

SSRO

Single Source
Regulations Office

Requiring the payment of referral-related costs

Consultation

7 May 2021

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1. Introduction

- 1.1 The Single Source Regulations Office (SSRO) is an executive non-departmental public body, sponsored by the Ministry of Defence (MOD). It 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). 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.
- 1.2 The SSRO may be asked to give an opinion or make a determination on matters related to the regulatory framework in circumstances set out in the Act and Regulations. Separate from any powers provided under the Act that permit the SSRO to determine an adjustment to the price of a qualifying contract in some cases, Section 35(4) of the Act provides that the SSRO may, when giving an opinion or making a determination on any matter referred to it under the Act, require the payment by one party to another of such costs as it considers appropriate.
- 1.3 As we explain in this document, the SSRO expects that in most referrals there should be no need to require the payment of referral-related costs by one party to another. Our draft guidance establishes the general principle that the parties to a referral should bear their own referral-related costs, subject to any agreement between them for one party to recover some, or all, of their costs from the other. Exceptionally, either party may ask the SSRO to require the other party to pay some amount of their referral-related costs.
- 1.4 In the six referrals considered by the SSRO to date we have not required any party to pay the costs of another. Nor has any party asked the SSRO to consider a claim for costs. It is important, however, that the prospective parties to referrals understand the circumstances in which the SSRO may require the payment of costs and the procedures it will follow when deciding whether to do so. Accordingly, the SSRO is now consulting on draft guidance that will direct how it exercises its power under section 35(4). The [draft guidance is contained in a companion document available on the SSRO's website](#). This document describes the rationale for our proposals.
- 1.5 In developing our proposals, we sought views from members of the SSRO's Operational Working Group to better understand the issues around costs and the potential impact of different approaches to exercising our power in this area. We are grateful to the Ministry of Defence, ADS Group Ltd and the individual defence suppliers who shared their views with us. We also drew insight as appropriate from the approaches used to determine a requirement for costs to be paid in a number of other adjudicative contexts.
- 1.6 The stakeholders we spoke to agreed that we should take a proportionate approach in developing our proposals and aim to keep the policy and procedures as simple as possible. They considered we should only require the payment of costs in limited circumstances to avoid discouraging the parties to qualifying contracts from making referrals that would help resolve contractual disputes and enhance understanding about the proper application of the Regulations to contracts.

- 1.7 Our consultation proposals seek balance the need to be proportionate with the need to provide sufficient specificity for stakeholders about the policy and procedures to be followed when exercising the power provided by section 35(4).
- 1.8 The proposed timetable for finalising the guidance is summarised below.

Activity	Date
Consultation period commences	7 May 2021
Consultation period ends	2 July 2021
Consider consultation responses and finalise guidance	July to August 2021
SSRO Regulatory Committee approves guidance	19 October 2021
Guidance published with a response to the consultation	25 October 2021
Guidance applies	1 November 2021

Responding to the consultation

- 1.9 The SSRO invites interested parties to provide their views on the draft guidance, together with supporting evidence where appropriate. We would particularly welcome responses to the following consultation questions.
- Is the draft guidance clear?
 - Is the draft guidance helpful?
 - How, if at all, might the draft guidance be made clearer or more helpful?
 - Are there any matters relevant to the SSRO's power under section 35(4) which have not been adequately addressed in the draft guidance?
 - Do you have any comments regarding the proposed publication and application dates of the guidance?
- 1.10 We ask that any submissions in response to this consultation are made by email to consultations@ssro.gov.uk. The deadline for submissions is 5.00pm on 2 July 2021. Responses received after the deadline will not be taken into account in finalising the guidance to be published in October 2021 but may inform subsequent consideration of this subject.
- 1.11 If you have any questions about this consultation document, or would like to discuss the proposals, please contact David Pottruff, the manager responsible, at the earliest opportunity via david.pottruff@ssro.gov.uk.
- 1.12 In responding to the consultation, the SSRO will provide an anonymised summary of all responses received. In the interests of transparency for all stakeholders, the SSRO's preferred practice is to also publish responses to its consultations. Stakeholders are asked to identify on all their communications if they do not wish their responses to be published.
- 1.13 The SSRO has published policy statements on its website setting out how it handles the confidential, commercially sensitive and personal information it receives and how it meets its obligations under the Defence Reform Act 2014, the Freedom of Information Act 2000, the UK General Data Protection Regulation and the Data Protection Act 2018.
- The *Single Source Regulations Office: Our Personal Information Charter*, and
 - The *Single Source Regulations Office: Handling of Commercially Sensitive Information*.

2. How decisions will be made

- 2.1 Section 2 of the draft guidance sets out the proposed arrangements for determining whether to require the payment of an amount of costs by one party to another when giving an opinion or making a determination.
- 2.2 The SSRO's [existing guidance on the procedures for undertaking referrals](#) set out the general arrangements for their conduct. They describe:
- a. the role of the Referral Committee in giving an opinion or making a determination;
 - b. the constitution of a Referral Committee;
 - c. the role of the SSRO Case Team in supporting the Referral Committee and communicating with the parties to a referral;
 - d. how the SSRO will handle information provided to it;
 - e. the requirements that will guide decision making; and
 - f. how the parties to referrals may raise concerns or complaints with the SSRO about the conduct of the referral.
- 2.3 We consider these general arrangements should apply equally to decisions on requiring the payment of costs when undertaking a referral. We believe this will support fair and lawful decisions. One stakeholder we spoke to agreed that decisions on requiring the payment of costs should be made by the Referral Committee to ensure that these were made in a balanced and impartial manner.

3. When we may require the payment of costs

- 3.1 Section 3 of the draft guidance sets out our proposals on:
- a. the referrals in which we may require costs to be paid;
 - b. the costs we may require to be paid;
 - c. which persons may be required to pay costs;
 - d. when a requirement to pay costs will be considered; and
 - e. factors we will take into account.

- 3.2 We discuss matters relevant to the proposals below.

Referrals in which we may require costs to be paid

- 3.3 The enabling power provided by section 35(4) refers to requiring the payment of costs when giving an opinion or making a determination. The Act and Regulations specify the following matters that may be referred to the SSRO for an opinion or determination:
- a. an adjustment in a target price contract (section 16(2));
 - b. a profit rate adjustment (sections 18(3) and 35(1)(a));
 - c. allowable costs (sections 20(5) and 35(1)(a));
 - d. a final price adjustment (section 21(3));
 - e. appeals against assessment as a qualifying sub-contract (section 29(6));
 - f. penalty notice matters (section 32(8));
 - g. cost recovery rates (section 35(1)(a));
 - h. the Secretary of State's behaviour in requiring an on-demand report (section 35(1)(a));
 - i. any matter related to a QDC or proposed QDC if jointly referred (section 35(1)(a));
 - j. the defined pricing structure and output metrics used in reports (section 35(1)(b)); and
 - k. any matter related to a contract entered into before 18 December 2014 that would otherwise have been referred to the Review Board for Government Contracts (section 35(7)).
- 3.4 The Act provides for three other matters to be referred to the SSRO without explicitly stating whether the SSRO is giving an opinion or making a determination:
- a. notices of cessation as a qualifying sub-contract (section 30(4));
 - b. the Secretary of State's conduct in accessing records (section 23(6)); and
 - c. obligations of confidentiality (section 27(3)).

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- 3.5 One of these cases (conduct in accessing records) features in the Explanatory Notes to the Act as an example of a case in which the SSRO may exercise its power to require the payment of costs. This suggests that the word ‘determination’ in section 35(4) is used in the generally understood sense of ‘a decision or resolution of a controversy’, rather than being limited to grounds of referral in which it is stated that the SSRO can make a determination.
- 3.6 There does not seem to be a reason why the three grounds that are not clearly labelled in the legislation as opinions or determinations should be less likely to involve circumstances that may give rise to a requirement to pay costs. For these reasons, we view section 35(4) as applying to all grounds of referral that may be made to the SSRO and our proposals in section 3 of the draft guidance reflect this position.
- 3.7 Stakeholders we spoke with questioned whether there would be a need for requiring the payment of costs in:
- referrals for an opinion made jointly by both the Secretary of State and a contractor or proposed contractor under section 35(3); and
 - referrals for a determination which lead to an adjustment in the contract price.

Joint referrals

- 3.8 The parties’ willingness to make a joint referral might indicate their ability to agree any matters related to costs associated with the referred matter or the referral. However, this may not always be the case and we do not think the guidance for requiring the payment of costs should exclude the consideration of such matters in referrals made jointly.

Determinations which lead to an adjustment in the contract price

- 3.9 We note that there is a limited set of referrals which may result in the SSRO determining an adjustment to the price of a contract. These include determinations on:
- the amount of any price adjustment in a target price contract (section 16(2));
 - the appropriate amount of an adjustment to the baseline profit rate (section 18(3)(b));
 - the extent to which a particular cost is an allowable cost (section 20(6)); and
 - the final price adjustment (section 21(3)(b)).
- 3.10 It may be possible in such cases for any price adjustment determined by the SSRO to take account of any requirement to pay costs (if one is determined by the SSRO under section 35(4)). However, we think it desirable to maintain transparency for the parties to such referrals about the basis for requiring any adjustment to the contract price. The guidance to be followed in determining a requirement to pay costs in these cases would be the same as for other types of referral. Accordingly, we do not think there is a need for any exception to be made in the guidance on requiring payment of costs for referrals which may lead to an adjustment in the contract price.

Costs we may require to be paid

- 3.11 Section 35(4) does not specify any particular type of costs that the SSRO might require to be paid. The examples provided in the Act and its Explanatory Notes of when the SSRO may require a payment of costs under section 35(4) relate to costs incurred in the performance of obligations that the SSRO has determined were required unreasonably by the Secretary of State. Stakeholders considered there may also be cases where the normal costs of negotiating contract prices or demonstrating that costs are allowable (both matters that might give rise to referrals for an opinion of determination) could be inflated as a result of one or other party acting unreasonably.
- 3.12 No mention is made in the examples provided in the Act and its Explanatory Notes of costs arising from participation in a referral. One stakeholder noted that the parties to a qualifying contract or proposed contract may have differing capacities to resource their participation in a referral. It considered that the SSRO's power to require payment of costs may provide some protection against spurious referrals which would consume time and resources. We think it may be appropriate to include consideration of costs arising from participating in a referral in certain circumstances. These might include, for example, if the referral could reasonably have been avoided, or concluded more efficiently, but for the behaviour of one or other party.
- 3.13 The draft guidance indicates three categories of costs that the SSRO may require to be paid, which we call 'referral-related costs'. These are:
- a. costs incurred by contractors or sub-contractors in the performance of obligations required by the Secretary of State which are the subject of the referral;
 - b. costs incurred in advance of the referral by either party as a result of their efforts to reach agreement on the matter which is the subject of the referral; and
 - c. costs incurred by either party as a result of participating in the SSRO's investigation of the referral.
- 3.14 Referral-related costs do not include any costs incurred by the SSRO in relation to referrals.

Which persons we may require to pay costs

- 3.15 The Act and Regulations specify the persons which the SSRO may require to pay costs when giving an opinion or making a determination and to which other person those costs should be paid. These are:
- a. in the case of a QDC, by one party to the contract to the other;
 - b. in the case of a proposed QDC, by one proposed party to the contract to the other;
 - c. in the case of a QSC, by the sub-contractor to the Secretary of State, or by the Secretary of State to the sub-contractor; and
 - d. in the case of a proposed QSC, by the proposed sub-contractor to the Secretary of State; or by the Secretary of State to the proposed sub-contractor.

- 3.16 No provision is made in the Act or Regulations for the SSRO to require any payment to be made:
- a. in the case of QSC, by one party to the contract to the other; or
 - b. in the case of a proposed QSC, by one proposed party to the contract to the other.

- 3.17 Requests to consider requiring such payments shall be declined.

When a requirement to pay costs will be considered

- 3.18 Stakeholders considered that in most cases there should be no need for the SSRO to require payment of referral-related costs as there would either be no issue to resolve or, if there were any dispute about these costs, the matter would generally be concluded between the referring parties. The SSRO agrees that the power to require payment of costs should be used in the limited circumstances when a dispute about referral-related costs cannot be resolved by the parties to the referral. The draft guidance sets out our expectation that in most referrals there should be no need to require the payment of costs by one party to another.
- 3.19 One stakeholder advocated maintaining the approach used by the Review Board for Government Contracts under the Government Profit Formula and Associated Arrangements, which preceded the Act and Regulations. The Review Board applied the general principle that ‘Costs incurred by Government departments, by contractors or by sub-contractors arising from reference of individual contracts or sub-contracts to the Review Board, shall lie where they fall. Those incurred by contractors or sub-contractors will be regarded as allowable costs in arriving at overhead rates’.¹ There appears to us to be a contradiction between costs lying where they fall (being borne by the party that incurred them) and costs incurred by contractors being regarded as allowable costs in deriving overhead rates (ultimately being borne by the another party). We think the Review Board’s intention was to signal that the matter of referral-related costs should generally be left to the parties to resolve.
- 3.20 We propose in our draft guidance that the general principle guiding the apportionment of referral-related costs is that the parties should bear their own costs, subject to any agreement between the parties for one party to recover some, or all, of their costs from the other. We go on to note that costs incurred by contractors or sub-contractors which satisfy the requirements of allowable costs (specified in section 20(2) of the Act) may be allowable costs under a qualifying contract, subject to the choice of regulated contract pricing method.
- 3.21 Stakeholders supported the idea that the SSRO should normally only consider using its power to require payment of costs when asked to do so by a party to the referral. Such a request may arise because, for example, the parties have not been able to agree how costs should be apportioned when one or other wishes to deviate from the general principle that each bears their own costs.

¹ Review Board for Government Contracts, *2015 Annual Review of the Profit Formula for Non-competitive Government Contracts, Appendix B, Section 1, Part C, para 1.30.*

- 3.22 Two stakeholders suggested that the SSRO might also unilaterally consider a requirement to pay costs where it deemed that was appropriate. One suggested the SSRO should intervene in a case if it was clear that one or other party was wasting taxpayers' money. We have considered whether there are circumstances in which the SSRO should require a payment of costs by one party to another without such a payment being requested; and what the consequences of making such a requirement might be. We have concluded that:
- a. there are practical impediments to the SSRO knowing if any payment is required in the absence of a request by one or other party; and
 - b. if a party does not seek payment of their costs when they have the opportunity to do so they must be content that they can bear the costs or recover them in another way.
- 3.23 Accordingly, we propose only to consider requiring payment of costs when asked to do so by a party to the referral.

Factors we will take into account

- 3.24 The draft guidance specifies the factors the SSRO will consider when deciding whether and to what extent it will require the payment of referral-related costs from one party to another. We make the following observations in support of the proposals.

The timing and manner of a costs claim

- 3.25 Our proposed process (section 5):
- a. encourages the parties to raise any request for the SSRO to require the payment of referral-related costs at the earliest opportunity in the referral process; and
 - b. sets out the information a party should provide to assist the SSRO to consider the matter.
- 3.26 A request to consider requiring payment of costs which is made late in the SSRO's investigation of a referral for opinion or determination has the potential to delay the SSRO's decision on the matter referred. Similarly, a request which does not include information that will assist the SSRO's investigation may take more time and effort to investigate and determine. We, therefore, think it appropriate to consider whether the party seeking payment of some amount of costs assisted the SSRO's investigation of the matter by bringing it to the SSRO's attention in a timely way and having had regard to the procedures set out in the guidance.

The extent of costs claimed

- 3.27 One stakeholder considered that the scale of any claimed costs should be taken into account when determining whether or not to exercise the power under section 35(4) of the Act. We should not, it said, consider claims which were low value. Another stakeholder considered that the costs associated with matters that had been referred to date, or the costs of those referrals, were likely to have been trivial in comparison to the financial consequence of the matters referred for opinion or determination. It considered that low-value cost claims, or those which were immaterial in relation to the financial impact of the matter referred, should be excluded from consideration.

- 3.28 We agree that there is a need for proportionality when considering whether to require the payment of costs by one party in a referral to another. While we do not intend to specify any value threshold below which claims will not be considered, we are mindful of the need to ensure good value for money in exercising our functions. Our draft guidance indicates our intention to consider the extent of costs claimed and whether it would be proportionate to investigate the matter.
- 3.29 We are not persuaded, however, that our willingness to investigate cost claims should be contingent on how material the costs are with reference to the financial impact of the matter referred for opinion or determination. To do so might risk unfairly excluding from consideration modest costs claims that occur in high-value referrals.

The conduct of both parties and whether they have behaved reasonably

- 3.30 The Act describes no specific purpose for requiring the payment of costs when giving an opinion or making a determination and there are, as yet, no examples from the referrals the SSRO has concluded of costs being claimed or required. The Act and its Explanatory Notes, however, provide two examples of when the SSRO may require the payment of costs. Both relate to requiring the Secretary of State to make a payment to a contractor in respect of costs the contractor has incurred as a result of the Secretary of State's actions which the SSRO has determined were unreasonable. We can foresee other circumstances where the costs of the Secretary of State, a contractor or sub-contractor in relation to a referred matter or referral may be higher than they might otherwise have been as a consequence of the actions of the other party to the referral. Where costs occur as a result of the unreasonable behaviour of the other party, it may be fair for the other party to pay these costs.
- 3.31 Stakeholders suggested that the power under section 35(4) of the Act may provide a mechanism by which either party could recover their referral-related costs when a referral became necessary to resolve a dispute which had arisen due to unreasonable behaviour. For example, if a party failed to have regard to SSRO guidance or took an unreasonable position concerning the application of the Regulations. Stakeholders also said there should be no need for the SSRO to require payment of costs where the parties to a referral have acted reasonably.
- 3.32 Accordingly, our draft guidance proposes that we consider the conduct of the parties and whether they have acted reasonably. We intend to consider conduct:
- a. in advance of the referral, in relation to the matter referred and efforts to reach an agreement; and
 - b. during the referral proceedings.

The extent to which the conduct of the parties has given rise to costs

- 3.33 Given the general principle that the parties should bear their own costs, we consider that we should only require a party to pay another's costs where those costs have been incurred, or their amount increased, as a consequence of that party's unreasonable behaviour. Our draft guidance proposes to consider how the conduct of the parties has given rise to costs. A party should not be required to pay costs that would have been incurred irrespective of their unreasonable behaviour.

The circumstances of the case

- 3.34 One stakeholder considered that an assessment of whether a party had behaved reasonably or not would require consideration of the circumstances of the case. It was quite understandable, it said, for disputes to arise and persist in complex contractual negotiations. However, what may be reasonable in one case may not be reasonable in another.
- 3.35 Our draft guidance indicates that we will consider the circumstances surrounding each case and any mitigating or aggravating factors.

What it was reasonable to expect

- 3.36 To determine whether a party to the referral has acted unreasonably, we must consider what it was reasonable to expect of that party. One stakeholder considered that assessing whether there had been an unreasonable level of dispute between the parties to a referral about, for example, the contract price, would be difficult. We are mindful of the need to take account of the circumstance of the case when assessing what behaviour is reasonable or unreasonable. Our draft guidance indicates this will be our approach.

Whether costs may be recovered in another way

- 3.37 We propose to consider whether the costs claimed may be recovered in any other way. Where costs may be recovered in another way, for example, as allowable costs under the contract, there should be no need for the SSRO to require their payment. We discuss in paragraphs 3.39 to 3.46 a number of matters related to the recovery of referral-related costs as allowable costs under a contract.

Impact

- 3.38 We will consider the impact of a requirement to pay on the paying and receiving parties. We are particularly mindful that, for smaller contractors, the recovery of referral-related costs or the requirement to pay another's costs, may have significant financial consequences which should be assessed prior to any determination.

Allowable costs

- 3.39 The draft guidance notes that a contractor's referral-related costs may be allowable costs in qualifying contracts subject to meeting the requirements of such costs and the requirements of the regulated contract pricing method. Where costs are recoverable as allowable costs under a contract there will be no need for the SSRO to require their payment. Indeed, for a cost to be attributable to a qualifying contract the parties must be satisfied that it 'has not been and is not anticipated to be recovered, directly or indirectly, from another source, as Allowable Costs must only be recovered once'.²
- 3.40 There may, however, be circumstances in which referral related costs are not fully recoverable as Allowable Costs under a qualifying contract. We discuss these further below.

² SSRO (2020) *Allowable Costs Guidance (Version 5)*, Paragraph 3.12(d).

The AAR Test

- 3.41 Section 20(2) of the Act requires that ‘In determining whether a particular cost is an allowable cost under a qualifying defence contract, the Secretary of State or an authorised person, and the primary contractor, must be satisfied that the cost is:
- a. appropriate,
 - b. attributable to the contract, and
 - c. reasonable in the circumstances.’
- 3.42 In determining whether these requirements (the AAR test) are met in relation to a particular cost, the Secretary of State or an authorised person, and the primary contractor, must have regard to guidance issued by the SSRO under subsection 20(1) of the Act. The SSRO’s [Allowable Costs guidance](#) does not deal explicitly with referral-related costs. One stakeholder thought the absence of a specific reference to referral-related costs may result in such costs being deemed unallowable. It was particularly concerned that referral-related costs might not be regarded as costs that ‘enable the performance of the contract’ – a key consideration in determining whether costs are attributable to the contract. Another noted that if the Secretary of State considered it was unreasonable for a contractor to pursue a referral or to defend itself in a referral brought by the Secretary of State, they may conclude that the contractor’s associated costs did not meet the requirements of Allowable Costs.
- 3.43 The Allowable Costs guidance sets out the typical characteristics of costs that meet the requirements of Allowable Costs. The relevant parties should consider these when evaluating whether a particular cost incurred by a contractor meets each requirement. We do not consider there is a need for specific guidance on referral-related costs.

Contract pricing method

- 3.44 Regulation 10 specifies six regulated pricing methods which the parties to a qualifying contract may use in determining the price of the contract. The pricing method specifies whether the price of the contract is based on:
- a. the allowable costs estimated at the time of agreement (which may be adjusted in certain cases in accordance with changes in specified indices or rates or the actual volume of contract outputs);
 - b. the actual allowable costs determined during the contract or after contract completion; or
 - c. a combination of both estimated and actual allowable costs.

3.45 Stakeholders noted that:

- a. there would be little or no opportunity for contractors to recover referral-related costs in firm or fixed price contracts unless such costs had featured in the cost estimates used to determine the contract price;
- b. the parties would not normally anticipate costs associated with disputes and referrals when estimating allowable costs;
- c. in a target price contract, referral-related costs that were not anticipated in the cost estimate but which were included in the actual allowable costs may be shared between the parties to the contract in accordance with the terms of any sharing arrangements specified in the contract; and
- d. subject to satisfying the requirements of the AAR test, referral-related costs may be included in the allowable costs used to determine the price of a contract priced using actual allowable costs.

3.46 We acknowledge that contractors' ability to recover referral-related costs differs in contracts using different regulated pricing methods. However, we also note that this difference applies to any other cost that was not anticipated in an estimate of allowable costs used to price a contract, but which might otherwise be recovered in a contract priced on actual allowable costs. There are a variety of reasons why the parties to a contract may choose one pricing method over another, in full knowledge of the impact of that choice on the recovery of costs. We do not, therefore, consider that the power to require payment of costs under section 35(4) should seek to remedy any difference concerning recovery of referral-related costs arising from the contract pricing method. The exception to this is where it is clear that the referral-related costs have been incurred as a consequence of the unreasonable behaviour of the other party to the referral.

4. How costs will be calculated

- 4.1 Our proposals in section 4 of the draft guidance set out:
- a. the types of costs that will be considered for payment; and
 - b. the requirements for evidencing these.
- 4.2 We discuss these matters briefly below.

Types of costs

- 4.3 Section 35(4) empowers the SSRO to require the payment of such costs as it considers appropriate. We sought views from stakeholders on the types of referral-related costs that might be incurred and which it would be possible to quantify and evidence.
- 4.4 Stakeholders indicated that staff costs accounted for a significant proportion of referral-related costs. They noted, however, that the ease with which these could be quantified might vary depending on which staff were involved and whether it was usual for them to record their time against activities. Others noted that they would be likely to seek recovery of costs incurred in procuring external advice related to referred matters and referrals, such as legal advice or cost engineers.
- 4.5 Drawing on the examples given by stakeholders, and examples of costs that we observed as recoverable within other adjudicative contexts, our draft guidance indicates examples of the types of costs we might consider for payment. These include:
- a. costs associated with staff or contractors;
 - b. legal or other expert fees;
 - c. materials; and
 - d. travel and subsistence
- 4.6 Stakeholders did not support the inclusion of consequential costs in any determination on a requirement to pay costs. They considered these would be hard to quantify. One thought it was unlikely that a referral on a qualifying contract would have consequential impacts on other parts of the contractor's business, although another noted that a referral might consume a large amount of management time for a small contractor. Another stakeholder noted that there may be commercial consequences for contractors where it became known by other contracting authorities that they were involved in a contract dispute leading to a referral, but did not consider such matters should be remedied by the SSRO's use of the power under section 35(4) of the Act.

- 4.7 Our draft guidance indicates that we will generally not consider requiring any payment in respect of different types of costs that have not actually been incurred including:
- a. consequential losses;
 - b. compensation for inconvenience, distress, aggravation, reputational damage, etc;
 - c. profit that otherwise may have been earned on costs; or
 - d. interest that otherwise may have been earned on any amount the SSRO requires to be paid to a party under section 35(4).

Requirements for evidence

- 4.8 We sought views on whether a requirement to pay referral-related costs should be based on evidence of actual costs incurred or a formulaic approach based on certain information about the features of the case. Stakeholders indicated a preference for an evidence-based assessment of costs incurred. They noted, however, that some costs were easier to evidence than others. For example, where there were invoices. They also considered that it may be difficult to identify or prove in some cases that the costs which had been incurred were higher than what might normally be expected. As a result, cost claims might be limited to those costs that could be demonstrably proven to have exceeded what was normal, for example, where expertise had been procured for a specific purpose and there was an invoice for this.
- 4.9 Related to this, one stakeholder considered the SSRO would need to be clear as to how its assessment of a requirement to pay costs had been arrived at. Another considered that the SSRO's assessment should include consideration of whether the costs claimed would have been incurred by a well-run company aiming to maximise efficiency.
- 4.10 The SSRO acknowledges the challenges identified by stakeholders concerning the evidencing of costs and the assessment of any amount that may be required to be paid. Our draft guidance indicates that before requiring the payment of any referral-related cost, the SSRO will look for evidence as to the following matters:
- a. that the party in whose favour the requirement would be made has incurred the cost;
 - b. the amount of the cost incurred;
 - c. the extent to which it was reasonable or appropriate to incur the cost;
 - d. the part of the cost attributable to the unreasonable behaviour of the party who would be required to pay.
- 4.11 We intend to take a proportionate approach when determining what type and standard of information is required regarding referral-related costs. Our expectations for evidence will be tailored depending on:
- a. the type of costs claimed;
 - b. the materiality of the costs; and
 - c. what evidence it is reasonable to expect would be available in each case.

5. The process

5.1 Our proposals in section 5 of the draft guidance set out the indicative stages in the process for identifying, considering and determining a requirement to pay costs when giving an opinion or making a determination. The process may need to be adapted for the circumstances of the referral in which any requirement to pay costs is considered.

5.2 We discuss the basis of the proposals briefly below.

Early engagement

5.3 Our existing guidance on procedures for undertaking referrals encourages any party or parties that are considering making a referral to seek early engagement with the SSRO in advance of doing so. Early engagement can assist those considering a referral to clarify the question and understand any requirements and expectations of the process. It can also help the SSRO with planning to deliver the opinion or determination. We consider that engagement in advance of a referral should include, where relevant, any matters related to the recovery of referral-related costs.

Requesting consideration of referral-related costs

5.4 Stakeholders expressed a range of views on when during a referral the parties should most appropriately raise a request for the SSRO to consider requiring the payment of costs. Two considered that it should be possible at the point of referral to indicate whether any costs had been incurred in relation to the matter up to that point in time and whether any other costs that might be claimed were foreseen. One noted that it may only become clear once a referral is under way that a requirement to pay costs should be considered. Another considered that a claim for costs should come after the referral decision had been made and communicated with the parties to the referral. If otherwise, the question of costs might colour the referral parties' conduct during the referral. Another said that any discussion of costs should be conducted during the referral proceedings rather than at the end of the process

5.5 Where there is a need to consider a requirement to pay costs, we consider it would be desirable for that matter to be resolved at the same time that the SSRO concludes the referral to which it relates, rather than at a later date. Accordingly, the draft guidance encourages the parties to the referral to raise any matters related to the recovery of referral-related costs at the earliest opportunity.

5.6 The SSRO considers that its process for considering referral-related costs should discourage opportunistic claims at a late stage in the SSRO's deliberation on the substantive matter referred. The draft guidance encourages the parties to request consideration of a requirement to pay costs at the earliest opportunity in the referral process and notes that the timing of any request will be considered by the SSRO in deciding whether to require they payment of costs. The SSRO will not consider requests made after it has issued its opinion or determination.

5.7 Our proposed guidance also indicates the range of information that should be provided by any party when asking the SSRO to consider a requirement to pay costs.

Investigating a requirement to pay costs

- 5.8 The existing guidance for opinions and determinations describe the range of ways in which the SSRO may gather evidence to support its deliberation on the matter referred. Where possible, we think it would be desirable for any investigation of a requirement to pay costs to be conducted alongside that investigation. Our proposed guidance indicates that the extent of investigation needed will depend on the nature and amount of referral-related costs under consideration.

Submissions

- 5.9 To ensure fairness in the consideration of costs matters, the SSRO proposes to provide an opportunity for submissions to be made before requiring any payment of referral-related costs and to share any written representations and supporting evidence received from one party to the referral with the other party.

Communicating the decision

- 5.10 One stakeholder considered it would be important for the SSRO to indicate how it had reached any decision in cases where costs were required to be paid.
- 5.11 Our proposals indicate that we will normally communicate any decision on requiring the payment of costs with the opinion or determination to which the requirement relates. In doing so, the SSRO will provide a clear statement of how it weighed evidence in relation to the factors it has taken into account (identified in section 3).

Publishing the decision

- 5.12 The SSRO proposes to publish anonymised summary information about any requirement it makes on a party to a referral to pay an amount of another party's referral-related costs. We consider this would be helpful to aid wider understanding about the operation of the regulatory framework. In accordance with the general procedures for opinions and determinations, the SSRO will consider any representations from the parties to the referral about the content of any publication related to the referral decision.

Appealing against a decision

- 5.13 The Act and Regulations make no provision for any party to a referral to appeal the SSRO's determination on a requirement to pay costs. The parties, may, however, ask a court to review the lawfulness of the decision through a judicial review process.
- 5.14 It is hoped that where a party to a referral feels that the SSRO is acting unfairly or has not complied with a legal requirement or its guidance they will raise their concerns with the SSRO Case Team at the earliest opportunity. A party who is dissatisfied with the SSRO's response to an initial concern may raise a formal complaint with the SSRO in accordance with its [complaints policy](#).

Feedback

- 5.15 It is the SSRO's normal practice to seek feedback from the parties to a referral on its referral decisions and the processes followed. This helps us improve our approach to referrals. We propose that where a referral includes consideration of any requirement to pay costs, we will also seek feedback about this aspect of the referral process.

6. Termination of investigations

- 6.1 Section 6 of the draft guidance addresses when the SSRO may cease consideration of a requirement to pay costs.
- 6.2 We considered whether there might be circumstances in which, during an ongoing referral, we might terminate our investigation of a requirement to pay costs. We think the guidance should provide for the possibility that an investigation might cease before the SSRO determines any requirement to pay. This might be, for example, when:
- a. the party to the referral seeking payment of referral-related costs withdraws their request;
 - b. the parties to the referral reach an agreement about referral-related costs;
 - c. the SSRO has been unable to obtain the information needed to determine whether a requirement to pay costs should be made; or
 - d. the SSRO is otherwise satisfied that there is no need to require the payment of referral-related costs by one party to another.
- 6.3 Our draft guidance reflects this.
- 6.4 Our existing guidance on undertaking referrals indicates that, in exceptional cases, the SSRO will close a referral investigation before a final decision is made if the legislation permits and the SSRO is satisfied in the circumstances that an opinion or determination should not be given. We considered how any investigation of a requirement to pay costs would be affected by, or would affect, a decision to terminate the referral investigation before an opinion or determination is provided.
- 6.5 As the power provided by section 35(4) extends to requiring the payment of costs when giving an opinion or making a determination, we consider that any investigation of a requirement to pay costs should cease if the SSRO terminates its investigation of the referral without giving an opinion or making a determination. Our draft guidance reflects this position.
- 6.6 We think it would be appropriate, when deciding whether to terminate a referral investigation before providing an opinion or determination, for the SSRO to take account of any related investigation it is undertaking of a requirement to pay costs. We propose to make a minor change to the guidance for undertaking opinions and determinations to note this additional consideration.

7. Other matters

7.1 In developing our proposals, we have sought to mitigate any unintended consequences that may arise in relation to:

- a. contracting parties' willingness to make referrals;
- b. stakeholder relations; and
- c. perverse incentives.

7.2 We discuss these below.

Impact on willingness to refer

7.3 The SSRO believes that referrals have the potential to provide valuable learning about the proper application of the regulatory framework to qualifying contracts. However, the low number of referrals to date indicates there may be some reluctance among the parties to qualifying contracts or proposed contracts to make referrals.

7.4 It is not clear that the prospect of recovering referral-related costs through a requirement made under section 35(4) provides any particular incentive for contractors to make referrals, especially if those costs are already recoverable as allowable costs under the contract. One stakeholder thought the prospect of recovering referral-related costs may be an incentive for some smaller contractors, but only if the matter of costs was considered routinely. Another noted that the recovery of referral-related costs might be a marginal consideration in cases where the substantive matter referred had a significant financial impact.

7.5 The prospect of having to pay the other party's costs might be a disincentive to making referrals, especially for smaller contractors. One stakeholder considered that smaller contractors were likely to be less familiar with the Regulations and, consequently, more concerned about the prospect of having costs awarded against them. But other factors influencing contractors' (especially smaller contractors) willingness to refer were also highlighted. They included a desire not to damage a commercial relationship with the MOD, especially where future contracts were sought, and being unsure whether they had the management capacity to support the referral process.

7.6 We are keen to minimise any adverse effect that the guidance on requiring the payment of costs might have on contracting parties' willingness to make referrals. Stakeholders agreed that this was important. We have sought to mitigate this by:

- a. setting out the general principle that the parties should bear their own referral-related costs unless agreed otherwise;
- b. being clear that we only expect to require payment of costs in limited circumstances;
- c. providing clarity about what those circumstances are; and
- d. including the impact of a requirement to pay costs among the factors we will consider in determining any case.

Impact on stakeholder relations

- 7.7 In giving an opinion or making a determination the SSRO makes a judgement which may be unwelcome to one or other of the parties to the referral. This can present a challenge to the maintenance of a positive working relationship with the affected party. Requiring the payment of costs has the potential to challenge stakeholder relations further, albeit that the effect may be small compared to the effect of the opinion or determination.
- 7.8 We hope to minimise any adverse impact on our relationship with any party who is required to pay costs by providing transparency about the factors that are taken into account and the evidence considered in making a determination. Additionally, our process is procedurally fair, providing both parties to the referral with an opportunity to seek recovery of costs and to provide evidence in relation to any costs claimed by the other party.

Perverse incentives

- 7.9 We are keen to avoid any perverse incentives that might arise from the possibility that we may require one or other party to pay costs. We don't, for example, want to create an environment where either party incurs costs that might otherwise have been avoided simply because the SSRO might subsequently require them to be paid by another party.
- 7.10 As we finalise the guidance, we will give further consideration to any undesirable behaviours or outcomes that may arise and how these might be mitigated or avoided.

the fact that the number of patients with type 2 diabetes is increasing rapidly in the Netherlands.

There are several reasons why the prevalence of type 2 diabetes is increasing. First, the incidence of type 2 diabetes is increasing. Second, the duration of the disease is increasing. Third, the population is ageing.

The incidence of type 2 diabetes is increasing. In the Netherlands, the incidence of type 2 diabetes is increasing from 1.5% in 1980 to 3.5% in 2000.

The duration of the disease is increasing. In the Netherlands, the duration of type 2 diabetes is increasing from 10 years in 1980 to 15 years in 2000.

The population is ageing. In the Netherlands, the population is ageing from 20% in 1980 to 30% in 2000.

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