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SSRO's reporting guidance consultation paper April 2022

We welcome the chance to provide input to your review. We provide our response as complementary to DSAG's paper.

We recognise the consultation request is to comment on the proposed guidance. However, as we have a number of questions regarding interpretation of the regulations our response has primarily focused on raising those issues as their conclusion may impact proposed guidance.

Appendix 1 – Aggregation principles

Does the proposed guidance adequately assist stakeholders to understand the reporting of sub-contracts and qualifying sub-contracts having applied the aggregation principles?

We would welcome a review with yourselves, MOD and industry, of the intentions of the regulations and of the changes introduced with SI 2019 No.1106. The MOD Commercial cascade associated with SI 2019 No.1106 explained part of its intent was to help resolve practical reporting problems caused by the dual use of the term "contract value" (as a test for threshold and as an alternate expression of a contracts price).

By means of example, post the changes introduced by SI 2019 No1106, Regulation 26 (quarterly contract report) reads as:

26(6)(j)
"a description of any actual or intended subcontracts which the primary contractor has entered into, or intends to enter into….(including the total proportion of the contract **price** of the QDC which the contractor expects to subcontract): and"

Here the SI changed the term "contract value" for "contract price".

- *To conduct the calculation you compare the aggregated SC **prices** with the QDC **price**, to do otherwise (and report the SC values on a "value for threshold" basis would distort the result and overstate the proportion of the QDC being subcontracted).*

Reg 26(6)(k) then states:

"in relation to each such subcontract into which the primary contractor has entered in the period covered by the report, or intends to in the calendar quarter following the period covered by the report, and which has or is expected to have **a value not less than £1m**…."

- The wording at (j) and (k) ": and in relation to each such subcontract…." suggests Reg 26(6)(k) refers to the subcontracts considered under 26(6)(j) and you are explaining the specific subcontracts entered into, or about to be to (in the next quarter), that form part of the proportion reported under (j). If so, shouldn't the reporting be the subcontract(s) value at price?
- If so it would have been tidier if the SI had changed the language regards price and value at both (j) and (k). If that is not the case then pursuing formal regulation 5 valuations for every "small" subcontract would seem to be very burdensome and costly.
- We would also refer to similar confusion existing at Regulation 5, at 5(6)(c), 5(7), 5(8)(b) and 5(8A) where the term value is used and we believe for the Regulation to work it is referring to a contract's price and not using a value based on the "value for threshold" test.

We hope a discussion on the above would resolve understanding before guidance is concluded. We add two additional comments of detail on the guidance at 3.35 and 3.41.

3.35

We agree with the point being explained but also recognise, in the case of subcontracts, the threshold test takes place twice: when QDC is let, and when the subcontract is subsequently let, "whichever is the higher".

3.41

Explores Regulation 5(5)(a) the purpose of the contract is to fulfil a requirement for goods, works or services and 5(5)(b)…… enter into, one or more other contracts….with the same person for the purpose of fulfilling that requirement and seems consistent with the regulation.

Bullet 1 seems consistent with the regulation as it talks of the requirement in terms of contract deliverables.

Bullet 2 seems inconsistent as it expands the definition of requirement from one that describes the contracted deliverables to one that is framed by their use (a contribution to a common asset or project). This could mean quite different contract deliverables, with the same parties for the same common asset or project could be subject to aggregation. We do not think that consistent with Regulation 5.

Does the example enhance the guidance or are there elements which need to be further clarified?

The inclusion of an example is a valuable addition to guidance to aid the understanding of the requirements and would raise the following points:

First paragraph shows "£500,0000", we presume it should be "£500,000"?

In paragraph one should the term "price" be used for each sub-contract being considered for the threshold aggregation test? Likewise the first sentence of the section "Value of SC6 and 7".

Notice of a sub-contract assessment, template – we do not understand the logic for attaching this template to the DefCARs report, since the information is already a requirement of each report.

Appendix 2 – Reporting under framework contracts

Does the proposed guidance assist contractors with overcoming any difficulties associated with reporting the price of the framework agreement when it is a QDC or QSC?

3.29 & 3.30

We believe the term “framework” agreement might encompass a number of “contract” types.
Some may simply set out common terms and conditions that may be used on a range of “contracts” subsequently let.
Some may be of a “call off” nature.
To discuss some of these differences:

- Is a framework that sets out terms and conditions, to be used in the future, when contracting differing deliverables, a contract in its own right?
- Would contracts that are for differing requirements, but that use a shared framework agreement of T&C’s be seen as separate contracts and Regulation 5 aggregation only apply to those contracts that were with the same parties for the same requirements?
- Framework contracts that are in fact “call off contracts” for the same goods and services would be subject to aggregation under Regulation 5.
- How is a framework “contract”, as in the example for £1, to be considered against Regulation 5(8A) £1m test?

3.31
Regulation 5(8A) explains a contract with a value of less than £1m shall not be a qualifying contract unless the authority is satisfied the contract has been subdivided.
In the case of a “framework” contract, that is a “call off” contract for the same goods and services, with the same parties, the assessment of value would be for the likely total “call off” value.
However, in the case of a framework that is not a “call off” arrangement, but an agreed set of common T&C’s to be used when differing requirements/contracts are let, is aggregation under Regulation 5 required at the point of framework agreement, or is the Regulation 5 valuation for threshold test be applied when the subsequent contracts are let?

Appendix 3 – General requirements for supplier reports

Does the guidance on the general requirements for Part 6 supplier reports assist contractors?

The guidance is helpful.

Appendix 4 – Company registration for overseas contractors

Do contractors (UK based or overseas) agree with the arrangements which the SSRO proposes to add to its guidance?

We agree with that proposed.

Do contractors (UK based or overseas) have any experience of company registration arrangements that are not covered by the proposed guidance which may be helpful to include?

We suggest Table 5 might recognise not all European countries are in the EU.

Appendix 5: Minor and uncontroversial changes

Value assessment and Interim Contract Reports

We recommend the term “value” is clarified by consistent use of a term, different to “price”, such as “contract value for threshold purposes” or some other easily understood alternative.

Proposed user permissions

If “download reports” means the ability to export an excel version of a report, we would recommend anyone who has been given access to the DefCARs system is allowed this facility.

Searching for contracts

The proposal states a search can be performed using either the contract reference number or the contract name. Could a search also be facilitated by use of a drop down list too?

Closing issues in previously submitted reports

The proposal suggests that both the SSRO and the MoD have a status of reviews complete. Could these be independently flagged?

We hope our comments are helpful to your review and are happy to discuss them further.

Yours sincerely

James A Schofield
VP Finance

cc: L Hawkins

DSAG comments on the SSRO's Reporting consultation paper, April 2022

General Comments

DSAG welcomes the opportunity to respond to the SSRO on the above consultation paper. The consultation paper as a considerable scope and has implications on the scope of QDCs/QSCs beyond simply reporting.

1. DSAG believes that where the scope of a regulated work is being considered, this should be addressed in a wider tri-partite forum with the MoD. It would be useful to industry to have clarity on 'the requirement' as required by Regulation 5, industry has been asking MoD for clear definition of this term since 2013.

2. DSAG has concerns about the practicality of some of the guidance on reporting of sub-contracts and negative QSC assessments. The SSRO guidance may be technically correct in some areas, but impractical and onerous to implement. Here we will require that the MoD consider this in their legislative reform agenda currently underway.

3. DSAG does not object to publication of our feedback.

Aggregation principles

4. DSAG has a long-standing contention to the wording around 'value' within the Regulations. We are addressing these issues with the MoD in the reform of the framework during 2022, and have issued a table to MoD (attached) proposing changes to the terminology . DSAG believes that the reporting guidance should not be updated until these issues are resolved after the changes to the Regulations are agreed. The SSRO have interpreted somewhat loose and confusing language in the Regulations, we believe that these interpretations have are making the requirements onerous, unattractive to some contractors and confusing. We would welcome engagement with the SSRO on updates to the statutory guidance once the Regulation reform is clear.

5. We believe that the Regulation 5 value should be named 'expected value', elsewhere the term 'value', should be replaced with 'contract price'. These definitions are relevant for aggregation principles and the second issue in the CP 'Reporting under framework contracts'. This would assist all users in understanding the Regulations and not require the SSRO to use confusing definitions such as 'price committed to be paid', and 'contract price' (CP Appendix 2 Item 3).

6. Contractors must report sub-contracts and proposed sub-contracts 'which have, or are expected to have, a value of £1 million or more' and QSC negative assessments for sub-contract when the value exceeds £15m as the SSRO state in the consultation paper (CP)

CP2.4.

7. SSRO proposed guidance makes it clear that the Regulation 5 ‘value of a contract’ is to be used in these calculations. We believe that this was not the intent of the legislation and is impractical.

    a. Regulation 5 was intended to be used as a ‘threshold value’, to be used in assessing if the £5m/£25m thresholds had been crossed for QDC/QSC status. This definition is an anti-avoidance measure to ensure that contactors/the MoD do not seek to split contracts to avoid classification as a QDC/QSC.
    b. Contractors may have many sub-contracts, many of which are indirect in nature. As the scope of Regulation 5 is so wide (past, this, future contracts), and the limit is only £1m, this definition will require contractors to assess:

        i. virtually all relevant direct sub-contracts.

        ii. Realistically all indirect sub-contracts.

8. This may be particularly invasive and onerous for some companies, where they have a low value of QDC/QSC work but are required to report most of their indirect cost base. This may deter companies that do few single-source contracts/’non-usual’ MoD suppliers, and overseas companies. This may frustrate the MoD securing capability or require exemptions from the regime, both undesirable outcomes.

9. In CP Appendix 1 paragraph 3 the SSRO are seeking to define the key term ‘requirement’ for the purpose of Regulation 5. The definition required is highly complex, and requires tri-partite working to agree the definition. The definition of the word requirement is fundamental to the scope of what is a QDC/QSC and therefore what is the scope of the Defence Reform Act. This definition should not be made in the SSRO reporting guidance, and therefore must be removed..

10. The SSRO definition of ‘requirement’ is brief and does not cater for the complexity of the goods and services that are delivered to the MoD by the contractor base. For example, what is the scope of the ‘single economic and technical function, e.g. they all contribute to one asset or project’ in the case of submarine maintenance? Is the boundary a single task when on a tidal-x berth, is it fleet time maintenance, is it a long-overhaul period refuel (LOPR), or is it all of these requirements, as they are all for the purposes of Continuous At Sea Deterrent (CASD)?

11. This issue is fundamental to the scope of the Defence Reform Act, and regulated contracts. Definition must be led by the MoD with the inclusion of industry and the SSRO in it formulation.

12. We support the SSROs statement in CP Appendix 1 bullet 10. Value assessments are made once and not re-visited.

13. Comments on proposed reporting guidance:
    a. 3.33 'For each sub-contract which has or is expected to have a value of not less than £1 million, contractors are required to report the outcome of any assessment that has been made of whether a sub- contract is a QSC'. This wording suggests that all contracts greater than £1m report a QSC assessment. This is not the requirement; it should state that the outcome is required **'IF'** an assessment has been made. The Regulations as quoted (R26,27,28) all start with the word 'if'.
    b. 3.34 'assessments in all cases', we believe that this appears to expansive and 'for assessments that are undertaken' should be substituted.
    c. 3.37 'Contractors must determine the value of each sub-contract to a QDC or QSC in order to know whether to report':
        i. This requires assessment of all relevant direct sub-contracts.
        ii. This requires assessment of all indirect sub-contracts recovered through relevant rates even if it recovers a very small percentage of a sub-contract.
        iii. We believe that the use of the Regulation 5 threshold value is onerous, invasive, and not the intent of the legislation.
    d. 3.40. The SSRO define the Regulation 5 'requirement '. This is a fundamental definition of the scope of a QDC/QSC, as such it should not be defined by reporting guidance. It is a complex and judgemental definition. DSAG supports the MoD in leading a tri-partite working group to adequately complete this task.
    e. 3.42 sub-bullet 3 'Confirmation of whether the contract enables theperformance of contracts other than a QDC or QSC. For a sub-contract to be a QSC, it must involve the **provision by the sub-contractor of anything for the purposes** of a QDC or QSC to which the primary contractor is a party**. If the contractor decided the sub-contract was not a QSC on this ground, then it should indicate the contracts which are not QDCs or QSCs that the contract supports and explain why the contract isbeing identified for the purposes of the QDC or QSC that is being reported on.'** We reject this requirement, the contractor must only be required to report that a contract is not a QSC and the status of a failure under the 50% test. It should not be required to report non-QDCs/non-QSCs that the contract supports.

14. Aggregation example. Whilst we disagree with some principles as outlined above, the example is consistent with the SSRO's approach. We do not understand the following however:

    a. 'give notice in writing to the Secretary of State and the SSRO that each QSC assessment has been made for SC6 and SC7 (regulation 61(8)) **(notice in relation to contracts SC1, SC2, SC3, SC4 and SC5 should previously have been made to the Secretary of State and to the SSRO)'**;
    b. Why would notices have been given in relation to SC1-SC5. These contracts had values of £200k, £500k x 3 and £2m. No assessment is required. The SSRO are suggested that every sub-contract should be assessed and therefore a negative

assessment reported, even when the value is obviously not relevant. Can the SSRO explain this statement and show how this is reasonable and proportionate.

c. '**For all sub-contracts and proposed sub-contracts** Contractor A has entered into or intends to enter into, **regardless of value**, **it is required to provide** a **description** (together with the total proportion of the contract price of the QDC which it expects to sub-contract) in the CNR (reg 25(2)(k)), QCR (reg 26(6)(j)) and ICRL (reg 27(5)(d)). This includes sub-contracts SC1 – SC4 which were disregarded for the purposes of the determining the value of SC6 and SC7. Paragraph 4.68 of the contract reporting guidance refers'. Whilst this is the requirement of the Regulations, it is expansive, onerous and not proportionate for all contracts to be included.

Reporting under framework contracts

15. The SSRO needs to define the types of framework agreement in Appendix 2. One in which the contracts are let within an expanding contract, and one where the framework contract enables separate contracts to be let. The SSRO guidance should consider both of these possible forms in its reporting guidance (as the guidance may/will require to be different).

16. CP Appendix 2 bullet 1, the SSRO use the words 'as terms need only be refined' under a framework contract. We believe that this statement is incorrect and should be deleted. The terms are usually agreed and quantities are simply added.

17. CP Appendix 2 bullet 3. Please see previous comments about values. 'Contract value' should be 'expected value'. We do not agree or support the SSRO's definitions of 'contract price' and 'price committed to pay', the two are the same thing (DSAG's definition of 'contract price'). Under a framework agreement, the contract price is how much the MoD have required/authorised to be performed, that is the same as 'price committed to pay'. We do not see any differentiation. Further we believe that separating the two will lead to confusion and error in reporting.

18. Comments on proposed reporting guidance:

    a. 3.31 in line with comments above is highly confusing. The SSRO have now introduced '**nominal** agreed contract price' and '**nominal** price that the contracting authority has committed to pay', further confusing with terms that are new. This section requires deletion.

    b. '**The price the contracting authority is committed to paying** is the **price that the contracting authority is contractually boundto pay** at the initial reporting date. This amount may be the same as the contract price'. DSAG believes this will always be the case. This bifurcation creates confusion and complexity and should be deleted.

    c. 'An example of where the contract price andtotal price committed to pay may differ is where the contracting parties have committed to a **limitation of liability cap**, but the **estimated contract price for a cost-plus contract at the initial reporting date is higherthan that commitment**.' This cannot be the case, the contract price cannot exceed the limit of liability, the MoD have no requirement to pay any excess.

General requirements for supplier reports

19. Comments on proposed reporting guidance:
    a. 33(1)(d). The issue of financial year (FY) is currently being changed in the draft of the primary legislation, and work on definition in the Regulations will follow. We believe that making any changes to guidance at this time is premature and should wait for the conclusion of legislative amendments.
    b. 33(2)(b). Again, await the conclusion of legislative change in this area.

Company registration for overseas contractors

20. Comments on proposed reporting guidance:
    a. The guidance considers Europe in terms of membership if the EU only, the SSRO needs to consider non-EU European countries

Response to Consultation on Reporting Guidance

April 2022

Status of the Reporting Guidance

The introduction to the consultation paper would appear to include a substantial change to the status of the guidance, which requires explanation from the SSRO.

The second sentence of paragraph 1.1. refers to SSRO's 'guidance on the preparation and submission of reports' as 'statutory guidance'. I believe that SSRO should always refer to 'reporting guidance' as 'guidance' in its consultations and not 'statutory guidance', in particular, if the guidance includes references to DEFCARS, given that contractors are not obliged to use it.

Scope of the Reporting Guidance

Set out below are references to the sections of the DRA 2014 and associated regulations that relate to guidance that the SSRO may or is required to issue. I believe the vires for such guidance is restricted to:

- Section 18(1) The Secretary of State or an authorised person, and the primary contractor, must have regard to guidance issued by the SSRO in relation to any of the steps set out in section 17(2).
- Section 20(1) The SSRO must issue guidance about determining whether costs are allowable costs under qualifying defence contracts.
- Section 24(2)(d) may require a primary contractor to have regard to guidance issued by the SSRO in preparing reports.
- Section 25(6)(d) may require designated persons to have regard to guidance issued by the SSRO in preparing the reports.
- Section 33(3) and (4) In determining the amount of a penalty under section 32, the Secretary of State must have regard to guidance issued by the SSRO. The SSRO must publish guidance issued under subsection (3) in such manner as it thinks appropriate.
- The SSPR regulations 18 and 19 refer to 'statutory guidance' when referencing contract profit rate adjustments and allowable costs.

The Vires at sections 24(2)(d) and 25(6)(d) is for guidance in preparing Part 5 and Part 6 reports and does not extend to permit guidance for other Parts of the SSPR regulations.

Regulations 22 and 33 set out the general requirements for completion of Part 5 and Part 6 reports. These regulations require a contractor, when preparing each report, to have regard to any relevant guidance issued by the SSRO.

The scope of SSRO reporting guidance should be restricted to the reporting obligations as set out in regulations in Part 5 and Part 6 of the SSPRs and not extend to other aspects of the regime. Unfortunately, this consultation goes beyond those limitations as detailed later in this paper.

It is recognised that as part of its DSIS process MOD consulted industry about changes to the DRA and SSPR, included within which was a short paragraph where is considering a

change to the legislation to allow the SSRO to issue guidance on all aspects of the regime. No such change has been made to the legislation.

Comments on the proposed guidance pages 9 - 19

3.33. I am content with the revised wording.

3.34. Whilst this guidance on notification requirements of regulation 61 sections (3), (6) and (8) may be both accurate and even helpful, it does not constitute reporting guidance on Part 5 of the regulations and should therefore be removed along with SSROs notification templates.

3.35. Although the intent of this paragraph is to indicate that a new assessment need only be made if a subcontract is amended in such a way that what would be deemed to be a new contract is created and it would be that new contract that would be subject to assessment and not the original contract, the wording does encapsulate this idea succinctly. Given that the guidance relates to regulation 61, the paragraph should be wholly removed. The contents refer to assessment requirements that lay outside Part 5.

3.36. This paragraph should be removed as the contents refer to assessment requirements that lay within regulations outside Part 5.

3.37. This paragraph should be removed as the contents refer to assessment requirements that lay within regulations outside Part 5.

3.38. This paragraph should be removed as the contents refer to assessment requirements that lay within regulations outside Part 5.

3.39. This paragraph should be removed as the contents refer to assessment requirements that lay within regulations outside Part 5. The 'Aggregation example' should also be excluded.

3.40 and 3.41. These paragraphs should be removed as the contents refer to assessment requirement that lay within regulations outside Part 5. As SSRO points out in its appendix 1 paragraph 5 '*The aggregation provisions are intended to prevent a single requirement being distributed among multiple contracts in order to circumvent application of the Act and Regulations*', and in paragraph 3 of the same appendix, that '*the term 'requirement' is not defined in the DRA or regulations'*. It should therefore be left to the contracting authority to describe the requirement to be satisfied by a contract, to assess whether the requirement is or will be satisfied by more than one contract and to assess whether or not it considers that aggregation provisions should apply. It is then a matter for the MOD to decide whether assessments have been made correctly. The SSRO, in its role as an independent entity, should have no concern with the assessment unless and until such time as a reference is made to it for a determination.

3.42. This paragraph should be removed as the reporting requirements set out in Part 5 reporting regulations are addressed in 3.33 and this section of guidance requests information that is not required by the regulations.

Assessment notification templates are outside the scope of reporting guidance relating to Part 5 and should therefore be removed. The SSRO does not have vires to issue guidance relating to regulation 61.

Comments on the proposed guidance pages 20 - 24

3.29 and 3.30. These are matters that are addressed in Parts 1, 2 and 10 of the SSPRs and therefore lay outside the scope of reporting guidance. I agree that each contract within a framework agreement needs to be assessed in accordance with the requirements of regulation 5. However, this is the assessment necessary to be undertaken by the contracting officer to establish if that initial or subsequent contract is a qualifying contract required to be priced and reported as a stand-alone qualifying contract and nothing to do with Part 5 reporting. Reporting under Part 5 will follow should a positive assessment be made. Reporting guidance should be just that, guidance on how to report and not how to assess if a contract should be reported.

3.31. I am unsure why the SSRO has included this section. The proposed guidance has little to do with reporting obligations. The situation is further confused by the fact that guidance on the use of DEFCARS has been integrated into what is labelled statutory guidance. I am surprised that the SSRO should recommend that "*The contractor should consider taking legal advice to understand …*". This is not something I would expect to be found in statutory guidance.

Comments proposed guidance pages 25 - 28

I have no comments. The content looks to be consistent with the reporting requirements set out in Part 6.

Comments proposed guidance pages 29 - 34

I have no further comments

J B Ashley