

SSRO

Single Source
Regulations Office

Consultation response

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

April 2024

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1. Introduction

- 1.1 The regulatory framework for single source defence contracts¹ 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, training and support to the MOD and defence contractors to help them understand and apply the requirements of the regulatory framework.
- 1.2 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, though less commonly, referrals for a formal opinion or determination on how the regulatory framework should be applied. The SSRO wants to provide more effective and timely responses to the contract-specific queries it receives. This includes giving formal opinions more quickly when relevant matters are referred to the SSRO. Developing these aspects of the SSRO's support to stakeholders will:
 - a. contribute to achievement of the SSRO's ambition, set out in its Corporate Plan,² to support industry and the Ministry of Defence to better apply the tools of the regulatory framework; and
 - b. better assist the Ministry of Defence and its suppliers to deliver the improvements in defence acquisition set out in the government's Defence and Security Industrial Strategy.
- 1.3 From November to December 2023 the SSRO sought views from stakeholders on proposals for improving the way it responds to contract-specific queries on the regulatory framework.³ The proposals were intended to provide a more accessible, timely and relevant service to meet stakeholders' needs. We are grateful to the following organisations for taking time to provide written responses to the consultation: the Defence Single Source Advisory Group; Babcock International Group; BAE Systems plc, Leonardo; MBDA Systems.
- 1.4 This document provides a summary of the feedback given by the consultation respondents on the proposals and how, having considered the feedback, the SSRO intends to proceed with developments in this aspect of its work.

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

2 Available at: <https://www.gov.uk/government/publications/ssro-corporate-plan-2023-2026>.

3 The SSRO's consultation document is available at: <https://www.gov.uk/government/consultations/improving-the-ssros-response-to-contract-specific-queries-on-the-regulatory-framework-for-single-source-defence-contracts>

2. Feedback on the proposals

2.1 The SSRO's consultation set out four proposals that we considered would improve the support the SSRO provides to stakeholders with complex contract-specific queries. The sections below summarise the feedback provided by respondents on each proposal.⁴

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

2.2 The SSRO proposed to develop and codify the principles that apply when the SSRO is asked to consider and respond to a complex contract-specific query. We considered that giving stakeholders greater clarity about how queries would be handled would make it more likely that queries would be raised, drive greater consistency in the SSRO's response to queries, and better enable stakeholders to hold the SSRO to account for how it has responded to queries.

2.3 Consultation respondents were broadly supportive of the proposal to develop and codify principles for responding to complex contract-specific queries.⁵ This proposal gained the most support from the consultation respondents.

2.4 Respondents welcomed the greater clarity that published principles would provide about the routes to raising queries and issues with the SSRO and the way that these would be dealt with. Aspects of the SSRO's approach that respondents thought required clarification included:

- a. the timescales for providing different types of response;
- b. how information about queries received and responses provided would be used to support wider learning;
- c. how the SSRO would ensure that sensitive information provided by enquirers was not disclosed without consent; and
- d. what reliance stakeholders could place on responses provided by the SSRO.

2.5 Respondents also considered that the SSRO's approach to information gathering and responding to queries should provide sufficient flexibility for it to tailor its approach depending on the circumstances of each case. The SSRO agrees and considers that the codification of principles will better support flexibility in its approach to responding to queries than would the development of detailed procedures.

2.6 Respondents also raised concerns that the enhanced response services proposed may result in additional demand for SSRO support that exceeds the SSRO's capacity to deliver. The SSRO is mindful of the potential risk to its existing planned work programme from introducing new responsive services for which there will be an uncertain level of demand. We are also keen to ensure that we provide timely responses to queries raised so that enquirers are able to agree contracts and resolve disputes as quickly as possible. Our proposals for the development of these support services (set out in the next section of this paper) are intended to ensure that enhanced support is introduced in a phased way that will enable demand to be managed and existing SSRO resources to be allocated to these services over the medium term to meet the level of demand that arises.

⁴ Details of the proposals are provided in the SSRO's consultation document.

⁵ Four 'Fully support'; one 'Support in part'.

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

- 2.7 The SSRO proposed to develop an enhanced form of response to contract-specific questions which would include providing independent and authoritative written advice to a contracting party or parties on the application of the regulatory framework. We noted in our consultation that the proposed pre-referral advice was not intended to be a substitute for a formal opinion or determination by a Referral Committee, where permitted by the regulatory framework, but would assist the receiving party or parties to progress contract negotiations and/or weigh the likely benefits of seeking an opinion or determination. We thought that the provision of enhanced pre-referral advice would support the resolution of disputes and speed up contract agreement. We also thought it would encourage referrals to be made only where there was a need to clarify how the regulatory framework should be applied and would improve the quality of referral submissions.
- 2.8 Most consultation respondents were broadly supportive of the proposal to provide formal pre-referral advice to assist in contract negotiations or inform a contracting party's decision to refer.⁶ Most also thought it likely that a party or parties to a QDC might request pre-referral advice if the SSRO were to provide such a mechanism.⁷
- 2.9 Respondents agreed that the pre-referral advice service would assist the parties to qualifying contracts (or proposed contracts) to correctly interpret the requirements of the regulatory framework. They considered this would support speedier decisions and limit the need for referrals. It was also suggested that, given the low number of referrals to date, the advice service would help the SSRO to develop its understanding of issues affecting the agreement of QDCs. This would, in turn, support the SSRO to deliver or recommend improvements in the regulatory framework.
- 2.10 Respondents were concerned that:
- a. SSRO staff providing advice may not have sufficient knowledge or understanding of the matters raised to give informed advice;
 - b. the proposed approach of responding to queries raised by a single party based on information provided by that party might result in advice that would be different to that provided if information from both parties to the matter was considered;
 - c. the provision of pre-referral advice may unduly influence the SSRO's consideration of any subsequent referral related to the same matter; and
 - d. recipients of pre-referral advice might misuse this to influence contract negotiations or discourage a counterparty referral to the SSRO on a related matter.
- 2.11 The SSRO will proceed to implement its planned advice service to assist stakeholders with queries on applying the regulatory framework to contract-specific issues. We have considered, however, that the term 'non-referral advice' might be a more appropriate descriptor for this service than 'pre-referral advice' as a party seeking advice on applying the regulatory framework may have no intention of making a referral for an opinion or determination. It will also distinguish this advice service from the pre-referral engagement that occurs between the SSRO and a party or parties that intend to make a referral.⁸

6 One 'Fully support'; three 'Support in part'; one 'Do not support'.

7 One 'Very likely'; three 'Likely'; one 'Unlikely'.

8 We use the term 'non-referral advice' in the remainder of this document.

- 2.12 The SSRO has considered how the matters raised by consultation respondents might influence the implementation of its non-referral advice service.
- a. The non-referral advice service aims to improve enquirers' understanding of the aspects of the regulatory framework that are relevant to the matters raised and how the regulatory framework might be applied in contract-specific circumstances. We consider that the SSRO, as the body established to oversee the operation of the regulatory framework, is best placed to provide advice on these matters. The SSRO will ensure that non-referral advice is prepared and quality assured by separate staff with appropriate levels of knowledge and understanding of the regulatory framework. Where queries are raised whose complexity is such that they cannot be fully addressed by the SSRO's non-referral advice service, we will encourage the party raising the query to consider referring the matter to the SSRO, where this is provided for by the regulatory framework, so that the matter can be more fully investigated and considered for opinion or determination by a Referral Committee.
 - b. We acknowledge there is the potential for advice provided on the basis of information presented by a single party to differ from that which might have been provided if information from both parties had been considered. Our consultation noted that this might result in a formal opinion or determination (based on consideration of evidence provided by both parties to a referred matter) conflicting with any non-referral advice the SSRO had provided on that matter (based solely on information from one or other party). The only way to avoid this risk would be for the SSRO to only provide advice on queries raised when it had received information from both parties. However, this would increase the time and resource required to provide non-referral advice, even if both parties were willing to engage with the process, and would make it harder to distinguish non-referral advice from a formal opinion or determination. It would also mean that a sole party could not raise a query in confidence with the SSRO. This may discourage some parties from raising queries when it would be beneficial for them, and for the wider operation of the regulatory framework, to do so. We consider that the intended benefits of the proposed non-referral advice service would be lost if the SSRO were not able to provide advice based on a query and information from a single party. In responding to a request for non-referral advice the SSRO will endeavour to ascertain the facts of the case from the enquiring party. We will also remind enquiring parties that it is in their interests to ensure they provide sufficient information relevant to their queries for the SSRO to provide authoritative advice.
 - c. The SSRO's consultation noted aspects of its approach to referrals which would mitigate the risk that an opinion or determination was unduly influenced by the SSRO's prior consideration of the same or a related matter for the purpose of providing non-referral advice. The SSRO's non-referral advice service operates independently of the referrals process and of the Board and Referral Panel members who might be appointed to a Referral Committee to give an opinion or make a determination. The SSRO is also committed to ensuring that where a matter on which non-referral advice has been provided is subsequently referred for opinion or determination it will, as a matter of policy, share with any counterparty to the referral the advice it previously provided and the information on which that advice was based.
 - d. The risk that one or other party to a current or proposed qualifying contract uses superior knowledge of the regulatory framework and how it applies to its advantage in contract negotiations arises irrespective of the provision of non-referral advice by the SSRO. The SSRO cannot control the use that is made of its non-referral advice by the party receiving it but will endeavour to ensure that all parties to current or prospective contracts are aware of the opportunities available to raise queries with the SSRO on applying the regulatory framework. This should help to mitigate any potential disadvantage that may arise for a contracting party from a lack of understanding about the regulatory framework.

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

- 2.13 The SSRO has specific powers to provide guidance on the application of the regulatory framework.⁹ From 1 April 2024, Schedule 10 of the Procurement Act introduces 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. To coincide with the widening of the SSRO's guidance-giving powers, the SSRO proposed to establish a mechanism through which the SSRO could 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.
- 2.14 The SSRO's consultation outlined the proposed mechanism for providing supplementary guidance. The SSRO considered the provision of supplementary guidance would assist the parties to qualifying contracts to apply the regulatory framework or resolve contract disputes more quickly, and support general improvements in the SSRO's published guidance.
- 2.15 Most consultation respondents gave qualified support for the proposal to provide supplementary guidance in response to contract-specific queries.¹⁰ There was some uncertainty, however, as to how likely it was that a party or parties to a QDC might request supplementary guidance if the SSRO were to provide such a mechanism.¹¹
- 2.16 Respondents were concerned that the SSRO's proposal to develop supplementary guidance in response to contract-specific matters raised by the parties to those contracts might have detrimental effects on the SSRO's guidance over time. These included that the guidance might become:
- a. more complex;
 - b. less stable;
 - c. less broadly applicable; and/or
 - d. less likely to support achievement of the SSRO's dual statutory aims.¹²
- 2.17 We have noted these concerns.
- a. We accept that the development of supplementary guidance in response to contract-specific queries has the potential to make the guidance more complex and less stable but consider that these effects might also be viewed positively; as guidance becoming more comprehensive and more responsive to stakeholder issues and feedback. Care will be needed to ensure that the SSRO's approach to developing supplementary guidance avoids the negative effects anticipated by respondents.
 - b. While the proposal relates to the development of supplementary guidance in response to contract-specific queries, we consider there is no reason for this to result in the preparation of guidance that is not broadly applicable or supportive of the SSRO's statutory aims.

⁹ These include providing guidance on: determining the contract profit rate for a QDC or QSC; determining whether costs are allowable costs under qualifying contracts; determining the amount of a penalty; and preparing reports.

¹⁰ Four 'Support in part'; one 'Do not support'.

¹¹ Three 'Likely'; two 'Don't know'.

¹² In carrying out its functions under Act and Regulations the SSRO must aim to ensure that good value for money is obtained in government expenditure on QDCs and that persons (other than the Secretary of State) who are parties to QDCs are paid a fair and reasonable price under those contracts.

- i. The SSRO's general approach is to prepare guidance that is principles based rather than rules based and we will take the former approach when preparing supplementary guidance.
 - ii. The SSRO has a duty when preparing guidance to pursue its dual statutory aims.
- 2.18 Respondents also suggested that the SSRO's supplementary guidance mechanism should include giving stakeholders a say in how the requests for supplementary guidance should be prioritised. This, it was said, would help to ensure the SSRO's limited resources were focused on preparing supplementary guidance that would have the greatest relevance to other qualifying contracts. Respondents also thought it would be undesirable for supplementary guidance to be issued without wider engagement with stakeholders during its development.
- 2.19 The SSRO agrees that there would be benefits from engaging with stakeholders in deciding which requests for supplementary guidance merit prioritisation and on the content of supplementary guidance prior to its publication and application. We consider it would be helpful to explore with stakeholders how such engagement might best be undertaken. We propose to examine this further during the next financial year.

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

- 2.20 The SSRO's current general aim is to give an authoritative written opinion on a referred matter within 40 working days of the referral being accepted. The SSRO's proposal was to provide a formal opinion on a referred matter within 10 working days of referral acceptance where specified circumstances prevailed. It considered that a fast-track opinion option would be less resource intensive, enable faster resolution of contract negotiations or disputes, and make it more likely that opinions would be sought, which would in turn support longer-term improvements in the regulatory framework. The SSRO thought that the pre-conditions for a fast-track opinion were only likely to be fully met in a limited number of cases and would be more likely to be met in cases where the SSRO had provided formal non-referral advice on a related query.
- 2.21 Most consultation respondents were supportive of the proposal to provide a fast-track opinion option in some cases.¹³ But only one thought it likely that a fast-track option would lead to an increase in referrals for opinions where these are permitted under the Act and Regulations.¹⁴
- 2.22 Respondents welcomed the SSRO's commitment to providing opinions more quickly where circumstances allowed provided that matters referred continued to receive an appropriate degree of consideration by the SSRO. However, the need for the SSRO to establish a specific fast-track option to deliver opinions more quickly was questioned.
- 2.23 The SSRO has now updated its procedural guidance for opinions to note that these might be available in some cases within 10 working days of referral acceptance and to identify additional factors that will be taken into account when setting the timetable for an opinion.

¹³ One 'Fully support'; three 'Support in part'; one 'Do not support'.

¹⁴ One 'Likely'; one 'Unlikely'; three 'Don't know'.

3. Next steps

- 3.1 The SSRO has taken or will take the following action in response to the feedback provided on its consultation proposals.

Codifying principles for responding to queries

- 3.2 The SSRO has published a Code of Practice setting out the high-level principles which guide the SSRO's approach to responding to queries about the regulatory framework for single source defence contracts, including matters which are formally referred for opinion or determination.¹⁵ The Code of Practice is intended to provide clarity for stakeholders on how the SSRO will deal with queries and referrals it receives.

- 3.3 The Code of Practice can be found on the SSRO's website at: <https://www.gov.uk/government/publications/code-of-practice-for-responding-to-queries>

Non-referral advice

- 3.4 The SSRO has published information for stakeholders on its non-referral advice service, explaining how contract-specific queries can be raised and the way in which the SSRO will deal with these. This can be found on the SSRO's website at: <https://www.gov.uk/government/publications/the-ssros-non-referral-advice-service>

Supplementary guidance

- 3.5 The SSRO intends to undertake further work in 2024/25, in consultation with stakeholders, to develop the mechanism by which requests for supplementary guidance in response to contract-specific matters might be raised for consideration and response by the SSRO. Further details on this work will be made available in due course.

Fast-track opinions

- 3.6 The SSRO has updated its procedural guidance for opinions to note that these might be available in some limited cases within 10 working days of referral acceptance and to identify the circumstances in which this may be possible.

¹⁵ Including appeals against assessment as a QSC; and notices of cessation as a QSC.