes where the prime contract is not changed.

SSRO Rolls Royce experience should also cause consideration to be given to commercial sensitivity.

2.6 Were the role of the Case Team to include some of the roles I've listed in 2.2 above then there may be conflict in the management of a complaint against the same case teams perceived fairness or compliance with the agreed process.

Section 3

3.2 Reads a little like caveat emptor. Disputes require resolution when the negotiation process between the parties (e.g. contractor and MoD) has broken failed to produce an agreed outcome. I had thought that the legislation provided a basis under which certain disputes that could not be resolved by the parties to a qualifying contract would be resolved without equivocation. The process should be clear, transparent and consistently applied.

I can see little purpose of “Review and comment on statement of facts and evidence from all parties.” Facts may very often be seen differently between the parties and if there were ever going to agree on facts and evidence then there would probably never have been a reference. Utility of this step is unclear and should be included within the guidance. I can only see risk that the process is extended for an undefined purpose. Academy of Experts process does not include this step.

For the same reasons I’ve set out in the paragraph immediately above, I see little purpose of “Provisional determination issued [by SSRO Referrals Committee]”.

Disclosure to the public at large should be avoided in all but exceptional circumstances. Where a public statement is made. I’m pleased to see that SSRO draft guidance shows on page 4 for this to be anonymised. SSRO may want to include metrics for referrals received and concluded in its annual report. Under DEFCON 530 ADR dispute process, even for an expert binding determination; is confidential, no legal precedent established, the parties to the dispute can pre-agree the process to be followed.

Section 4

4. I suspect that the SSRO has received few referrals for a determination over the 4 years since the regulations came into effect. This may in no small part be due to the savage mauling SSRO gave Rolls Royce. Lack of references is not necessarily a bad thing; MoD and the contractor should not seek assistance from SSRO by way of a binding determination if they could otherwise agree. SSRO engagement should only be sought when there is a matter of principle that needs to be resolved and a consistent understanding established; however, the legal framework makes no such limitation. Matters, where the legislation and statutory guidance are clear, should be resolved between the parties. Accordingly, I do not understand why the procedure for SSRO's taking a referral needs to be mealy mouthed. The SSRO should only exclude referrals, made within the scope of the legal framework, where there is a sound reason to publicly reject acting to provide an expert determination.

Where there is more than one party then the emphasis should be on the parties to (1) agree what they can agree on and (2) agree what they are taking to the SSRO for a binding determination. If the matter lays outside of the SSRO's authority, then the matter should be progressed in accordance with the provisions of the contract e.g. DEFCON 530. The parties when approaching the SSRO should be clear how the matter referred for a determination sits within the framework of responsibility and authority of the SSRO. The SSRO should not seek to refuse because the legislation uses 'may' rather than 'must'. Similarly, the information to be provided should be agreed by the parties to the referral.

4.5 There should be a structure and there should be page limits.

4.8 I agree that the nature of the information required to support the referral will vary according to the circumstances of the referral. My concern lays with the example given where "a copy of the qualifying contract" is an unlikely inclusion. If an overhead, then it should be considered against single source contracts performed or anticipated. If a direct cost, then it should be considered against specific elements of the contract SoW and obligations, bid and proposal preparation and support, change management etc.

4.9 If information is not provided then the assertions made, or defences given are unsupported. SSRO should be able to proceed with information that is given and draw its own conclusions where information is not made available else the referral can be frustrated by a party withholding such information. A reasonable time should be allowed for each party to prepare its (1) submissions and supporting evidence, and (2) rebuttal and supporting evidence.

Section 5

5.2 Is there an appeal process for this e.g. if a party believes that the referral requested by the other party lays outside of SSRO's jurisdiction?

5.3 SSRO looks to strongly indicate a preference to exercise its discretion to exclude. There are few instances where there are (1) 'direct and indirect benefits for all parties to qualifying contracts'; (2) strategic significance of the matter referred.

5.4 Same issue as 5.3 above. The SSRO may have unreasonable expectations as to the quantity and clarity of information that is available.

5.7 'The question accepted' should be 'the question as agreed by the parties' it is not for SSRO to decide on the scope of questions to be addressed. The timetable should be agreed by the parties (it is they who have the role of preparing and producing evidence). There is an asymmetry of knowledge about the members of the case team, their skills, background and beliefs. There are much more likely to be known to MoD SSAT but unknown to contractors. It is important that SSRO case team and Referrals Committee has appropriate industrial accounting qualifications supported by practical experience of industrial accounting e.g. standard costing, IFRS inventory valuation, treatment of foreign exchange, criteria for recognition of assets and liabilities within the statement of Financial Position, allocation of period expenses to the income statement, other comprehensive income and expenditure.

5.9 I see no purpose in this. The SSRO's Annual Report could include summary of activities undertaken.

Section 6

6.3 The parties should be able to record and jointly communicate what matters they agree and what matters they disagree. Provision of supporting information on arguments relating to matters upon which they disagree should be included within the submissions made by each of the parties at a later date. The phrase “investigation phase” sounds very European and suggests that the SSRO investigates the facts by deciding on questions are to be asked of and answered by the parties. The Angle Saxon approach is the basis of ‘The Academy of Experts Rules for Expert Determinations’.

6.4 through 6.8 Timeliness, quality, completeness and evidential basis of submissions and any rebuttals are the responsibility of the parties to the reference. SSRO should satisfy itself that it has adequate understanding of the submissions and rebuttals and has understood the quality of evidential basis of assertions made. What is included within the draft is all too vague and could be simply put as “SSRO has discretion to adjust timetable as required’

Section 7

7.2 Where the SSRO has 'regard to its own relevant data' this data must be made available to all parties in anonymised form and the SSRO will communicate the evidential basis for consistency between SSRO's own data and that provided by the parties. For example, information derived from other contractor Part 6 reports or Part 5 reports SSRO may be challenged on the basis of consistency of reporting and adequacy of SSRO's statutory guidance on reporting to enable meaningful comparisons to be made.

7.4 Such meeting should be open to all parties to attend (subject to commercial confidentiality requirements and undertakings).

7.5 See my comments in 6.4 above

7.6 through 7.8 See my comments in 6.4 above. It is not the SSRO's role to Act as an investigating officer. The term 'Case team' increasing reads as if the SSRO sets its own scope for the referral. The process and information made available should be open (subject to commercial confidentiality requirements and undertakings).

7.9 Submissions and rebuttals, together with all supporting information, should be required to given between the parties to the referral simultaneous with submission to the SSRO. Right to make a rebuttal should be automatic and not by invitation of the SSRO. Information should not be shared with parties to the contract who are not party to the referral and comments should neither be sought nor disclosed. The process should be open (subject to commercial confidentiality requirements and undertakings).

7.10 The obligation should lay with the SSRO to explain and seek approval. If SSRO wishes to share any information not already in the public domain then the SSRO must have specific approval from the provider of that information.

7.11 SSRO should only consider information that is made available to the parties to the referral

7.12 The SSRO's role is to make factual findings – facts are rarely agreed between the parties else there would not have been a referral for an expert binding determination.

7.13 through 7.16 The other party to the referral should be invited to observe.

7.17 All parties to a referral should be in attendance at an oral hearing

Section 8

I can't see the need for a provisional determination. Is it that the SSRO is expects to lack sufficient certainty that it understood the facts and rebuttals presented to it by the parties? Such matters should be addressed during prior reviews and oral hearings. All parties to a referral should be in attendance at an oral hearing.

Section 9

9.3 Payment of costs should normally lay where they fall and payment of another party's costs should be restricted to exceptional circumstances where the actions of one party caused, by its behaviour, unnecessary and/or excessive costs to be incurred. The normal costs of the SSRO should not be recharged as, (1) 50% is anyway paid by contractors through a reduction to the contract profit rate, and (2) if the cost is 'normal' to the SSRO it would have been incurred anyway. I can't see where there could be a determination relating to a proposed QSC as there is not a contract in place. I suspect that SSRO is not contemplating matters I raised in section 1.4.i above?

9.4 I wholly disagree. A referral may inform SSRO on workings of the framework, indeed the absence of referrals will leave SSRO with a scant practical (or lopsided) understanding of how the legal framework is put to use. SSRO can and should take practical lessons learned from referrals into account when contemplating what changes to the legal framework it proposes to make to the Secretary of State for consideration in any amendment to the Act or Regulations as well as SSRO's own drafting of statutory guidance issued for consultation.

9.5 Naming of contractors and or Delivery Teams within MoD DE&S because of perceived poor behaviour or knowledge seldom delivers equity or any utility. The naming of Rolls Royce destroyed careers and made engagement with SSRO to be seen as higher risk. For the same reasoning I do not consider SSRO naming individual MoD Delivery Teams to be helpful.

9.6 In the 40 years of the Review Board for Government Contracts no contractor nor MoD Acquisition Team engaged in a reference was ever named or shamed. If principles resulted from the reference, then these were summarised neutrally. Very quickly after the first few references MoD and the contractor understood that the Review Board for Government Contracts should only be considered when there was a matter of principle to be established. 14 in over 40 years. As a consequence of the lack of real engagement the Review Board for Government Contracts learned very little about the acquisition process and was consequentially considered as unsafe by both parties. SSRO needs to avoid this ghost of Christmas to come. Lack of engagement by the Review Board for Government Contracts in contract references for a 23-year period between 1986 and 2009 left the Board weakened and on occasions seemingly unable to understand the single source acquisition process and associated industrial accounting.

Appendix 1

I found the table to be less than helpful. It lacked (a) a full listing of when a determination [opinion] must be given by the SSRO, (b) a full listing of when a determination [opinion] may be given by the SSRO, (c) a full listing of who can make the referral without agreement another party, (d) a full listing of the parties who are required to submit a joint referral when a §35(3) (e.g. for a QSC or a proposed QSC is one of the parties that agrees to a referral required to be the Secretary of State or will the two contractors suffice), a full listing of who can be parties to a determination (e.g. when there is a pricing dispute between a higher tier contractor and its [proposed] sub-contractor).

Circumstances that may require resolution for qualifying contracts and sub-contracts through ADR or SSRO referral include:

- (1) *Failure to agree allowable cost for a sub-contract amendment where the sub-contract provisions require the amendment to be entered into. This may not be caused by a change to the SoW of the QDC.*
- (2) *MoD seeking remedy through the contracting line in circumstances where the basis of the QSC sub-contractor's price is considered by MoD to be not AAR compliant and the sub-contractor does not agree MoD's assessment.*
- (3) *Where allowable costs included in contract prices (estimated or actual costs) were based upon a report issued by a foreign authority under an intergovernmental reciprocal audit undertaken in accordance with the agreed MOU is the intergovernmental authority a party to the referral e.g. US contractors and sub-contractors prices established by reference to FAR Part 31, DFAR Part 231, CASB etc and guidance issued by DCAA rather than SSRO guidance on allowable costs and SSCRs.*
- (4) *QSCs where the target pricing method was used as one of the pricing methods. In such circumstances Part 5 Reports on qualifying defence contracts will not provide reported value of (1) the final target cost (total cost is given for all pricing methods), (2) the final actual cost for those SoW elements of the contract that the target pricing method is used, (3) the amount included in the the contract completion report or contract cost statement for the that are still estimated rather than actual and apply to the target pricing element of the contract. The value assessed by the contractor of any TCIF adjustment is included within the Contract Completion Report issued to the Secretary of State (and SSRO). §23(3)(iii) requires the contractor (primary or subcontractor with a qualifying contract) to provide relevant records for the purposes of matters relating to the price payable under a qualifying contract to the Secretary of State but not the contracting authority. Rights to audit a sub-contractor's costs and records lay with the Secretary of State; values of any assessment of TCIF liability are reported by the subcontractor to the Secretary of State. Any question or uncertainty in the mind of a contracting authority can only be resolved through engagement between the subcontractor and the Secretary of State. A referral by a contracting authority may be as a consequence of the Secretary of State seeking to disallow a proportion of payments made by the contracting authority to its subcontractor as the Secretary of State believes that a (further) adjustment is required; this may be disputed by the subcontractor. Whilst the contracting authority has the right to seek a determination as to the value of the TCIF adjustment applicable to a QSC*

he has little meat on the bone by way of knowledge. The Secretary of State and the sub-contractor are the effective parties to the reference. Anything else would be wholly ineffective or require SSRO to act as investigating CAAS Accountants. The Review Board for Government Contracts found it impossible to engage in providing expert determinations on pricing disputes between prime contractors and their subcontractors except where the MoD had undertaken the role of pricing authority. This is an element of the legal framework made weak by the Secretary of State vacating the role of pricing authority for establishing allowable costs to be used in pricing of subcontracts and amendments and requiring the contracting authority to fill the void as best he can.

- (5) Where ADR is used to resolve an impasse (SSRO does not provide the only route to achieving an independent and impartial expert binding determination) it would be useful to understand if SSRO would consider such an external ruling final and authoritative.
- (6) *Disputes relating pricing of contract changes on QSCs for sales not for qualifying contracts (the less than 50% element of the content)*
- (7) Disputes where Act and regulations are not complied with
 - QDCs that are should never have been notified in DEFCON 800 by MoD that they believed them to be QDCs
 - Contracts which appear to meet the criteria of being QDCs that MoD did not include DEFCON 800 in the contract to say that they believed them to be QDCs
 - *QSCs that are not wholly QSCs (contracts that were entered into by the parties who took SSRO FAQ 3.6 as sufficient authority to believe they had become a QSC through material contract amendment*
 - Sunk costs on conversion of a contract definition of which was later seen not to have not been sufficiently defined (boundary)
- (8) Cost and price disputes where information is excluded from reports by design
 - Support for final price adjustment for contracts that utilise multiple pricing types including target pricing method as well as firm pricing method and fixed pricing method.
 - *Support for final price adjustment for QSCs that are not 100% for qualifying contracts*
 - Support for Target price adjustments for QSCs and QDCs where multiple pricing methods are employed

6. MOD

Annex A - MOD's response

Draft guidance for consultation on the SSRO's referral procedures for determinations under the Defence Reform Act 2014 (for consultation) 10 December 2018

In our experience, during the determination, we had to be absolutely clear to the SSRO as to which document we were referring.

Para	Id	Comments
1.2		<p>It says "the SSRO may be asked to make a determination" but does not explain what is meant by a 'determination'.</p> <p>It would be helpful to have a new para defining what is meant by a 'determination', and how it differs from an opinion (which could then cross-reference the separate guidance on opinions)</p>
3		<p>More a stylistic point but there are many mentions of "a determination", "for a determination" etc. in these bullets/paragraphs.</p> <p>Since the whole document is restricted to "determinations" and this is made clear in the section heading, is there a need for quite so much repetition?</p>
Flowchart Page 4		<ul style="list-style-type: none"> • 1st vertical box in left-hand column – amend to read "Activities required of a referring party before submission for a determination" • 2nd vertical box in left-hand column – delete "Investigating" and replace with "SSRO investigation of" • 3rd and 4th boxes – delete "submit question for" • Delete arrow from 4th box back to start. A party may resubmit for determination after the SSRO has rejected the referral (but presumably only if there is new information), but you don't want a flowchart that directs them to start again, after a rejection. • 6th box – delete "and set out" and replace with "including" • All boxes – state who is doing the activity – is it the referring party or parties, the SSRO, or both? For example, the 10th box is the SSRO, and the 11th box is the referring parties.
Page 4		<p>A timeline is given from when the determination is accepted of 5 months though it would be useful to put a timeline on pre-engagement to letter of acceptance as this can sometimes take several months. A timeline may focus attention to how long the whole process can take.</p>
4.5	bullet 2	<p>It would be useful to provide the example for the non-familiar user of the regulations e.g.</p> <p><i>The referral was made under Section 35(1) of the Defence Reform Act 2014 (the Act) and Regulation 51(1) (d) of the Single Source Contract Regulations 2014 (the Regulations)</i></p>
4.5	bullet 2	<p>What is meant by "reasons they feel the decision is appropriate and justified". There is no decision at this time.</p>
4.9		<p>Would read better if stated "information that each will need to provide"</p>

5.7	bullet 6	Security measures for communicating with parties and any software requirements - can the SSRO provide an example of what they mean by any software requirements
6.3		ERROR – para refers to an “opinion”, when it should be a “determination”
6.6 - 6.8		“Stay” is rather archaic language – why not just say “suspend”, which is more readily understood?
7.1		Suggest amending 1st sentence to “The SSRO will investigate the information and evidence submitted by all parties before making a determination”.
7.2.c		Delete “any provisions of the contract providing for a target cost incentive fee adjustment” and replace with: “the pricing method; and any relevant provisions of the contract, subject to DRA 2014 Section 43(5)”
7.14		There has been an instance where the site visit was intended to set the context of the contract and service but was used by one party to argue their case. The SSRO did allow the other party to respond, but the guidance should make it clear that this will not be allowed. In this case the site visit was immediately followed by the joint oral hearing. We believe felt that the oral hearing should always be on neutral ground.
7.19		It would be useful if oral hearing evidence packs were produced centrally by SSRO and issued to the parties.
9.4		MOD must conduct a security appraisal and authorise disclosure prior to SSRO publishing on Website to ensure that UK operational security is not compromised
9.5		As above.
9.6		As above.
10.1		Expand on what is meant by "legislation permits" in this context

Where these changes have been added by the SSRO to their Opinions guidance, the above table also applies where relevant.

OPINIONS – SSRO DRAFT GUIDANCE DOCUMENT DATED 10 DEC 2018

Para	Id	Comments	By
4.9		“SSRO will not proceed until all information required is provided”. One of the matters that can be referred for an opinion is the reasonableness of a request by SofS for information. SSRO could refuse to proceed without seeing the information the contractor wishes to withhold.	
6.4		See comments on 4.9	
7.2		POSSIBLE LEGAL ISSUE	

		<p>Delete “pre-scheme contract” and replace with: “a contract which is not a QDC or QSC and which is referred under the provision of Sections 35(6) of the DRA 2014...”</p> <p>Incidentally, although S35(6) refers to both determinations and opinions, I believe a referral on this basis could <u>only</u> be for a determination, under the provisions of DEFCON 650 or 650A, Clause (5).</p> <p>So perhaps this ‘Review Board’ example needs to shift from the Opinions paper to the Determination paper?</p>	
7.9 to 7.11		SSRO should not share all information – see comments on 4.9.	
7.16		A representative from all parties should always be on a site visit. This would avoid problems encountered already.	
9.3		Is this para is relevant to an opinion, since an opinion is non-binding?	

Where these changes have been added by the SSRO to their determinations guidance, the above table also applies where relevant.

7. Rolls-Royce Holdings plc

BY E-MAIL

We were content with the proposed changes to the SSRO guidance on:

- **opinions and determinations.**

This addressed the points that I discussed with [REDACTED] and [REDACTED] on the 14th November 2018 (by telephone call).

We thought that overall the proposed changes were sound and also agreed with the ADS suggested amendments that were mostly editorial.

Rolls-Royce Holdings plc
[REDACTED]