

**SSRO**

Single Source  
Regulations Office

## Requiring the payment of referral-related costs

Consultation response

27 October 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. Section 35(4) of the Act provides that the SSRO may, when giving an opinion or making a determination, require the payment by one party to another of such costs as it considers appropriate. This power to require the payment of costs is separate from any powers provided under the Act that permit the SSRO to determine an adjustment to the price of a qualifying contract.
- 1.3 From May to July 2021, the SSRO consulted on draft guidance on requiring the payment of referral-related costs. The proposed guidance aims to assist parties to referrals to understand the circumstances in which the SSRO may require a costs payment and the procedures it will follow when deciding whether to do so. The draft guidance on which we consulted and a consultation document explaining the rationale for our proposals can be found on the [SSRO's website](#).
- 1.4 Five organisations responded to the consultation: the Ministry of Defence (MOD), ADS Group Ltd; Babcock International Group; Leonardo UK Ltd; and Metasums Ltd. We are grateful to them for sharing their views with us. The MOD and Metasums indicated they were content with the proposed guidance. The other three respondents provided comments or sought clarifications on a number of specific aspects of the proposed guidance. This document summarises the feedback provided, sets out how the feedback has been considered and explains the consequential changes we have made to the proposed guidance. In this document, revisions to the proposed guidance are highlighted in yellow and additions are highlighted in green.
- 1.5 The [final guidance on requiring the payment of referral-related costs](#) has been published alongside this document and applies to all referrals received on or after 1 November 2021. It should be considered alongside the [procedures for making and considering referrals](#), which are also available on the SSRO's website.
- 1.6 The SSRO may revise the guidance from time to time to reflect changes in the law, good practice or learning obtained from its application. Any further comment or questions related to the guidance, which may inform its future development, should be raised with the SSRO via [referrals@ssro.gov.uk](mailto:referrals@ssro.gov.uk) or 020 3771 4785.

## 2. How decisions will be made

2.1 Section 2 of the draft guidance set 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. We discuss feedback on the proposals below.

### Which persons may be required to pay costs

2.2 The draft guidance noted in paragraph 3.5 that the SSRO would only require costs to be paid by one person to another in accordance with the provisions of the legislation which were summarised in paragraph 3.4.

2.3 One respondent was concerned about what might happen in respect of an appeal by a proposed sub-contractor against an assessment, made by a contracting authority, that the contract to be entered into is a QSC. The respondent suggested we review and clarify which party to such a referral may be required to pay costs to which other party.

2.4 We consider that the guidance at paragraph 3.4 provides a clear description of which person may be required to pay costs to which other person as provided for by section 35(4) of the Act and regulations 64(9) and (10). The legislative provisions are also set out in the appendix to the guidance.

2.5 In the case of an appeal made by a proposed sub-contractor against a QSC assessment, the SSRO may only require a payment to be made by the proposed sub-contractor to the Secretary of State or by the Secretary of State to the proposed sub-contractor. The contracting authority which made the QSC assessment cannot be required to pay the proposed sub-contractor's or the Secretary of State's costs and those parties cannot be required to pay the costs of the contracting authority who made the QSC assessment.

### When a requirement to pay costs will be considered

2.6 Our draft guidance indicates in paragraph 3.6 that we expect there should be no need to require the payment of referral-related costs by one party to another in most referrals. It proposes that the general principle which would guide 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.

2.7 One respondent agreed that the costs of referral should lie where they fall unless the SSRO determines that one party has acted unreasonably. In such a case, it said, it would be for the other party (whether the Secretary of State or the contractor) to claim any additional costs incurred. Another respondent felt the guidance needed to be clearer at this point that referral-related costs incurred by a contractor might be recoverable as allowable costs under a qualifying contract.

2.8 We think the guidance provides sufficient clarity on the potential recovery of referral-related costs as allowable costs, subject to the change discussed in paragraph 2.10 below.

- 2.9 One respondent queried whether the draft guidance at paragraph 3.7 meant that any referral-related costs incurred by a contractor in relation to a cost-plus contract could be recovered under the contract. If so, it suggested that the guidance made this clear.
- 2.10 We do not think the guidance needs to make special provision for cost-plus contracts. Regulation 10(6) states that under the cost-plus pricing method the allowable costs are the actual allowable costs determined during the contract or after the contract completion date. The cost-plus pricing method is not unique in this respect, as the estimate-based fee pricing method (Regulations 10(7) and (8)) also provides for actual allowable costs to be ascertained during the contract or after contract completion. If a pricing method relies on estimates of allowable costs, there is the potential for anticipated referral-related costs to be included when the contract is agreed or amended. The recovery of referral-related costs under a qualifying contract depends on the costs satisfying the requirements of allowable costs and being determined in accordance with one of the regulated pricing methods. We have made a minor change to paragraph 3.7 of the draft guidance to emphasise that it is a requirement for the costs to be determined in accordance with one of the regulated pricing methods.

Proposed guidance	Final guidance <sup>1</sup>
<p>3.7 Referral-related costs that are incurred by contractors in QDCs or sub-contractors in QSCs that satisfy the requirements specified in section 20(2) of the Act may be allowable costs under those contracts, subject to the requirements of the regulated pricing method used to determine the contract price. The SSRO provides separate guidance to assist the Secretary of State and contractors or sub-contractors to determine whether particular costs are allowable costs under qualifying contracts. The Secretary of State and contractors or sub-contractors must have regard to the allowable costs guidance when determining whether costs are allowable.</p>	<p>3.7 Referral-related costs that are incurred by contractors in QDCs or sub-contractors in QSCs may be allowable costs under those contracts if the costs:</p> <ul style="list-style-type: none"> <li>a) satisfy the requirements specified in section 20(2) of the Act; and</li> <li>b) are determined in accordance with one of the six regulated pricing methods.</li> </ul> <p>3.8 The SSRO provides separate guidance to assist the Secretary of State and contractors or sub-contractors to determine whether particular costs are allowable costs under qualifying contracts. The Secretary of State and contractors or sub-contractors must have regard to the SSRO's allowable costs guidance when determining whether costs are allowable.</p>

<sup>1</sup> Subsequent paragraphs in the final guidance have been renumbered accordingly.

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- 2.11 Another respondent considered it would be difficult to justify recovery of some referral-related costs under a QDC or QSC. It said that referrals were a feature of the legislation, not a feature of qualifying contracts and, as such, that the costs of participating in a referral were not incurred for the purpose of the contract nor to enable its performance. It also suggested that costs incurred as a result of the Secretary of State's unreasonable behaviour were not consistent with the principles of Allowable Costs described in the SSRO's guidance. The respondent considered it would be inappropriate, therefore, for us to require referral-related costs to meet the requirements of allowable costs for them to be recoverable.
- 2.12 The proposed guidance recognises that a contractor's referral-related costs may be recovered as allowable costs under a QDC or QSC. We accept that the SSRO's guidance makes the question of whether a referral enables the performance of the contract relevant when determining whether costs are allowable. In our view referrals can enable performance, for example, by enabling questions about prices to be resolved and agreed. We do not specify that the only mode of recovering referral-related costs is as allowable costs under a QDC or QSC. The guidance is clear that we will exercise our power to require the payment of referral-related costs in appropriate cases. We consider the guidance correctly identifies the relationship between allowable costs and referral-related costs and we have not revised the guidance in this respect.
- 2.13 One respondent assumed that any referral-related costs incurred by a contractor but payable by the Secretary of State would be settled separately from the contract. Another believed that, in the case of a referral related to the Secretary of State's conduct where the SSRO determined the Secretary of State had acted unreasonably, a contractor's costs of servicing the referral should be met by the Secretary of State outside the pricing/payment framework of the contract.
- 2.14 We do not consider it is for the SSRO to specify how any payment it requires to be made is settled. There are a number of approaches that may be taken, depending on which party is required to pay the other's costs.

## 3. When we may require the payment of costs

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

- 3.2 We discuss feedback on the proposals below.

### Costs we may require to be paid

- 3.3 Paragraph 3.2 of the draft guidance indicates that the costs that the SSRO may require to be paid under section 35(4) of the Act (for which we use the term 'referral-related costs') shall be limited to those that fall into one or more of the following categories:
- 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;
  - 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
  - costs incurred by either party as a result of participating in the SSRO's investigation of the referral.
- 3.4 No respondents commented specifically on the categories of referral-related costs we identified. We have considered, however, that in addition to the costs identified, there may be costs incurred by the party that makes the referral to prepare its referral submission which it may also wish to recover from the other party. To allow the SSRO to consider any claims for the recovery of such costs we have amended the guidance as follows:

Proposed guidance	Final guidance
3.2.c) costs incurred by either party as a result of participating in the SSRO's investigation of the referral.	3.2.c) costs incurred by the referring party in making the referral or by either party as a result of participating in the SSRO's investigation of the referral.

### Factors we will take into account

- 3.5 The draft guidance set out in paragraph 3.9 the factors the SSRO would consider when deciding, upon a request to do so, whether the circumstances require the payment of an amount of referral-related costs from one party to another. Respondents commented on certain aspects of the draft guidance, as described below.

***The extent of costs claimed***

- 3.6 The draft guidance indicates in paragraph 3.9(b) that we will take into account the extent of the costs under consideration and whether it would be proportionate to investigate them. One respondent queried what the reference point would be for this assessment of proportionality. For example, whether the costs claimed would be considered relative to the costs of the referral or to the value of the contract to which the referral related.
- 3.7 Our consultation document explained in paragraph 3.8 that we are mindful of the need to ensure good value for money in exercising our functions. It was with this in mind that our draft guidance indicates that we will consider the extent of costs claimed and whether it would be proportionate to investigate the matter. We also explained in paragraph 3.29 of the consultation document that we did not think it appropriate to assess the merit of cost claims with reference to the financial impact of the matter referred, as this might unfairly exclude consideration of modest costs in high-value referrals. We think it would be helpful to clarify our intention as to the nature of the proportionality test and have amended the guidance as follows:

<b>Proposed guidance</b>	<b>Final guidance</b>
3.9(b) the extent of the costs under consideration and whether it would be proportionate to investigate them;	3.10(b) the extent of the costs claimed relative to the cost of investigating whether the SSRO should require their payment;

***The conduct of the parties***

- 3.8 The draft guidance indicates in paragraph 3.9(c) that we will take into account the conduct of both parties to the referral and whether they have behaved reasonably. One respondent thought that in deciding whether to require a payment by one party to another it would be better for us to consider whether a party had acted unreasonably rather than consider whether it had acted reasonably.
- 3.9 We do not consider there to be any substantive difference between the approach we proposed and the alternative suggested by the respondent. Both approaches would result in a conclusion being made as to whether either party had acted reasonably or unreasonably. The approach we proposed is better aligned with our consideration (set out at paragraph 3.9(f) of the proposed guidance) of what it was reasonable to expect in the circumstances.
- 3.10 The respondent also noted that disagreements between the Secretary of State and contractor on contract costs or price, particularly where these related to the estimation of costs or cost recovery rates, did not necessarily indicate unreasonable behaviour on the part of either party. This is a point we acknowledged in paragraph 3.36 of our consultation document. We recognise the importance of considering the circumstances of each case and what it may be reasonable to expect when assessing the conduct of the parties. Paragraphs 3.9(e) and (f) of the draft guidance indicate that we will consider these matters when deciding on an application for costs.



### ***The link between conduct and costs***

- 3.11 The draft guidance indicates in paragraph 3.9(d) that we will take into account the extent to which the costs have been incurred as a consequence of the conduct of the parties. One respondent considered that this would be improved by referring to the 'unreasonable conduct' of the parties, as the majority of costs would be incurred as a consequence of the conduct of the parties.
- 3.12 The reasonableness of a party's conduct is dealt with in paragraph 3.9(c) of the draft guidance. Our intention at paragraph (d) is to consider whose conduct caused the costs to be incurred or affected their amount. To make this clearer we have amended the proposed guidance as follows:

<b>Proposed guidance</b>	<b>Final guidance</b>
3.9(d) the extent to which the costs have been incurred as a consequence of the conduct of the parties;	3.10(d) the extent to which each party's conduct has caused the costs to be incurred or affected the amount of costs incurred;

### ***What should be expected in the circumstances***

- 3.13 The draft guidance indicates in paragraph 3.9(f) that in deciding whether the circumstances require the payment of an amount of referral-related costs from one party to another we will take into account what it was reasonable to expect in the circumstances. One respondent queried what this assessment would be based on, noting that different parties may have different expectations.
- 3.14 The assessment of what it was reasonable to expect in the circumstance will be based on our objective consideration of the facts of the case. It means that we will consider what a reasonable person informed of the facts would have done given the circumstances under which the parties were operating and the information that was available to them at the time. This will provide a benchmark against which the conduct of each party can be considered to determine whether they have acted reasonably or not. To make it clearer that our assessment of what is reasonable is focused on the behaviour of each party we have amended the proposed guidance as follows:

<b>Proposed guidance</b>	<b>Final guidance</b>
3.9(f) what it was reasonable to expect in the circumstances;	3.10(f) what it was reasonable to expect of each party in the circumstances;

### ***Financial impact***

- 3.15 The draft guidance indicated in paragraph 3.9(h) that we will take into account the impact on the paying and receiving parties of a requirement to pay costs. One respondent considered that the MOD would invariably claim that it has no additional funds with which to pay additional costs that the SSRO may require it to pay.

3.16 Any party against whom costs are claimed may indicate that it has insufficient funds to pay. This is a relevant factor to consider, although not necessarily determinative. The intention of the guidance at paragraph 3.9(h) is to ensure that the impact on both the paying and receiving parties is considered before a decision is reached. It allows us to consider the sorts of circumstances identified in paragraph 3.38 of our consultation document, where the recovery of referral-related costs incurred or the requirement to pay another's costs, may have significant financial consequences for smaller contractors which should be assessed prior to any determination.

***How the factors will be considered***

3.17 One respondent asked how the factors identified in paragraph 3.9 of the draft guidance were to be considered with reference to a wider understanding of the regulatory framework.

3.18 In carrying out its statutory functions, the SSRO must seek to ensure that the government receives good value for money from its expenditure on qualifying defence contracts and that contractors are paid a fair and reasonable price. The guidance on referral-related costs has been prepared with regard to these aims. We consider the approach is balanced, proportionate and likely to facilitate referrals.

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## 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 feedback related to these matters below.

### Types of costs

- 4.3 The draft guidance in paragraph 3.2 specifies three categories of referral-related costs that the SSRO may require one party to a referral to pay to the other party. Examples of costs that the SSRO might consider for payment within these categories, whether directly or indirectly incurred, are provided in paragraph 4.1 of the draft guidance. They include:

- a) costs associated with staff or contractors;
- b) legal or other expert fees;
- c) materials; and
- d) travel and subsistence.

- 4.4 One respondent suggested that referral-related costs should also include the cost of financing the servicing of the referral and any interest on the financing costs.

- 4.5 We do not consider the proposed guidance would preclude a party from claiming costs of the type identified by the respondent. We do not, however, think it would be helpful to provide a more comprehensive list of the sorts of costs that a party might claim, as it may be interpreted as exhaustive and deter claims for other costs. Our preference is to provide a general indication of the costs we will or will not consider requiring to be paid, as we do at paragraphs 4.1 and 4.2 of the guidance respectively.

### Requirements for evidence

- 4.6 The draft guidance indicates in paragraph 4.3 that before requiring the payment of any referral-related cost, the SSRO will look for evidence as to the following:
- a) that the party in whose favour the requirement would be made has incurred the costs;
  - b) the amount of the costs incurred;
  - c) the extent to which it was reasonable or appropriate to incur the costs;
  - d) the part of the costs attributable to the unreasonable behaviour of the party who would be required to pay.

4.7 One respondent questioned why there was not more explicit reference to the gathering of evidence related to the full range of factors, identified at paragraph 3.9 in the draft guidance, which the SSRO will take into account when deciding whether to require the payment of referral-related costs from one party to another. We agree it would be helpful to make more explicit reference to gathering evidence relevant to these factors. We have made the following changes in finalising the guidance:

Proposed guidance	Final guidance <sup>2</sup>
<p><b>4.3</b> Before requiring the payment of any referral-related cost, the SSRO will look for evidence <b>as to the following matters:</b></p> <ul style="list-style-type: none"> <li>a) <b>that the party in whose favour the requirement would be made has incurred the cost;</b></li> <li>b) <b>the amount of the cost incurred;</b></li> <li>c) <b>the extent to which it was reasonable or appropriate to incur the cost;</b></li> <li>d) <b>the part of the cost attributable to the unreasonable behaviour of the party who would be required to pay.</b></li> </ul>	<p><b>4.3</b> Before requiring the payment of any referral-related cost, the SSRO will look for evidence <b>to support its assessment of the factors set out in paragraph 3.10 and:</b></p> <ul style="list-style-type: none"> <li>a) <b>that the party in whose favour the requirement would be made has incurred the cost, or will do so; and</b></li> <li>b) <b>the amount of the cost, whether anticipated or incurred.</b></li> </ul>

4.8 The draft guidance indicates that the SSRO will take a proportionate approach when determining what type and standard of information is required regarding referral-related costs. The SSRO’s expectation for evidence would 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.

4.9 One respondent considered it was not clear what was meant by ‘proportionate approach’ in this context. It suggested that ‘reasonable approach’ might be a more appropriate term.

4.10 Reference in the draft guidance to proportionality in the SSRO’s demands for evidence to determine a requirement to pay costs reflects our expectation that the parties to qualifying contracts will take a proportionate approach to determine the information they need to be satisfied that cost are allowable under a qualifying contract ([Allowable Costs Guidance](#) paragraph 2.6). In both cases the term ‘proportionate approach’ is used to indicate that the requirement for evidence will be adjusted to ensure that it properly reflects the nature and amount of the cost under consideration. We indicate, in both cases, factors that would influence the evidential requirement. We consider that reasonableness is an inherent feature of proportionality and we do not need to further revise the guidance.

<sup>2</sup> Includes changes identified in paragraph 5.10 of this paper.

## 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. We discuss feedback on the proposals below.

### Changes to the published process

5.2 The draft guidance (paragraph 5.1) notes that the process described should be viewed as indicative and that it may need to be adapted for the circumstances of the referral in which any requirement to pay costs is considered. One respondent questioned when the parties to the referral would be notified of any planned investigation of costs and of any changes to the published process for determining a requirement to pay costs in that case.

5.3 The process for investigating a claim for payment of referral-related costs, set out in the draft guidance, aims to provide sufficient flexibility to enable the SSRO to undertake a proportionate investigation taking account of the circumstances of the case. If the circumstances require any significant deviation from the published process, we agree it would be desirable to notify the parties to the referral of such changes at an early stage. We consider it would also be helpful to the parties for us to confirm promptly if we plan to investigate a claim for costs. We have amended the draft guidance as follows:

Proposed guidance	Final guidance
5.5 The SSRO will notify affected parties if it plans to consider a requirement to pay costs as part of the referral.	5.5 If, having received a request to do so, the SSRO plans to investigate a requirement to pay costs as part of the referral investigation, it will: <ul style="list-style-type: none"> <li>a) notify the parties to the referral at the earliest opportunity; and</li> <li>b) confirm the approach it will take to investigate the claim for costs.</li> </ul>

### Requesting consideration of referral-related costs

5.4 The draft guidance at paragraph 5.2 encourages a party that is engaging with the SSRO in advance of making a referral to raise, at that time, any matters relevant to the recovery of referral-related costs. Paragraph 5.3 encourages the parties to the referral to raise any request for the SSRO to require the payment of referral-related costs at the earliest opportunity and indicates that the SSRO will not consider cost claims after it has issued its opinion or determination.

5.5 One respondent considered that the need to make a claim for referral-related costs may not be known at the time of referral. It suggested that it could be late in the investigation of a referral before either party concluded that a claim for costs should be made. It also considered that one party may make a claim for costs later in the process if it became clear that the other party was seeking to recover its referral-related costs.

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- 5.6 We note that a party to a referral may not have concluded in advance of making a referral or the commencement of the SSRO's referral investigation whether it wishes to recover certain referral-related costs from the other party. However, we maintain it is desirable that a party seeking to recover referral-related costs makes this known at the earliest opportunity and in advance of the SSRO issuing its opinion or determination. This is intended to allow claims to be investigated, promote finality in decision-making and avoid opportunistic claims being made once the outcome of the referral is known. The draft guidance permits either party to ask the SSRO to consider a claim for costs at any point before the opinion or determination is issued and makes clear that claims made thereafter will not be considered. Paragraph 5.3 of the draft guidance notes that the timing of any request will be considered by the SSRO in deciding whether to require the payment of costs.
- 5.7 The draft guidance indicated in paragraph 5.4 that a party seeking costs should submit a range of information including details of 'the nature and amount of any referral related costs they wish the other party to pay'. One respondent noted that it would not be possible to quantify the amount of costs associated with participating in the SSRO's investigation of the referred matter until that investigation was complete and the SSRO's opinion or determination issued.
- 5.8 It would be helpful to provide additional clarification in the guidance on how matters may proceed in cases where a party wishes to ask the SSRO to consider requiring the payment of referral-related costs which are not yet known or quantified. This should only occur when a party wishes to seek recovery of its anticipated costs of participating in the SSRO's investigation of a referral. Where a party seeks to recover referral-related costs already incurred when its claim is submitted to the SSRO, the party should be able to identify and quantify those costs.
- 5.9 Where a party seeks the SSRO's determination on the payment of referral-related costs not yet incurred, we think it would be reasonable to provide an estimate of the expected costs at the earliest opportunity. The SSRO may seek additional evidence. Any amount that the SSRO requires to be paid will be determined based on either the estimates supplied, or evidence of costs actually incurred, together with any other relevant evidence. If evidence is required of actual costs, this has potential to delay the SSRO's decision.
- 5.10 To reflect these considerations, we have made the following changes to the guidance:

Proposed guidance	Final guidance <sup>3</sup>
<p>4.3 Before requiring the payment of any referral-related cost, the SSRO will look for evidence <b>as to the following matters:</b></p> <ul style="list-style-type: none"> <li>a) that the party in whose favour the requirement would be made has incurred the cost;</li> <li>b) the amount of the cost incurred;</li> <li>c) <b>the extent to which it was reasonable or appropriate to incur the cost;</b></li> <li>d) <b>the part of the cost attributable to the unreasonable behaviour of the party who would be required to pay.</b></li> </ul>	<p>4.3 Before requiring the payment of any referral-related cost, the SSRO will look for evidence <b>to support its assessment of the factors set out in paragraph 3.10 and:</b></p> <ul style="list-style-type: none"> <li>a) <b>that the party in whose favour the requirement would be made has incurred the cost, or will do so; and</b></li> <li>b) <b>the amount of the cost, whether anticipated or incurred.</b></li> </ul>
<p>4.4 The SSRO will 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:</p> <ul style="list-style-type: none"> <li>a) the type of costs claimed;</li> <li>b) the materiality of the costs; and</li> <li>c) what evidence it is reasonable to expect would be available in each case.</li> </ul>	<p>4.4 The SSRO will 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:</p> <ul style="list-style-type: none"> <li>a) the type of costs claimed;</li> <li>b) <b>whether the costs are anticipated or have already been incurred;</b></li> <li>c) the materiality of the costs; and</li> <li>d) what evidence it is reasonable to expect would be available in each case.</li> </ul>

<sup>3</sup> Includes changes identified in paragraph 4.7 of this paper.

Proposed guidance	Final guidance <sup>3</sup>
<p>5.4 A party seeking costs should clearly submit the following:</p> <ul style="list-style-type: none"> <li>a) the nature and amount of any referral-related costs they wish the other party to pay;</li> <li>b) why they consider the other party should be required to pay these costs;</li> <li>c) why the costs cannot be recovered in another way;</li> <li>d) relevant circumstances of the case, including mitigating or aggravating factors, that the SSRO should take into account;</li> <li>e) information to assist the SSRO’s consideration of the impact of a determination on costs.</li> </ul>	<p>5.4 A party seeking costs should clearly submit the following:</p> <ul style="list-style-type: none"> <li>a) the nature and amount (whether estimated or actual) of any referral-related costs they wish the other party to pay;</li> <li>b) why they consider the other party should be required to pay these costs;</li> <li>c) why the costs cannot be recovered in another way;</li> <li>d) relevant circumstances of the case, including mitigating or aggravating factors, that the SSRO should take into account; and</li> <li>e) information to assist the SSRO’s consideration of the impact of a determination on costs.</li> </ul>
<p>-</p>	<p>5.12 The SSRO may defer its determination of a requirement to pay costs until the party in whose favour the requirement will be made has provided evidence of the actual costs incurred. In such cases, the SSRO will aim to conclude the matter in reasonable time.</p> <p>5.13 If a party does not provide evidence in response to a request by the SSRO, we may proceed to a decision on costs without that evidence. If the applicant fails to provide requested evidence, we may conclude that no payment is required in respect of those costs.</p>



### Investigating a requirement to pay costs

- 5.11 Paragraph 5.6 of the draft guidance indicates that when a party to the referral seeks payment of referral-related costs, the SSRO will undertake a proportionate investigation of the facts of the case. Paragraph 5.7 states that the extent of the SSRO’s investigation will depend on the type and amount of referral-related costs under consideration. One respondent sought clarification in the guidance on the types of costs that might lead to a more extensive investigation and whether there was any threshold amount below which a claim for costs would not be investigated.
- 5.12 It would be inappropriate to say that a particular type or amount of costs would always result in a particular level of investigation as the SSRO aims to conduct a proportionate investigation, taking account of the circumstances. Factors such as the type and amount of the costs will be relevant considerations, as may be the costs of undertaking the investigation and the attitude of the other party to the cost item. To reflect these considerations, we have modified paragraph 5.7 of the guidance as follows:

Proposed guidance	Final guidance
5.7 Where possible, the SSRO’s investigation of a requirement to pay costs will be conducted alongside the investigation of the matter referred for opinion or determination. The extent of the SSRO’s investigation of costs will <b>depend on</b> the type and amount of referral-related costs under consideration.	5.7 Where possible, the SSRO’s investigation of a requirement to pay costs will be conducted alongside the investigation of the matter referred for opinion or determination. The extent of the SSRO’s investigation of costs will <b>take account of the circumstances of the case, including</b> the type and amount of referral-related costs under consideration.

### Submissions

- 5.13 Paragraph 5.10 of the draft guidance indicates that we would provide an opportunity for submissions to be made before determining any requirement to pay. One respondent considered that any party whose conduct was being called into question by the other party should have an opportunity to defend itself against accusations.
- 5.14 While this was the intention of the draft guidance, we consider the point can be made more clearly by amending the draft guidance as follows:

Proposed guidance	Final guidance
5.10 The SSRO will provide an opportunity for submissions to be made before requiring the payment of referral-related costs. In the interests of fairness, the SSRO will share the following material between affected parties:  a) representations made by a party claiming costs; and  b) supporting evidence or facts.	5.10 The SSRO will provide <b>a reasonable opportunity</b> for submissions to be made <b>by both parties</b> before requiring the payment of referral-related costs. In the interests of fairness, the SSRO will share the following material between affected parties:  a) representations made by a party claiming costs; and  b) supporting evidence or facts.

## 6. Termination of investigations

- 6.1 Section 6 of the draft guidance set out when the SSRO may cease consideration of a requirement to pay costs. It noted that if the SSRO ceased to investigate a referral for an opinion or determination it would have no legal power to require the payment of costs and its investigation of costs would, therefore, also cease.
- 6.2 One respondent considered that there should be a mechanism for compensating a party for costs incurred by participating in the investigation of a referral which was made by another party and terminated before conclusion at the other party's request. This could occur, for example, if the referring party concluded that it was unlikely to secure a favourable outcome.
- 6.3 The SSRO is not empowered to require the payment of costs if an investigation of a reference does not culminate in an opinion or determination being issued. However, as proposed in paragraph 6.6 of our consultation, we will amend our referrals procedures to note that we will take account of any claims for costs when deciding whether or not to stop a referral investigation.
- 6.4 We detail below the changes we will make in the published guidance for different types of referral with effect from 1 November 2021.

### ***Guidance on the SSRO's referrals procedures for opinions under the Defence Reform Act 2014***

Existing guidance	Amended guidance
<p><b>Closing the referral</b></p> <p>9.1 In exceptional cases, the SSRO will close a request for an opinion before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>the legislation permits; and</li> <li>it is satisfied in the circumstances that an opinion should not be given.</li> </ul> <p>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 or where a suspended process (referred to in paragraph 6.6) becomes frustrated and the SSRO has a discretionary power as to whether to give the opinion.</p>	<p><b>Closing the referral</b></p> <p>9.1 In exceptional cases, the SSRO will close a request for an opinion before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>the legislation permits; and</li> <li>it is satisfied in the circumstances that an opinion should not be given.</li> </ul> <p>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 or where a suspended process (referred to in paragraph 6.6) becomes frustrated and the SSRO has a discretionary power as to whether to give the opinion.</p> <p>9.3 In considering whether to close its investigation of a referral, the SSRO will take account of any claims made by either party to the referral for the payment of its referral-related costs.</p>

**Guidance on the SSRO's referrals procedures for determinations under the Defence Reform Act 2014**

<b>Existing guidance</b>	<b>Amended guidance</b>
<p><b>Closing the referral</b></p> <p>10.1 In exceptional cases, the SSRO will close a request for a determination before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>• the legislation permits; and</li> <li>• it is satisfied in the circumstances that a determination should not be given.</li> </ul> <p>10.2 This may be appropriate, for example, if all parties reach a settlement when the matter is in progress and seek to withdraw the referral or where a suspended process (referred to in paragraph 6.6) becomes frustrated and the SSRO has a discretionary power as to whether to make a determination.</p>	<p><b>Closing the referral</b></p> <p>10.1 In exceptional cases, the SSRO will close a request for a determination before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>• the legislation permits; and</li> <li>• it is satisfied in the circumstances that a determination should not be given.</li> </ul> <p>10.2 This may be appropriate, for example, if all parties reach a settlement when the matter is in progress and seek to withdraw the referral or where a suspended process (referred to in paragraph 6.6) becomes frustrated and the SSRO has a discretionary power as to whether to make a determination.</p> <p>10.3 In considering whether to close its investigation of a referral, the SSRO will take account of any claims made by either party to the referral for the payment of its referral-related costs.</p>

**Guidance on the SSRO’s referrals procedures for appeals against assessment as a qualifying sub-contract under the Defence Reform Act 2014**

<b>Existing guidance</b>	<b>Amended guidance</b>
<p><b>Closing the referral</b></p> <p>9.1 In exceptional cases, the SSRO will close an appeal before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>• the legislation permits; and</li> <li>• it is satisfied in the circumstances that the appeal should not be determined.</li> </ul> <p>9.2 This may be appropriate, for example, if all parties reach a settlement when the matter is in progress and the proposed sub-contractor seeks to withdraw the appeal.</p>	<p><b>Closing the referral</b></p> <p>9.1 In exceptional cases, the SSRO will close an appeal before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>• the legislation permits; and</li> <li>• it is satisfied in the circumstances that the appeal should not be determined.</li> </ul> <p>9.2 This may be appropriate, for example, if all parties reach a settlement when the matter is in progress and the proposed sub-contractor seeks to withdraw the appeal.</p> <p>9.3 In considering whether to close its investigation of an appeal, the SSRO will take account of any claims made by the proposed sub-contractor or the Secretary of State for the payment of its referral-related costs.</p>

**Guidance on the SSRO’s referrals procedures for notices of cessation as a qualifying subcontract under the Defence Reform Act 2014**

Existing guidance	Amended guidance
<p><b>Closing the referral</b></p> <p>9.1 In exceptional cases, the SSRO will close a notice of cessation matter before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>• the legislation permits; and</li> <li>• it is satisfied in the circumstances that a decision should not be given.</li> </ul> <p>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.</p>	<p><b>Closing the referral</b></p> <p>9.1 In exceptional cases, the SSRO will close a notice of cessation matter before a final decision is made, if:</p> <ul style="list-style-type: none"> <li>• the legislation permits; and</li> <li>• it is satisfied in the circumstances that a decision should not be given.</li> </ul> <p>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.</p> <p>9.3 In considering whether to close its investigation of a notice of cessation, the SSRO will take account of any claims made by the sub-contractor or the Secretary of State for the payment of its referral-related costs.</p>

## 7. Other matters

7.1 In developing our proposals, we 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 feedback on these and other matters below.

### Impact on willingness to refer

7.3 Our consultation noted that there has been a low number of referrals to date which might indicate some reluctance by parties to QDCs and QSCs to make referrals. We indicated the ways in which our proposed guidance sought to mitigate any concerns the parties to contracts who are considering referrals might have about the way in which the SSRO would exercise its power to require the payment of costs when giving an opinion or making a determination.

7.4 One respondent considered that many of the activities involved in the making of a referral by a contractor would fall under the heading of general administration. It considered this would act as a deterrent to small businesses in making referrals if such costs were not recoverable under the qualifying contract to which a referral relates.

7.5 As indicated in paragraph 3.4 of this document, referral-related costs include costs incurred by the referring party in making the referral or by either party as a result of participating in the SSRO's investigation of the referral. The general principle underpinning the guidance is that the parties to a referral should bear their own referral-related costs. The parties to a referral may, however, agree between them that one party can recover some, or all, of their referral-related costs from the other. Accordingly, where a contractor (of whatever size) believes its referral-related costs should be met by the Secretary of State it may seek to recover the costs either:

- a) under a qualifying contract, subject to the costs meeting the requirements set out in section 20(2) of the Act and the contract pricing method;
- b) by entering a separate agreement with the Secretary of State for payment of the costs; or
- c) by asking the SSRO to consider requiring the Secretary of State to pay the costs when giving its opinion or making a determination on the matter referred.

7.6 We accept that the prospect of having to bear referral-related costs may act as a deterrent to referral in some cases. The effect of the general principle, however, is that a party to a referral who has behaved reasonably need only be concerned about its own costs and need not be concerned about the risk of being liable for the other party's costs. Our approach encourages the parties to potential referrals to behave reasonably while leaving open the possibility of recovering costs that result from the unreasonable behaviour of the other party.

### SSRO statutory aims

- 7.7 Section 13(2) of the Act requires that, in carrying out its functions under or by virtue of Part 2 of the Act, the SSRO must aim to ensure:
- a) that good value for money is obtained in government expenditure on qualifying defence contracts, and
  - b) that persons (other than the Secretary of State) who are parties to qualifying defence contracts are paid a fair and reasonable price under those contracts.
- 7.8 In the introduction to the draft guidance (1.7), we assert that the policy and procedures set out in the guidance support those statutory aims. One respondent questioned how the payment of referral-related costs would support the achievement of these aims. It said that as referrals were made under the legislation and not the contract the criteria did not necessarily apply, particularly where the MOD had acted unreasonably.
- 7.9 We consider there is a clear link between a proportionate referrals process and achieving the SSRO's statutory aims. We want the parties to qualifying contracts (whether proposed or agreed) to use the referrals process to resolve issues under the regulatory framework, facilitating the agreement and delivery of qualifying contracts. It is important that referral-related costs do not unduly impact the balance between value for money and fair and reasonable prices, either by disproportionately changing the balance on an individual contract or by deterring use of the referrals process.
- 7.10 The draft guidance (1.8) states that the SSRO may depart from the policy and procedures for requiring payment of referral-related costs as it considers necessary or appropriate. One respondent questioned whether a deviation from the published policy and procedures might affect the SSRO's ability to achieve its statutory aims (described in paragraph 1.7 of the draft guidance).
- 7.11 The draft guidance aims to provide clarity for the parties to a referral about the circumstances under which the SSRO may consider requiring one or other party to pay the other's costs and how such a decision will be made. It is not possible, however, for us to anticipate all the circumstances under which a party to a referral may ask us to consider requiring the other to pay some amount of its referral-related costs. Accordingly, the guidance must allow that we will adapt our approach where appropriate or necessary to the circumstances of each case. In doing so, we remain bound by the requirements of the legislation which empower us and by our statutory aims.

### Terms of payment

- 7.12 One respondent considered that in requiring a payment of referral-related costs the SSRO should say something about when such a payment should be made. It suggested that it would be appropriate to establish a principle that payment should be made within 60 days of the requirement to pay being made and that interest should become payable on any amount outstanding after the payment date. It drew attention, by way of analogy, to the provision under section 34(2) of the Act whereby 'If all or part of the penalty [required by a penalty notice] is not paid before the payment date, the unpaid balance carries interest from that date at the rate for the time being specified in section 17 of the Judgments Act 1838'.

- 7.13 We have considered the scope of the power provided under section 35(4) to ‘require the payment of such costs as the SSRO considers appropriate’. We are content that in exercising the power we might specify not just the amount that should be paid but a date by which it should be paid. Indeed, we consider that specifying a payment date would be necessary to enable the parties to give effect to the requirement.
- 7.14 We believe that 30 days from the date the SSRO issues its decision will generally be a reasonable period for the payment of referral-related costs. We do not consider it would be appropriate, however, for the guidance to specify a timeframe within which a required payment should be made. We think it would be preferable for the date by which a payment is required to be set on a case-by-case basis taking account of the circumstances of the case. It would be reasonable, for example, to consider the amount to be paid, the payer’s ability to pay, and the recipient’s need for the funds. Bearing these points in mind, we have introduced additional guidance in section 5 as follows:

Proposed guidance	Final guidance <sup>4</sup>
-	<p data-bbox="847 831 1171 869"><b>The SSRO’s decision</b></p> <p data-bbox="847 887 1430 1037">5.11 Where the SSRO determines to require one party to pay an amount of referral-related costs to the other party, it will specify:</p> <ul style="list-style-type: none"> <li data-bbox="932 1066 1353 1104">a) the amount to be paid; and</li> <li data-bbox="932 1122 1430 1379">b) the date by which the payment is to be made – which will take account of the circumstances of the case, such as the amount to be paid, the payer’s ability to pay and the recipient’s need for the funds.</li> </ul>

### The process for finalising guidance

- 7.15 One respondent sought clarification on whether the SSRO would undertake further engagement with stakeholders prior to publishing the final guidance.
- 7.16 In finalising the guidance, we have sought clarification from respondents where we considered that necessary to understand the points they had raised. We do not consider that the changes we have made in finalising the guidance merited a further period of public consultation. We indicate in the final guidance that we may revise the policy and procedures from time to time to reflect learning obtained from their application and that comments should be directed to the SSRO via [referrals@ssro.gov.uk](mailto:referrals@ssro.gov.uk) or 020 3771 4785.

<sup>4</sup> Subsequent paragraphs in the final guidance have been renumbered accordingly.



