

ADS Group Limited

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

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Comments on style and formatting are not required.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes (Nearly) No

Please add comments to support your answer:

The reader would benefit if the Guidance provided more information about the context in which it was issued and identified the circumstances and process leading to a penalty being applied. It would be helpful if cross references were to the Defence Reform Act.

It would also be helpful if the Guidance made it clearer that it also applied to Subcontractor. The Defence Reform Act uses the expression 'person' to describe those to whom §31-34 applies. Suggest using this expression or 'contractor/subcontractor' in place of 'contractor' throughout the Guidance.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

ADS supports using a principles rather than rules based approach to producing the Guidance as this will result in a more user friendly document and help the parties reach outcomes that are practical and pragmatic. However, whilst a number of principles can be inferred or implied from the draft Guidance, a number of reviewers felt it would be helpful if they could be expressly stated.

Application of the principles will inevitably lead to rules being established. It is important that these are consistent and are visible to companies.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

A number of the 'factors' in paragraphs 3-6 are 'principles' whilst other parts deal with their application e.g. in 3.2.3 the principle is that the amount of the penalty will be determined (in part) by the Contractor's (or Subcontractor's) track record of compliance with the SSCRs. The factors that will be taken into consideration in applying the principle are the number of Penalty Notices the contractor has received previously, their frequency, and the similarity of this occasion with previous Penalties etc.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

Reviewers thought it would be useful if it was stated that when determining the amount of a Penalty the SSRO would also have regard to:

1. The reasons underlying the contravention particularly circumstances where:
 - a. The Contractor/Subcontractor was unable to rectify or remedy the contravention;
 - b. MOD rejected the justification offered by the Contractor/Subcontractor under §32(7)(a), however, on review by the SSRO, its actions were found reasonable in the circumstances.
2. Any opinions relevant to the subject matter it had given previously.
3. The value of the contract. Guidance is required on contract valuation for Penalty thresholds:
 - a. A complex system of valuation is used to calculate the contract value (Regulation 5) and this may differ from the actual value of the contract placed. The guidance should set out that Penalties apply only to the latter.
 - b. Guidance on supplier penalty values is required. The value threshold for supplier reporting is the total of let QDCs and QSCs, which at any one time may be considerable, and may drive large maximum penalties. It would be helpful if the guidance set out that the penalty for a minor contravention will be proportionate to the circumstances.
4. The amount of work remaining and the contract value outstanding at the time the Penalty Notice.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

Rules will emerge as determinations based on the principles are made. These will be welcomed where they improve clarity, consistency and coherence.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

Examples will help improve understanding and illustrations showing how each of the principles would be applied will be useful and appreciated by Members. It would be particularly useful if the processes and criteria underlying the way judgements would be made could be identified.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

It is becoming increasingly clear from discussions with Member companies that many feel the impact of the Regulations on their businesses will be greater than originally anticipated. A number are still some way off being able to assess with any certainty the resources, cost and timescales that will be required to change internal processes and reporting systems to generate the information required by the new regime. In many instances this will only become apparent as they start to perform regulated contracts.

There are also practical concerns about the rate at which it will be possible to engage companies in the supply chain that will be performing QSCs, and the timescales that will be needed for them to attain the state of understanding and readiness required to accept a Qualifying Subcontract.

ADS believes transitional arrangements should reflect the circumstances of each situation and that the SSRO should avoid tying itself to a prescriptive approach that specifies the number of contracts/reports which qualify for forgiveness. Whilst recognising that the Act and Regulations are now law, a 'soft launch' approach will help to avoid disrupting supply chains.

Particular issues identified are:

- a. A contractor may receive a number of QDCs over a short period of time and only the first would qualify for relief under the proposed transitional arrangements.
- b. The first three reports will not cover the full spectrum of reporting.
- c. Transitional arrangements should be available to distinct parts of a group, for example, an Air division should qualify for transitional relief in addition to a Land division. Management and systems are often independent (and sometimes in different countries).

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

A number of reviewers noted that the Guidance was silent on the timescales the SSRO anticipated would be required for a determination. Whilst recognising each occasion will be different, it was felt that an indication of timescales for major milestones would be welcomed.

Several reviewers also suggested it would be helpful if the SSRO could give a provisional view of the likely outcome when asked for a determination. This would allow them to make appropriate provisions in their accounts and manage shareholder expectations and value more effectively.

It would be equitable to publish only the names of companies whose references to the SSRO for determination of the amount of a Penalty were unsuccessful. The contractor/subcontractor should not be identified until the determination is concluded.

It would be helpful if the number of determinations where the outcome was in favour of the contractor/subcontractor, expressed as a percentage of the total, was published.

It was suggested that the heading of section 10 should be 'Determinations'. The DRA §31(8) does not provide for the SSRO to give an 'opinion' in these circumstances.

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes No

Please add comments to support your answer:

It is important that opinions and determinations made by the SSRO are published as soon as possible after they are concluded so that other contractors and subcontractors are able to reflect the outcomes in their own work and situations.

Babcock International Group

Your details

Name:

Organisation:

Position:

Consultation questions

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

Principles need to be established before it would be possible to move to a rules based approach. We would like to see more detail on the principles in order to avoid unnecessary referral to the SSRO.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes

No

Please add comments to support your answer:

Para 3.2.3 refers to the first offence of the contractor. There are many different parts of the Babcock organisation which interface with MoD. We think this should refer to Business Unit, not contractor.

In addition, it would be useful to understand the process more clearly for who determines whether a penalty should be imposed and the amount of the penalty. If it is the SSAT, what is the make-up of the SSAT's and what is its role in determining the penalty? It would also be helpful to understand SSAT's relationship to CAAS and others involved in the project.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes

No

Please add comments to support your answer:

No, but it would be useful to establish guidance of the impact/mitigating factors on the penalty as it is difficult to gauge whether a first offence would only lead to a penalty of, say, a maximum of 10% of the maximum penalty. I appreciate it is a guidance document but some 'grading' of the penalty would be helpful. It would be helpful to set out events which would be a reasonable excuse for error e.g. fire, virus, other force majeure event which is not fault-based.

In addition, it would be reasonable to expect that one event resulting in a penalty can only attract one penalty i.e. if an event breached more than one of the four categories of penalty it would not suffer multiple penalties. If this is the case, then it should be stated

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes

No

Please add comments to support your answer:

Guidance on the grading and severity of penalty would be helpful.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

It is important that in the event that a penalty is determined, the contractor is provided with a report explaining the factors considered, mitigations accepted or rejected and the basis of the calculation so that the contractor can understand the breach and learn from experience.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

Will the only public reporting of penalty notices by the SSRO be in its yearly report? Will the contractor be given advance notice of the timing of the publication of the report?

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

Save as mentioned in answer to Q7.

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

BAE Systems

Your details

Name:

Organisation:

BAE Systems

Position:

Consultation questions

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Yes No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

No additional comment

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

No additional comment

QUESTION 3 -Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

The use of rules based guidance would be too restrictive and is unlikely to cover all possible situations.

QUESTION 4 - Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

No additional comment

QUESTION 5 - Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

No additional comment

QUESTION 6 - Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

For the reasons set out in response to question 3, we believe a principles based approach should be maintained.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

Due to the range and scale of the various possible circumstances relating to the incurring and then sizing of any penalty, benefit of worked examples would probably be limited.

QUESTION 8 - Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

The proposed transitional arrangements only cover a limited number of reports (CPS, CRP and CNR) and it also appears that the transition is only applied at a parent company level rather than individual business units (which will have distinct systems, processes and management). We propose that the transitional arrangements apply to QBUs and that the exemption period is for one year for contracts greater than one year in duration and for the whole of the contract term for contract lasting less than one year. We also believe there should be a transitional period in relation to supplier level reporting.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

Guidance is in the main restatement of the relevant parts of the legislation in more plain English

QUESTION 10- Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes No

Please add comments to support your answer:

Determinations reached and the reasons therefore will help build a body of "case law " that will assist contractors, especially when they may be considering raising appeals on any penalty to the SSRO. It may also help to reduce or eliminate spurious appeals and associated nugatory costs.

The Boeing Company

Your details

Name:

Organisation:

The Boeing Company

Position:

Consultation questions

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

Although a generally clear document, Section 2 of the Introduction; Application of the Guidance, would benefit from additional information pursuant to the context and particularly the circumstances that might lead to penalties being determined. For example a short summary paragraph on what constitutes a contravention and referencing that the document contains the timetable for and the values of penalties.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

I think that principles rather than rules are the correct direction of travel, which will allow parties sensible latitude in negotiation in respect of matters of determination and over mitigating or aggravating factors.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes

No

Please add comments to support your answer:

Although in general agreement with the factors for determining a penalty, in respect of paragraph 3.1; where it speaks of ‘...fair and proportionate...’, I suggest that the sentence should also include the word ‘timely’ – following the mantra; “justice delayed = justice denied”.

In respect of paragraph 3.2 and following paragraphs / sections the word ‘contractor’ should be replaced by ‘persons’ pursuant to the wording in the Act.

In respect of paragraph 3.3, although 3 (a) ‘...first offence’ is a well understood shorthand, I think that here we should be more formal, for instance ‘the first occasion on which a penalty notice has been warranted and issued’

In respect of paragraph 10.1 (b), I suggest ‘reasonable excuse’ should be replaced by ‘authentic reason’!

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes

No

Please add comments to support your answer:

In respect of paragraph 4.1, I think that the notion of ‘authentic reason’ (see above comments on paragraph 10.1 (b)) for late or miss-filing should feature in this paragraph as a factor tending to decrease the level of any penalty.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes

No

Please add comments to support your answer:

I think that principles rather than rules are the correct direction of travel, which will allow parties sensible latitude in negotiation in respect of matters of determination and over mitigating or aggravating factors.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

Notwithstanding my comments about a principles based approach rather than a rules based approach, perhaps one or two worked examples would assist. Areas of judgement will have to be carefully handled, with perhaps a range of possibilities shown?

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

The transitional arrangements appear to be very reasonable provided they are not time bounded – for instance the relief for the first QDC needs to be available whenever in that future that QDC is awarded.

Further, I suggest that the transitional relief should also apply to the first QSC?

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

This is an important data-set that will guide future approaches on both sides.

FinExperts

Your details

Name:

Organisation:

Position:

Consultation questions

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Yes No

Introduction

Please note, Yusani Limited has shared its response with FinExperts Ltd, and FinExperts Ltd is in agreement with the issues raised by Yusani Limited.

These comments are therefore additive to Yusani's and have not duplicated points already made.

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

However the current launch of Statutory Guidance is understandably very rushed to meet the 1st April 2015 deadline.

It would be helpful to consider/label all current Statutory Guidance as interim/draft until an adequate, meaningful, and interactive consultation has taken place, with meetings at the working level driving out the detail.

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

Guidance is required on contract valuation for penalty thresholds:

1. For qualification purposes a complex system of valuation is used, which differs from the actual let contract value. The guidance should set out that penalties apply to the let contract value only.
2. Guidance on supplier penalty values is required. The value threshold for supplier reporting, is the total of let QDCs and QSCs, which in steady state may be a large value, which may drive large maximum penalties. It would be helpful if the guidance set out that for minor contraventions the penalty should be considerably less than the maximum penalty (depending on the circumstances)

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes

No

Please add comments to support your answer:

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes

No

Please add comments to support your answer:

- 8.1 sets out that there will be a transitional period, while 8.2 applies the transition to the first QDC and first three reports.

 3. 8.2 is an event based measure, while 8.1 suggests a period. A transitional period would be more appropriate. Contractors may receive a number of QDCs, days apart, whilst only the first QDC would be in transition, additionally the first three reports will not cover the full spectrum of reporting.
 4. QSCs should have similar transitional arrangements
 5. Transition arrangements should apply to distinct parts of a group, for example an Air division should have a transitional period in addition to a Land division as often management and systems are independent.
 6. Supplier amnesty periods may be the best way to address transition

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes

No

Please add comments to support your answer:

The SSRO will only make determinations on penalties, there are no SSRO opinions to make, this therefore requires renaming.

Reporting of Penalties (9)

1. The SSRO should set out the timetable of publishing its compliance notice, which may be sensitive with the contractor's share price
2. No reporting of penalty notices should be made until the conclusion of an appeal
3. It would be useful to disclose the percentage of appeals that are successful

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

1. There are no determination durations (or targets). Timely determinations are important for industry as the point of principle may affect many contracts and have much wider consequences than just the specific determination in hand.
2. After the SSRO makes a determination, it should set out the detail of that determination to the contractor, in addition any points of principle should be communicated publicly to allow a body of knowledge and compliance to be built.

Other issues without applicable question on response form:

1. The final paragraph of Appendix A should have a paragraph number (5) as it is not part of paragraph 4.
2. The guidance does not adequately address QSCs, instead of referring to QDCs it would be clearer to refer to either Qualifying contracts or Regulated contracts.

Finmeccanica UK

Your details

Name:

Organisation:

Position:

Consultation questions

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

This is a reasonable attempt at guidance on determining penalties. However, it might benefit from further changes to tighten-up some of the definitions. The provision of some worked examples covering different circumstances would also be helpful. One of the unintended consequences of the guidance could be that, for QSC's, the prime contractor is incentivised always to declare that the sub-contractor is a QSC as there is no penalty for such a declaration but there is a significant penalty for the failure to assess as a QSC.

Also, contractors would expect that, if we have referred a decision to the SSRO on whether a sub-contract is a QSC or not, then the determination of the SSRO should be able to be relied upon. This notion might usefully appear in the guidance

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

We would suggest need for further clarification with the inclusion of a new para 2.2 as follows :

“The Secretary of State may issue a contractor a penalty notice, where the contractor has contravened Section 31 and

- (i) has failed, without reasonable excuse, to take the steps specified in a compliance notice issued by the Secretary of State, or
- (ii) the Secretary of State does not consider there are steps that can be taken to remedy the contravention “

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

There is a need to include a need further factor.

Add a new 3.2.3(d) as follows: _ overall performance of the Contractor in submitting reports for all Qualifying Defence Contracts and Qualifying Subcontracts on time.

Paragraph 3.2.4 is puzzling. Surely the key facet is the size of the qualifying defence contract as detailed in Appendix A. Introducing the notion of company size and turnover is ambiguous given that, in many cases where large global companies are concerned, only a portion of their revenues might arise from UK defence business or indeed any nation's defence contracts.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

While such a move could be plausible in due course, it would require contractors first to gain confidence in the application of the current guidance before such an approach were introduced.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

As drafted, para 8.2 is ambiguous.

Does the exemption for the first three contract reports apply solely to that first QDC and not to overlapping (in time) subsequent QDCs? This might not be a meaningful exemption if the company receives a second QDC one day later.

In essence, contractors could potentially receive multiple qualifying contacts or sub-contracts over a short time period. To make the transition period more meaningful, we would request that the exemption applies for a reasonable period of time and covers all reports for both Qualifying Defence Contracts and Qualifying subcontracts. This would be consistent with the discussions we have had to date about a fair and reasonable / pragmatic approach being taken during the initial period in which these new regulations apply.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

In addition, at 10.3, in determining the matter, surely the SSRO should also take into consideration the factors identified under paras 3, 4, 5 & 6.

General Dynamics UK

Your details

Name:

Organisation:

Position:

Consultation questions

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

It is considered that this would hamper the ability to negotiate settlements

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

In principle the transitional arrangements appear reasonable, however as the first three reports under 8.2 are likely to be delivered simultaneously a single failure in delivery would cause any future failure to attract penalty, clarification in this respect would be welcomed.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

Lingwood Rix Limited

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

All earlier factors are appropriate, but the discount for early settlement does not seem consistent with the stated aims.

This appears to mean early payment of the penalty amount, which would simply serve to undermine the stated objective of deterrence. This implies a person may make a contravention, receive a fair and proportionate penalty, and then halve that penalty by paying early.

There should be a discount, with similar periods and amounts to that in Table 1 of 7.1, but only if the person remedies the contravention – i.e. the discount should encourage compliance even at this stage of the process.

On this basis, the discount should not apply to general contravention under (31(3)(a)(i) as that may not be capable of remedy. It should instead apply to contraventions under 31(3)(a)(ii) and then more specifically contraventions under Regulation 48(1)(b) to (d) which are capable of remedy.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

It is appropriate to have a transitional arrangement, it is not clear why this principle should only apply to reporting. For example, it could equally apply to the requirement to keep relevant records, and even the duty to notify for a limited period.

It does not seem appropriate to exempt “the first three reports” – these will be the contract pricing statement, contract reporting plan and contract notification report – three of the most important reports in the whole of Part 5 of the SSCRs. Instead, it should apply to the first few QCRs which are the regular reporting that may take a while for a contactor to embed into their management systems. The information in the CPS, CRP and CNR reflect contract negotiations and should not be difficult to produce.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes No

Please add comments to support your answer:

Lockheed Martin

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

The transitional arrangements needs to be expanded and detail how it will be applied. E.g. a contract awarded on Monday could benefit from the transitional period but how will a contract awarded the next day on a Tuesday be dealt with. The use of “transitional period” is not correct as 8.2 refer to the number of reports.

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

The introduction needs to refer specially to the Defence Reform Act 2014 and refer to sections of the regulations where a penalty notice will be issued.

It should describe the process for issuing compliance notices which in turn will lead to a penalty notice if the contractor fails to comply.

It may be beneficial to note the role of the SSAT and it is the SSAT who issue compliance and penalty notices.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes

No

Please add comments to support your answer:

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes

No

Please add comments to support your answer:

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes

No

Please add comments to support your answer:

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

Examples will help with the understanding and interpretation of the guidance.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

There is no mention no mention on the time scales that the SSRO will need to make a determination (section 10.2). A contractor who has applied to the SSRO for determination should be given a time so that appropriate provisions can be made on the accounts and can be justified to the auditors.

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

Opinions in section 10 should be removed or the paragraph amended. No where in the section does it mention opinions but only the determinations of the SSRO.

Contractors should know on what basis the SSRO determination was based on and this should be distributed to both parties.

Marshall Aerospace and Defence Group

Your details

Name:

Organisation:

Marshall Aerospace and Defence Group, The Airport, Cambridge

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

I feel that people familiar with the legislation will be comfortable with the introduction as it is. However, people unfamiliar with the development of the legislation may not know exactly how this fits and therefore a fuller description or introduction of how a penalty may arise would be beneficial.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

If the party contravened section 31 and the contravention cannot be remedied but a reasonable excuse applied as per section 32 (7) of the Act

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

If the rules based approach were an improvement

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

If the examples addressed the question of how contract value were to be worked out. For example what is the value of an enabling agreement that is valid for 30 years but only has agreed pricing for 3 years at a time and has a mix of fixed and variable services? How would an exchange rate play into that calculation over such a long time if foreign currency were involved? How are options dealt with? Is it annual contract value or total contract value? Consideration of these issues as part of a worked example (or indeed on their own) would be very helpful.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

I think that they could be clearer and fairer still. For example, with so many reports requiring completion, should it be the first so many of each report type that should be covered rather than just the first three on the first contract? What happens if two contracts are signed within days of each other? One could benefit from the exemption but the second could start some reports sooner. Perhaps it should be the first number of reports from a supplier or business unit or CP:CE unit.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

Seeing these as they arise would help any organisation that may find itself involved in a discussion or process around a potential non-compliance

MBDA UK Limited

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

The introduction refers to “the Act” – reference should be to the Defence Reform Act 2014.

It is unclear what the “non-statutory” functions of the SSRO might be or why they have relevance here.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

A clear statement of principle is fundamental

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

It is not clear if the factors considered all have equal weighting – it would be useful if this could be clarified.

The regulations refer to “a person” – in places this guidance refers to “the contractor”. There should be commonality of terminology between the two.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

Where appropriate, it may be that any penalty determined should take account of any justifiable excuse for a contravention.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

Ultimately, yes.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

Worked examples often aid understanding and such an example in relation to a case where the SSRO might alter a decision in a penalty notice would be useful.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

For any new system a transitional arrangement appears reasonable. However what is described under 8 is not a “transitional period” since it is event based. It is possible for a company to receive two QDCs or QSCs almost simultaneously and, under 8, the first would be subject to the transitional arrangements whilst the second, even were it to be received on the same day, would not be.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

The title of Section 10 is "Opinions and Determinations" – however, the section deals only with determinations. Additionally, we note that there is no time limit for reaching a determination. Is this intentional?

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes No

Please add comments to support your answer:

This could be extremely useful for all parties.

Ministry of Defence

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes

No

Please add comments to support your answer:

The MOD considers that it would be very helpful if the SSRO were to list out the different contraventions that the guidance applies to early in the main section as this will not be clear to lay readers from the Defence Reform Act 2014 (hereafter the Act) and Single Source Contract Regulations 2014 (hereafter the Regulations). At the moment some of this material is in Appendix A, but only in the context of maximum penalties. Note that there are omissions to Appendix A, which are highlighted here as MOD could see no question related directly to Appendix A.

- Appendix A - general – all the tables are marked with “Value of qualifying defence contract”. This is only correct for contract-level reports (i.e. Part 5 of the Regulations). For all the supplier-level reports (i.e. Part 6 of the Regulations), the value is the “total value of all qualifying defence contracts and qualifying sub-contracts to which the person who has been given the penalty notice, or any person associated with that person, is party” as per Regulation 50(5)(a).
- Appendix A - Paragraph 1 - Failure to make copies available to the Secretary of State (SofS) in hard or electronic form needs to be added as a fourth contravention.
- Appendix A - Paragraph 1(c) – “refusal to provide further information or explanation related to relevant records” should be used rather than “refusal to explain relevant records” as further information is wider than explanation (it covers follow-up information).
- Appendix A - Paragraph 4 – In the paragraph that includes “the submission of misleading reports under section 31(3)(b) of the Act or in relation to a failure to notify the Secretary of State of the occurrence of a relevant event, circumstance, or information under section 31(3)(c) of the Act” needs to be amended to include “occurrence or likely occurrence”. Section 26 (duty to notify) requires the supplier to tell MOD of either an occurrence *or the risk of an occurrence*; these are two separate duties.

Back to the main document, the MOD considers that it would be very helpful if the SSRO were to list out the timescales that apply to each penalty, such as when the right to issue a compliance/penalty notice is triggered, and when it expires.

The document makes many references to the Secretary of State. The MOD considers that it would be helpful, up front, to mention that these powers may be delegated to officials, otherwise it suggests his or her personal involvement will be required.

Sections 1 and 2, although very short, appear to be slightly mixed up. It is only Section 33(4) of the Act that gives the SSRO the vires to write statutory guidance, not Sections 33(3) and 33(4). Section 2 on ‘Application of this guidance’ appears the better place to introduce 33(3) – which sets out the MOD’s and supplier’s duty to have regard to the guidance, rather than in section 1.

Question 1 continued...

Sections 3 and 4 provide factors that should be taken into account in determining the penalty amount, and the split between them appears to the MOD to be somewhat arbitrary. In particular it is not clear why 4 is separate from 3 – the purpose of all the factors in section 3 is to influence the amount e.g. impact of contravention, nature of contravention, history of compliance... it is not clear to MOD what is different about the factors related to mitigation of further contravention that puts them in a separate section. Is this because it should have a greater or lesser prominence than the section 3 factors? Although they are singled out as factors that may “decrease the level of penalty”, this is also true of all the section 3 factors (e.g. if it is low impact, not material, and there is no history of failure). It is the intent that this factor is only considered after the first three have been considered?

Section 5 for repeated and persistent offence is very similar to paragraph 3 of section 3, which covers “previous penalty notices and general compliance history”, and MOD considers that it would be clearer to set out the fact that there can a 20% increase to the maximum penalty when discussing this factor, and leave the details to Appendix A (where all other maximum amounts are discussed in detail) rather than raise an entirely new section on it in the main part of the document.

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes

No

Please add comments to support your answer:

The MOD believe that there is a fundamental distinction that needs to be made on the status of the guidance that has not been made. There are two classes of contravention:

- 1) those subject to a maximum amount, where the status is to provide guidance to MOD on an appropriate amount between £0 and the maximum; and
- 2) those where the amount should be set in accordance to Section 33(2) of the Act, which states that “in such a case the amount of the penalty is to be calculated as if the contravention were a breach of contract (and is to be calculated in accordance with the general law of contract having effect in England and Wales).”

For class (2) contraventions, the SSRO’s guidance, if provided at all, must be on how to calculate a penalty in accordance with the general law of contract in England and Wales (i.e. damages). The factors outlined in sections 3 and 4 have no legal effect in this case, however setting them out without making this clear is liable to cause confusion. It is for the SSRO to consider whether they wish to provide any guidance on the general law of contract in England and Wales, however if they do so the MOD would urge them to consult widely with experts in this area and update the guidance on a regular basis in line with case law.

Question 2 continued...

The MOD consider that the scope of the guidance (for class (1) contraventions above) is broader than the SSRO has covered in the draft guidance. Under Section 32(8)(b)(ii), of the Act, the SSRO has the ability to cancel a penalty notice. This means that the guidance could usefully cover matters indicating that a penalty notice has been inappropriately applied by the MOD, not just on factors that influence the amount of the fine. This would be helpful to all parties. Examples might include MOD issuing a compliance notice to an inappropriate person, MOD issuing a non-compliant compliance/penalty notice, or MOD not taking into account a “reasonable excuse” as per Section 32(7)(b) of the Act. These circumstances are not well addressed in the SSRO draft guidance, however MOD feel a separate section on this would be helpful to both MOD operators and suppliers.

The MOD has taken internal legal advice on the guidance which has raised an important point regarding language. There is a legal risk in using any civil penalty regime as the European Court of Human Rights (ECHR) is concerned that member states can take advantage of the lower burden of proof for civil penalties (on the balance of probabilities) than for criminal sanctions (beyond reasonable doubt). There are cases of the ECHR overturning civil penalties where they consider that the offence is actually criminal in nature. Legal advice is that words such as ‘deterrent’ (3.1), ‘deliberate’ (3.2(a)), and ‘reckless’ (3.2(2)(b)) should be removed as they all point to a criminal offence. Similarly, the word ‘offence’ is used in a number of places. Our legal advice is that this should be amended to ‘contravention’ in line with the language in the Act and Regulations, and which is also used in the guidance in a number of places.

Paragraph 2.1 – This sets out that the guidance applies to all qualifying defence contracts (hereinafter referred to as QDCs) and qualifying sub-contracts (hereinafter referred to as QSCs) “subject to the restrictions set out in the Act and Regulations”. The MOD is not clear on what these restrictions are – the MOD believes that the requirement to have regard to the guidance applies to all QDCs and QSCs.

QUESTION 3 – Do you agree that this guidance should be principles rather than rules based?

Yes

No

Please add comments to support your answer:

The MOD agrees that a principles-based approach is appropriate.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes

No

Please add comments to support your answer:

One of the advantages of a statutory regime is that it allowed the MOD to introduce a clear and workable compliance regime for reporting. Contract law does not allow for penalties; any breaches of contract must be treated as damages – i.e. the quantum of the penalty is based on financial loss borne by the aggrieved party. This is very hard to estimate for the non-provision of information. The relationship between information and financial loss is very indirect, requiring assessment of matters such as:

- whether the information was available to the party in another form;
- what decisions might have been made differently had the information been made available, and the likelihood of this;
- who was aware of the information;
- what efforts the parties should have made to become aware through other means.

These are subjective measures that are very hard to establish, so any financial amount (such as 'liquidated damages') risks being challenged in the courts (this risk varies over time in line with case law). The civil penalty approach provided a solution to this problem – financial fines for the non-provision of information, resulting in a robust and clear incentive on supplier to comply without getting involved in protracted discussions about who knew what when, and whether or not it would really have made a difference anyway.

The MOD believes that the SSRO's stated objective behind the guidance, namely to provide an effective incentive for compliance, is exactly right. To achieve this, the MOD considers that it is most effective to use a simple approach, namely to link the penalty directly to the nature of the contravention itself, rather than considering the causes for the contravention and/or its consequences. This would make it clear to all concerned, and easy to communicate, and will avoid time consuming and potential contentious debates and referrals.

Detailed points in relation to the suggested factors are provided overleaf.

Question 4 continued...

The first factor introduces two of the subjective issues we wanted to avoid in the determination of the penalty amounts, for reasons discussed above. In particular:

1(a) – What harm has the contravention caused the SofS?

This is subjective and very hard to determine. How would the MOD assess this without knowing what the information was (given that it has not been provided)? The true harm may take a substantial time to come to light, which could be after the period during which a penalty notice may be issued had expired.

1(b) – What benefit has the contractor gained with the contravention?

This is subjective and very hard to determine. How would the MOD assess this without knowing what the information was? Again the benefit might only come to light after the time period had expired.

In the first factor, the term “duration of the contravention” was not clear to MOD readers. Could the SSRO please clarify what this means?

The second factor introduces the causes of the contravention, in particular:

2(a) – Was the contravention deliberate?

By whom? If the project staff fail to provide a report because a senior manager did not tell them to, but the senior manager did not tell them because he/she were not on top of the issue, is this deliberate or reckless? How would the MOD establish this?

2(a)(i) – Was the contractor aware that their action or inaction would or could result in a contravention?

Some people will be aware, and others not. How do MOD establish who was aware and who should have been aware, and who should have completed the report?

2(b) – Was the contravention reckless?

Recklessness is a legally defined term, and generally involves a judgement as to whether there was a conscious disregard of a substantial risk. This requires an assessment of the internal mental state of the person. How will MOD establish this and for whom?

The MOD is concerned that these factors may make determining the penalty amount complex and difficult, requiring the MOD to establish who knew what when, why the contravention was made, and potentially accusing a supplier of deliberate contravention or reckless incompetence. The MOD is also concerned that there will often be differences between the parties on these matters and this will lead to overhead and multiple referrals to the SSRO.

The MOD also considers that this factor is largely not needed. For nearly all contraventions to which the guidance applies (see the ‘class 1’ contraventions described in the response to question 1), a penalty notice is only issued after a compliance notice is issued. Once a supplier receives a compliance notice, there can be little argument about whether or not the contravention was deliberate, whether they were aware, or whether not addressing the compliance notice was reckless. Despite the second factor not being relevant in most cases, the MOD will be required to have regard to it in all cases, and including it as factor two gives it significant prominence.

The only class 1 contravention that is not proceeded by a compliance notice are the sub-contractor flow-down contraventions (failure to make an assessment, making the wrong assessment, and/or failing to notify the subcontractor and MOD of the assessment).

Question 4 continued...

The second factor uses the term 'materially incomplete' – this requires an assessment of the impact of any missing data, which could be read as requiring consideration of the matters outlined in factor 1. The MOD would prefer something like the 'extent of non-completion', rather than materiality, as this is about how much information is missing, not the impact of missing information.

The fourth factor states that the penalty should take into consideration the size and turnover of the contractor. The value of the *maximum* penalty as a proportion of the contract value varies between less than 0.1% to a maximum of 1% (a £50k fine on a £5m contract). It is hard to imagine this having a major impact on the profitability of the company as a whole as they would have to commit multiple contraventions before this would even result in a single contract making a loss. So the MOD do not consider that this factor is necessary. The MOD also consider that, should the SSRO decide to keep the factor, more guidance on *how* to take into account the size and turnover of the contractor would be helpful (e.g. is a £250m turnover small, medium, or large? Should MOD consider the fine as a proportion of last year's profit or turnover? Is it the size and turnover of the specific legal entity that matters (which may be a special purpose vehicle) or the corporate group? What threshold should be breached before a fine is reduced for this factor?)

The MOD interprets the further three factors under section 4 as aiming to incentive good future behaviour by reducing the fine for non-compliance. The MOD considers that this complicates the picture. Not getting fined in the future, and not being named/shamed, provides the strongest incentive to improve. But this depends on suppliers thinking that fines will actually be levied for non-compliance. These three factors give the appearance of increasing the incentive on suppliers to improve, but MOD is concerned that their effect will actually be the opposite. They suggest the fine may not apply if you can make promises to improve (which may not be delivered), and that you might get a 'free pass' on initial infringements.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes

No

Please add comments to support your answer:

There are four factors that MOD considers might be relevant to setting a fair and reasonable fine that still provides an appropriate incentive to comply:

- 1) Materiality of the contract. The maximum fines included in Regulation 50 vary with the contract value, so it seems surprising that this is not included as a factor worth considering. For example a £50k maximum fine applies to all QDCs below £50m, but this covers a large range (£5m to £50m).
- 2) Familiarity with the regime. The MOD considers that benefit of the doubt would be appropriate for suppliers unfamiliar with the regime, provided there was a genuine attempt at compliance.
- 3) The presence of extenuating circumstances. Circumstances such as an IT system failure, holidays, or sickness of the only person able to provide the report may mean that it would be heavy-handed to fine the supplier without giving them more time to comply. There may also be extenuating circumstances as a result of peculiarities of the contract or supplier that make the reports hard to complete given the specifics of the case. The MOD considers that this is arguably the most significant factor.
- 4) The costs of fulfilling the reporting requirement. The fine should not be set so low that a supplier has a financial incentive to not comply.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes

No

Please add comments to support your answer:

The MOD is open to this, provided the factors are objective. Perhaps it is preferable to start with a principles-based approach and revisit this question once the regime has become embedded.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes

No

Please add comments to support your answer:

The MOD supports the use of a principles-based approach, which makes the inclusion of a worked example impractical.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes

No

Please add comments to support your answer:

The MOD believes the draft transitional arrangements are not acceptable. The MOD has interpreted them as saying that there is no compliance regime for the first three reports for the first QDC (QSC?) for each supplier (we are not sure if this applies to each specific legal entity level or at the corporate group level). The first three reports are:

- 1) the Contract Reporting Plan which serves as the basis for all compliance on reporting; and
- 2) the Contract Notification Report which represents the financial baseline and will provide the basis for defence benchmarks and parametrics; and
- 3) (most importantly) the Contract Pricing Statement. This provides the audit trail for any future price referrals to the SSRO. It is the CPS that gives the supplier the incentive to use pricing assumptions that are appropriate, attributable to the contract, and reasonable in the circumstances (AAR) *and* are in accordance with the Single Source Cost Standards (SSCS) published by the SSRO.

The MOD believes that not receiving these reports will have a very major impact on the effectiveness of the regime and on our ability to get value for money on the first QDC for each supplier. Given that the first QDC/QSC may be worth hundreds of millions of pounds, the MOD does not consider this to be a good approach.

The MOD are, however, entirely understanding of the difficulties suppliers may face for the first QDCs, particularly in the first year of the new regime where guidance is still new (or only in draft) and communication and training materials are relatively immature. However there are many ways to address this without removing the compliance regime entirely from these first three reports. For example stating that the SSRO will regard it as unreasonable if the MOD do not give suppliers an additional two months grace period before raising compliance/penalty notices for the first three reports of the first QDC (giving them 3 months from contract signing). Or the SSRO could make the suggested transitional arrangements dependent upon a genuine and demonstrable effort to comply. This way if the supplier is trying to comply they will not be fined, even if their attempts fall short. Alternatively the SSRO could add 'familiarity with the regime' as a factor and let the MOD decide how to judiciously apply this, which the supplier could then appeal to the SSRO if they felt MOD did not given this matter due consideration. This last option is the MOD's preferred option as it allows for a more balanced consideration which could be extended beyond the first three reports (it may be that the first QCR or ICR will cause the most difficulty for some suppliers) and would take into account the particulars of the case.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes

No

Please add comments to support your answer:

The MOD considers that the role of the SSRO, as set out in section 10, effectively communicates the role of the SSRO, although it may be worth mentioning the possibility of judicial review in paragraph 10.4.

The MOD has a particular concern with section 7, which is included here as there is no specific question that directly relates to this section. Paragraph 7.1 states that the supplier is entitled to a discount against the penalty amount “if the contractor makes a settlement within the time specified in Table 1”. The term “makes a settlement” seems to suggest the payment of the fine. The MOD strongly object to this, and consider that any discount should only apply if the supplier complies with the requirement, albeit late, and that no discount should be applied for early payment. The purpose of the compliance regime is not to generate funds.

If a supplier has not provided a report, and a compliance notice has been issued, and they still fail to provide a report and MOD has issued a penalty notice, we think the objective of the compliance regime is best served if the supplier provides a late report. A discount for late compliance will give them this incentive, however a discount for early *payment* will substantially reduce the incentive provided by the penalty. As written it suggests that a supplier will only ever have to pay a quarter of the fine, provided they pay it in a timely matter, which MOD considers will undermine the compliance regime very considerably. It is likely that the fine paid will often end up less than the cost of submitting the report, which will give suppliers a financial incentive not to comply.

On a minor point, the heading of table 1 should read ‘number of months’ rather than ‘number of days’. The MOD also considers that adding a row for ‘3 months or later’/‘full’ would be helpful.

The MOD also suggests that section 9, namely the naming and shaming of non-compliance, could be amended to include:

- any declaration by the SSRO where they consider the MOD has acted unreasonably in requesting records or ad-hoc reports (see Section 23(7) of the Act and Regulation 51(2)(b) of the Regulations); and
- any situation where a supplier repeatedly does not provide a report, or fulfil the open book requirements, until a compliance notice has been issued.

MOD legal advice is that paragraph 9.2 could potentially misinterpreted in two ways. A supplier might be able to show that they would “benefit from the transitional period” even if the transitional period had expired. Also the term “if a determination is outstanding” should make it clear that the determination in question must relate to the contravention being considered.

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

The MOD considers that this will be very helpful.

QinetiQ

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

Please do not feel that you need to respond to all of the consultation questions set out in the document: we welcome brief or partial responses addressing only those issues where you wish to put forward a view.

Comments on style and formatting are not required.

In the interests of transparency, it is our intention to publish responses to this consultation on the SSRO website upon completion of the consultation. Please indicate whether or not you consent to publication of your response by ticking one of the boxes below.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

No comment.

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

The introduction could be expanded to more inclusive of the scope of the Guidance and address the context of the penalty application so that there is inclusion of; the process to be followed, the timeframes and inclusion in the guidance coverage of the determination of the penalty.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

No comments.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

We are aware of some drafting issues that are being raised by industry partners and would be supportive of changes that provide any further clarification to the principles.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

No comments.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

Our preference is for the Guidance to be Principles based, but the issuance of (say) annual supplements providing case examples, in areas where clarification is needed, may be useful to improved understanding.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

See our response to Question 6.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

The transitional arrangements are helpful and recognise that the change to long established practices have been introduced in a short time period. As a consequence there could be some unforeseen issues for all parties concerned.

Given the above comments, consideration could be given to both expanding the transition to cover a specific period and including multiply events during that period. This would address a period of change requiring embedding in new system and processes and also accommodate common factors arising on multiply QDCs with the

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

No comments.

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

See our response in Question 6.

Rolls-Royce Holdings plc

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

Please do not feel that you need to respond to all of the consultation questions set out in the document: we welcome brief or partial responses addressing only those issues where you wish to put forward a view.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

Well structured and good principles that are fair and reasonable.

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

We assume that contractor refers to both contractor and subcontractor as the 'person' in the act. Perhaps this could be made clearer.
Also perhaps under 'application' more guidance on when the SoS can issue a penalty and the timescales for payment.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

We support the guidance being principles based but over time as experience is gained then definitive rules can be established from decisions of the SSRO.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

Helpful principles.

In respect of the Penalties guidance, we would seek clarification that the prompt-payment discounts available under 7.1 would still be available if a contractor appeals to the SSRO for a determination and that the discount applicability period would commence from the date of a determination. Otherwise contractors may be unfairly deterred from appealing for fear of forgoing the discount for prompt payment.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

After the transitional period there may be a need for a further period depending on the experience of the contractor. Guidance from the SSRO in these circumstances would be helpful.

Guidance on what the position would be as regards to 'force majeure' eg. if we were to lose a building or IT to fire or flood?

10.4 says that the SSRO determination is final. We agree this is the case but it would be helpful just to clarify that the only additional option in exceptional circumstances is a judicial review.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

Likely that rules can be established from the determinations of the SSRO over time.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

This would be appreciated.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

This seems fair and reasonable given the new system will take time to understand. However we would ask that the transitional arrangements have flexibility depending on the circumstances and in particular the fact that so many questions of interpretation on the reporting regime are still outstanding. Guidance on these will greatly help Industry and MOD and we believe it is only after these are answered that a definitive transitional period can be determined.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

However timescales for major milestones would be helpful.

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes No

Please add comments to support your answer:

This would be very helpful such that a database of decisions can inform rules that can update the guidance.

For clarity, it would be helpful to add to the guidance that there are no liabilities on the prime contractor from any breaches leading to fines by their subcontractors.

Serco Limited

Your details

Name:

Organisation:

Serco Limited

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

Please do not feel that you need to respond to all of the consultation questions set out in the document: we welcome brief or partial responses addressing only those issues where you wish to put forward a view.

Comments on style and formatting are not required.

In the interests of transparency, it is our intention to publish responses to this consultation on the SSRO website upon completion of the consultation. Please indicate whether or not you consent to publication of your response by ticking one of the boxes below.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Yes No

Please add comments to support your answer:

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

It would be helpful if there were cross references to the Defence Reform Act.

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

The application of the principles will lead to rules being established over time, which will help in the future.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes No

Please add comments to support your answer:

The guidance should state that the penalties apply with regard to the actual value of the contract, as the time of the offence.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes No

Please add comments to support your answer:

Rules will develop as determinations are made by the SSRO.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

Worked examples would certainly aid the application.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

A preferable transitional arrangement would be that given that the reporting requirements will be completely new to companies within the industry, it would be fairer that the first QDC/QSC to that company should be exempt from penalty.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes No

Please add comments to support your answer:

Expected timeframes for SSRO determinations should be indicated in terms of a maximum.

Section 10 should be limited to Determinations rather than opinions.

QUESTION 10 - Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO, as they arise?

Yes

No

Please add comments to support your answer:

Yusani Limited

Your details

Name:

Organisation:

Position:

Consultation questions

When answering the consultation questions, it would be very helpful if you could support your responses with additional explanation and detail, particularly on areas where you disagree. This will help us to understand the basis for your answer and inform our finalisation of the guidance. As a minimum, please include the paragraph number your comment refers to.

Please do not feel that you need to respond to all of the consultation questions set out in the document: we welcome brief or partial responses addressing only those issues where you wish to put forward a view.

Comments on style and formatting are not required.

In the interests of transparency, it is our intention to publish responses to this consultation on the SSRO website upon completion of the consultation. Please indicate whether or not you consent to publication of your response by ticking one of the boxes below.

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Yes

No

Introduction

QUESTION 1 - Do you agree the guidance has been structured effectively?

Please add comments to support your answer:

Yes No

QUESTION 2 - Does the introduction provide a clear description of the status and the purpose of this guidance?

Yes No

Please add comments to support your answer:

The Introduction needs to be more comprehensive to give the context and sequence of events that might lead to a penalty. It needs to start with something like the introduction to the SSCs: “This document is issued by the Single Source Regulations Office (SSRO) and sets out the guidance for use by the Secretary of State when determining the amount of a penalty under the Defence Reform Act 2014 (the “Act”) or the Single Source Contract Regulations 2014 (the “Regulations”).”

The Application of this Guidance needs to be supplemented with something like:

“2.2 Where a person has contravened section 31 and –

- (i) that person has failed, without reasonable excuse, to take the steps specified in a compliance notice issued by the Secretary of State, or
- (ii) the Secretary of State does not think that there are steps that can be taken to remedy the contravention,

the Secretary of State may issue a penalty notice to that person.

2.3 The penalty notice requires the person to pay a penalty to the Secretary of State within 6 months of the date on which the notice is given [§32(4)].

2.4 This document sets out the guidance for determining the amount of the penalty to be paid. It applies to the Secretary of State when determining the amount of the penalty in a penalty notice [§32 and §33(3)]. It also applies to the SSRO when a person applies to the SSRO for a determination of matters under section 32(7), see paragraph 11.1.”

QUESTION 3 –Do you agree that this guidance should be principles rather than rules based?

Yes No

Please add comments to support your answer:

The elaboration of principles will lead to rules. But it is important to have the principles clearly stated.

QUESTION 4 – Do you agree with the factors to determine amount of penalty?

Yes No

Please add comments to support your answer:

There are a number of errors that need correcting and clarifications need to be added:

1. In 3.1, the deterrence is “from future contraventions” acting as an incentive to “future” compliance, having regard to the seriousness of the “contravention”.
2. In 3.2, 4.1, 6.1, 7.1, 8, 9 and 10, “contractor” is incorrectly used. This is not just about contractors. The Act refers to “persons” in sections 31 - 35. A contravention of sections 23 and 25 applies to persons. Wherever, “contractor” occurs replace with “person”.
In 3(a), it not a first “offence” but the first “issue of a penalty notice”.
In 3(b), it is the frequency of penalty notices, rather than contraventions, that are relevant in Regulation 50(3); so 3(b) should read “how frequently have previous penalty notices been issued (repeated penalty notices may lead to significantly increased penalties); and”
In 3(c), it is incorrect to refer to a “violation”, it should read “is the current circumstance the same or similar to prior circumstances that gave rise to a penalty notice?”
In 4, It is not clear what significance the size and turnover of the person has. It is not clear with all these factors what weight will be given to each of them in deciding the amount of the penalty.
3. In 4.1.1, delete “the contravention and”. A penalty notice is issued only when the person has failed to take the steps in the compliance notice. In 4.1.2, delete “any steps taken to end the contravention in question, and” insert “by the person” before “to mitigate”.
4. The title of para 5 should be aligned with the title of para 4, such as “Factors increasing the level of any penalty”. It would be helpful to have a preamble to para 5.1, along the lines of “Where there are repeated contraventions to comply with one or more of the specified requirements imposed by virtue of section 24 or 25 (reports) leading to multiple penalty notices then,” In para 5.1, delete “persistent offence” and insert “the amount of the penalty”.
5. In para 6, delete “Final” in the title and in para 6.2.
6. In para 7, it would be helpful to have a preamble along the lines of: “A penalty notice requires the person receiving it to pay a penalty to the Secretary of State before the end of the period of 6 months beginning on the date on which the notice is given.” In Para 7.1, it would clarify the meaning if the following amendments were made: after “reduced” insert “by the percentage amount shown in Table 1”, after “settlement” insert “of that reduced amount”. In Table 1, convert months to days; change title of second column to: “Per cent payable of penalty stated in penalty notice”.
7. In para 8.1, it is unclear how the “SSRO will allow” something that is not provided for in the Act or the Regulations. However, on a reference, the SSRO has a relatively free hand; suggest adding at the start: “On a reference to the SSRO for a determination, ...”; delete “receiving penalties” and insert “payment of penalties on receipt of penalty notices”. In para 8.2, second bullet, after “submitted” insert “by a person or” to cover both contract reports and supplier reports.

Response to Question 4, continued:

8. In para 9.2, delete “qualifying defence contract” and insert “circumstances”, to cover both contractor and supplier circumstances - not all persons will have a QDC.
9. In para 10.1, delete “the contractor” and insert “a person in receipt of a penalty notice” to clarify.
10. In para 10.2, delete “notice”.

See attached mark-up of the draft Guidance.

QUESTION 5 – Are there any additional factors that you think should determine the amount of penalty?

Yes

No

Please add comments to support your answer:

Some additional factors should be added to para 3:

“The impact of any reasonable excuse for the contravention.” This is because even though the MoD may have dismissed the excuse, on a reference the SSRO may consider the excuse well founded - the guidance applies just as much to the SSRO as to the MoD.

“Any representations made by or on behalf of the person and any other circumstances relevant to the matter.” These are matters referred to in para 6.1 of the guidance and need to be in the list of factors if they are to be given appropriate weight.

An additional factor should be added to para 4:

“the impact of any reasonable excuse for the contravention where it cannot be remedied”. Where the contravention cannot be remedied the Secretary of State is entitled to issue a penalty notice, notwithstanding any reasonable excuse. The amount of the penalty should have regard to any reasonable excuse in those circumstances.

QUESTION 6 – Would you support moving towards a more rules based approach in the future?

Yes

No

Please add comments to support your answer:

It is important that all parties have clarity in this matter. If clarity is improved by moving to a rules based approach then it will receive support.

QUESTION 7 – Do you think that the inclusion of worked examples would aid your understanding of determining the amount of penalty?

Yes No

Please add comments to support your answer:

If a worked example provided clarity to illustrate the principles, in different circumstances, then that would be helpful. It would need to be clear in the examples where judgement was involved.

An example where, on a reference, the SSRO altered the decision in the penalty notice would also be helpful.

QUESTION 8 – Do you think that the proposed transitional arrangements are fair?

Yes No

Please add comments to support your answer:

It would be fair, as these are early days for a new regime, which will take time for the parties to understand and implement. The penalty notices should still be issued but, on a reference, the SSRO should reduce the penalty to zero or cancel the notice - it may be that if the SSRO announces its policy approach for transition, the MoD will make the penalty zero in the penalty notice from the outset. The penalty for repeated contraventions should not apply during the transition periods and penalty notices issued during the transition period should not be taken into account after the transition period. These points need to be reflected in the guidance.

Opinions and determination

QUESTION 9 - Do you agree that the role of the SSRO with regards to determining the amount of penalty has been effectively communicated?

Yes

No

QUESTION 10 – Do you agree that supplementary guidance should be issued setting out examples of opinions and/or determinations made by the SSRO as they arise.

Yes

No

Please add comments to support your answer:

It is important that all parties are aware of examples of opinions and determinations by the SSRO as soon as possible after they are made so that any necessary adjustment to behaviour can be made in the light of the examples.