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Draft guidance for consultation on the SSRO's referral procedures for opinions under the Defence Reform Act 2014 (for consultation)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

Contents

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 website[1]. 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 is not intended to be exhaustive 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 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 interest[2] 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 Policy[3]. 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.

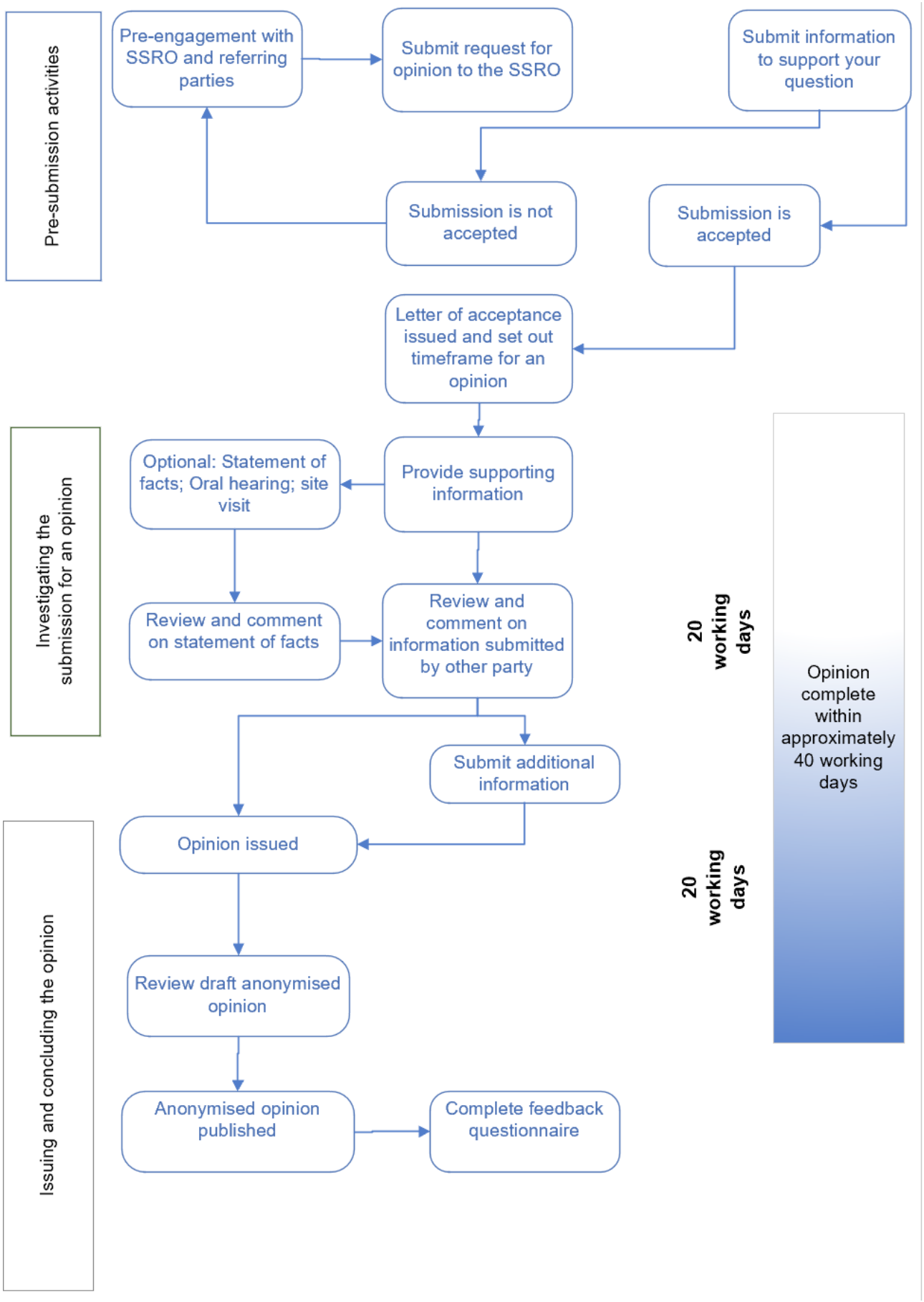
2 https://www.gov.uk/government/publications/ssro-code-of-conduct
3 https://www.gov.uk/government/publications/ssro-complaints-policy

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.


Pre-submission activities
Pre-engagement with SSRO and referring parties
Submit request for opinion to the SSRO
Submit information to support your question
Submission is not accepted
Submission is accepted
Letter of acceptance issued and set out timeframe for an opinion
Investigating the submission for an opinion
Provide supporting information
Optional: Statement of facts; Oral hearing; site visit
Review and comment on statement of facts
Review and comment on information submitted by other party
Submit additional information
20 working days
Opinion issued
Issuing and concluding the opinion
Review draft anonymised opinion
Anonymised opinion published
Complete feedback questionnaire
20 working days
Opinion complete within approximately 40 working days

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

Early engagement with the SSRO

4.1 The SSRO encourages early engagement with parties that are considering making a submission for an opinion. Early engagement should support the parties to:

- clarify the question and whether it is within the SSRO's functions;
- outline any circumstances 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 all parties; and
- identify information which should be provided in support of a submission. This should prevent delays in giving the opinion and to increase likelihood that the opinion question will be accepted.

4.2 Early engagement should also assist the SSRO to plan and conduct an efficient process and deliver a timely opinion.

4.3 Parties considering requesting an opinion should contact the SSRO via referrals@ssro.gov.uk or **020 3771 4785**. It is recommended that parties contacting the SSRO 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);
- a copy of the qualifying contract or proposed qualifying contract (if there are relevant provisions);
- 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 clarity on the information that will need to be provided in order for the SSRO to proceed to accept the question for the opinion. The SSRO will not be able to progress the opinion until all the information required is 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, if 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 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 all 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 when making a submission for an opinion, or as soon as it arises.

6.3 It may shorten the investigation phase required for an opinion, if all parties agree a statement of the relevant facts and provide this with the original submission along with any supporting information. The SSRO will consider how such a statement affects the required investigation when setting a timeframe.

6.4 The SSRO's ability to give an opinion in 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 The timeframe may have to be adjusted if these expectations are not met.

6.6 In exceptional cases, the SSRO may 'stay' (or halt) the opinion process, effectively stopping the clock on the opinion timetable. It may be appropriate to consider a stay if:

- negotiations are taking place that may resolve issues between the parties; or
- significant unforeseen events prevent the SSRO from proceeding.

6.7 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.

6.8 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 investigate 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 relevant 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 pre-scheme contract, 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 arrange to meet with a party 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 remotely and should assist 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 organise a site visit to 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 A site visit is not intended to be an evidence-gathering exercise. With this in mind, a formal record will not usually be made of a site visit. Attendees may take their own informal notes to aid their understanding. The parties should not seek to argue their respective cases or make submissions at the site visit.

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 organise an oral hearing. 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 hearing 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 QDC or proposed QDC the SSRO can require the payment of appropriate costs by one party to the other or by one proposed party to the other (Section 35(4) and (5)) and this requirement will be binding on those parties. Where the opinion 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 opinion

8.4 A summary or redacted version of the opinion and its outcomes is likely to be uploaded onto 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 SSRO expects the published version of the opinion to be anonymous in the majority of cases. However, circumstances may arise where the SSRO believe naming a party is appropriate. If the SSRO considers this to be likely, the SSRO will seek representations from the parties before reaching a decision.

8.6 The SSRO will seek to exclude from the published version any information that would be likely to cause significant commercial prejudice to the parties engaged in 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 In exceptional cases, the SSRO may close a request for an opinion before a final decision is made, if:

- the legislation permits; and
- it is satisfied in the circumstances that an opinion should not be given.

9.2 This may be appropriate, 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)	The SSRO **must** give an opinion on matters prescribed in the Regulations relating to a QDC or a proposed QDC, being: the appropriate amount of adjustment in steps 2, 3 or 6 of contract profit rate calculations; the appropriate amount of a group cost risk adjustment, group POCO adjustment, or group capital servicing adjustment; any question relevant to the cost recovery rates to estimate likely allowable costs; and the extent to which a particular cost would be an allowable cost. and, in respect to qualifying defence contracts only: whether the Secretary of State has acted unreasonably in exercising a power to require the contractor to provide information in an on-demand report	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) In relation to ground (e), only the primary contractor.	Grounds (a) to (d): —— In relation to ground (e), within 3 months of receiving written direction by the Secretary of State.

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".