

**SSRO**

Single Source  
Regulations Office

**Improving the SSRO's response to contract-specific queries on the regulatory framework for single source defence contracts**

November 2023

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# 1. Introduction

- 1.1 The regulatory framework for single source defence contracts<sup>1</sup> specifies how contracts that meet the requirements for being qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs) must be priced and requires transparency over those contracts and from the contractors who hold them. The SSRO provides guidance, where permitted, training and support to the Secretary of State for Defence and current and prospective QDC/QSC contractors to assist them to understand and apply the requirements of the regulatory framework. The SSRO also responds to queries on the application of the regulatory framework and the SSRO's statutory guidance on contract pricing and reporting. In certain cases, specified in the legislation, questions relating to the application of the regulatory framework may be referred to the SSRO for a formal opinion or determination.<sup>2</sup>
- 1.2 In response to requests from stakeholders, the SSRO's Corporate Plan 2023-26 sets out our ambitions to:
- a. help industry and the MOD to use and apply the tools of the regulatory framework;
  - b. provide help on the ground to stakeholders in understanding and applying the guidance and legislation consistently;
  - c. increase stakeholder understanding of referrals by spending more time on, and using a structured approach to, pre-referral engagement; and
  - d. implement a fast-track opinion option to allow for quicker resolution and contract negotiations without compromising the quality and rigour of our referral work.
- 1.3 We consider that achieving improvements in these aspects of the SSRO's support to stakeholders will better assist the Ministry of Defence and its suppliers to deliver the improvements in defence acquisition that are envisaged by the government's Defence and Security Industrial Strategy.<sup>3</sup>
- 1.4 In support of these aims, this paper sets out the SSRO's proposals in relation to the following aspects of the SSRO's response to queries where stakeholders have indicated a desire for improvement:
- the provision, when requested, of more detailed advice or guidance on the application of the regulatory framework to contract-specific issues in advance of a referral for an SSRO opinion or determination; and
  - faster delivery of opinions when relevant matters are referred to the SSRO.

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1 Established by Part 2 of the Defence Reform Act 2014 (the Act) and the Single Source Contract Regulations 2014 (the Regulations).

2 Schedule 10 of the Procurement Act 2023 amends Part 2 of the Defence Reform Act 2014 in ways that, once implemented, will enhance the SSRO's ability to provide guidance in relation to the application or interpretation of the regulatory framework and enable referrals to be made to the SSRO on a wider range of matters.

3 HM Government (2021) *Defence and Security Industrial Strategy: A Strategic Approach to the UK's Defence and Security Industrial Sectors* (CP 410).

- 1.5 The SSRO is seeking feedback from stakeholders on the potential improvement proposals outlined in this paper to inform their further development and the SSRO's decisions on implementation. Details on how to respond to this consultation are provided in section 4 of this document. The consultation period runs until 20 December 2023.
- 1.6 The SSRO welcomes the opportunity to meet with stakeholders to discuss the proposals during the consultation period. If you wish to discuss the proposals, please contact us by email ([david.potruff@ssro.gov.uk](mailto:david.potruff@ssro.gov.uk)) or by telephone (020 3589 4556) to arrange a meeting.
- 1.7 Following consideration of the consultation responses, the SSRO will publish details in spring 2024 of any changes it will make to the way it responds to stakeholder queries on the regulatory framework.

## 2. Current approaches to responding to queries

- 2.1 The SSRO receives and responds to a wide range of queries from stakeholders concerning the regulatory framework and its application to qualifying contracts. These include queries concerning:
- a. the regulatory framework itself;
  - b. the role of the SSRO and its work;
  - c. applying the SSRO's guidance on contract pricing and statutory reporting;
  - d. using the SSRO's Defence Contracts Analysis and Reporting System (DefCARS) to submit statutory reports; and
  - e. opportunities to refer matters to the SSRO for an opinion or determination.
- 2.2 The majority of queries are relatively simple and dealt with by signposting enquirers to existing SSRO guidance. These queries are routinely handled by the SSRO's Helpdesk and all such queries are responded to within five working days.
- 2.3 Some queries, however, typically on contract pricing and reporting, are more complex in nature and require more detailed responses. Responding to such queries involves more extensive consideration by SSRO staff and commonly requires enquirers to provide additional information about the terms of specific contracts and the circumstances giving rise to their queries.
- 2.4 Where the questions raised by stakeholders are matters which the legislation provides might be referred to the SSRO for an opinion or determination, or where it is clear that a referral is already being contemplated, the SSRO has to date generally taken the view that it is not appropriate to provide detailed commentary on such matters outside the formal referrals mechanism. To do so, particularly in the absence of a full understanding of the facts of the case, risks unduly prejudicing any subsequent referral proceedings. It may also risk the SSRO's executive assuming or subverting the role and powers of a Referral Committee.<sup>4</sup> The SSRO does, however, provide guidance to stakeholders in these cases on how matters might be referred for opinion or determination; aspects of the legislation or guidance which are relevant to the matter raised based on the brief provided; and aspects of the case that might have a particular bearing on a Referral Committee's consideration of a referral if made.

### Stakeholder feedback

- 2.5 The SSRO's stakeholders have expressed a desire for the SSRO to develop alternative ways of helping them resolve complex contract-specific questions or disputes about the application of the regulatory framework, outside the referrals mechanism or before a formal referral for opinion or determination is made.

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<sup>4</sup> The legislation governing referrals requires that opinions will be given and determinations made by a three-person Committee, appointed by the SSRO's Chair, including at least one person who is neither an employee nor a member of the SSRO. The SSRO has published procedural guidance for opinions and determinations which is available on the [SSRO's website](#).

- 2.6 Some stakeholders have suggested the SSRO provides more comprehensive, tailored advice or guidance in response to contract-specific queries. This would, they suggest:
- a. avoid the need for a referral for an opinion or determination in some cases – which may, in their view, enable contract disputes to be resolved more quickly; and
  - b. help the parties to qualifying contracts understand the factors that might influence an SSRO opinion or determination – which would better enable the parties to qualifying contracts to assess the merits of making a referral.
- 2.7 Although not expressly provided for in the Act and Regulations, some stakeholders have suggested the SSRO might informally arbitrate between the parties to qualifying contracts where disputes about applying the regulatory framework arise. Some have proposed that the SSRO act as an expert facilitator during contract negotiations – combining knowledge of the regulatory framework with experience of procuring goods, works or services across different domains. The SSRO considers that this type of involvement in contract agreement would require a change to its current statutory role within the regime. Even if the SSRO were so empowered, the validity or independence of an SSRO opinion or determination on a referred matter might be challenged if it had previously acted in an arbitration role in relation to that matter.
- 2.8 Stakeholders have also asked the SSRO to publish more information about the responses it has provided to questions on the application of the regulatory framework, to support wider learning. The SSRO notes that it publishes a quarterly digest on its website of its responses to commonly asked questions where it considers these will be helpful to the parties to QDCs. The SSRO also routinely publishes information about the outcome of opinions or determinations.
- 2.9 The proposals set out in the next section of this paper are intended to address the feedback provided by stakeholders by offering new services relevant to their needs in a way that the SSRO considers is consistent with:
- a. the SSRO's functions and powers as provided for by the Defence Reform Act and the Regulations and the ways in which these will change when Schedule 10 of the Procurement Act comes into force;
  - b. the SSRO's statutory aims in exercising its functions, to ensure the achievement of good value for money in government expenditure on qualifying contracts and contract prices that are fair and reasonable; and
  - c. the SSRO's Corporate Plan objective to support a well-functioning regulatory framework.<sup>5</sup>

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<sup>5</sup> Objective 2 in *SSRO Corporate Plan 2023-2026*.

## 3. The SSRO's proposals

- 3.1 The SSRO has noted an increase since 2022 in the number of complex contract-specific queries raised by stakeholders on applying the regulatory framework, including requests for support when a referral is being contemplated. The SSRO's assessment is that complex queries tend to arise where one or both parties to a current or prospective QDC/QSC:
- a. consider the SSRO's published guidance does not sufficiently or specifically address the matter they are seeking to resolve;
  - b. are unsure how to apply the SSRO's published guidance;
  - c. have differing views on how to apply the SSRO's published guidance; or
  - d. consider the SSRO's published guidance does not support the achievement of good value for money in government expenditure on qualifying contracts or a fair and reasonable contract price.<sup>6</sup>
- 3.2 The SSRO wants to provide more effective and timely responses to the complex contract-specific queries it receives. This includes assisting the parties to proposed or agreed QDCs/QSCs to understand when it may or may not be appropriate or necessary to seek an SSRO opinion or determination and, when opinions are sought, providing these more quickly when the circumstances permit.
- 3.3 We set out below four proposals that we consider would deliver improvements in the support the SSRO provides to stakeholders where complex contract-specific queries are raised. We invite stakeholders to provide feedback on these proposals to inform their further development and the SSRO's decisions on implementation. The proposals are not presented as options from which only one may be selected for development but, rather, a suite of complementary developments which, if implemented in totality, can be applied as appropriate to the circumstances of a particular case.
- 3.4 The proposals relate specifically to the SSRO's response to complex contract-specific queries. More general requests from stakeholders for new or updated guidance on particular topics will continue to be considered and prioritised for response as part of the SSRO's annual business planning activity.

### **Proposal 1 – Develop and codify principles for responding to complex queries**

- 3.5 The SSRO considers it would be beneficial to stakeholders and the SSRO to develop and codify the principles that apply when the SSRO is asked to consider and respond to complex contract-specific queries. Such principles might identify:
- a. the types of questions that would generally be considered (and those that would definitely not) and the method(s) for raising these;
  - b. the type(s) of response the SSRO would provide in different circumstances (including, if implemented, the types of response proposed in this consultation paper);

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<sup>6</sup> These triggers for queries are not mutually exclusive. For example, stakeholders may disagree on how to apply the SSRO's guidance (c) because they either do not know how to apply the guidance (b) or think the guidance does not support the statutory aims (d).

- c. the information with which the SSRO would typically need to be provided in order to consider and respond to a query;
- d. how the SSRO will engage with the party raising the query;
- e. in what circumstances and how the SSRO might engage with any other party to a qualifying contract on which a query is raised;
- f. that, other than determinations made by the SSRO under the Act, SSRO responses to queries are not legally binding on the parties to qualifying contracts;
- g. that the SSRO bears no liability for decisions made by the parties to qualifying contracts based on the SSRO's responses to queries;
- h. ways in which the information provided by an enquirer may be used by the SSRO, for example, in considering any subsequent referral related to the matter;
- i. that SSRO responses to queries are not binding on the decision of a Referral Committee if the SSRO is subsequently asked to give a formal opinion or make a determination on a referral; and
- j. the approach the SSRO will take to disseminating anonymised information about queries received and responses provided.

3.6 We summarise below the SSRO's view of the main potential benefits and risks associated with the proposal to develop and codify principles for responding to complex queries.

Benefits	Risks
<ul style="list-style-type: none"> <li>• Stakeholders will have greater confidence to raise queries when they have greater certainty about how these will be handled, leading to more queries being raised and greater levels of understanding of and compliance with the regulatory requirements.</li> <li>• The application of principles leads to greater consistency in the SSRO's response to queries and opportunities to improve the speed and efficiency of those responses.</li> <li>• Stakeholders will be better able to hold the SSRO to account for how it has responded to queries when there is clarity about how these will be dealt with.</li> </ul>	<ul style="list-style-type: none"> <li>• The codification of principles unduly constrains the scope of queries that may be raised or responded to, or introduces undue complexity to the mechanism for raising and responding to queries, leading to: <ul style="list-style-type: none"> <li>• fewer queries being raised and lower levels of compliance with the regulatory requirements; and/or</li> <li>• administrative inefficiency or delay in providing responses.</li> </ul> </li> </ul>

3.7 We welcome stakeholders' views on:

- a. the main benefits and risks (for stakeholders or the SSRO) of developing and codifying principles for responding to complex queries; and
- b. aspects of the approach to responding to complex queries which should (or should not) be codified in principles.



## Proposal 2 – Provide formal pre-referral advice to inform the decision to refer

- 3.8 The SSRO proposes to develop an enhanced form of response to contract-specific questions which will include providing independent and authoritative written advice to a contracting party or parties on the application of the regulatory framework. This may be used to inform their contract negotiations or help them decide whether to seek an SSRO opinion or determination when permitted. This type of response is most likely to be helpful where the parties to a contract have been unable to resolve a contract-specific dispute and a referral is being contemplated by one or both parties.
- 3.9 In relevant cases, a Case Advisor, with the support of other SSRO staff as required, will be appointed to consider information about the circumstances of the case and issue written advice. This advice would include:
- a. a summary of the key facts provided by the party or parties seeking advice on the application of the regulatory framework;
  - b. details of the provisions of the Act and Regulations and the SSRO's guidance that relate to the matter;
  - c. the Case Advisor's view on the merits of any arguments put forward by the party or parties seeking advice as to how the regulatory framework should be applied in the case;
  - d. details of the opportunities, if available to the contract parties, to refer the matter formally for an opinion or determination; and
  - e. a summary of factors which the Case Advisor considers would be most likely to influence a Referral Committee's formal opinion or determination, should the matter be referred.
- 3.10 The provision of advice by a Case Advisor is not a substitute for an opinion or determination by a Referral Committee, where permitted by the regulatory framework. It is expected, however, that pre-referral advice will assist the receiving party or parties to progress negotiations on the matter reviewed and/or weigh the likely benefits of seeking an opinion or determination. Where a party makes a referral to the SSRO for an opinion or determination after it has received pre-referral advice, the SSRO would expect the referral submission to take account of the advice provided. For example, the referral submission should include information on matters that were identified by the SSRO in its pre-referral advice as being relevant to a Referral Committee's consideration of a referral. Where the quality of a referral submission is high, the SSRO is more likely to be able to provide an opinion or determination in a shorter timeframe.
- 3.11 Either party to a current or proposed qualifying contract may seek pre-referral advice on the application of the regulatory framework to a contract. In order for the advice to be provided, the party or parties requesting advice would be asked to provide a written submission related to the matter, setting out the facts of the case and their position on the matter. A standard template will be prepared to assist with the submission of required information. Where necessary to understand the facts of the case, the Case Advisor (or supporting staff, where applicable) may meet with the party or parties seeking advice or request written clarification.

- 3.12 Unlike the SSRO's investigation of a referral for an opinion or determination, the SSRO may provide advice through this mechanism to just one or other party to a contract based solely on the information that party provides without seeking any information from the other party. While the Case Advisor will provide impartial advice on applying the regulatory framework based on the information provided by the enquirer, a Referral Committee considering any subsequent referral on the matter will draw independent conclusions taking account of evidence provided by both parties to the contract.
- 3.13 While the SSRO considers there would be merit in engaging with both parties to a contract in order to provide pre-referral advice, it recognises that there may be occasions where one party to a contract does not wish the other party to know that it is contemplating a referral or considering the soundness of its approach to a negotiation point. Engaging with both parties to a contract would also increase the time and resource needed to prepare advice. However, should a matter on which pre-referral advice has been provided be subsequently taken forward and referred for opinion or determination, the SSRO would, as a matter of policy and in the interests of transparency, disclose any pre-referral advice it had provided to one party on the matter to the other party to the referral.
- 3.14 Other differences between the provision of pre-referral advice and the SSRO's approach to referral investigations include that there would be no oral hearing at which the parties to the matter would make representations to the Case Advisor; there would be no opportunity for the parties to the case to comment on a Statement of Facts; and there would be no opportunity to comment on draft advice. This reflects the less formal approach to pre-referral engagement.
- 3.15 If a matter on which pre-referral advice has been given is subsequently referred for an opinion or determination, the matter will be considered independently by a Referral Committee appointed by the SSRO's Chair and in accordance with the SSRO's procedures for referrals. A Case Advisor's written advice would be considered by the appointed Referral Committee along with any other information pertaining to the matter that the Referral Committee considered relevant to its decision. A Referral Committee will not be bound by any advice provided by the Case Advisor. Where a Referral Committee's opinion or determination conflicts with any advice provided by a Case Advisor, the reasons for such differences will be explained by the Referral Committee in giving its opinion or making its determination.
- 3.16 The SSRO is mindful that there is the potential for an actual or perceived conflict of interest to arise if a Case Advisor that has given pre-referral advice or other staff supporting the Case Advisor are subsequently involved in the Case Team that supports a Referral Committee appointed to conclude a referral on the same matter. The pool of SSRO staff who could be involved in the preparation of pre-referral advice and in supporting Referral Committees is limited in number. However, we consider that the risk of a Referral Committee's opinion or determination being biased by the involvement in the referral Case Team of staff who have been involved in preparing pre-referral advice on the same matter will be mitigated by:
- a. ensuring both parties to the referral are aware of what pre-referral advice the SSRO has provided on the matter and the information on which this advice was based;

- b. the opinion or determination being concluded independently by a three-person Referral Committee (appointed in accordance with the SSRO's Corporate Governance Framework) which will not include any persons involved in the preparation of the pre-referral advice; and
- c. ensuring both parties to the referral are fully sighted on the matters and evidence that the Referral Committee has taken into account in reaching a conclusion on the matter referred.

3.17 We summarise below the SSRO's view of the main potential benefits and risks associated with the proposal to provide formal pre-referral advice to inform a stakeholder's decision to refer a matter for opinion or determination.

Benefits	Risks
<ul style="list-style-type: none"> <li>• Contracting parties in receipt of advice will be better informed about the application of the regulatory framework to a case and opportunities to refer for opinion or determination.</li> <li>• The provision of advice will support the contracting parties to resolve disputes and speed up contract agreement when utilised in a timely manner during contract negotiations.</li> <li>• Formal referrals will only be made in cases where there is a need to clarify how the regulatory framework should be applied, ensuring effective use of SSRO resources.</li> <li>• The quality of referral submissions will improve enabling opinions and determinations to be delivered more quickly.</li> </ul>	<ul style="list-style-type: none"> <li>• Where the SSRO's understanding of a contract-specific issue is limited to the information provided by one party to the contract, there is a risk that its advice could be different to that which it might have given had it considered evidence from both parties. Pre-referral advice on a matter may, therefore, conflict with a subsequent opinion or determination on the matter based on information provided by both parties to the contract.</li> <li>• The provision of pre-referral advice may result in very few or no referrals for opinion or determination, limiting opportunities for in-depth investigation of contract-related matters.</li> <li>• Demand for pre-referral advice may exceed the SSRO's planned resources to deliver. <ul style="list-style-type: none"> <li>• Delays providing advice may impact on the resolution of contract disputes and have a negative impact on SSRO's stakeholder engagement.</li> <li>• Reallocation of SSRO resources to meet demand for advice may impact on the delivery of other planned work of importance to stakeholders.</li> </ul> </li> </ul>

3.18 We welcome stakeholders' views on:

- a. the main benefits and risks (for stakeholders or the SSRO) of providing formal pre-referral advice to assist in contract negotiations or inform a contracting party's decision to refer;
- b. the elements of the pre-referral advice process outlined in the proposal;
- c. whether the SSRO should restrict in any way the range of matters that can be raised for pre-referral advice; and
- d. the likelihood that a party or parties to a QDC might request pre-referral advice if the SSRO were to provide such a mechanism.

**Proposal 3 – Provide supplementary guidance in response to contract-specific issues**

3.19 The SSRO has specific powers to provide guidance in the following areas:

- the steps for determining the contract profit rate for a QDC or QSC (section 18(1) of the Act);
- determining whether costs are allowable costs under qualifying defence contracts (section 20(1) of the Act);
- determining the amount of a penalty (section 33(4) of the Act); and
- the preparation of reports (regulations 22(9) and 33(8)).

3.20 The SSRO has published guidance on each of these topics as well as procedural guidance for the consideration of referrals for opinions or determinations.<sup>7</sup> The SSRO's [Corporate Governance Framework](#) identifies that its Regulatory Committee has responsibility for approving updates to the SSRO's guidance. The Chief Regulatory Officer and heads of function<sup>8</sup> have delegated responsibility for approving minor and uncontroversial changes to the SSRO's guidance.

3.21 Schedule 10 of the Procurement Act, expected to be in force from 1 April 2024, will introduce a more general power under section 35A of the Defence Reform Act for the SSRO to provide such guidance as it considers appropriate in relation to the application or interpretation of Part 2 of the Act and the Regulations.

3.22 To coincide with the widening of the SSRO's guidance-giving powers, the SSRO proposes to establish a mechanism through which the SSRO can provide supplementary guidance on specific matters related to the application of the regulatory framework when requested by a party or parties to a current or proposed QDC. This might be in relation to a matter not presently addressed by the SSRO's published guidance or where clarification is required on how the SSRO's published guidance applies in a particular circumstance. Where the SSRO issues supplementary guidance through this mechanism in the areas referred to at paragraph 3.19, for example, on determining allowable costs, such guidance would be issued under the same statutory guidance-giving powers and would have the same status as other SSRO guidance on those aspects of the regulatory framework. Where guidance is issued in relation to other aspects of the regulatory framework, the SSRO expects to rely on its new power under section 35A of the Act.

<sup>7</sup> An overview of the SSRO's published guidance and the SSRO's approach to guidance development and review is available on the SSRO's [website](#).

<sup>8</sup> Head of Pricing and Economics – Allowable Costs and contract profit rate guidance; Head of Compliance and Reporting – guidance on reporting and penalties; and Head of Policy, Referrals and Support – guidance on referrals procedures.

- 3.23 The SSRO's proposed mechanism for providing supplementary guidance is outlined below.
- a. A party or parties to a current or proposed QDC may submit a request (using a standard template) for supplementary guidance on any matter related to the application of the regulatory framework to that contract. The submission template will require relevant information to be supplied about the circumstances of the case together with details of the supplementary guidance that is sought. A party or parties seeking supplementary guidance will be invited to propose draft supplementary guidance related to the matter for the SSRO's consideration.
  - b. Where necessary to understand the circumstances of the case or the supplementary guidance that is required, SSRO staff will meet with and seek further information from the requesting party or parties, and any other party to the contract in respect of which this guidance is sought.
  - c. Based on the information provided, SSRO staff will prepare draft supplementary guidance for approval in accordance with the SSRO's Corporate Governance Framework.
  - d. Once approved, supplementary guidance will be provided, in writing, to the requesting party or parties and any other party to the contract. It will also be published in an anonymised way and will be applicable to all qualifying contracts agreed on or after the date of its publication. Supplementary guidance, as with all SSRO guidance, will be subject to periodic review and may be incorporated, in due course, within the SSRO's relevant principal guidance publications.
  - e. Where the legislation requires the parties to qualifying contracts to have regard to guidance issued by the SSRO on certain matters, they would need to have regard to any supplementary guidance issued by the SSRO on those matters. The SSRO would also need to have regard to its supplementary guidance when giving an opinion or making a determination on a matter to which the supplementary guidance relates.
  - f. In cases where the SSRO considers more extensive investigation or consideration of a matter is required before any supplementary guidance can be provided in response to a request it will take one of the following courses of action:
    - i. Where the matter on which supplementary guidance is sought is a matter that may be referred for opinion or determination, the party or parties raising the request will be asked if they wish to refer the matter for investigation and consideration by an SSRO Referral Committee. The nature of any changes that may be needed to the SSRO's published guidance will be considered once an opinion has been given or determination made following a referral.
    - ii. Where the matter on which supplementary guidance is sought is not a matter that may be referred for opinion or determination, or where no referral is made, the SSRO will give the matter further consideration (which may include wider stakeholder engagement) before making any changes to its published guidance. The priority to be given to any further consideration of the matter will depend on its importance relative to the SSRO's other planned work and the availability of SSRO staff to undertake the necessary investigation.

- g. A party or parties in receipt of supplementary guidance may subsequently seek an SSRO opinion or determination related to the matter on which supplementary guidance has been given, where such a referral is provided for by the legislation. In the event that a related opinion or determination is sought, the SSRO may take into account any information previously provided to the SSRO on the matter as part of its consideration of a request for supplementary guidance.

3.24 We summarise below the SSRO's view of the main potential benefits and risks associated with the proposal to provide supplementary guidance in response to contract-specific issues.

Benefits	Risks
<ul style="list-style-type: none"> <li>• The provision of supplementary guidance may assist the parties to qualifying contracts to apply the regulatory framework or resolve contract disputes without the need for an SSRO opinion or determination, speeding up contract negotiations and agreement.</li> <li>• The provision of supplementary guidance in response to requests will support general improvements in the SSRO's published guidance which, in turn, helps deliver the aims of the regulatory framework.</li> </ul>	<ul style="list-style-type: none"> <li>• Demand for supplementary guidance may exceed the SSRO's planned capacity to deliver.               <ul style="list-style-type: none"> <li>• Delays processing requests may impact on the agreement of contracts or the resolution of contract disputes and have a negative impact on the SSRO's stakeholder engagement.</li> <li>• Reallocation of SSRO resources to meet demand may impact on the delivery of other planned work of importance to stakeholders.</li> </ul> </li> <li>• The SSRO may be asked to provide supplementary guidance which would unduly favour one or other party to a qualifying contract or which is related to circumstances which are not likely to be replicated in other contracts. The SSRO will need to exercise care to ensure its provision of supplementary guidance avoids unintended consequences for the parties to QDCs/QSCs and demonstrates good value for money in the use of its resources.</li> </ul>

3.25 We welcome stakeholders' views on:

- a. the main benefits and risks (for stakeholders or the SSRO) of providing supplementary guidance in response to contract-specific issues;
- b. any criteria that the SSRO should apply when deciding whether to accept a request for supplementary guidance, to ensure its resources are used effectively;

- c. the elements of the proposed mechanism outlined by the SSRO (in paragraph 3.23); and
- d. the likelihood that a party or parties to a QDC might request supplementary guidance if the SSRO were to provide such a mechanism.

#### **Proposal 4 – Provide a fast-track opinion option (in some cases)**

- 3.26 The SSRO's current procedures for investigating and giving an opinion on a matter referred under the legislation are published on our website.<sup>9</sup> These set out our general aim to give an opinion within 40 days of a referral being accepted while acknowledging that the timetable for each case will depend on:
- a. the circumstances of the case, including complexity, scope and urgency; and
  - b. the clarity and completeness of the information submitted, including the submissions, supporting information and any agreed statement of facts.
- 3.27 Demand for opinions has been low. To date, the SSRO has given four opinions. On average, these were delivered 29 working days after the referrals were accepted. The quickest was given 20 working days after acceptance. The slowest was given 35 working days after acceptance.<sup>10</sup>
- 3.28 The SSRO considers it would be able to give an opinion in the shortest amount of time in the following circumstances, most of which are dependent on the parties to the referral.
- a. The matter on which an opinion is sought is clearly defined.
  - b. Other than the matter on which an opinion is sought, there are no disagreements between the parties to the contract as to the application of the regulatory framework to that contract.
  - c. The referral submission (and any counter-party's response to this, where relevant) clearly presents the information necessary for an opinion to be given, including details of the matter referred, any relevant contract, and the party's (or parties') position(s) on the matter. The use of a referral submission template might assist with this.
  - d. There is agreement between the parties to the referral as to the facts of the case at the time of referral.
  - e. There is a good level of engagement from the parties to the referral, including good availability for meetings and prompt responses to the SSRO's queries or information requests, where required.
  - f. There is no need for the SSRO to undertake a site visit to understand the circumstances giving rise to the referral.
  - g. The SSRO does not need to procure specific subject-matter expertise to assist it to understand or consider the facts of the case.
  - h. SSRO Case Team meetings with the parties to the referral, or hearings with the Referral Committee, where needed, can be scheduled at short notice – making use of videoconferencing where appropriate to facilitate this.

<sup>9</sup> See [SSRO opinions guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

<sup>10</sup> For the purpose of comparison, the SSRO has made five determinations. These were completed, on average, 114 days (5.2 months) after referral acceptance.

- i. The SSRO’s Referral Committee and Case Team are available to give dedicated consideration to the matter referred as required.

3.29 In cases where the circumstances identified above prevail, the SSRO considers it would be possible to give its independent and authoritative written opinion within 10 working days from referral acceptance.

3.30 The SSRO notes that the pre-conditions for a fast-track opinion are only likely to be fully met in a limited number of cases. We also consider that the pre-conditions are more likely to be met in cases where the SSRO has provided formal pre-referral advice to a party to inform its decision on whether or not to make a referral. For example, the matter on which an opinion may be sought is likely to be more clearly defined; the referring party will have clarity on the information it should include in any referral submission; and the SSRO will have sufficient understanding of the matter being referred to quickly establish a Case Team and Referral Committee with appropriate knowledge and expertise to consider the matter.

3.31 We summarise below the SSRO’s view of the main potential benefits and risks associated with the proposal to offer a fast-track opinion option in some cases referred.

Benefits	Risks
<ul style="list-style-type: none"> <li>• The fast-track opinion process would be less resource intensive and costly for the MOD, defence contractors and the SSRO than the standard opinion process.</li> <li>• The parties to prospective or current QDCs obtain an SSRO opinion more quickly, enabling faster resolution of contract negotiations or disputes.</li> <li>• There is an increase in the number of opinions sought, supporting the SSRO’s and stakeholder’s learning about the application of the regulatory framework to qualifying contracts and longer-term improvements in the regulatory framework.</li> <li>• Experience in the delivery of fast-track opinions leads to general improvements and increased efficiency in the SSRO’s delivery of other opinions and determinations, ensuring the SSRO is better able to respond to any increase in referrals arising from the implementation of Schedule 10 of the Procurement Act.</li> </ul>	<ul style="list-style-type: none"> <li>• Demand for fast-track opinions may exceed the SSRO’s planned capacity. Parties making referrals may not receive opinions as quickly as expected which impacts on the SSRO’s reputation and stakeholder engagement. The SSRO may divert resources from other work of importance to stakeholders to ensure opinions are delivered quickly.</li> <li>• The existence of a fast-track option may increase stakeholders’ expectations about the pace with which all opinions are given and determinations made. Failure to meet stakeholder expectations may impact on the SSRO’s reputation and stakeholder engagement.</li> <li>• One or both parties to a referral may contest the outcome of a fast-track process on the basis that the matter was not given sufficient consideration. Additional resources may need to be deployed to support any consequent referrals or other action.</li> </ul>



3.32 We welcome stakeholders' views on:

- a. the benefits and risks (for stakeholders or the SSRO) of offering a fast-track opinion option;
- b. the circumstances under which a fast-track opinion might be delivered; and
- c. the likelihood that offering a fast-track option will lead to an increase in referrals for opinions where these are permitted under the Act and Regulations.

## 4. Questions for stakeholders

- 4.1 The SSRO invites stakeholder views, together with supporting evidence where appropriate, on the proposals presented in this paper to inform their further development and the SSRO's decisions on implementation. We specifically seek responses to the consultation questions set out below although general feedback on the proposals is also welcomed.

Proposal	Questions
<p>1. Develop and codify procedures for responding to complex queries</p>	<p>1.1 To what extent do you support the proposal to develop and codify principles for responding to complex contract-specific queries?</p> <p>1.2 What are the main benefits or risks (for stakeholders or the SSRO) of developing and codifying principles for responding to complex queries?</p> <p>1.3 What aspects of the approach to responding to complex queries should (or should not) be codified in principles?</p>
<p>2. Provide formal pre-referral advice to inform the decision to refer</p>	<p>2.1 To what extent do you support the proposal to provide formal pre-referral advice to assist in contract negotiations or inform a contracting party's decision to refer?</p> <p>2.2 How likely is it that a party or parties to a QDC might request pre-referral advice if the SSRO were to provide such a mechanism?</p> <p>2.3 What are the main benefits or risks (for stakeholders or the SSRO) of providing formal pre-referral advice?</p> <p>2.4 What, if any, changes would you make to the elements of the pre-referral advice process outlined in the paper?</p> <p>2.5 Should the SSRO restrict in any way the range of matters that can be raised for pre-referral advice?</p>

Proposal	Questions
3. Provide supplementary guidance in response to contract-specific issues	<p>3.1 To what extent do you support the proposal to provide supplementary guidance in response to contract-specific issues?</p> <p>3.2 How likely is it that a party or parties to a QDC might request supplementary guidance if the SSRO were to provide such a mechanism?</p> <p>3.3 What are the main benefits or risks (for stakeholders or the SSRO) of providing supplementary guidance in response to contract-specific issues?</p> <p>3.4 What, if any, criteria should the SSRO apply when deciding whether to accept a request for supplementary guidance, to ensure its resources are used effectively?</p> <p>3.5 Do you have any comments on the elements of the proposed mechanism outlined by the SSRO (in paragraph 3.23)?</p>
4. Provide a fast-track opinion option (in some cases)	<p>4.1 To what extent do you support the proposal to provide a fast-track opinion option (in some cases)?</p> <p>4.2 How likely is it that a fast-track option will lead to an increase in referrals for opinions where these are permitted under the Act and Regulations?</p> <p>4.3 What are the main benefits or risks (for stakeholders or the SSRO) of offering a fast-track opinion option?</p> <p>4.4 What are the circumstances under which a fast-track opinion might be delivered?</p>

4.5 A consultation response form containing these questions has been published alongside this consultation document on the SSRO's website. Consultation responses should be sent:

- by email to: [consultations@ssro.gov.uk](mailto:consultations@ssro.gov.uk) (preferred); or
- by post to: Improving the SSRO's Response Consultation, SSRO, G51/G52, 100 Parliament Street, London, SW1A 2BQ.

4.6 Written responses to the consultation should be received by 5.00pm on 20 December 2023. Responses received after this date may not be taken into account.

- 4.7 The SSRO also welcomes the opportunity to meet with stakeholders to discuss the proposals during the consultation period. If you wish to discuss the proposals, please contact us by email ([david.pottruff@ssro.gov.uk](mailto:david.pottruff@ssro.gov.uk)) or by telephone (020 3589 4556) to arrange a meeting.
- 4.8 In the interests of transparency for all stakeholders, the SSRO's preferred practice is to publish responses to its consultations, in full or in summary form. Respondents are asked to confirm whether they consent to their response being published and to the attribution of comments they make. Where consent is not provided comments will only be published in an anonymised form.
- 4.9 Stakeholders' attention is drawn to the following policy statements, available on the SSRO's 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: Handling of Commercially Sensitive Information; and
  - The Single Source Regulations Office: Our Personal Information Charter