Bird & Bird

Lexology: Getting the Deal Through

Defence & Security Procurement

2023

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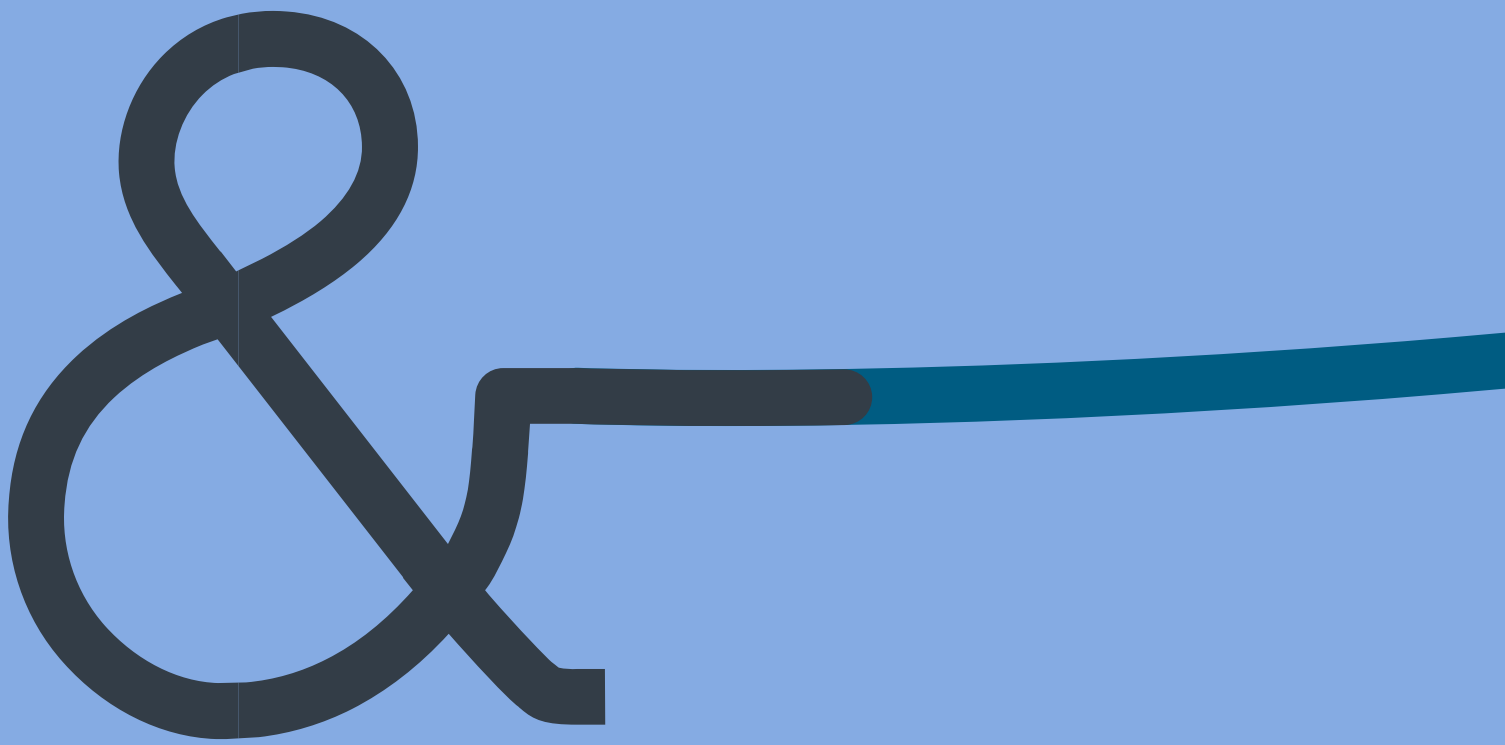

Bird & Bird's International Defence & Security team are delighted to have contributed to the global 2023 edition of 'Lexology: Getting the Deal Through: Defence & Security Procurement'.

Our team has written the Global Overview and the UK, Germany, Poland, Italy and France chapters and Elizabeth Reid is contributing editor for the publication.

This annual publication provides excellent expert analysis on how to navigate defence procurement, including the regulatory environment, hot topics on contracting, export control, dispute resolution, anti-corruption, employment law and more. It is an ideal tool for in-house counsel and commercial practitioners.

Upon reaching the end of a challenging 2022, we look ahead to another year of geopolitical tensions and global economic change. On 24 February 2022, Russia tragically invaded Ukraine provoking widespread international condemnation and a large response from the UK, US, EU and other nations in the form of sanctions and military aid. These sanctions have severely impacted exports of Russian oil and gas, causing massive inflation in energy prices not seen since the 1970s and 1980s. This has exacerbated overall inflation globally and across all industries causing disruption across the global economy. Almost three years have passed since the emergence of covid-19 and although much of the world has moved on from the impact of lockdowns, the economic impact of covid-19 on global supply chains and inflation remains, intensified by the impact of the Russian invasion of Ukraine.

Notwithstanding all of this, the defence industry has remained fairly well insulated with indexed government contracts largely mitigating this high inflation environment, and with manufacturing remaining stable in 2022. Further, Sweden and Finland are in the process of joining NATO and there is increased spending planned on defence across eastern European nations. Nations are also reinforcing innovative efforts in science and technology as defence continues to be a sector being transformed by technology.

Our experts analyse all the hot topics affecting the industry, including emerging developments in technology, climate change, budgetary pressures and more.

Please get in touch if you would like to hear more about how our international team can help you.

LEXOLOGY
Getting the Deal Through

DEFENCE & SECURITY PROCUREMENT 2023

Contributing editor
Elizabeth Reid

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Upon reaching the end of a challenging 2022, we look ahead to another year of geopolitical tensions and global economic change. On 24 February 2022, Russia tragically invaded Ukraine provoking widespread international condemnation and a large response from the UK, US, EU and other nations in the form of sanctions and military aid. These sanctions have severely impacted exports of Russian oil and gas, causing massive inflation in energy prices not seen since the 1970s and 1980s. This has exacerbated overall inflation globally and across all industries causing disruption across the global economy. Almost three years have passed since the emergence of covid-19 and although much of the world has moved on from the impact of lockdowns, the economic impact of covid-19 on global supply chains and inflation remains, intensified by the impact of the Russian invasion of Ukraine.

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Budgetary pressures

There is growing recognition that countries will need to adapt their own capabilities to ensure that defence and security remain stable and effective in increasingly hostile and unforgiving environments.

A slower global economic growth and a high inflationary environment emerged over 2022, which could place pressure on government defence budgets going into 2023. Nevertheless, global defence spending increased in 2022, and as geopolitical tensions persist, it is expected that budgets will remain stable or even increase further in 2023. The US has forecast an uplift of the defence budget by US$33 billion for the 2023 fiscal year, greater than the US$10 billion increase from 2021 to 2022. In 2021, total European defence spending stood at a new high of €214 billion, marking a further 6 per cent increase on 2020.

In the UK, the Autumn Statement confirmed that defence spending will not fall below 2 per cent of GDP but did not commit to the doubling of defence spending set out by the previous leadership. We now expect an updated Integrated Review in spring/summer 2023, which will set out any increase to spending. A further notable hike in defence spending was seen in Germany, which announced in February, days after Russia's invasion of Ukraine, that there would be a prioritisation of military spending. This will increase the German average annual

budget from the current €50 billion (1.4 per cent of GDP) to €70 billion (2 per cent of GDP) over the next five years.

Climate change

The heightened awareness of the reliance on Russian oil and gas has accelerated a transition towards alternative energy sources and the decarbonisation of economies. Previously, there was concern that as global focus shifts towards combatting climate change, this will ultimately be at the expense of defence and security. The renewed geopolitical tensions in 2022 have somewhat reversed this trend and there are renewed concerns that tackling climate change has been pushed to the back burner due to issues causing more strain in the present.

The United Nations' COP27 delivered mixed results with a notable positive being a 'loss and damage fund' to assist the poorest countries suffering the effects of climate change. Unfortunately, the conference failed to deliver binding targets on the reduction of greenhouse gases, particularly notable from the three biggest emitters the US, China and India. The final agreement did include 'the urgent need for deep, rapid and sustained reductions in global greenhouse gas emissions', yet following the UNEP Emission Gap Report 2022 finding that there is no credible pathway for limiting warming to 1.5°C, the lack of tangible progress at COP 27 is considered bad news for a warming world.

Technological change and investment

Defence continues to be a sector being transformed by technology. Governments are looking for improved capabilities in fighter aircraft, space resilience, ship or submarine building and cybersecurity. Training will need to occur in virtual reality and governments will need to be able to collate, analyse and exploit masses of data to create operational advantage. Software-led assets are becoming a higher priority in defence manufacturing, still complemented by the focus on classic tangible hardware-led assets. Technology is changing the landscape of how wars are fought and on the back of this, giants from Amazon to Microsoft are pitching for US defence contracts. Further, venture capital funding for aerospace and defence start-ups in the US has increased over the past four years with the first half of 2022 seeing US$4 billion raised in these tech-focused defence start-ups. This has seen tech-focused defence companies such as Palantir, who focus on data analytics in defence, to post better than expected revenue through 2022. Anduril, having been awarded a US$1 billion 10-year anti-drone contract, and Skydio, a US$100 million drone contract, are demonstrating the ability of tech-focused defence firms to win a slice of the US defence budget.

The European Defence Fund allocated €1.2 billion across 61 projects, with companies including Leonardo and Indra being some of the largest receivers of this funding. The projects include R&D funding to transform cyber defence in addition to funding towards innovation in more conventional defence technologies including aircraft, electronics and space. This trend is expected to increase through 2023 and beyond, as nations become acutely aware of the importance of technological change in Aerospace and Defence.

On 7 April 2022, NATO Allies approved the Charter of the Defence Innovation Accelerator for the North Atlantic, which has been coined DIANA. DIANA aims to bring defence personnel together from across the alliance along with innovative start-ups, scientific researchers and technology companies with the aim to tackle security and defence challenges focusing on emerging and disruptive technologies. There are plans for 'accelerator sites' and 'test centres' across member countries with a base in both North America and Europe. Following this, NATO launched their

Innovation Fund on 30 June 2022, which is intended to invest €1 billion in early-stage start-ups over a 15-year time frame. These include the same target technologies as DIANA, including, for example, nascent AI, big-data processing, autonomy and biotechnology with use in security and that are of priority to NATO.

Strong M&A activity

Although 2022 has been marked by increasing interest rates, inflation and other risk factors, markets have been eyeing correction and we continue to see healthy M&A activity across the defence industry. Indexed government contracts are more attractive than ever as hedges against high inflation and the sector, which has posted strong revenue in this climate, is in a good position for growth, especially with strong global defence budgets. M&A activity in the defence sector was extremely strong in 2021 and 2022, still rebounding from the slowing down in 2020. There remains a robust environment for deal-making activity in 2023.

Geo-political tensions, together with technological innovations, are expected to steer defence M&A activity in 2023 and beyond. We expect to see further alignment of technology companies with the more traditional military sector, particularly as major defence corporates seek to invest in emerging technologies through the acquisition of innovative start-ups.

Geopolitical landscape

We live in an increasingly complex security environment, with Russia's war in Ukraine and China's increased provocation around Taiwan, challenges to the West are more acute than ever.

The war in Ukraine has reframed how security should be ensured across Europe. With more nations seeking to join NATO and a revitalised sense of unity in Europe and the US, the sense of fragmentation in the EU from Brexit has been somewhat mitigated. However, one of the main challenges to the global economy in the next decade may come from a continued trend toward deglobalisation, highlighted by Brexit, and faster-than-expected inflation. Nevertheless, owing to the threats from Russia, it is clear that NATO will remain the foundation of collective security in our home region of the Euro-Atlantic.

Nancy Pelosi's visit to Taiwan in August provoked the response of China, which conducted military exercises around the island. It is likely that relations between NATO and China look set to continue on their current tricky path.

When the Australia–United Kingdom–United States Partnership (AUKUS) was announced in September 2021, Prime Minister Morrison, Prime Minister Johnson and President Joe Biden agreed to determine, by March 2023, the optimal pathway for an Australian conventionally armed, nuclear-powered submarine capability. AUKUS partners have taken important steps toward implementation, so we expect a major announcement on it in Q1/2 2023.

Therefore, reflecting on these shifts in the global economic and geopolitical landscape, we present the seventh annual edition of Lexology Getting the Deal Through – *Defence & Security Procurement*.

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Summary

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LEGAL FRAMEWORK Relevant legislation

> **1** What statutes or regulations govern procurement of defence and security articles?

Contracts for defence and sensitive security equipment and services (MPDS) are public procurement contracts. Three public procurement codes have been successfully implemented since 2001. Furthermore, the French government has recently integrated public procurement rules into a single code, the Public Procurement Code (PPC). MPDS are public procurement contracts (PPC, article L. 2) and therefore governed, since 1 April 2019, by articles L. 1113–1, L. 2300–1 to L. 2397–3, and R. 2300–1 to R. 2397–4 of the PPC.

The EU Defence and Security Directive (DSPCR) (2009/81/EC) has been incorporated into French law and has resulted in the development of a series of legislative acts governing defence procurement (dated 2004, 2011 and finally 2016).

Other laws, regulations and policies are applicable to defence contracts, most notably:

- the standard administrative clauses (CAC Armement) that are specific to the French Defence Procurement Agency; and
- the technical note of the Legal Affairs Department of the Ministry of Finance dated 1 January 2020.

General principles derived from the EU Treaty also apply to defence procurements, including the principles of equal treatment, non-discrimination, transparency, proportionality and mutual recognition. However, due to the strategic nature of some defence procurement, many MPDS are subject to classification measures in accordance with the regulations governing the protection of secrecy (arising in particular from the Criminal Code and the Defence Code). Such contracts are, as a result, excluded from the public procurement rules (subject to certain exclusions).

Identification

> **2** How are defence and security procurements identified as such and are they treated differently from civil procurements?

Article L. 1113–1 of the PPC defines MPDS as contracts concluded by the state or one of its public institutions that have one of the following activities:

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- the supply of military equipment, including any parts, components or subassemblies thereof;
- the supply of sensitive equipment, including any parts, components or subassemblies thereof;
- works, goods and services directly related to military or sensitive equipment for any and all elements of its life cycle; and
- works and services for specifically military purposes or sensitive works and sensitive services.

However, some defence procurement is excluded from the application of the PPC. According to article 2515–1 of the PPC, this applies to:

- public procurement of financial services, excluding insurance services;
- public procurement of arms, ammunition or war materiel where the protection of the essential security interests of the state so requires; and
- public contracts for which the application of the regulation would require the disclosure of information contrary to the essential security interests of the state.

Conduct

3 How are defence and security procurements typically conducted?

The PPC provides three main procedures for awarding MPDS.

First, those that are not subject to the PPC and can be directly awarded without the use of competitive procedures. These are expressly listed in article L. 2515-1 of the PPC.

Second, for MPDS falling within the scope of the PPC, a distinction is made between those that can be subject to a negotiated procedure and those that are subject to a formalised procedure.

For MPDS covered by a negotiated procedure, the availability of the negotiated procedure without prior publication or competition is greater than for public procurement in the traditional sector (articles R. 2322-1 to R. 2322-14 of the PPC). In such cases, the public entity is free to organise this procedure but must proceed in accordance with the normal principles of public procurement law. In 2021, the availability threshold for such procedure increased from €40,000 before tax to €100,000 before tax for MPDS.

Above certain specific thresholds (up to €431,000 before tax for supplies and services and €5,382,000 before tax for works contracts), the contracting authority may freely choose one of the following formalised procedures with publication and competition: restricted invitation to tender, competitive procedure with negotiation, or competitive dialogue.

Finally, for MPDS not expressly falling into these two categories and when the estimated value of the needs of the contracting authority is below the thresholds of a formalised procedure, the contracts will be subject to an adapted procedure that enables the public entity to award their contracts according to a transparent competitive tendering procedure freely determined according to the subject matter and special features of the contract.

Framework agreement remains another procedure for awarding several MPDS to a defence contractor. Legal provisions applying to these contracts were modified in 2021 (Decree No. 2021-1111 of 25 August 2021) to comply with a decision from the European Court of Justice (ECJ, 17 June 2021, *Simonsen & Weel A/S*, C-23/20). Henceforth, the contract notice or the tender specifications for defence and security framework agreements shall indicate the maximum quantity of the

products that can be acquired under the framework agreement or the total maximum value of that agreement, whereas prior legal provisions allowed not mentioning any maximum.

Proposed changes

> **4** Are there significant proposals pending to change the defence and security procurement process?

The European Commission reviewed the MPDS regime in 2016 and determined that no legislative changes were necessary. However, it has indicated that it will take a stricter approach to enforcing compliance with the rules, as it found too many MPDS contracts were awarded without any competition.

Information technology

> **5** Are there different or additional procurement rules for information technology versus non-IT goods and services?

There are specific rules that relate to IT procurement. Most IT procurement will be undertaken under the general administrative clauses (CCAG) applicable to IT procurement (IT procurement CCAG), which was published on 16 October 2009 by a ministerial order of 16 September 2009. In many instances, the IT procurement CCAG will only apply to contracts that expressly refer to these clauses.

If the contracting authority chooses to refer to the IT procurement CCAG, it will have to adapt the provisions of the contract to reflect the specific features of IT procurement. This will be done through a set of special administrative clauses (CCAP), either to supplement or to derogate from the IT procurement CCAG (article R. 2112–3 of the PPC). If the contracting authority chooses not to refer to the IT procurement CCAG, it will have to include the provisions necessary for the management of these kinds of contracts in its CCAP.

It should be noted that the IT procurement CCAG was not adapted to the provisions of the ordinance of 23 July 2015 on public procurement and its two implementing decrees of 25 March 2016, which entered into force on 1 April 2016. The first decree relates to public procurement contracts in general, and the second, the MPDS Decree, to public procurement in the defence sector. However, this mechanism is still enforceable if the contracting authority chooses to refer to the IT procurement CCAG (see article 151 of the MPDS Decree).

Relevant treaties

> **6** Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

The majority (70 per cent) of defence and security procurement in France is negotiated by mutual agreement. The predominance of this mode of awarding contracts is explained by the complexity of the trans actions at stake, the necessity for a comprehensive exchange of information prior to the contract being awarded, as well as the willingness of the public authorities to support the industrial defence sector (Jean-Michel Oudot, *Choix du type de contrat et performance: le cas des marchés publics de défense*, Économie publique/Public economics). However, the statistics

published by the French Ministry of Defence do not provide for specific percentages regarding the use of the national security exemption. The Observatory of European Defence and Security Procurement published an eight-year review of the application of the DSPCR in June 2019. This review does not mention the number of contracts that are exempt from the normal requirement to compete openly, but it does show that 24 per cent of French defence contracts use a procedure that does not utilise prior publication.

DISPUTES AND RISK ALLOCATION Dispute resolution

7 How are disputes between the government and defence contractor resolved?

There are traditionally two types of dispute settlement; either a conciliation procedure or a procedure before a French administrative judge. However, most defence and security contracts provide for an amicable settlement of disputes before the case is referred to the competent court. In France, amicable settlements of defence and security disputes are referred to the National Committee for the Amicable Settlement of Disputes in Public Procurement (CCNRA). This committee is neither a court of law nor an arbitration body. Its mission is to seek legal and factual elements with a view to proposing an amicable and equitable solution (articles R. 2197-1 of the Public Procurement Code (PPC)). The CCNRA then issues opinions, which the parties are free to follow or to disregard.

Where a dispute is referred to a conciliator, the referral suspends the limitation period, which resumes if the solution proposed by the conciliator is rejected by the contracting authority. If the conciliation fails, the party who initiated it can refer the matter to the administrative court within the time limit that runs from notification of the administration's decision to refuse to follow the opinion of the conciliation committee. If a party prefers to bring the dispute before the administrative court, it must do so within two months of the rejection of its prior administrative complaint.

8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

The conciliation procedure or a procedure before a French administrative judge only concern disputes between the administration and the contractor or the defence consortium and security contractor. If the dispute is between members of the defence consortium holding the contract or the contractor with a Tier 1 subcontractor or a Tier 1 subcontractor with a Tier 2 subcontractor, referral to the CCNRA by one of them is not possible. This referral is only possible for the administration and the contractor. On the other hand, there is nothing preventing any of the former parties from trying to reach an out-of-court settlement. Otherwise (if these procurement participants choose the litigation route), their litigation can only be brought before the judicial and not the administrative judge.

Indemnification

9 What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

Public procurement is subject to an extensive system of law characterised by a balance of power that gives the public contracting party the means to enable it to impose its will on its contracting partner. The government has the right (even if there is no contractual clause stipulating it) to terminate the contract unilaterally for public policy reasons, subject to the total indemnification of the operator for the damage suffered (which is composed of the loss incurred and the lost profit). The government also has extensive power to impose uni lateral modifications on the contract. The use of this prerogative must, however, not lead to the economic disruption of the contract. A judicial tool – unpredictability theory – provides an essential guarantee for the contractor against the risk of economic uncertainties. It provides that if certain conditions are met (in the case of an event that is unpredictable, independent from the will of the parties and that leads to the economic disruption of the public contract) the operator is obliged to continue to perform the contract. However, the government is required to pay a fee to the operator relative to any increased cost of performing the contract. In general, French administrative jurisprudence has set this percentage at 90 per cent of the losses caused by the unforeseen event. Furthermore, the French administrative courts provide compensation in a situation where the contractor carries out, under its own initiative and outside the scope of the contract, work that it considers necessary for the proper performance of the contract.

The government may request indemnification from the contractor in case of third-party claims for loss or damage to property, personal injury, death, or damage to government property. The standard administrative clauses contain specific indemnities relating to damages resulting from aircraft, missiles and ammunition.

Limits on liability

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

It is very usual for the government to limit its own liability under the contract. The public entity may stipulate in the CCAP a clause specifically limiting the contractor's right to compensation in the event of unilateral termination of the contract on grounds of public interest (see CAA Versailles, 7 March 2006, No. 04VE01381, *Cne Draveil* and CE, 4 May 2011, No 334280, *CCI of Nîmes, Uzès, Bagnols, Le Vigan*). Furthermore, there is nothing to prevent contractual provisions from entirely excluding any right to compensation in the event of unilateral termination on grounds of public interest (CE, 19 Dec. 2012, No. 350341, *AB Trans*).

With regard to the reciprocal limitation of the contractor's liability, the contract may also provide that the public body's right to compensation for direct damage is limited in the case of a single contract to the total amount of the contract or in the case of a split contract to the minimum amount of the contract with a purchase order. The contract award procedure will determine the extent to which this limit is negotiable.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

The risk of non-payment for an undisputed, valid invoice by the French Defence Procurement Agency is perceived to be very low. The government's commitment to incur expenditure is subject to the availability of credit payment provided by the finance laws and the amending finance laws.

Parent guarantee

12 Under what circumstances must a contractor provide a parent guarantee?

If a bidder is a special purpose vehicle set up specifically for a contract, the terms and conditions of the initial tender documentation usually require that the contractor must execute a parent guarantee for the benefit of the public entity and in accordance with a specific template. In such a case, failure to provide this guarantee will result in the disqualification of the contractor from the procurement process. Under French law, the granting by a company, in whatever form, of a guarantee to secure the obligations of an affiliated company must comply with its corporate purpose and corporate interest. If the contractor wishes to transfer its contracts to a special purpose vehicle after it is awarded, the Ministry of Defence usually requests that the shareholders of the special purpose vehicle execute a parent guarantee.

DEFENCE PROCUREMENT LAW FUNDAMENTALS Mandatory procurement clauses

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

The standard administrative clause (CAC Armement) is part of the procurement contract and is common to all defence services. The Directorate General of Armaments (DGA) will typically seek to include certain standard clauses in its contracts. Primarily, these are the DGA standard clauses of 2014 that constitute a collection of standard contractual clauses relating to the most frequent cases encountered in defence or security contracts awarded under the previous Public Procurement Code (PPC) of 2006.

Cost allocation

14 How are costs allocated between the contractor and government within a contract?

The CAC Armement does not provide any pricing methods. The allocation of costs will, therefore, be contained in a commercial agreement between the parties. Fixed or firm prices are the most common pricing methods for Contracts for defence and sensitive security equipment and services (MPDS). However, under public procurement rules, the procuring entity may conclude a framework agreement and then issue individual purchase orders for each required service. This volume-driven pricing is common in long-term MPDS contracts.

In order to take into account particular circumstances, such as urgency or the technical, functional or economic characteristics of defence equipment or service, a joint decision of the minister responsible for defence and the minister responsible for the budget may authorise the insertion of a clause providing for a deferred payment (article L. 2391–5 and article R. 2391–18 of the PPC).

Disclosures

15 What disclosures must the contractor make regarding its cost and pricing?

According to article 7.2 of the CAC Armement, a contractor is required to report on the costs that it will incur or has incurred in performing the contract. It must keep all accounting documents and data for at least five years from the date of completion of the contract. When it is subject to a cost control, it is required to provide, at the request of the procuring entity, cost statements showing a breakdown of the cost components, including volume of hours, hourly rates, procurement expenses and overhead costs.

Audits

16 How are audits of defence and security procurements conducted in this jurisdiction?

Under the CAC Armement, the contract and related records shall be accessible to the contracting authority or its designated representative. The right of audit can be exercised at any time.

IP rights

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

In France, in general, the private contracting party obtains the intellectual property resulting from a contract. Contractual relationships between public and private entities are governed by the French PPC and Chapter VII of the CAC Armement relating to IP. The main difference regarding contractual relationships concerns the use of the services produced, rather than their property rights. In return for the ownership of IP rights, the Ministry of Defence expects the right to disclose and use the IP for government purposes (including security and civil protection). By way of derogation from article 62 of the CAC Armament, the clauses of the contract may provide for certain scenarios where IP rights will be granted to the public entity.

Economic zones

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

In France, there are no special defence units located in special economic zones benefiting foreign defence and security contractors.

Forming legal entities

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

Under French law, the term ‘joint venture’ does not correspond to any specific legal situation. It refers, in fact, to any form of cooperation between companies that have in common their contractual and associative natures. The structure of a joint venture can be either purely contractual (collaboration agreement), or both contractual and corporate (collaboration agreement and a joint subsidiary). When this cooperation is expected to last, partners may wish to set up a new legal structure (usually a simplified joint-stock company or a company with limited responsibility structure is used for this). To establish a company, the parties must carry out the

formalities of constituting a company required by the legislation applicable to the specific type of legal entity.

Access to government records

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

Under the French Code of Relations Between the Public and the Administrations (CRPA), there is a general right for the public to access information held by public bodies. As the Ministry of Defence is a public body, its contracts and records may, in principle, be requested by any involved entity. With regard to the rules of public procurement, a signed contract may be disclosed. However, this right of access must be exercised in compliance with industrial and commercial confidentiality protected by the provisions of article L. 311–6 of this Code. In addition to the information protected by industrial and commercial secrecy, the secrecy of documents classified as national defence secrets pursuant to article 413–9 of the Criminal Code are also protected by law. In addition, national defence secrets are considered to be heavily classified by article L311–5 of the CRPA, which provides that 'other administrative documents whose consultation or disclosure would prejudice . . . national defence secrecy . . . shall not be disclosed'.

Compliance with the principle of access to administrative documents is monitored by the Commission for Access to Administrative Documents, which has developed a doctrine on access to the various documents that may be involved in the award, conclusion and performance of public contracts.

Supply chain management

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

There are no specific rules regarding eligibility for MPDS contracts. Suppliers are generally considered eligible for public contracts if they meet the standard requirements of public procurements (both on the professional and the financial and economic side). Subject to limited exceptions, the defence procurement rules oblige an authority to reject tenders from bidders who have been convicted of certain serious offences.

Regarding supply chain management, the PPC and the CAC Armement include specific commitments by the contractor to ensure the security of supply. Furthermore, the first paragraph of article L. 2393–1 of the PPC defines the legal regime applicable to subcontracts for defence or security contracts. It provides that:

> *[The] holder of a defence or security contract may, under his responsibility, entrust another economic operator, referred to as a subcontractor, with the performance of part of his contract, including a supply contract, without this consisting in an assignment of the contract.*

The concept of a subcontractor used by the EU Defence and Security Directive is broader than in French national law, which excludes from its scope standardised contracts for goods or services that are not specifically designed to meet the needs of the public entity. The rules expressly permit authorities to consider the same exclusion grounds for subcontractors, as well as giving them broad

rights (eg, to require a supplier to openly compete on some of the subcontracts or to flow down obligations regarding information security (article 2393–3 of the PPC)).

There are no specific rules regarding anti-counterfeit parts.

INTERNATIONAL TRADE RULES Export controls

22 What export controls limit international trade in defence and security articles? Who administers them?

The French regulation implementing Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (the Common Position) and the Arms Trade Treaty, are contained within the French Defence Code (articles L2331–1 and seq).

The production and trade of defence items are subject to a specific authorisation. An 'export licence' is necessary to export defence articles outside the EU and a 'transfer licence' is necessary to export such items within the EU. The licences are delivered by the Prime Minister after advice from the Commission for Export of Defence Goods, which assesses each project taking into account, primarily, their consequences on peace and regional security, the respect by the country of destination of human rights, the protection of sensitive technologies and the risk of use by non-authorised final users.

A specific regulation applies to dual-use items (ie, goods, software and technology that can be used for both civilian and military applications). On the basis of EU Regulation 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, the export of controlled items is subject to the grant of a licence. Annex I of this regulation lists the controlled items and is updated annually by Commission Delegated Regulation to reflect changes in control regimes.

Domestic preferences

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

The Minister of Defence has stated that contracts awarded by the ministry must comply with the procurement rules described in the legislation on public procurement. The latest legislative text prohibits the introduction of a criterion based on national preference. In fact, so long as the foreign contractor undertakes to comply with the protocols, in particular that of the International Labour Organisation, nothing prevents it from bidding on a French procurement directly, even if the activity is located in its territory. Moreover, reserving contracts for national suppliers can lead to a non-competitive situation, or even to a monopoly situation (Parliamentary Question No. 84337, Rep. Min of 16 September 2010).

Favourable treatment

24 Are certain treaty partners treated more favourably?

The principle of European preference is stated in article L. 2353–1 of the Public Procurement Code (PPC) for defence and security contracts. This principle permits the exclusion of economic operators that are not EU member states or who do not belong to the European Economic Area (article L. 2342–7 of the PPC).

Sanctions

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

The EU implements embargoes and sanctions directed by the UN and also imposes its own autonomous embargoes and sanctions. The French government also has the power to impose national sanctions.

Embargoes and sanctions, depending on their type and ultimate aim, are targeted at individuals, entities, sectors or countries.

The map of all countries affected by embargoes and sanctions and a consolidated list of all persons subject to financial sanctions can be found on the French government website.

The consolidated list of all persons subject to financial sanctions can also be found on the French government website.

Trade offsets

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

Offsets are not part of France's defence and security procurement. Indeed, according to the interpretation set forth in the Guidance Note on offsets issued by the European Commission, 'offset requirements are restrictive measures that go against the basic principles of the Treaty [on the Functioning of the European Union] because they discriminate against economic operators, goods and services from other member states and impede the free movement of goods and services'. Although the Guidance Note mentions that offset requirements could, in certain strictly limited circumstances, be justified on the basis of article 346 of the Treaty, provided that the relevant member state can 'demonstrate that these requirements are necessary to protect its essential security interests', France has not, to our knowledge, relied on these provisions.

ETHICS AND ANTI-CORRUPTION Private sector appointments

27 When and how may former government employees take up appointments in the private sector and vice versa?

The High Authority for Transparency in Public Life (HATVP) is responsible for controlling the new private activities of former ministers, former presidents of local executive authorities, and former members of independent administrative authorities. For a period of three years, any person who has held one of these positions must refer the matter to HATVP for consideration as to whether the new private activities are compatible with their former functions.

HATVP checks whether the planned activity raises criminal or ethical challenges.

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On a criminal level, it examines whether the proposed activity exposes the person concerned to a criminal risk (ie, article 432–13 of the Penal Code prohibits a former public official from working for an undertaking that was subject to the supervisory or control powers of that former official when they still performed public functions, with which it has concluded contracts or in respect of which it has taken or proposed decisions).

On an ethical level, HATVP ensures that the activity envisaged does not undermine the dignity, probity and integrity of functions previously held, and examines whether the activity would lead the person involved to fail to comply with the requirement to prevent conflicts of interest enforced on them during their former public service, in particular when that activity is carried out in the same economic sector. Finally, it checks that the activity does not jeopardise the independent, impartial and objective functioning of the public institution in which they have carried out their duties.

Depending on the risks identified, HATVP may declare the activity as incompatible or formulate necessary reservations. The law provides that the HATVP may make public the opinions it issues after having received the comments of the person concerned and after having removed any information that infringes a secret protected by law.

Employees of the private sector who wish to join a public office are not subject to any specific regulation. They should, however, be mindful of any potential conflict of interest.

Addressing corruption

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Corruption consists of two main actions – passive and active corruption – each constituting a separate offence, made up of different elements.

The offence of passive corruption as conceived in the field of public procurement is punishable by article 432–11 of the Criminal Code. This article states that the offending conduct is divided into two distinct, but similar, offences: passive corruption and influence peddling.

These offences have in common the quality of the person likely to commit them, that of the corrupt.

Active corruption is provided for under French law by article 433–1 of the Criminal Code. The persons likely to commit active corruption are the same as those concerned by passive corruption. Furthermore, to comply with France's international commitments, the offences of foreign and international public corruption are provided for by articles 435–1 and seq of the Criminal Code.

With regard to related offences relevant to public procurement – such as bribery, embezzlement and misappropriation of public property and funds, revolving doors between public office and the private sector (pantouflage), forgery and use of forgeries, fraud, concealment, and money laundering – French law has fairly similar definitions, even if the sanctions regime is more or less severe. In particular, bribery is provided for by article 432–10 of the Criminal Code and is punishable by five years' imprisonment and a fine of €75,000.

The Sapin II Law broadened the protection afforded to whistle-blowers. However, whistle-blowers are required first to inform their managers, then a public authority and, only as a last resort, the public media. Any abusive reports (ie, reports made in bad faith) will incur civil liability. Moreover, the French Anti-Corruption Agency (AFA) has developed recommendations to assist public and private entities in the corruption prevention process (Act No. 2016–1691 of 9 December 2016 on transparency (Sapin II Law, article 3–2°). The AFA published its Best Practice Guidelines on the prevention and detection of breaches of the duty of probity online in 2017. It particularly insists on the need for contractors to set up an 'internal alert system'.

Lobbyists

29 What are the registration requirements for lobbyists or commercial agents?

Regulation of interest representation and lobbying, and of the professionals who undertake these activities was first introduced into French law by Sapin Law II. This law entrusts responsibility for the implementation and management of a monitoring system to a specially created authority, the HATVP.

Since 1 July 2017, it is mandatory for interest representatives to be registered in a detailed numerical list overseen by the HATVP, in which they must provide information on their organisation, lobbying activities and the resources allocated to them. A ministerial order of 4 July 2017 established the list of ranges relating to the detailed numerical list of interest representatives.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

In the public procurement sector, it is uncommon to use success-fee-based agents and intermediaries in a way that is comparable to other markets. In practise, some contractors use external assistance to help them understand the procurement process. They should, however, be mindful of any specific disclosure requirements. Registration may also be required where the agent's activity falls within activities listed in French law by Sapin Law II such as interest representation and lobbying.

AVIATION

Conversion of aircraft

31 How are aircraft converted from military to civil use, and vice versa?

As military aircraft are designed with a certification basis that is very different from civil requirements, obtaining a civil certificate for military aircraft would often be too difficult and costly. Certificates of airworthiness can, nevertheless, be granted for specific uses on a case-by-case basis. The process for obtaining a certificate of airworthiness is delegated to the Security Advisory Council.

The conversion of civil aircraft for military purposes would require meeting the certification specifications set by military standards.

Drones

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

Drones designed or modified for military use require a licence to be exported from France.

Civil drones will often be considered as dual use goods and therefore be also subject to export control. Indeed, civil drones often contain items covered by Category 6 of Annex I of EU Regulation 2021/821, such as infrared video cameras, lasers and other regulated parts.

MISCELLANEOUS Employment law

33 Which domestic labour and employment rules apply to foreign defence contractors?

There are no specific statutory employment rules that apply exclusively to foreign defence contractors in France. The parties can choose the governing law that applies to the employment contract. Nevertheless, to ensure maximum protection for the worker, the employee could not be deprived of certain mandatory provisions if he or she habitually works in France (including working time provisions, days off, paid holidays, minimum salary, overtime, and rules relating to health and safety). Foreign employees temporarily seconded to France will also benefit from certain French labour legal requirements during the secondment. This will ensure that the secondment will not deprive the seconded employee of the rights they would have been granted under a French employment contract.

Defence contract rules

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

The most notable are the standard administrative clauses and the technical note of the Legal Affairs Department of the Ministry of Finance dated 1 August 2019.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

If a contractor provides goods or services to the French government, the laws, regulations and policies detailed above will apply even if the work is performed outside France.

Personal information

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

Companies will be asked to provide information about their directors and certain other employees as part of the pre-qualification questionnaire process, and will usually be required to sign different statements certifying that directors and certain other personnel have not been convicted of certain offences and that the contractor, or each member of the defence consortium, is not subject to the

categories of exclusion provided for in articles L. 2341–1 to L. 2341–3 or articles L. 2141–7 to L. 2141–10 of the Public Procurement Code (PPC). Moreover, any candidate for contracts where national defence secrecy is at stake must submit a file allowing his or her company to be authorised at the various levels of defence secrecy. In such cases, employees' personal information would need to be provided to the Ministry of Defence so that relevant checks could be carried out.

Licensing requirements

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

There are no specific licensing or registration requirements to operate in the defence and security sector in France. However, depending on the nature of the particular project and its degree of sensitivity, there are specific rules governing security clearances. In addition, under the terms of article L. 2331–1 of the Defence Code, war materiel, weapons and ammunition are classified into four categories (A to D). In this respect, the Internal Security Code provide for a specific regime for the detention of each category. Finally, the production and trade of defence items are subject to the grant of a specific authorisation.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

In France, defence contractors will face different environmental legislation depending on their operations, or products or services they provide. They could be subject to regulatory restrictions in relation to as air emissions, water discharge, water pollution, noise and waste disposal, and face responsibility for electrical waste and electronic equipment, and restrictions on hazardous substances within such equipment. Applicable requirements may also incorporate energy efficiency, carbon emissions and energy consumption. Contractors involved with nuclear substances are subject to a separate and additional set of environmental obligations, as well as strict nuclear waste disposal restrictions.

Furthermore, France has a fairly elaborate framework for extra-financial transparency and declaration on corporate social and environmental responsibility. Several laws have introduced mandatory non-financial reporting for listed companies (2010 NRE Law, 2012, 2015 energy transition law and 2017). Defence contractors will also have to comply with social and environmental soft law rules governing their strategies and activities (article 1833 of the Civil Code as amended by the Action Plan for Business Growth and Transformation, PACTE Law). In addition, France looks set to deepen its legislative framework in this area by adopting a bill that will create a process for public certification of social performance and environmental issues.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

In France, companies do not have mandatory environmental targets to meet. Meeting a standard of environmental and social responsibility is voluntary. Yet the harmonisation of methodologies, making the reporting exercise more streamlined, and working on accompanying guides are essential to ensure that the environmental impacts of companies' activities are better taken into account.

40 Do 'green' solutions have an advantage in procurements?

French public procurement law takes into account sustainable development and environmental protection. In particular, the PPC allows environmental considerations as award criteria, provided they are related to the subject matter of the contract or to its conditions of execution (article R2152–7 of the PPC). The special conditions for the performance of a contract for defence and sensitive security equipment and services may, in particular, include elements of a social or environmental nature that take into account the objectives of sustainable development by reconciling economic development, protection and enhancement of the environment and social progress' (article R2312–4 of the PPC).

UPDATE AND TRENDS Key developments of the past year

41 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Legal provisions applying to framework agreements were modified in 2021 (Decree No. 2021-1111 of 25 August 2021) to comply with a decision from the European Court of Justice (ECJ, 17 June 2021, *Simonsen & Weel A/S*, C-23/20).

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Summary

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LEGAL FRAMEWORK Relevant legislation

> **1** What statutes or regulations govern procurement of defence and security articles?

Above the EU thresholds, public procurement for defence and security goods, services or construction works in Germany is governed by:

- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 concerning the coordination of procedures for the award of certain works contracts, supply contracts and public services contracts in the fields of defence and security;
- the German Act Against Restraints for Competition;
- the Procurement Regulation for Defence and Security; and • the Procurement Regulation for Construction Works (VOB/A).

Below the EU thresholds, public procurement for defence and security goods, services or construction works is governed by:

- the corresponding federal or state budgetary law;
- the Procurement Regulation for Contracts Below the EU Thresholds; • VOB/A; and
- possibly corresponding state procurement law.

Identification

> **2** How are defence and security procurements identified as such and are they treated differently from civil procurements?

Defence and security procurement is defined in Directive 2009/81/EC as procurement of military equipment, including:

- any parts, components or subassemblies thereof;
- sensitive equipment, including any parts, components or subassemblies thereof;

- works, goods and services directly related to military or sensitive equipment; and
- works and services for specifically military purposes or sensitive works and sensitive services.

As with other procurement directives, the value of the relevant contracts must be above the EU financial threshold to fall within the scope of EU and national procurement law. The applicable thresholds are, as of 1 January 2022, €431,000 for goods and service contracts and €5,382,000 for works contracts. Contracts whose value is below these thresholds are not covered by the Defence and Security Directive.

It is with regard to the structure and basic principles that the system is similar to the general rules on public procurement. Nevertheless, there are some differences, such as the fact that the contracting authority is free to choose between a restricted procedure and a negotiated procedure, while the possibility of an open procedure does not exist. Another special rule is that, in addition to the traditional grounds for exclusion and the lack of ability, there are further grounds for exclusion for bidders from public procurement procedures. They may also be excluded because they lack reliability and because exclusion is justified on grounds of national security. Specific rules also apply to protect classified information and to safeguard information and there may also be specific rules on the security of supply.

Conduct

3 How are defence and security procurements typically conducted?

Defence and security procurement for the German military can be divided into three groups. The first group comprises the procurement process for operational products, the scope for which is defined by the German military's customer product management process. This is an internal framework guideline for the capability-based determination of requirements, the cost-efficient and timely procurement of operational products and services and their efficient use in the business area of the Federal Ministry of Defence of the Federal Republic of Germany.

The industry is involved in all phases of the process, within the limits set by public procurement law. The second area of German military procurement involves the procurement of standard and military goods and services for military missions. The third area of procurement involves the procurement of complex services. The Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support as well as the Federal Office for Infrastructure, Environmental Protection and Services of the Bundeswehr are ultimately responsible for central military procurement.

The Procurement Authority of the Federal Ministry of the Interior is in charge of non-military security procurement for federal institutions. This applies in particular to security procurement for the Federal Police, Customs and the Federal Administration in general. As far as security procurement at state level is concerned, the procurement office or the requesting body is generally responsible.

The restricted procedure and the negotiated procedure with the publication of a contract notice are the standard procedures for defence and security contracts. In these two constellations, the contracting authority publishes a call for competition in the course of an EU call for tenders. Where the procedure is restricted, the contracting authority shall invite a limited number of candidates taking part to submit tenders. The corresponding bids are not subject to any further negotiation. A limited number of candidates shall be invited by the contracting authority to submit tenders in the negotiated procedure. These tenders then become the subject of negotiations.

Exceptionally, a negotiated procedure without publication of a contract notice is also permitted. The contracting entity may choose such a procedure in the following scenarios.

In the case of supply and service contracts

If, in a restricted procedure, in a negotiated procedure with a call for competition or in a competitive dialogue:

- no tenders or no suitable tenders or no applications have been submitted, provided that the original terms of the contract are not fundamentally altered; and
- no proper tenders have been submitted or only tenders that are unacceptable under the applicable procurement law or under the legal provisions to be observed in the procurement procedure have been submitted, provided that the original terms of the contract are not fundamentally altered and if all and only those tenderers are included who meet the eligibility criteria and have submitted tenders in the course of the previous procurement procedure that meet the formal requirements for the procurement procedure.

If the time limits, including the shortened time limits pursuant to section 20 (2), second sentence, and (3), second sentence, prescribed for the restricted procedure and the negotiated procedure with a competitive bidding process cannot be complied with because of:

- urgent reasons in connection with a crisis do not permit it; an urgent reason is generally present if:

- mandated foreign missions or obligations of the Bundeswehr equivalent to missions;
- peacekeeping operations;
- defence against terrorist attacks; or
- major emergencies that have occurred or are imminent, require new procurements at short notice or increase existing procurement requirements; or

- urgent, compelling reasons in connection with events that the contracting authorities could not foresee do not permit this. Circumstances justifying the compelling urgency must not be attributable to the conduct of the contracting authorities.

If, at the time of the invitation to submit tenders, the contract can be performed only by a certain company due to its technical peculiarities or due to the protection of exclusive rights, such as patent or copyright;

- if research and development services are involved;
- if the goods in question are manufactured exclusively for the purpose of research and development; this shall not apply to series production for the purpose of demonstrating marketability or covering research and development costs;

In the case of supply contracts

- For additional supplies by a contractor intended either for the partial replacement of marketable goods supplied or for the extension of supplies or existing facilities, if a change of contractor would result in the contracting authority having to purchase goods with different technical characteristics and this would lead to technical incompatibility or disproportionate technical difficulties in use and maintenance. The term of such contracts or standing orders shall not exceed five years, except in exceptional cases determined by taking into account the

expected useful life of delivered goods, equipment or systems and the technical difficulties created by a change of contractor;

- in the case of goods quoted and purchased on a commodity exchange; and
- where goods are purchased on particularly advantageous terms from suppliers who are definitively winding up their business activities or from liquidators under insolvency proceedings or similar proceedings provided for in the legislation of another member state.

In the case of service contracts

- For additional services not provided for in the design underlying the award or in the contract initially concluded but which, owing to an unforeseen event, are necessary for the performance of the service described therein, provided that the contract is awarded to the contractor performing such service, if the aggregate value of the orders for the additional services does not exceed 50 per cent of the value of the original contract; and

  1 such additional services cannot be technically and economically separated from the original contract without substantial disadvantage to the contracting authority; or
  2 such services, although separable from the performance of the original contract, are strictly necessary for its completion;

- in the case of new service contracts that repeat services awarded by the same contracting entity to the same contractor, provided that they conform to a basic design and that this design was the subject of the original contract awarded by restricted procedure, negotiated procedure with a call for competition or competitive dialogue. The contracting entity shall indicate the possibility of applying this procedure already at the call for competition for the first project; the total contract value envisaged for the continuation of the services shall be taken into account by the contracting entity when applying section 106(2)(3) of the Act against Restraints of Competition. This procedure may be applied only within five years of the date of completion of the initial contract, except in exceptional cases determined by taking into account the expected useful life of delivered goods, equipment or systems and the technical difficulties arising from a change of the company.

For contracts related to the provision of air and maritime transport services for the armed forces or security forces deployed or to be deployed abroad, if the contracting entity has to procure such services from undertakings that guarantee the validity of their tenders only for such a short period of time that even the shortened time limit for the restricted procedure or the negotiated procedure with competitive bidding, including the shortened time limits pursuant to section 20(2), second sentence and (3), second sentence of the Procurement Regulation for Defence and Security cannot be observed.

In general, military and civil security goods or services may be procured without a public call for competition where the exemption of national security from EU or GPA procurement rules applies, or for intelligence purposes. Instead, these contracts are awarded through restricted negotiated procedures in accordance with the specific security requirements for the goods and services concerned.

Proposed changes

> **4** Are there significant proposals pending to change the defence and security procurement process?

On 19 July 2022, the Act on the Acceleration of Procurement Measures for the German Armed Forces (BwBBG) came into force.

The modifications to procurement law contained therein are intended to support a rapid strengthening of the Bundeswehr's operational capability.

Under section 9, the BwBBG is initially limited in time to 31 December 2026 and, under section 8, also covers all procurement procedures already commenced but not yet completed prior to its coming into force on 19 July 2022.

At the content level, the following aspects, among others, are worth highlighting.

Joint procurement of individual specialist or area lots if justified by economic, technical or time-related reasons.

At the request of the contracting authority, a contract may nevertheless not be declared invalid despite a determination in a review procedure that the contracting authority has violated restrictions on competition if, taking into account all relevant aspects and the purpose of protecting the special defence and security interests and directly strengthening the operational capability of the German Armed Forces, compelling reasons of general interest exceptionally justify preserving the effect of the contract.

The proceedings before the Public Procurement Tribunals and the Public Procurement Senate for the review of alleged violations of public procurement law are to be expedited. In the review and appeal proceedings, the oral proceedings may be held by means of video and audio transmission. It is envisaged that the Public Procurement Tribunals may decide according to the state of the files, insofar as this serves to accelerate the proceedings. In exceptional cases, this option is also available for the second (and final) instance before the appeal court (public procurement panel at the Higher Regional Court).

It should be possible to conduct cooperative procurements with other EU member states in a simplified manner. Contracting authorities may restrict participation in a procurement procedure to bidders located in a member state of the EU if the public contract is awarded within the framework of a cooperation programme conducted with at least one other member state of the EU.

Increased consideration of security interests in the award procedure may justify the exclusion of candidates or bidders from countries outside the EU.

It is clarified that not only procurements for classic institutional intelligence services such as the Military Counter-Intelligence Service are exempt from procurement law, but now also explicitly all contracts serving the purposes of military intelligence activities, in line with the functional concept of ‘intelligence activities’.

Information technology

> **5** Are there different or additional procurement rules for information technology versus non-IT goods and services?

There are no specific procurement rules, but there are nuances to the procurement of IT goods at a contractual level. Contracting authorities generally use standardised contract templates called EVB–IT contracts. The EVB–IT contracts are specifically standardised for the purchase of IT goods and services. To prevent the contractor from being subject to foreign laws, obliging the contractor to pass on confidential information to foreign government or security authorities, these contracts generally contain corresponding 'no spy' clauses. This confidential information may have been made available to the contractor in the course of the tendering procedure or the performance of the contract. In addition, to ensure that unauthorised third parties (eg, foreign governments or security authorities) do not have access to the system or the software, there are contractual conditions that guarantee that IT products are free of secret access points.

Relevant treaties

> **6** Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

In addition to EU procurement rules, Germany is bound by the GPA procurement rules. German contractors have generally applied these regulations to military and non-military security contracts following the implementation of EU Directive 2009/81/EC on contracts in the fields of defence and security into German law. Nevertheless, the national security exemption and the arms exemption under article 346 of the Treaty on the Functioning of the European Union (TFEU) are still applied in many cases, especially in the field of arms procurement.

However, the use of these exemptions has declined in the past, largely due to strict judicial interpretation and a changed political climate.

Recently, however, the application of article 346 TFEU has come back into focus insofar as a strategy paper adopted by the German cabinet to strengthen the security and defence industry has extended the list of relevant key technologies to include surface shipbuilding, among others, thus preventing a Europe-wide tendering obligation in this area.

DISPUTES AND RISK ALLOCATION Dispute resolution

> **7** How are disputes between the government and defence contractor resolved?

There are no arbitration clauses contained in either the standard contractual terms of the German military or in those of other German security authorities. Therefore, the civil courts usually deal with the disputes between the government and the contractors. For disputes during the procurement procedures, special public procurement tribunals exist.

> **8** To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

The agreement of an alternative dispute resolution with the German military is only considered on an ad hoc basis due to the fact that the German military will not deviate from its standard terms for smaller contracts. On the other hand, for larger contracts, the German military may agree arbitration clauses on a case-by-case basis.

Indemnification

9 What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

If the state breaches the contract with the contractor, German law requires the state, like any private client, to indemnify the contractor for the damage reasonably and foreseeably caused by the breach. On the other hand, if damages result from a breach by the contractor, the contractor has the obligation to indemnify the state for any damages.

Limits on liability

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

Limitation of the contractor's contractual liability can be agreed upon. However, in recent years the procurement authorities have been very strict on enforcing unlimited contractual liability clauses.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

Generally speaking, there is no legal risk of non-payment. German contracting authorities are bound by their contracts, as is the case for any private undertaking. Moreover, sufficient funds have to be achieved available before the contract is awarded.

Parent guarantee

12 Under what circumstances must a contractor provide a parent guarantee?

The cases in which a contractor is required to provide a parent guarantee are generally those in which the contractor itself does not meet the financial and economical requirements set out in the procedural documents. A parent guarantee might, therefore, be presented as an alternative. However, the adequacy of such parent guarantee as a way of attaining the financial requirements will be for the contracting authority to decide.

DEFENCE PROCUREMENT LAW FUNDAMENTALS Mandatory procurement clauses

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

There are no procurement clauses that must be included in a defence contract or that will be necessarily implied. However, there are a great number of varying standard terms and conditions and legal regulations that are commonly included in the contract by the contracting authority. In any case, the Defense and Security Procurement Regulations refer to the obligation to take into account the rules on prices in public contracts. Thus, the contracts are also subject to the price control provisions of Price Regulation No. 30/53, which contains binding rules for the pricing of public contracts. This regulation was amended with effect from 1 April 2022. Among other things, it now contains clearer requirements for proof of a market price, an extension of the minimum retention period for documents of contractors of public contracts to a total of 10 years, a definition of the 'marketability' of a price, the requirement that the decision to conduct a price check is at the discretion of the pricing authority, and a power of estimation for the price checking authority.

Cost allocation

14 How are costs allocated between the contractor and government within a contract?

Where contracts are awarded on the basis of a competitive procedure, the contracts in question generally contain fixed prices or a mix of fixed and variable price elements. Cost accounting elements can also be included. In the case of contracts that have been awarded without competitive procedures, most contracts contain cost-oriented fixed prices or extra cost prices, and the distribution of costs between the contractor and the state depends on individual agreements. The actual distribution of costs between the contractor and the state in these cases depends on the individual agreement.

Disclosures

15 What disclosures must the contractor make regarding its cost and pricing?

To verify that prices are reasonable, contracting authorities may require tenderers to explain their prices during the award procedure and during price controls and sometimes many years after the contract has been fulfilled.

In the case that during the bid evaluation there is a deviation of more than 20 per cent between the price of the best bidder and that of the second-best bidder in terms of price, the contracting authority shall provide price clarification. The bidder shall be obliged to prove accordingly:

- whether its offer is adequate in the light of the prices stated by it in the offer;
- whether and how reliable performance of the contract can be expected at the offered prices;
- whether the applicable environmental, social and labour law regulations are complied with;
- that its bid has not been submitted specifically with the intention of displacing the market and
- whether state aid has been granted to the company.

Audits

16 How are audits of defence and security procurements conducted in this jurisdiction?

The Ministry of Defence reviews procurements for the military. On the other hand, in the case of non-military procurements, audits are the responsibility of the supervisory authority, which is usually the Ministry of the Interior. The relevant ministry also reviews procurements at the ministerial level in internal audits. In other situations, the Federal Audit Office or the competent State Audit Office is responsible for audits.

IP rights

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

The ownership of intellectual property rights is individually governed by the contracts.

Economic zones

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

We are not aware of any such economic zones or programmes in Germany.

Forming legal entities

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

The limited liability company (GmbH) represents the most common form of commercial legal personality. A notarial shareholder agreement is a prerequisite for the formation of a GmbH, whereby the notary must verify the identity of the shareholders by means of valid identification documents at the time the agreement is notarised. In addition, the minimum share capital of a GmbH is €25,000 and the company must be registered in the commercial register. The entry in the commercial register requires the confirmation of the managing director to the effect that the share capital to be contributed by the shareholders is available to the company. This is usually combined with an account statement as proof. A list of shareholders signed by the managing director must also be submitted with the application for registration.

The Civil Code Partnership is a simple partnership based on the provisions of the German Civil Code and the simplest form of company under German law. It can be described as a simple and practical instrument suitable for temporary joint ventures, in particular for tenders or as an intermediate step in the formation of a permanent joint venture structure. There are no formal prerequisites for its formation. Furthermore, neither capital nor registration is required.

Access to government records

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

As a rule, government contracts are not published or passed on to third parties. However, everyone (including foreigners) has the right to access official information held by public authorities under the Freedom of Information Act of the Federation and the states. It is generally believed that this should include records of previous procedures for awarding public contracts, including previous contracts. However, access may be denied, among other things, in cases where disclosure could prejudice international relations, the military, public safety or other security interests, or in order to protect classified information and other official secrets or trade secrets (including confidential information and intellectual property rights of third parties). The disclosure of past government contracts will often be barred by one of these exemptions.

Supply chain management

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

There are no special defence and security procurement-related rules regarding eligible suppliers, supply chain management and anti-counterfeit parts.

Economic operators will be considered eligible to participate in public procurement procedures if they meet the eligibility criteria named by the tendering authority in the tender

notice. Eligibility criteria in accordance with EU and national regulations may include requirements of professional suitability, financial and economic standing and technical or professional ability and certain compliance self-declarations. All criteria must be connected with the tendered goods, services or construction work. If the tendering procedure or the contract requires access to classified information in accordance with the German Security Clearance Act bidders must also fulfil certain security requirements.

Regulations on supply chain management (especially commitments by the contractor to ensure the security of supply for the duration of the contract and even in the event of a crisis or war) are included on a case-by-case basis in the tendering authorities' standard terms and conditions.

INTERNATIONAL TRADE RULES Export controls

22 What export controls limit international trade in defence and security articles? Who administers them?

Germany has very strict export control regulations, especially the German Foreign Trade Act, the Foreign Trade Regulation and the Military Weapons Control Act (KrWaffKontrG). These regulations govern the terms and procedures for the export of military equipment and dual-use products. The manufacture, trade, brokering and transport of military weapons and equipment as well as certain dual use goods are subject to government permission. The licence under the KrWaffKontrG is issued by the Ministry of Economic Affairs, upon consultation with the Ministry of Defence and the Foreign Office. Export licences for weapons, military equipment and certain dual-use goods are issued by the Federal Office for Economic Affairs and Export Control. Due to Germany's history, decisions to grant or withhold licences are often highly political. The German government pays particular attention to ensuring that the goods will not be misused to commit human rights violations or to exacerbate a crisis. Decisions on licences for exports of military equipment are primarily based on foreign and security policy considerations, and not on commercial or labourmarket interests. These strict German rules also apply to parts of military equipment and often means that common European defence products cannot be exported to third parties, even if the contracting parties are not German. On 16 October 2019, Germany and France agreed on new common export regulations for common defence products.

Regulation (EU) 2022/328 of 25 February 2022, in the context of Russia's actions destabilising the situation in Ukraine, strengthened the prohibition framework of article 2 Regulation (EU) 833/2014.

The export, sale and transfer of all dual-use items and technologies listed in Annex I of the EU Dual-Use Regulation to Russia or for use in Russia is now prohibited in principle, regardless of the recipient or end user, article 2 paragraph 1.

Domestic preferences

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

European and national public procurement regulations prohibit discrimination against economic operators purely on the grounds of their nationality. Therefore in general, German public procurement procedures are open to all economic operators from the EU, the European Economic Area (EEA) and Agreement on Government Procurement member states. However, on a case-by-case basis and due to the prominence of security and confidentiality concerns in defence and security matters, bidders from non-EU, non-EEA or non-Nato countries might be excluded from the tendering procedures.

For this purpose, a contracting authority's tender documents must state that it reserves the right to reject tenders on defence and security grounds.

The following measures may also be taken to protect specific security interests:

- contracting authorities may require proof of a national security audit and accept its result only if this audit is recognised as equivalent on the basis of intelligence cooperation between the countries concerned;
- they may require the presentation of a certificate ensuring the permissibility of the transport of equipment, including additional supplies in crisis situations;
- they may require an undertaking regarding access to and confidentiality of classified information;
- they may require an undertaking regarding access to and confidentiality of classified information; and
- they may require the fulfilment of additional requirements set out in certain security regulations, such as the measures formulated in the Directive on network and information security to ensure a common high level of protection of network and information systems.

Favourable treatment

24 Are certain treaty partners treated more favourably?

European and national public procurement regulations prohibit favourable treatment due to certain national or treaty statutes.

Sanctions

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

Germany adheres to United Nations and EU boycotts, embargoes and other trade sanctions. A list of country and personal related weapon embargoes can be found here.

As at 18 October 2022, embargoed countries include:

- Armenia;
- Azerbaijan
- Belarus;
- Bosnia;
- Burundi;

- China;
- Democratic Republic of the Congo;
- Democratic People's Republic of Korea;
- Haiti;
- Iraq;
- Iran;
- Republic of Yemen;
- Lebanon;
- Libya;
- Mali;
- Myanmar (previously Burma);
- Nicaragua;
- Republic of Guinea;
- Republic of Guinea-Bissau;
- Russia;
- Zimbabwe;
- Somalia;
- Sudan;
- South Sudan;
- Syria;
- Pridnestrovian Moldavian Republic;
- Tunisia;
- Turkey;
- Ukraine (Restrictive measures in view of the situation in Ukraine);
- Venezuela; and
- Central African Republic.

Trade offsets

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

Offset deals are not part of the EU and German defence procurement regulations, since they are generally incompatible with the procurement law principles of equal treatment and transparency.

ETHICS AND ANTI-CORRUPTION Private sector appointments

27 When and how may former government employees take up appointments in the private sector and vice versa?

According to the Federal Civil Servants Act, retired civil servants and former civil servants with pension benefits are obliged to report any gainful employment or other employment that is connected with their official activity in the last five years before the termination of the civil service and that could be detrimental to official interests.

If officials retire at the normal retirement age, the obligation to notify the Commission ends three years after the end of their service. In other cases after five years.

The administrative authority must prohibit the activity if it will prejudice the service's interests. Such prohibition is effective until the end of the obligation to notify.

Addressing corruption

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Corruption is punishable under different sections of the German Criminal Code. Criminal offences include bribery of German and EU public officials and German soldiers, of members of parliament, commercial bribery and bribery of non-EU foreign officials. Though there is no true enterprise criminal law in Germany, economic operators may be subject to fines if their employees commit corruption offences on behalf of the company. Economic operators whose employees have been found guilty of corruption in a court of law are excluded from participation in public procurement procedures for a period of up to five years. However, before the bidder can be excluded from the procedure, it must be permitted to present its case and have the opportunity to set out measures it will take to prevent any further wrongdoing. The competition register set up and maintained by the Federal Cartel Office provides contracting authorities with information on grounds for exclusion within the meaning of competition law. Prior to registration, the company concerned has the opportunity to comment on the data collected within two weeks and to point out any incorrectness.

Lobbyists

29 What are the registration requirements for lobbyists or commercial agents?

There are no formal registration requirements for lobbyists and commercial agents.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

There are no formal limitations on the use of agents or representatives. However, contracts issued by the Federal Ministry of Defence or its subordinates usually include standard terms requiring the

approval of intermediaries or brokers. Approval will only be granted if it is commercially appropriate and there are no disadvantages for the contracting authority.

AVIATION

Conversion of aircraft

31 How are aircraft converted from military to civil use, and vice versa?

Military aircraft may be converted to civil use if the armed services give up control of the aircraft and the aircraft is fully demilitarised. For civil use, the former military aircraft has to obtain or retain all necessary certificates and permits generally required for civil aircraft. The use of a civil aircraft for military purposes requires that the aircraft is under control of the armed services and certified by the German Military Aviation Authority.

Drones

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

In general, the aviation laws and regulations governing the inspection and certification of aircraft also apply to unmanned air systems, both autonomous and remotely piloted. Systems that do not exceed a certain weight, use a type of special propulsion and are not or only used in certain areas are excluded from certain regulations.

EU drone regulations 2019/947 and 2020/746 must be observed.

At the national level, the legal requirements have been adapted by the corresponding law on the adaptation of national regulations to the Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aerial vehicles.

MISCELLANEOUS Employment law

33 Which domestic labour and employment rules apply to foreign defence contractors?

Foreign defence contractors must adhere to German labour and employment regulations if they permanently operated in Germany or post employees in Germany. These regulations included provisions on equal treatment and non-discrimination, hiring and laying off employees, minimum wages, working conditions, health and safety measures and protective measures for pregnant women. Violations of these labour and employment laws may, besides other punishments, lead to an exclusion from further public contracting procedures.

Defence contract rules

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

Foreign and domestic defence contractors must adhere to all applicable regulations on the production, handling, transport, export and use of weapons and other relevant military goods. In

addition, if the contract involves access to classified information, contractors must observe all applicable regulations regarding the security of such information. However, foreign security clearances from EU and Nato member states might be accepted on a caseby-case basis.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

No. With the possible exclusion of labour and employment regulations, a contractor is usually bound by all applicable regulations, even if they perform work exclusively outside Germany.

Personal information

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

Economic operators participating in a public procurement procedure must generally declare, and possibly certify, that their directors, officers and leading employees have not been convicted of certain criminal offences. Usually, a self-declaration by the bidder is sufficient. If the contract involves access to classified information, personal security clearances are required for all personnel who might be involved with the contract or have access to classified information.

More detailed information on individual employees generally relates more to the specific contract and is requested as part of the suitability test and there under technical and professional capability.

Licensing requirements

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

Aside from the regulations governing access to classified information and manufacturing, trade, brokering and transport of military weapons and equipment as well as certain dual-use goods, there are no additional general registration or licensing requirements to operate in the defence and security sector in Germany.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

There are no specific environmental statutes or regulations for defence and security contractors. On a case-by-case basis, exemptions might be available from general environmental statutes or regulations for defence goods or services.

The contracting authority may require tenderers to comply with certain standards for environmental management and prove this by presenting certificates issued by independent organisations. The contracting authorities refer either to the Community eco-management and audit scheme or environmental management standards based on the relevant European or

international standards and certified by bodies conforming to Community legislation or European or international certification standards.

Equivalent certificates issued by organisations in other member states shall also be recognised.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

There are no specific environmental targets for defence and security contractors. However, the contracting authority may decide to include environmental objectives in a public procurement procedure either as performance requirements in the form of technical specifications, at the suitability test level as a requirement to meet specific environmental management standards relevant to the specific contract, or as an award criterion. In addition, it is also possible to include such criteria in the additional conditions for the performance of the contract. The use of these requirements and criteria in the defence and security sector is currently very rare.

40 Do 'green' solutions have an advantage in procurements?

The contracting authority might choose to include environmental issues and requirements either as performance requirements or as evaluation criteria in a public procurement procedure.

UPDATE AND TRENDS Key developments of the past year

41 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 5 November 2021, the Federal Council adopted the Third Ordinance Amending Ordinance PR No. 30/53, which will accordingly enter into force on 1 April 2022.

On 3 June 2022, the Bundestag passed legislation to amend the Basic Law and establish the Bundeswehr Special Fund.

The project was also approved by the Bundesrat on 10 June 2022.

The following paragraph 1a was added to article 87a of the Basic Law by the Law Amending the Basic Law (article 87a) of 28 June 2022: in order to strengthen its alliance and defence capabilities, the federal government may establish a special fund for the Bundeswehr with its own credit authorisation of up to €100 billion on a one-time basis. Articles 109(3) and 115(2) shall not apply to the credit authorisation. The details shall be regulated by a federal law.

The law was proclaimed on 30 June 2022.

In addition, the Act on the Financing of the Bundeswehr and the Establishment of a 'Special Fund of the Bundeswehr' was drafted on 1 July and proclaimed on 6 July.

OLG Düsseldorf, decision dated 22 June 2022 – VII-Verg 36/21

The Public Procurement Senate of the Düsseldorf Higher Regional Court has dismissed the immediate appeal filed by weapons manufacturer C.G. Haenel. The Federal Office of Bundeswehr

Equipment, Information Technology and In-Service Support may award a contract for the supply of new assault rifles to Heckler & Koch from Oberndorf am Neckar.

> The decision is based on an award procedure for the procurement of new assault rifles.

The review request submitted by C.G. Haenel was already rejected by the Procurement Chamber in a decision dated 10 June 2021. The Public Procurement Tribunal has now confirmed this decision by rejecting the immediate appeal. The respondent was right to exclude the applicant on the grounds of serious professional misconduct in the form of a reproachable patent infringement.

On 7 July 2022, the Bundestag passed the draft Acceleration Act. This was approved by the Bundesrat on 8 July. The Act entered into force on 19 July and expires at the end of 31 December 2026.

On 25 July 2022, the German Federal Cartel Office approved the merger of three major defence and security companies (Airbus Defence and Space GmbH, German FCMS GbR and MBDA Deutschland GmbH) and cleared the formation of a joint venture. The companies are working together as part of the Franco-German-Spanish initiative to develop the Future Combat Air System (FCAS) as part of the so-called National R&T Project. FCAS is a programme to develop a system consisting of a sixth-generation manned multi-role combat aircraft (New Generation Fighter), unmanned escort aircraft (Remote Carrier) and new weapons and communications systems.

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Italy

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Summary

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LEGAL FRAMEWORK Relevant legislation

> **1** What statutes or regulations govern procurement of defence and security articles?

Procurement of defence and security works, equipment and services by contracting authorities in Italy is regulated by legislative decree 20 April 2016, No. 50, sections 159-163, (the Public Procurement Code (PPC)), enacting European Union public procurement directives 2014/23, 2014/24 and 2014/25/EU. The PPC, in principle, applies to all public procurement contracts but carves out defence and security procurement which falls under special legislation. Legislative decree 15 November 2011, No. 208, the Military Procurement Code (MPC), which enacted EU Directive 2009/81/EC, is considered a special set of procurement rules applicable to certain defence and security contracts that prevails over the general PPC rules. The MPC, however, mostly makes selective references to the general PPC rules, introducing minor deviations. There are defence and security contracts that may fall outside the scope of both the PPC and MPC and are only subject to general EU Treaty principles. The Italian Ministry of Defence has published two enactment regulations, one for contracts under MPC (presidential decree 13 March 2013, No. 49) and one for contracts under the PPC (presidential decree 15 November 2012, No. 236).

Identification

> **2** How are defence and security procurements identified as such and are they treated differently from civil procurements?

The subject matter of the contract (ie, military/classified items; works, supply and services related to military/classified items; works and services aimed at specific military purposes) determines the application of the MPC to contracts above EU special thresholds (currently €428,000 for supply and services and €5,350,000 for works). The MPC introduces several exceptions to general PPC rules. Such exceptions are mostly aimed at guaranteeing the necessary level of protection for security and defence interests involved in defence and security contracts by ensuring that sensitive information is not divulged and is not handled by economic operators who have not obtained the necessary security clearances.

Conduct

> **3** How are defence and security procurements typically conducted?

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General principles of the Treaty on the Functioning of the European Union (TFEU) apply to all defence and security procurement. Three of the five types of tender procedures envisioned by the civil procurement rules – restricted, negotiated with or without a prior notice and competitive dialogue – are provided for by the MPC.

The publication of a notice or a request for offers is the usual start of the procedure, followed by the submission of documents showing the financial standing, technical capability and (where required) possession of security clearances by the candidates or tenderers. Such a pre-qualification phase may or may not be run jointly with the submission of technical and economic bids, with the most economically advantageous tender being the more frequent award criterion. However, contract terms and conditions are unilaterally drafted by contracting authorities and are almost invariably non-negotiable. As such, terms and conditions are advertised when soliciting requests for participation and bids, and often economic operators can only decide whether they are willing to accept them and submit an offer or whether they would rather not participate in the tender.

The assessment of bids is based on objective, transparent and non-discriminatory criteria. In particular, when the award follows a competitive bidding procedure, equality of treatment and transparency principles require that no substantial modification of the contract is permitted without a retender.

Proposed changes

> **4** Are there significant proposals pending to change the defence and security procurement process?

Article 8, paragraph 11, of Law Decree 16 July 2020, No. 76 (the Simplifications Decree), converted with amendments by Law 11 September 2020 No. 120, provides that the Italian government has to approve an enactment regulation relating to defence and security procurements. No such regulation has been approved yet.

Information technology

> **5** Are there different or additional procurement rules for information technology versus non-IT goods and services?

No. Information technology goods and services may fall under the PPC or MPC, depending on the subject matter of the contract.

Relevant treaties

> **6** Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

The MPC is based on TFEU principles and the number of contracts that do not fall under either the MPC or the PPC is limited. Italian courts consider the general exception provided by article 346 TFEU as an exception to be narrowly interpreted and affirm the applicability of TFEU principles to all defence and security procurement.

DISPUTES AND RISK ALLOCATION Dispute resolution

7 How are disputes between the government and defence contractor resolved?

Disputes concerning the award procedure are reserved for administrative courts, which have general jurisdiction on the award of public procurement contracts. Disputes concerning contractual obligations are reserved for civil courts. Arbitration and out-of-court settlement procedures are permitted only in relation to contractual obligations.

8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

There is no specific rule on the use of alternative dispute resolution (ADR) in the Military Procurement Code (MPC). ADR models (eg, arbitration and amicable settlement) are provided by the Public Procurement Code (PPC) and are applicable to defence and security contracts. The use of arbitration – which is only admissible if it is provided for in the initial tender notice or invitation and is authorised by the governing body of the contracting authority – is very common in works and long-term supply-and-service contracts, and is used more frequently in disputes between contractors and subcontractors than between contracting authorities and prime contractors.

Arbitrators have to be registered with the Arbitration Chamber managed by the Italian National Anti-Corruption Authority (ANAC), which acts as a regulator of public procurement.

Indemnification

9 What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

General rules on limitation of liability set out by the Italian Civil Code render invalid any limitations covering grossly negligent or wilful conduct. Contracting authorities are liable for non-performance, but normally do not provide any indemnity for contractors. Contractors are usually required to indemnify the contracting authority in relation to several issues that may cause liability during contract performance, mainly resorting to insurance policies (eg, third-party claims, product liability and personnel protection).

Limits on liability

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

Public contracts awarded by contracting authorities – including military and defence contracts – generally do not provide limitations on liability, and such limitations cannot be negotiated once the contract is awarded, as they would amount to an impermissible modification of the contract.

There is no statutory limitation on the ability of the contractor to recover against a contracting authority for breach of contract, and, in general, the burden of proof when asserting government liability is less strict than the one applicable to private parties.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

The risk of non-payment exists as in any other public contract. However, normally defence and security procurement procedures are launched only after the necessary funds are secured by the relevant administration. There is no specific rule prioritising payments to prime contractors, while general procurement contracts rules make it possible for subcontractors to obtain payment directly from the contracting authority if the prime contractor fails to fulfil its obligations.

Parent guarantee

12 Under what circumstances must a contractor provide a parent guarantee?

The only guarantees that are required in relation to the performance of a public procurement contract are bank guarantees or insurance guarantees. The requirement of a parent company guarantee is not envisioned by PPC or MPC rules.

DEFENCE PROCUREMENT LAW FUNDAMENTALS Mandatory procurement clauses

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

The standard draft contract, which is set forth as an attachment to the contract notice, or the invitation to tender, is non-negotiable, but, pursuant to a general Civil Code principle, clauses declared mandatory by a statute have to be read into a contract regardless of their actual inclusion. There are no defence- or security-specific clauses, the inclusion of which is required or automatic. In public procurement contracts in general, the most well-known mandatory clauses provided by national legislation are those concerning the traceability of payments (aimed at making every transfer of monies paid from the contracting authority traceable through the chain of subcontractors and suppliers of the prime contractor) and the clauses making it mandatory for successful tenderers to ensure employment continuity for personnel of past contractors (also known as 'social' clauses).

Cost allocation

14 How are costs allocated between the contractor and government within a contract?

Cost allocations between the government and contractor is usually defined by the contract itself, preferably through a fixed or firm price mechanism.

Disclosures

15 What disclosures must the contractor make regarding its cost and pricing?

Cost and price assessments are common, with at least three main purposes.

Within a competitive tender procedure, they may be aimed at verifying whether a price/offer by a tenderer is reliable and sustainable, and has not been the result of optimistic assumptions or underestimated costs (abnormally low tenders). Such an assessment is also aimed at verifying whether mandatory costs have been factored into the price offered by a potential supplier (eg, minimum wages for the workforce, or costs that cannot be subject to rebates as those necessary to ensure compliance with rules on health and safety on the workplace).

Within a non-competitive negotiated procedure, a cost analysis based on information disclosed by the prospective contractor according to Ministry of Defence guidelines is aimed at establishing the price for the goods and services to be purchased.

During the execution of a procurement contract, they may be aimed at establishing new prices for unforeseen additional goods and services required by the contracting authority and price adjustments required by unforeseen circumstances.

Audits

16 How are audits of defence and security procurements conducted in this jurisdiction?

General Public Procurement Code (PPC) rules afford contracting authorities with wide powers to audit and inspect contractors' activities to verify their performance. Cost and price assessments are also routinely carried out, especially in long-term contracts associated with military programmes. There is no limitation or timeline that can predict when audits or assessments will be carried out. The Italian National Anti-Corruption Authority (ANAC) – the anti-bribery independent authority, which also acts as the public procurement sector regulator and enforcer – also has supervisory powers and may request information and conduct inspections in relation to tender procedures and procurement contracts performance.

IP rights

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

There are no statutory rules allocating intellectual property rights created during the performance of a defence and security procurement contract differently from any other procurement contract. If the intellectual property is the result of contracted research and development activity it will be owned by the contracting authority. Otherwise, unless there are specific provisions in the contract, it will be owned by the contractor.

Economic zones

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

We are not aware of any such economic zones or programmes in Italy.

Forming legal entities

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

Joint ventures can be formed by mere contractual agreements, without creating a new entity, when parties enter into cooperation agreements. Corporate joint ventures can be created by incorporating a company pursuant to the Civil Code. In general, while contractual joint ventures can be created by the parties without resorting to a public notary, corporate joint ventures require the assistance of a public notary. The public notary takes care of validating the articles of association and the company by-laws, registering the new entity with the Company Register.

Access to government records

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

Access to public administration documents is generally allowed for interested parties by national legislation on transparency and on administrative procedures (Law 7 August 1990, No. 241 and Legislative Decree 25 May 2016, No. 97). The PPC also provides specific rules granting access to public procurement procedures documents. Restrictions apply during the tender procedure, but after the award, any information that is not covered by trade or commercial secrets, or is not classified, can be disclosed upon request, including versions of previous contracts. A trend towards enhanced transparency in public contracts is underway, with recent legislation stating that most information on public contracts has to be published on contracting authorities' websites and that any citizen may obtain information on public contracts without providing any specific reason or interest.

Supply chain management

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

Eligibility of suppliers in defence and procurement is subject to the same criteria provided by the PPC and EU procurement directives, with limited deviations. Contractors having people convicted of particular crimes, including terrorism, fraud, bribery and money laundering cannot participate in public tenders. Furthermore, financial, technical and professional requirements proportionate to the public tender subject matter can be set by the contracting authority to select eligible suppliers. Similar rules apply also to subcontractors. Technical and professional requirements may also refer to the supply chain characteristics.

INTERNATIONAL TRADE RULES Export controls

22 What export controls limit international trade in defence and security articles? Who administers them?

Pursuant to EU general rules on the export of military and dual-use items, national enactment legislation (Law 9 July 1990, No. 185 for military items and Legislative Decree 15 December 2017, No. 221 for dual-use items) provides a licensing framework for exports and, in certain cases, for intra-EU transfer of controlled items and technology. Separate directorates of the Ministry of Foreign Affairs are responsible for the issue of export licences, while Italy's customs and law enforcement agencies are responsible for policing and enforcement.

Italy does not maintain national controlled items lists that differ from the EU Military list and the Annexes to the EU dual-use regulation (No. 821/2021).

Domestic preferences

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

The PPC and the Military Procurement Code (MPC) do not provide any domestic preference rules, but, as in other countries, when such rules do not apply, it is not uncommon that contracts are directly awarded to national contractors.

Favourable treatment

24 Are certain treaty partners treated more favourably?

Agreement on Government Procurement signatories, EU members and countries that have bilateral treaties with Italy granting reciprocity of treatment are the only partners who may participate in defence and security procurement procedures launched by Italian contracting authorities.

Sanctions

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

Italy has no boycott, embargo or trade sanctions in place other than those imposed by the EU, pursuant to United Nations general positions. The responsibility for related policy measures lies with the Ministry of Foreign Affairs, while the Ministry of Economy is responsible for financial measures and enforcement.

Trade offsets

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

Trade offsets are part of the Italian defence and security procurement regime and were regulated by two Ministry of Defence directives of 2002 and 2012. Industrial compensation is, however, currently less frequent due to their inherent limited compatibility with EU rules.

ETHICS AND ANTI-CORRUPTION Private sector appointments

27 When and how may former government employees take up appointments in the private sector and vice versa?

National civil service regulation (Legislative Decree 30 March 2001, No. 165) forbids employees leaving public service from accepting private employment in industries that are subject to the regulatory or supervisory powers of their former office for three years after termination of their employment (the anti-pantouflage rule). In the event of an infringement,

both the former civil servant and the private employer risk serious penalties. There is no reverse prohibition, save for general rules aimed at preventing conflicts of interest.

Addressing corruption

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Bribery and international bribery are punished as criminal offences with incarceration and financial penalties by the Italian criminal code. Bribes can take the form of monetary payments or any other advantage. Giving, offering or agreeing to give a bribe is an offence, as is accepting, asking for or agreeing to accept a bribe.

Public administrations are bound to adopt procedures, ethics codes, and organisation models specifically aimed at preventing corruption, pursuant to law 6 November 2012, No. 190. The Italian National Anti-Corruption Authority (ANAC) has anti-bribery enforcement powers and regulates the public procurement sector.

Lobbyists

29 What are the registration requirements for lobbyists or commercial agents?

Italy does not have specific legislation on lobbying. Minimal measures have been introduced in parliament regulations for lobbyists active in the rulemaking process, but a broader set of rules on lobbyists is being discussed by the current political majority and might be the subject of special legislation.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

There is no specific statutory limitation on the use of paid intermediaries, but the defence and security procurement system is devised to foster direct participation of undertakings in transparent and non-discriminatory tender procedures. As a result, resorting to local agents, especially for foreign bidders, is not as common as it might be in other jurisdictions, especially because intermediaries not possessing the necessary participation requirements would not be in a position to place bids or participate in tenders.

AVIATION

Conversion of aircraft

31 How are aircraft converted from military to civil use, and vice versa?

While civil aircraft airworthiness is harmonised throughout the EU, subject to EU regulations and European Union Aviation Safety Agency policing, regulating the airworthiness of military aircraft is largely left to each state. It is, therefore, complicated to convert military aircraft to civil use, but it has been done several times. An example is the EH–101 helicopter (which is now known as the

AW101), which was originally designed as a military helicopter but was subsequently certified for civil use. For the same reasons, it might be easier to convert a civil aircraft to military use, even though the higher military requirements have to be met.

Drones

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

Italy's national rules on drones complement EU regulations on unmanned aerial systems (UAS) entered into force in July 2020 (EU Regulation 2019/45 on unmanned aircraft systems and on third-country operators of UAS EU Regulation 2019/947 on the rules and procedures for the operation of unmanned aircraft). The use of drones is regulated by ENAC – the national civil aviation authority – which has adopted its own implementing regulation that entered into force on 31 December 2020. Military UAS systems are subject to military items restrictions (ie, a government licence is required to manufacture, sell, hold, maintain, import and export such equipment). Military UAS systems are considered strategic assets, therefore entities manufacturing or developing military UAS systems are subject to foreign direct investment restriction provisions set forth by Law Decree 12 January 2012, No. 21. Such provisions afford the government broad special powers to impose conditions or to veto transactions or corporate decisions affecting entities developing UAS technology or manufacturing UAS systems.

MISCELLANEOUS Employment law

33 Which domestic labour and employment rules apply to foreign defence contractors?

No specific rule applies only to foreign defence contractors. Italian labour legislation applies to any worker habitually working in Italy, irrespective of any choice of law made in the employment contract.

Defence contract rules

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

The replies in other questions describe the specific rules applicable to foreign and domestic defence contractors.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

Rules on defence contracts still apply even if the contractor performs its work outside the jurisdiction.

Personal information

36 Must directors, officers or employees of the contractor provide personal

information or certify that they fulfil any particular requirements to contract with a government entity?

Yes. When participating in a tender or submitting a bid for entering into a public contract, directors, officers, sole shareholders or majority shareholders and even certain employees have to provide personal information, such as name, date and place of birth of themselves and of persons of legal age living in the same household, for the purpose of allowing anti-organised crime infiltration background checks. Furthermore, the same director, officers, employees, sole or majority shareholders have to file declarations attesting that they have not been convicted of crimes such as bribery, fraud, money laundering or terrorism. Finally, if contracts entail handling of classified information or items, security clearances need to be obtained through a process that requires disclosing personal information and provided to the contracting authority.

Licensing requirements

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

To hold, manufacture, store, maintain, sell military items and technology in Italy, a licence issued by a provincial government office is required. Importing and exporting military items requires that an economic operator is registered in the national register of undertakings operating in the defence sector and that export licences are obtained prior to any import, export or intra-EU transfer transaction. Harsh criminal penalties, including incarceration, can be incurred in the case of infringement.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

The Italian environmental code (Legislative Decree 3 April 2006, No. 152) sets forth emissions limits, licensing requirements and rules on waste disposal that apply to any works, or production or manufacturing processes. Procurement contracts and tender selection rules can incorporate environmental purposes or require economic operators to meet minimal environmental criteria set out by ministerial decrees.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

There are no special environmental targets set out by defence and security procurement rules. However, environmental targets and criteria can be part of the procurement process. Furthermore, broader environmental targets may derive from general policies (eg, greenhouse gas reduction or renewable energy production increase) or by specific provisions of environmental authorisations, licences and management systems applying to the specific operations of an economic operator involved in the performance of defence and security procurement contracts.

40 Do ‘green’ solutions have an advantage in procurements?

Recent legislation on minimal environmental criteria in public procurement contracts allows contracting authorities to award premium points to bids containing environmental-friendly

solutions with respect to the production of goods and services and life cycle management. Minimal environmental criteria are set out in the Public Procurement Code's enactment legislation and are updated by the Ministry of Environment, with reference to activity and product categories. Only contract-specific green solutions may grant advantages in the procurement process.

UPDATE AND TRENDS Key developments of the past year

41 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There have been no major developments concerning procurement in the defence and security sector over the past 12 months.

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Poland

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Summary

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LEGAL FRAMEWORK Relevant legislation

> **1** What statutes or regulations govern procurement of defence and security articles?

Since 1 January 2021, the procurement of defence and security equipment in Poland has essentially been governed in principle by the Act of 11 September 2019 – the Public Procurement Law Act (PPL), which incorporates the EU Defence and Security Directive (2009/81/EC) into Polish law, and by section VI of the PPL in particular.

In the case of the procurement of arms, munitions or war material referred to in article 346 of the Treaty on the Functioning of the European Union (TFEU), if the essential interests of national security so require, the PPL does not apply. Instead, the Decision of the Minister of National Defence No. 367/MON of 14 September 2015 will apply. This decision regulates the principles and procedures of awarding contracts to which the provisions of the PPL do not apply. The decision is supplemented by a number of additional regulations on planning, preparation, justification and approval procedures regarding defence procurement to which Decision No. 367/MON applies.

The use of such an exemption from the PPL rules can require the application of the Act on Certain Agreements Concluded in Connection with Contracts Essential for National Security of 26 June 2014 (the Offset Act). The Act sets out the rules for concluding agreements in connection with the performance of contracts related to the production and trade in arms, munitions and war materiel, commonly called offset contracts.

The public procurement rules also do not apply to the procurement of defence and security equipment in the situations described in article 13 of the PPL, which include but are not limited to the following:

- the procurement is subject to a special procedure: (1) under an international agreement if Poland is a procurement party; (2) in cases of government-to-government procurement if Poland is a procurement party; (3) of an international organisation purchasing for its purposes, or to contracts that must be awarded by the Republic of Poland in accordance with this procedure;

- the application of the provisions of the PPL would oblige the contracting authority to supply information the disclosure of which would be contrary to the essential security interests of Poland; and
- in the event of contracts provided for intelligence or counter-intelligence activities.

Notwithstanding the exemption of the PPL, general principles derived from the TFEU apply to such excluded procurements, including the principles of equal treatment, non-discrimination, transparency, proportionality and mutual recognition.

Identification

> **2** How are defence and security procurements identified as such and are they treated differently from civil procurements?

A procurement by a Polish contracting authority falls within the scope of the PPL when the contract has a value equal to or greater than the EU financial thresholds for goods and services and for works (from 1 January 2022 for goods and services €431,000 and for works €5,382,000), and if the procurement covers:

- the supply of military equipment, including any parts, components, subassemblies or software;
- the supply of sensitive equipment, including any parts, components, subassemblies or software;
- works, supplies and services directly related to the security of the facilities at the disposal of entities performing contracts in the fields of defence and security, or related to the equipment referred to above and all parts, components, and subassemblies of the life cycle of that product or service; and
- works and services for specifically military purposes or sensitive works and sensitive services.

Notification of a procurement procedure will be provided in the Official Journal of the European Union.

The key differences between procurement procedures carried out under the specific defence rules and under general procurement rules are:

- the mechanisms put in place to protect sensitive information and to ensure defence and security interests are protected (eg, restriction of the range of contractors authorised to obtain classified information);
- a broader catalogue of the circumstances justifying the exclusion of economic operators from the procurement procedure;
- the power of the contracting authority to restrict the involvement of subcontractors in certain situations;
- the limitation of the number of contract award procedures which may be applied (this only applies to procedures for awarding contracts in which an initial qualification of contractors is possible (eg, restricted tender or negotiated procedure with prior publication));
- a wider range of tender assessment criteria (other than standard criteria such as viability, security of supply, interoperability, and operational characteristics indicated in terms of reference);

- additional rights for the contracting authority to reject an offer or cancel the procedure; and
- differences in the content of contract notices or terms of reference.

Decision 367/MON (applicable if the application of the provisions of the New PPL is excluded because of the existence of an essential state security interest) imposes more stringent requirements regarding procurement. It limits the scope of procurement procedures to just three:

- negotiations with one supplier;
- negotiations with several suppliers; and
- exceptionally negotiated procedure with prior publication.

In addition, the Decision does not provide the mechanism for lodging appeals against the decisions of the contracting entity to the National Appeals Chamber. This Chamber can only consider procurement disputes regulated by the New PPL. In the case of procurement under Decision 367/MON, contractors can only file claims in civil courts.

Conduct

3 How are defence and security procurements typically conducted?

The procurement of standard defence and security equipment is usually conducted as public procurement procedure regulated by the PPL. The strategic procurement, or any other procurement that is related with protecting the essential security interests of the state, is typically conducted on the basis of Decision 367/MON or a government-to-government arrangement (eg, contracting with the US government based on a foreign military sales programme).

Under the New PPL there are two procedures available for all defence and security procurements:

- restricted procedure; or
- negotiated procedure with the publication of a contract notice.

In addition, there are four more procedures that may be applied in certain cases:

- competitive dialogue;
- negotiated procedure without the publication of a contract notice;
- single-source procurement; or
- electronic auction (in the case of the restricted procedure or the negotiated procedure with the publication of a contract notice).

Most procurement procedures involve a pre-qualification process in which bidders must demonstrate their financial stability and technical capability, including experience in performing similar contracts. The way that the procurement procedure proceeds depends on whether the authority has chosen a procedure that permits contracts and requirements to be negotiated with bidders. The negotiations phase is usually limited, with many of the contract terms being identified as non-negotiable. The evaluation process is undertaken using transparent award criteria, which are provided to bidders in advance in the tender documents. Once the winning bidder is selected, there is relatively little scope for further negotiation.

Decision 367/MON states that the procurement procedure may take the form of negotiations with one or several suppliers and, in exceptional cases, if it is not possible to define a closed catalogue of potential contractors, in a negotiated procedure with prior publication.

Proposed changes

> **4** Are there significant proposals pending to change the defence and security procurement process?

Currently, the most significant changes in respect of public procurement (including defence and security procurement) concern the indexation of remuneration. Due to the many serious economic problems faced by businesses as a result of the post-pandemic recession and war in Ukraine, Polish legislature decided to modify the scope of the indexation clause included in public procurement contracts. From 10 November 2022, the indexation clause has to be used in a works contract, supply contracts and in service contracts concluded for a period of more than six months (previously, this only applied in the case of works contracts or service contracts concluded for a period of more than 12 months). The legislator also modified the grounds for amending a contract and indicated that the contracting authority also has a legal basis for modifying an agreement in respect of price (previously, the Polish Public Procurement Office indicated that there such possibility exists but now it will be clearly guaranteed by the law).

Information technology

> **5** Are there different or additional procurement rules for information technology versus non-IT goods and services?

There are no specific or additional rules that relate to IT procurement.

Relevant treaties

> **6** Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

The majority of defence and security procurements in Poland are conducted in accordance with the Agreement on Government Procurement, EU treaties or relevant EU directives. The number of contracts awarded based on the national security exemptions is limited, but the value of these contracts is usually substantial.

DISPUTES AND RISK ALLOCATION Dispute resolution

> **7** How are disputes between the government and defence contractor resolved?

The PPL provides a legal remedy framework which may be used by the contractors who have, or who had, an interest in winning a contract or have suffered, or may suffer, damage due to the contracting entity's violation of the provisions of the PPL. Disputes between the contracting authority and a contractor are adjudicated by the National Appeals Chamber (NAC) in Warsaw as a state entity (quasi-court) specialising in such disputes.

Disputes are adjudicated very quickly – usually within 14 days of submitting an appeal and usually after 1 hearing. Disputes are resolved by the NAC in accordance with the dispute procedure, which is regulated mainly by the PPL and partially by the Polish Civil Procedure Code.

A ruling issued by the NAC can be appealed before the Regional Court in Warsaw, which acts as a public procurement court. The judgment of the Regional Court in Warsaw may be contested by way of a cassation appeal filed with the Supreme Court.

The NAC has the power to adjudicate disputes related to procedures for awarding public contracts while other disputes regarding, for example, the performance of public contracts are adjudicated by the common courts. In most procurement procedures conducted on the basis of an exemption from the PPL (eg, where Minister of National Defence Decision No. 367/MON of 14 September 2015 applies), the disputes are adjudicated by the common courts. In practice, it means that the dispute may last a very long time and may be completed many months after the contract was awarded to a competitor. This is a significant difference compared with procurements under the PPL.

> **8** To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

The PPL introduced new provisions concerning formal alternative dispute resolution used to resolve conflicts between a contracting authority and a contractor. The legislature considered statutory regulation to be necessary because of the lack of the resolution of public procurement matters in practice.

The mediation (or another amicable dispute resolution method) is initiated with each party submitting a request for mediation with the Court of Arbitration at the General Counsel to the Republic of Poland, a selected mediator, or the person affecting another amicable dispute resolution method. It should be noted that mediation is mandatory in certain cases. If the estimated value of the contract is determined as equal to or greater than the zloty equivalent of €10 million for supplies or services and of €20 million for works, and the value of the subject of the dispute exceeds 100,000 zlotys, the court will refer the parties to mediation or to another amicable dispute resolution method at the Court of Arbitration at the General Counsel to the Republic of Poland, unless the parties have already indicated a choice of mediator or other person with regard to another amicable dispute resolution method. The legislation indicates that, as a rule, mediation should be conducted by the Court of Arbitration at the General Counsel to the Republic of Poland. The mediation procedures conducted by this court are resolved under the rules of the Court of Arbitration.

Indemnification

> **9** What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

There are no specific rules governing liability under a defence procurement contract. During the contract performance phase, the contractual liability of the parties is governed by the contract and the general rules of Polish civil law. The PPL does not modify these principles, except in regard to cooperation with subcontractors in construction works contracts. There are no statutory or legal obligations on a contractor to indemnify the government, although contractual indemnities may result from negotiation (subject to a negotiated procedure being undertaken).

The PPL does not regulate the liability of the awarding entity for breach of law during the award procedure. It only provides that in the event of cancellation of the procurement procedure for

reasons attributable to the contracting authority, contractors who have submitted valid tenders shall be entitled to claim reimbursement of the reasonable costs of participating in the procedure, in particular the costs of preparing the tender.

However, the Supreme Court on 25 February 2021 adopted a resolution (III CZP 16/20), according to which the recovery of damages by a contractor whose bid was not selected as a result of the violation by the contracting authority of the provisions of the PPL, does not require a prior finding of a violation of the provisions of the PPL by a final ruling of the NAC or a final court ruling issued after recognising a complaint against a ruling of the NAS. As a result, the contractors have the right to make a claim for damages against the contracting authority in certain situations, including violations of the PPL.

Limits on liability

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

The contracting authority can agree to limit a contractor's contractual liability. However, the usual policy of awarding entities is to not accept a limit unless it is reasonable or is common market practice. It is common practice in Poland that a contracting entity's liability towards contractors is limited to the amount of a contract's value. The contract award procedure used by the contracting authority will determine the extent to which the limitation of liability is negotiable.

The PPL introduces also a list of prohibited contractual provisions on the basis of which certain kinds of contractor liability are excluded. The proposed provisions that a contract may not envisage are:

- contractor's liability for delay, unless it is justified by the circumstances or the scope of procurement;
- the imposition of contractual penalties on the contractor that are not directly or indirectly linked to the subject of the contract or proper performance thereof; and
- the contractor's liability for the circumstances for which sole liability rests with the contracting authority.

Public contracts usually include provisions on the payment of liquidated damages. According to the Polish Civil Code, the result of introducing such a clause is the elimination of further liability by the payment of an amount stipulated in advance in a contract. However, the public contract usually explicitly outlines the possibility of claiming damages for the amount exceeding the amount of the contractually stipulated liquidated damages.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

In theory, there is a risk of non-payment, as with all customers. However, according to the Act on Public Finances, the awarding entities can only undertake obligations that are within their budgets. Therefore, in practice, the practical risk of non-payment for an undisputed, valid invoice by the awarding entity is very low. Additionally, major defence procurements are conducted in line with

the Polish Armed Forces development programmes. These programmes are financed from a special Armed Forces modernisation fund or a state budget. Currently, purchases of equipment by the Ministry of Defence for defence needs are carried out on the basis of the updated Plan for the Technical Modernisation of the Polish Armed Forces for the years 2021–2035. Under it, the ministry is permitted to conclude multi-year contracts with flexible budgets. The ministry assumes that 524 billion zlotys will be spent from 2021 to 2035.

In addition, in connection with the war in Ukraine and increasing military spending needs, the Polish Parliament introduced the Homeland Defence Act in 2022. Defence spending is expected to increase to 3 per cent of GDP from 2023 (compared with 2.4 per cent of GDP in 2022). The new legislation also established the Armed Forces Support Fund, the launching of which opens up new avenues for raising finance for the modernisation of the Polish Armed Forces. In 2023, 97.4 billion zlotys is to be allocated to national defence (compared with approximately 57 billion zlotys in 2022) as well as additional funding for the modernisation from the Armed Forces Support Fund.

Parent guarantee

12 Under what circumstances must a contractor provide a parent guarantee?

The contracting authority should specify in its initial tender documentation its requirements concerning the guarantees to be provided by the contractor. Under the PPL, there is no obligation to provide a parent guarantee. The contracting entity may require security in respect of performance of the contract. This is customary for large contracts. The procurement regulations contain a list of forms in which such security can be provided. These include, in the main, bank guarantees and insurance guarantees (performance bonds). The presentation of a performance bond is only mandatory in the case of offset agreements.

DEFENCE PROCUREMENT LAW FUNDAMENTALS Mandatory procurement clauses

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

There are mandatory clauses that must be included in a defence procurement contract based on the PPL (eg, indexation clause in the event of changes in the prices of materials or costs linked to the performance of the contract if the works contract), the supply contract or the service contract was concluded for a period of more than six months. There are also numerous provisions contained in the Polish Civil Code and other legal acts that will apply regardless of whether they are included in a defence procurement contract or not. The most important are mandatory provisions that cannot be modified by the parties to a contract (eg, the scope of the public contract, termination and duration). Other provisions (non-mandatory) stem from, in the main, the Polish Civil Code (regarding payments, liability, warranty, etc) and will be applicable unless otherwise agreed by the parties.

Cost allocation

14 How are costs allocated between the contractor and government within a contract?

There is no allocation of costs in the case of public contracts. The consideration due to the contractor is indicated in a contract, usually as a fixed price for all contractual consideration. All costs incurred or estimated by the contractor plus an agreed profit margin would need to be included in the price. The only exception is the indexation clause indicated in the PPL. Under it, a contracting authority is obliged to modify remuneration in the event of changes in the prices of materials or costs linked to the performance of the contract, if the works contracts, a supply contract or a service contract was concluded for a period of more than six months.

Disclosures

15 What disclosures must the contractor make regarding its cost and pricing?

The contractor may be required to disclose the cost and pricing information in the case of complex procurements (typically in the form of a spreadsheet indicating the elements of the price and how they have been calculated).

Additionally, in case there is concern that the offered price is abnormally low or doubts are raised by the contracting authority as to the possibility of performing the subject of the contract in accordance with the requirements, the awarding entity has a right to require more detailed information regarding cost and pricing. In the case of works contracts or service contracts, the contracting authority is obliged to request such explanations regarding abnormally low prices.

Audits

16 How are audits of defence and security procurements conducted in this jurisdiction?

Audits of defence and security procurements are conducted by:

- the Armament Agency – the Agency regularly conducts audits by internal audit and control units;
- the Supreme Audit Office – temporarily, from the perspective of general compliance with the law and with the Act on Public Finances in particular; and
- the Ministry of Defence's Office of Anticorruption Procedures and the Public Procurement Office, during the stage of procurement proceedings.

If the procurement is financed from EU funds, there an additional audit regarding the spending of EU funds might have to be performed.

IP rights

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

In the description of the subject of a contract, the contracting authority may require the transfer of intellectual property rights or the granting of a licence. The usual policy on the ownership of IP under public contracts is that IP that was created before the signing of the contract will normally vest with the contractor generating the IP, in exchange for which the awarding entity will expect to have the right to disclose and use the IP for the contracting authorities' purposes (licence). However, the awarding entities will expect that any IP that is created by the contractor exclusively

for the awarding entity in/during performance of the contract to be transferred to the awarding entity.

Economic zones

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

There are no economic zones or programmes dedicated exclusively to defence contractors in Poland. In general, economic zones or similar special programmes exist in Poland for the benefit of businesses. Defence contractors may not only benefit from undertaking economic activity in economic zones, but also in areas where there are a lot of companies active in specific sectors; sometimes they are grouped in clusters, such as the Aviation Valley Association in southern Poland.

Forming legal entities

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

There are various types of legal entities that may be formed in Poland, including limited liability companies, general partnerships, limited liability partnerships, limited partnerships, limited joint stock partnerships, simple joint-stock company and joint stock companies. Business activities may also be conducted in the form of individual business activity, civil partnerships (under a contract) or by the branch office of a foreign company.

Joint ventures can be corporate or commercial. A corporate joint venture would involve the joint venture's parties setting up a new legal entity (likely, a limited liability company registered in Poland), which would be an independent legal entity able to contract in its own right and where the joint venture parties are the shareholders. It is relatively straightforward and inexpensive to establish a company (the required share capital for a limited liability company is 5,000 zlotys). The parties must file a motion together with respective attachments (eg, articles of association and so on) with a registry court and pay the applicable filing fee. The company will gain legal personality once entered in the National Court Register. The joint venture's parties would also likely agree in a shareholders' agreement the roles and responsibilities of each shareholder and their respective obligations to invest capital and resources in the company. A commercial joint venture does not involve any separate legal entity, and the parties contractually agree each party's roles and responsibilities based on various types of agreements such as cooperation agreements, consortium agreements and agreements on a common understanding. In public procurement, the most popular type of joint venture is a commercial consortium based on a consortium agreement.

Access to government records

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

Under the Access to Public Information Act 2001, there is a general right for the public to access information held by public bodies. As the Ministry of Defence is a public body, this right would, on the face of it, extend to contracts and records held by the ministry, allowing anyone to request documents related to both the procurement and the contract performance phase. The PPL also

allows procedure records and annexes to be accessed. Such records are public and made available upon request. Annexes to the procedure record (such as tenders) are available after the selection of the most advantageous tender or cancellation of the procedure.

However, Polish law indicates a few exemptions from disclosure of information related to a contract award procedure that primarily covers classified information at the levels of restricted, confidential, secret and top secret, and information that is regarded as a business secret of the contractor. In such cases, a contractor is entitled to request that information of a technical, technological, organisational or other nature, which is of economic value should not be disclosed by that contracting entity. Procedures conducted under Decision 367/MON, which are aimed at securing the essential security interests of the state, are commonly set at the 'restricted' level. Therefore, public access to documents under such procedures is limited

Supply chain management

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

Subject to limited exceptions, the New PPL obliges an authority to reject tenders from bidders who have been convicted of certain serious offences. They also give the contracting authority discretion to exclude bidders on other grounds, such as insolvency or gross professional misconduct. The rules expressly permit contracting authorities to consider the same exclusion grounds for sub-contractors, as well as giving them broad rights, for example, to require a supplier to disclose all sub-contracts or to flow down obligations regarding information security.

In the case of procurements based on Decision 367/MON, the contracting authority may also limit the use of subcontractors or may require specific conditions to be met by subcontractors.

Under the PPL, contracts for defence and security equipment may be applied for by operators established in one of the states belonging to the European Union or to the European Economic Area, or in a state with which the European Union or the Republic of Poland has entered into an international agreement concerning such contracts. The contracting authority may specify in the contract notice that a defence and security contract may also be applied for by contractors from states other than those listed above. In the case of defence and security procurements, the contracting entities may shape the management of the supply chain of the contractor.

Despite general permission for contractors to use subcontractors under the PPL, the contracting entity has the right to:

- limit the scope of the contract which may be subcontracted;
- request the contractor to specify in his or her offer which part or parts of the contract it intends to subcontract to fulfil the subcontracting requirement;
- request the contractor to subcontract a share of the contract in a non-discriminatory manner; or
- to refuse to consent to a subcontract with a third party if that party does not comply with the conditions for participation or if there are grounds for exclusion.

INTERNATIONAL TRADE RULES Export controls

22 What export controls limit international trade in defence and security articles? Who administers them?

The Polish legislation implements EU regulations regarding export controls such as Council Regulation No. 428/2009 of 5 May 2009. The strategic goods (including dual-use items) captured by the regulation are known as 'controlled goods' as trading in them is permitted if, where appropriate, authorisation is obtained.

On the basis of Act of 29 November 2000 on International Trade in Goods, Technologies and Services of Strategic Importance for National Security and for the Maintenance of International Peace and Security, entrepreneurs are obliged to obtain a permit for the export of goods of strategic importance.

The EU has adopted the Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (the Common Position) and an accompanying list of military equipment covered by such a Common Position (the Common Military List) in the EU. The Common Position and Common Military List have been implemented by Poland into its own national legislation.

Domestic preferences

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

If the Act of 11 September 2019 Public Procurement Law (New PPL) applies, there is no scope for domestic preferences. Foreign contractors can bid on procurement directly without any local partner or without any local presence.

However, where article 346 of Treaty on the Functioning of the European Union (TFEU) is relied upon in order to exclude the application of the New PPL, defence procurement proceedings are conducted according to Decision 367/MON. The contracting entity may then request that the prime contractor be a domestic company if it can be demonstrated that the essential security interests of the state justify it. Furthermore, on the basis of Decision 367/MON the contracting entity may demand from the foreign contractor additional obligations such as offset obligations or the establishment of production or maintenance capacity in Poland.

The result is that domestic contractors may be given a more favourable position in comparison with foreign contractors.

Favourable treatment

24 Are certain treaty partners treated more favourably?

Only member states of the European Union and signatories of the Agreement on Government Procurement or a free-trade agreement with Poland are able to benefit from the full protection of the New PPL. Contractors from other countries may be less favourably treated, including facing total exclusion from bidding in procurement proceedings.

Sanctions

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

Poland complies with all EU-implemented embargoes and (financial) sanctions that are imposed by the United Nations or the EU. All of these embargoes and sanctions are implemented through EU regulations, which have direct legal effect in each member state. Poland complies also with the economic and trade sanctions imposed by organisations such as the Organization for Security and Cooperation in Europe and the North Atlantic Treaty Organization.

Currently, the most important trade sanctions imposed by the Polish Parliament are those imposed on Russia on the basis of the Act of 13 April 2022 on Special Solutions to Prevent Support for Aggression against Ukraine and to Protect National Security. This regulation (based on EU law) introduces an EU-wide ban on the participation of Russian contractors in public contracts and concessions.

Trade offsets

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

Defence trade offsets are part of Poland's defence and security procurement regime. However, the use of offsets is limited to specific cases. They may be required only if both the procurement itself and the related offset are justified by the existence of an essential state security interest of the state. Offset requirements apply only to foreign contractors so they can be used as a form of domestic preferential treatment.

The Offset Act is the governing regulation regarding offset agreements and was harmonised with the EU approach to offsets. The requirement for an offset can be justified on the basis of article 346 paragraph 1 (b) TFEU if it is necessary for the protection of the essential security interests of the state. Offsets are not performed in public procurement procedures under the PPL. They are admissible only in procedures governed by Decision 367/MON or in other procurements that are exempted from the PPL (eg, G2G agreements).

Offsets are negotiated by the Ministry of Defence. Signing an offset contract occurs after a procedure that consists of supplying the contractor with offset assumptions drafted by the ministry and a submission by the foreign contractor of an offset offer that responds to the assumptions.

ETHICS AND ANTI-CORRUPTION Private sector appointments

27 When and how may former government employees take up appointments in the private sector and vice versa?

The employment of former government employees in the private sector and vice versa is subject to restrictions stipulated in:

- the Act of 11 September 2019 Public Procurement Law (New PPL);
- Minister of National Defence Decision No. 367/MON of 14 September 2015;

- the Act of 21 August 1997 regarding Limitation of Conducting Business by Persons Exercising Public Functions; and
- the Homeland Defence Act of 11 March 2022.

Both the PPL as well as Decision 367/MON state that an economic operator that was involved in the preparation of a given contract award procedure, or whose employee was involved in the preparation of such a procedure, must be excluded from such procedure. Under the PPL, the exclusion is not mandatory if the distortion of competition caused can be remedied by another method than excluding the operator from participating in a procedure.

According to the Act regarding Limitation of Conducting Business by Persons Exercising Public Functions, governmental employees specified in this Act may not be employed or perform other activities for an entrepreneur within one year of the date of leaving their position or function if they participated in the issuance of a decision in individual cases concerning that entrepreneur.

Under the Homeland Defence Act, members of the Polish Armed Forces cannot:

- be employed nor undertake employment on the basis of another title or perform another occupation;
- be a member of the management board, supervisory board or audit committee of a commercial law company,
- hold more than 10 per cent of shares representing more than 10 per cent of the share capital in a commercial law company, if, within the three years prior to being discharged from professional military service, he participated in a procurement or task order procedure, which was subsequently awarded or commissioned to such an entrepreneur or its subsidiary.

Additionally, a professional soldier may not, within three years of being discharged from professional military service, engage in business consisting in the production or marketing of defence products included in the list referred to in article 346 paragraph 2 of the TFEU or conduct such business jointly with other persons or manage such business or be a representative or agent in the conduct of such business.

Addressing corruption

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Polish law criminalises domestic and foreign corruption practices. Moreover, the PPL provides for sanctions for contractors who (or whose management or supervisory board members) have been found guilty of corruption by a final court judgment. Such contractors must be excluded from procurement procedures. Moreover, on the basis of Decision 367/ MON, when a contract is being signed, the contractor is obliged to sign a clause under which the contractor will pay liquidated damages in the amount of 5 per cent of the gross value of the contract in the event of corruption within the procurement procedure involving the contractor or its representatives.

Lobbyists

29 What are the registration requirements for lobbyists or commercial agents?

The Lobbying Act 2005 requires that anyone active in the business of lobbying should be registered with the register of entities conducting lobbying activities held by the minister relevant for administrative affairs.

The rules of professional lobbying activity in the Sejm and Senate are set out in the Sejm's and Senate's regulations. Persons performing intermediation services in executing contracts concerning military equipment need to possess the relevant licence in accordance with the Act of 13 July 2019 on Conducting the Business of Manufacture and Sale of Explosives, Weapons, Ammunition and Technology for the Military or Police.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Polish law does not provide for such limitations.

AVIATION

Conversion of aircraft

31 How are aircraft converted from military to civil use, and vice versa?

Civil aircraft may not fly in Europe unless they comply with the airworthiness regime established pursuant to Regulation (EC) 2018/1139 or, if they fall within Annex I of the Regulation, are approved by individual member states.

Regulation 2018/1139 requires a type of certification process in accordance with certification specifications promulgated by the European Aviation Safety Agency (EASA). Annex I permits EU member states to approve ex-military aircraft, unless EASA has adopted a design standard for the type in question.

Moreover, there are separate registers for military and civil aircraft at the national level of legislation. The implementation of the registers of civil aircraft tasks results from the Aviation Law 2002 and the Minister of Infrastructure Regulation of 25 March 2021 on the register of civil aircraft, signs and inscriptions placed on aircraft and the list of distinguishing marks used for flight by aircraft not entered in the register of civil aircraft.

The register for military aircraft is maintained by the Ministry of Defence and is mainly based on the regulation adopted in Order No. 3/MON of the Ministry of Defence dated 11 February 2004 on the keeping of a register of military aircraft. The order contains provisions that suggest that an aircraft cannot be included in both registers at the same time. For example, to include an aircraft in the military register, the application should be accompanied by a certificate of removal from a foreign aircraft register where the previous user was not from the Armed Forces. Until a military aircraft is removed from the military register, it cannot be entered into another aircraft register.

Drones

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

The manufacturing and trade of unmanned aircraft systems (UAS) or drones for the military purposes requires a licence issued in accordance with the Act of 13 June 2019 on conducting business activity within the scope of manufacturing and trade in explosives, weapons, ammunition and products and technology for military or police purposes.

The manufacturing and trade of UAS or drones for other purposes is currently in the process of harmonising the EU regulations. On 11 June 2019, two EU regulations on drones were published to harmonise the law in the EU in this field: the Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 and Commission Implementing Regulation (EU) 2019/947 of 24 May 2019.

From 31 December 2020, the registration of drone operators, who use equipment equal to or greater than 250 grams, or less than 250 grams if the drone is equipped with a sensor capable of collecting data, will be mandatory. On the basis of these new regulations, drone manufacturing and trading will be subject to a number of exploitation requirements and requires qualification within one of the categories proposed by the EU.

MISCELLANEOUS Employment law

33 Which domestic labour and employment rules apply to foreign defence contractors?

There are no specific statutory employment rules that apply exclusively to foreign defence contractors. If the work is to be performed by a Polish worker or in Poland, the employment contract with the foreign contractor cannot be less favourable to the employee than the rules stipulated in Polish labour law. The choice of a foreign law may therefore, only result in the implementation of more favourable obligations (eg, longer holiday periods). Foreign contractors should also consider tax and insurance-related consequences in relation to the performance of work by employees in Poland.

Defence contract rules

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

The answers above provide the details of the laws, regulations and decisions applicable to the defence contracting authorities and contractors, most notably the New PPL, Decision 367/MON and the Act on Certain Agreements Concluded in Connection with Contracts Essential for National Security of 26 June 2014 (the Offset Act). Apart from that, there are other mandatory provisions of Polish law with respect to defence contracts provided by acts such as the Industrial Property Law dated 30 June 2000, the Act on Copyright and Related Rights of 4 February 1994 or other legislation governing supervision of military equipment or assessment of conformity of goods.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

If a contractor provides goods, services or works to a Polish awarding entity, the regulations detailed above will apply generally to all activities of the contractor related to the performance of the contract. If the work is performed outside of Poland, Polish rules will apply only to delivery of the results of these works to a Polish awarding entity unless the contract provides otherwise. A Polish awarding entity may, for instance, request the right to audit the production units of the contractor located abroad.

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Personal information

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

Companies will be asked to provide information about their management and supervisory board members as part of the pre-qualification process, and will usually be required to provide the official certificates certifying that management and supervisory board members have not been convicted of certain offences. In addition, the name, place of residence and the information from the criminal records of these persons must be disclosed to the contracting authority. On the basis of this information, the contracting authority makes a decision concerning a contractor's potential exclusion.

Licensing requirements

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

The Act of 13 June 2019 on conducting business activity within the scope of manufacturing and trade in explosives, weapons, ammunition and products and technology for military or police purposes provides for specific licensing requirements to operate in the defence and security sector in Poland.

These requirements relate to various areas of business activity. For example, one of the criteria is that two members of the management board of the company need to be citizens of Poland or an EU or European Economic Area member state.

The licensing authority is the Minister of Internal Affairs. In addition, a contractor may be obliged to meet additional procurement requirements such as obtaining a necessary licence to operate in the defence and security sector issued by the country of the contractor's residence. The contracting authority publishes specific conditions in the procurement documentation (typically in terms of reference). The defence contractor may be also required to meet other procurement conditions, such as military quality control systems.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

Contractors producing or supplying goods and services or importing them into Poland will face different environmental legislation depending on their operations, product or service. The most important act in this area is the Polish Environmental Law. Contractors could face regulations encompassing, among other things, air emissions, water discharges, water pollution, noise and waste disposal, and face responsibility for electrical waste and electronic equipment and restrictions on hazardous substances in such equipment. Applicable requirements may also incorporate energy efficiency, carbon emissions and energy consumption.

In some circumstances, there are exemptions, derogations or exemptions from environmental legislation for defence and military operations. One of them is derogation in respect to military

aircraft from Regulation (EC) No. 2018/1139 of 4 July 2018 on common rules in the field of civil aviation and establishing the European Union Aviation Safety Agency.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

The companies may need to meet environmental targets under respective environmental legislation. The contractors may be required to meet environmental targets if their activity has a negative impact on the environment. These requirements are the most important for manufacturers. However, in general, any activity that influences the environment may require relevant environmental permits. In Poland, the authorities conducting inspections and issuing permits are, in particular, the Ministry of Environment and local government administration bodies.

40 Do 'green' solutions have an advantage in procurements?

The contracting authorities may include in the procurements 'environmental' parameters such as life-cycle costs of a product or non-price environmental criteria for the evaluation of tenders. If such a requirement is included in the terms of reference then the contractor offering products compatible with such requirement may obtain an advantage. The use of environmental parameters is recommended by the government but it is not obligatory.

UPDATE AND TRENDS Key developments of the past year

41 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The main topics of the past year were the war in Ukraine and the post-pandemic recession. Poland's situation has changed rapidly following the Russian invasion of Ukraine. As a result, the Polish Government decided to accelerate policy implementation in the defence and security sectors. The main aim is to strengthen Poland militarily and to ensure the safety of the country's citizens now. In effect, defence spending is expected to increase to 3 per cent of GDP from 2023 (compared with 2.4 per cent of GDP in 2022). In 2023, 97.4 billion zlotys will be allocated to national defence (compared with approximately 57 billion zlotys in 2022). This is the highest amount of military spending in the history of the Polish Armed Forces. Therefore, the number of contracts concluded in the defence and security sectors is increasing. The largest military contracts have been placed with US and South Korean suppliers. The Polish government purchased or is in the process of purchasing equipment from the US that includes 5th generation fighter aircraft, the HIMARS system, the PATRIOT system, Abrams tanks, Rak self-propelled mortars, GLADIUS unmanned search and strike systems. The latest purchases in 2022 from South Korea include multi-launcher K239 Chunmoo, K2 Black Panther tanks, K9A1 self-propelled howitzers and FA 50 fighters. In addition, the Polish Parliament adopted a completely new defence and security act – the Homeland Defence Act of 11 March 2022. The Act includes definitions of the scope, in terms of both subject and object, of the obligation to defend Poland, the branches and composition of the Polish Armed Forces, authorities competent in matters of state defence and their tasks, types of military service, rules of appointment to military service, the powers and duties of soldiers and others.

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Summary

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LEGAL FRAMEWORK Relevant legislation

> **1** What statutes or regulations govern procurement of defence and security articles?

Procurement of defence and sensitive security equipment and services by contracting authorities in the United Kingdom is governed by the Defence and Security Public Contracts Regulations 2011 (DSPCR) (amended by the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 and the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020), which implement the EU Defence and Security Directive (2009/81/EC) in UK law. The DSPCR is retained EU law under the European Union (Withdrawal) Act 2018. General principles derived from the EU Treaty also apply to such procurements, including the principles of equal treatment, non-discrimination, transparency, proportionality and mutual recognition. EU and domestic case law is also influential in interpreting the applicable legislation. Decisions made by the Court of Justice of the European Union (CJEU) after 31 December 2020 will not be binding on UK courts and tribunals but UK courts will still be bound by judgments of the CJEU and domestic courts passed prior to this date.

The Single Source Contract Regulations 2014 (SSCRs) apply when the Ministry of Defence (MoD) awards qualifying defence contracts with a value of over £5 million without any competition. They are intended to ensure value for money is achieved even in the absence of competitive procurement.

Identification

> **2** How are defence and security procurements identified as such and are they treated differently from civil procurements?

A procurement by a UK contracting authority (such as the MoD) falls within the scope of the DSPCR when the contract has a value above the financial threshold of £426,955 for goods and services or £5,336,937 for works, and is for:

- military equipment and directly related goods, services, work and works;
- sensitive equipment (ie, equipment for security purposes involving, requiring or containing classified information) and directly related goods, services, work and works; • work, works and services for a specifically military purpose; or
- sensitive work or works and sensitive services.

The procurement will be advertised on Find a Tender (which has replaced the Official Journal of the European Union in the United Kingdom for procurements launched after 31 December 2020) as a procurement under the DSPCR. The MoD also uses the Defence Sourcing Portal to advertise its contract opportunities.

The key differences for procurements carried out under the specific defence rules are the mechanisms put in place to protect sensitive information and to ensure defence and security interests are protected. For example, there are specific provisions that are intended to protect sensitive information throughout the supply chain, to ensure security of supply and to give the courts flexibility to consider defence and security interests when considering remedies.

Where a procurement falls outside the scope of the DSPCR, it will be governed by the usual civil procurement rules, with a lower threshold of about £138,760 for goods and services contracts procured by central government departments (or £213,477 for sub-central authorities) and £5,336,937 for works contracts.

Conduct

3 How are defence and security procurements typically conducted?

There are three different procurement procedures under the DSPCR and five different procedures under the normal civil rules. Where the rules are triggered, a formal procurement process is initiated by the publication of a Contract Notice on Find a Tender. Most procurement procedures involve a pre-qualification process, as part of which bidders must demonstrate their financial stability and technical capability, including experience in similar contracts. The way that the procurement proceeds will depend on whether the authority has chosen a procedure that permits them to discuss the contract and requirements with the bidders (negotiated procedure with an advert, the competitive dialogue procedure or, under the civil rules only, innovation partnership) or not (restricted procedure or, under the civil rules only, the open procedure). It is increasingly common for negotiations on a contract to be limited, with many of the contract terms being identified as non-negotiable.

The evaluation process is undertaken on the basis of transparent award criteria and weightings, which are provided to bidders in advance within the tender documents. Once the winning bidder is selected, there is relatively little scope for further negotiation (although, in practice, some negotiation is common).

Proposed changes

4 Are there significant proposals pending to change the defence and security procurement process?

There is currently a Procurement Bill progressing through the UK Parliament with the intention of it repealing and consolidating various procurement regulations, including the DSPCR. The government has stated that it will give a minimum of six months' notice before 'go-live' and this will not be until 2023 at the earliest. With respect to the SSCRs, the government published a Command Paper on 4 April 2022 (Defence and Security Industrial Strategy: Reform of the Single Source Contract Regulations), which sets out various proposed changes. These include greater choice and flexibility in procurement, a quicker and simpler procurement process, the promotion of innovation and various technical changes to address problems encountered with the SSCRs in

the past eight years. Delivering this reform to the SSCRs requires amendments to the Defence Reform Act 2014 (which are listed in a schedule to the Procurement Bill), amending or creating new secondary legislation and revising the Statutory Guidance. There is no clear timescale for these changes at present.

Information technology

> **5** Are there different or additional procurement rules for information technology versus non-IT goods and services?

There are no specific or additional rules that relate to IT procurement. Most IT procurement will be undertaken under the civil rules and, in many instances, this is done through centralised framework agreements awarded by the Crown Commercial Service.

Relevant treaties

> **6** Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

The majority of defence and security procurements are conducted in accordance with the Government Procurement Agreement or European Union treaties, but a minority of contracts are still awarded in the context of national security and other exemptions. The MoD published a five-year review of the application of the DSPCR in December 2016. It shows that 25 per cent of its contracts were considered exempt from the normal requirement to compete openly, mostly in reliance on the national security exemption contained in article 346 of the Treaty on the Functioning of the European Union (the terms of which have been imported into the DSPCR through amendments to the regulations). However, it highlighted that there were also other exemptions relied upon, for example, an exemption relating to government-to-government sales. It also shows that since the introduction of the DSPCR there has been a decline in reliance on these exemptions – from 55 per cent to 25 per cent.

DISPUTES AND RISK ALLOCATION Dispute resolution

> **7** How are disputes between the government and defence contractor resolved?

Disputes between the government and a defence contractor regarding matters of contract performance will be resolved in accordance with the dispute resolution procedure contained in the contract. It is common for a defence contract to incorporate MoD defence condition (DEFCON) 530, which provides for disputes to be resolved by way of confidential arbitration in accordance with the Arbitration Act 1996.

For disputes regarding matters of contract award, how disputes are resolved will depend on which legislative regime the procurement process falls under. Where the Defence and Security Public Contracts Regulations 2011 (DSPCR) applies, there is a formal process under which suppliers may apply to the court to review the actions of the contracting authority during the procurement process, and grant any remedies that may be available (which differ depending on whether the contract has been entered into or not).

Where the Single Source Contract Regulations 2014 apply, either of the disputing parties may request that the Single Source Regulations Office makes a binding determination in certain circumstances. This determination will take precedence over any contractual dispute resolution procedure.

> **8** To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

DEFCON 530 requires the disputing parties to attempt, in good faith, to resolve disputes that may include alternative dispute resolution (ADR) procedures, before commencing arbitration. The most appropriate form of ADR will depend on the size and nature of the dispute but the most common form remains mediation. ADR will remain available once the arbitration is under way.

ADR is also available to parties in disputes concerning a contract award. Under the DSPCR, before proceedings can be commenced, the challenger must provide the contracting authority with details of its claim and its intention to start proceedings, which provides an opportunity for the parties to try to resolve the dispute. However, owing to the short time limits for pursuing a procurement claim (typically 30 days from the date the supplier knew or ought to have known of the grounds giving rise to the breach), time is extremely limited for the parties to engage in any formal ADR process at this stage. ADR will be available to the parties as a parallel confidential process during any litigation.

Indemnification

> **9** What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

The legal limits on the government's ability to indemnify a contractor apply to any business-to-business contract; they are not defence-specific. These limitations mainly stem from the Unfair Contract Terms Act 1977, which makes certain terms excluding or limiting liability ineffective or subject to reasonableness. There may also be public policy reasons for an indemnity not to be valid; for example, the government cannot indemnify a contractor for civil or criminal penalties incurred by the contractor if the contractor intentionally and knowingly committed the act giving rise to the penalty.

The MoD also has a commercial policy on when it can give indemnities. This policy states that the MoD can offer a limited range of pre-approved indemnities in respect of certain specific risks that it considers would be impossible or impractical or would not represent value for money for contractors to bear. Examples of these kinds of risk include termination for convenience payments, third party intellectual property rights infringement, shipbuilding and nuclear-related risks. The form of indemnity that the MoD is willing to give in in each of these cases is prescribed in the relevant DEFCON. The policy is clear that the MoD should not offer indemnities outside of this unless there are exceptional circumstances.

There are no statutory or legal obligations on a contractor to indemnify the government. Indemnities given by the contractor result from negotiation, although indemnities included in the initial draft contract issued by the government may not be negotiable depending on which contract award procedure is used.

If the government does request indemnities from the contractor, these are likely to focus on some of the following issues:

- third-party claims for loss or damage to property, personal injury or death;
- damage to government property;
- product liability claims;
- infringement of a third party's intellectual property rights; and
- breach of confidentiality.

Some DEFCONs contain indemnities relating to these issues.

Limits on liability

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

To avoid a detrimental effect on the willingness of contractors to bid for government defence contracts and to ensure better value for money, MoD policy is that a contractor should only be asked to accept unlimited liability where this is required under legislation or cross-government policy. This is a recent change in MoD policy and is likely to result in limitations on contractors' liability becoming more widespread in UK defence contracts.

Other than in respect of certain heads of loss where statute prevents a party from limiting or excluding its liability, the government is free to limit its liability to a contractor. Typically, the MoD will seek to exclude its liability for indirect and consequential loss and include financial caps.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

There is a risk of non-payment, as with all customers. However, the MoD's policy, even if procuring under the DSPCR, is to comply with Regulation 113 of the Public Contracts Regulations 2015, which requires public-sector buyers to pay prime contractors (Tier 1 suppliers) undisputed, valid invoices within 30 days. Generally, the risk of non-payment of a valid undisputed invoice by the MoD is perceived to be very low.

Parent guarantee

12 Under what circumstances must a contractor provide a parent guarantee?

The government should specify in its initial tender documentation whether it may require a parent company guarantee (PCG). If it is not specified in that documentation, the government should not, in theory, be able to ask for one later in the contract-award process. The government will assess a bidder's financial position during the qualification stage and determine whether it believes the company has the economic and financial capacity to deliver and perform the contract. If it does not believe that this is the case (eg, if a bidder is a special purpose vehicle set up specifically for a contract) then when the successful bidder is chosen, the government will determine whether a PCG is required. The MoD's standard-form PCG is set out in Defence Form (DEFFORM) 24.

DEFENCE PROCUREMENT LAW FUNDAMENTALS Mandatory procurement clauses

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

There are no mandatory clauses that must be included in a defence procurement contract, and no clauses that will be implied specifically within defence procurement contracts.

However, the Ministry of Defence (MoD) will typically seek to include certain standard clauses in its contracts. Primarily, these are the MoD defence conditions (DEFCONs), although the MoD does use other standard forms of contract in certain circumstances. If a particular DEFCON is relevant to the subject matter of a contract, the MoD will typically seek to include that DEFCON.

The current Procurement Bill contains various terms that would be implied into public contracts, for example, on payment terms and rights to terminate. The Bill is currently progressing through Parliament so there may still be amendments made to its current form before it becomes law.

Cost allocation

14 How are costs allocated between the contractor and government within a contract?

Where the Single Source Contract Regulations 2014 (SSCRs) do not apply, allocation of costs under a contract will be contained in a commercial agreement between the parties, with a fixed or firm price being the most common. Gainshare, painshare or value for money reviews are common in long-term contracts to avoid excessive profits or losses occurring.

Where the SSCRs apply, one of the specified pricing models set out in the SSCRs must be used. These pricing methods are:

- fixed price;
- firm price;
- cost plus;
- estimate-based fee; • target cost incentive fee; and
- volume-driven pricing.

All of these pricing mechanisms are based on the contract price being the allowable costs incurred or estimated by the contractor plus an agreed profit rate. To be allowable, costs must be appropriate, attributable to the contract and reasonable. This will be assessed by reference to the statutory guidance on allowable costs (published by the Single Source Regulations Office as regulator).

Disclosures

15 What disclosures must the contractor make regarding its cost and pricing?

Where the SSCRs do not apply the cost and pricing information that the contractor must disclose to the MoD is a commercial agreement between the parties. The MoD will often negotiate open-book contractual obligations into its higher value competed contracts. For single source contracts

above £1 million that are not qualifying contracts under the SSCR, then the MoD will seek to incorporate DEFCON 812 (single source open book) into the contract.

Under the SSCRs, there are statutory reporting requirements where the contractor is required to report on the costs that it will incur or has incurred in performing the contract. Particularly relevant to contract cost and pricing is the 'contract pricing statement', which is settled on contract signature and sets out the cost information on which the price is agreed.

Other reports are also required to be delivered regularly throughout the term of the contract (and at the end), which provide information on the costs actually incurred as the contract progresses.

Audits

16 How are audits of defence and security procurements conducted in this jurisdiction?

Where the SSCRs do not apply, the MoD will not have a statutory audit right but will be reliant on the open book or audit contractual provisions negotiated into the contract.

Where the SSCRs do not apply, the cost and pricing information that the contractor must disclose to the MoD is a commercial agreement between the parties. The MoD will often negotiate open-book contractual obligations into its higher-value contracts.

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Under the SSCRs, there are statutory requirements to keep records in relation to the contract, and the MoD has the right to examine these records.

The MoD's audit right can be exercised at any time, although the MoD guidance sets out when this right is likely to be exercised in practice.

IP rights

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

The MoD's policy on the ownership of intellectual property (IP) arising under its contracts is that IP will normally vest with the contractor generating the IP, in exchange for which the MoD will expect the right to disclose and use the IP for UK government purposes (including security and civil defence).

This is achieved through the inclusion of IP-related DEFCONs in the contract. A new IP DEFCON 707 was published on 1 April 2022 and applies to technical data generated or delivered under the contract. While the contractor still owns the IP generated, the licence rights granted to MoD are broader in order to enable MoD to competitively procure future modification and upgrade work.

MoD policy does specify certain scenarios when it expects that it should own the new IP created by the contractor but, in such cases, the MoD will not unreasonably prevent the contractor from using the skills and expertise developed in carrying out the work, only requiring a charge for its internal business purposes.

Economic zones

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

We are not aware of any such economic zones or programmes in the United Kingdom.

Forming legal entities

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

A joint venture could either be a corporate or commercial joint venture.

A corporate joint venture would involve the joint venture parties setting up a new legal entity (likely, a limited company registered in England and Wales), which would be an independent legal entity able to contract in its own right, and which is liable for its own debts. It is relatively straightforward and inexpensive to establish a company: the parties must file a Form IN01 and the articles of association at Companies House and pay the applicable filing fee. The company is brought into existence when Companies House issues the certificate of incorporation. The shareholders (joint venture parties) would also likely agree in a shareholders' agreement, the roles and responsibilities of each shareholder and their respective obligations to invest capital and resources into the company.

A commercial joint venture does not involve any separate legal entity, and the parties contractually agree on each party's roles and responsibilities.

Access to government records

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

Under the Freedom of Information Act 2000, there is a general right for the public to access information held by public bodies. As the MoD is a public body, on the face of it this right would extend to contracts and records held by the MoD allowing people to request these documents.

There are exemptions from disclosure under the Act (whether they apply depends on the context):

- for 'information provided in confidence', where disclosure of the information to the public would constitute a legally actionable breach of confidence; and
- under 'commercial interests', subject to a public interest test, for information that constitutes a trade secret or where disclosure would prejudice the commercial interests of any person.

MoD policy is to consult with companies when disclosure of information supplied by or related to them is being considered under the Act. Should the MoD decide to disclose information against the wishes of the company, it will notify the company of the decision prior to disclosure.

The UK government has a policy around transparency in public service that drives a general presumption in favour of disclosing information. The document 'The Transparency of Suppliers and Government to the Public' provides a statement of the expectations on government and its suppliers in meeting these aims.

Copies of contracts are therefore frequently made publicly available on UK Gov website with certain categories of information redacted on grounds of commercial confidentiality (pricing, IP, business plans).

Supply chain management

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

Subject to limited exceptions, the defence procurement rules oblige an authority to reject tenders from bidders who have been convicted of certain serious offences (eg, bribery, corruption and fraud). They also give the authority discretion to exclude bidders on other grounds, such as insolvency or gross professional misconduct. The rules expressly permit authorities to consider the same exclusion grounds for sub-contractors, as well as giving them broad rights, for example, to require a supplier to openly compete for some of the sub-contracts or to flow down obligations regarding information security.

If the MoD has specific concerns around the robustness of the supply chain (eg, supplier fragility or lack of competition) then it will negotiate contractual provisions with the contractor giving it certain controls or involvement in the supply chain strategy. Detailed quality assurance requirements will also be included in a contract and will cover fraudulent and counterfeit material.

INTERNATIONAL TRADE RULES Export controls

22 What export controls limit international trade in defence and security articles? Who administers them?

The EU Dual-Use Regulation 428/2009 has now been transposed by the Trade etc in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019 into national UK law as a 'retained' EU regulation. This means that the existing legislation will continue to operate in the UK as it did prior to the end of the transition period on 31 December 2020. However, the UK is now treated as 'third country' from the perspective of EU export controls (and vice versa).

The fundamental UK legislation implementing export controls is the Export Control Act 2002. The Act provides authority for the UK government to extend the export controls set forth in the Act through secondary legislation. The main piece of secondary legislation under the Act is Export Control Order 2008, which controls the trade and exports of listed military and dual-use items (ie, goods, software and technology that can be used for both civilian and military applications). However, the Export Control Order 2008 was amended twice in 2022 by The Export Control (Amendment) Order 2022 and The Export Control (Amendment) (No.2) Order 2022, which came

into force on 19 May 2022 and 3 November 202 respectively. The military and dual-use items captured by the Order are known as 'controlled goods' as trading in them is permitted as long as, where appropriate, a licence has been obtained. Licences are administered by the UK Export Control Joint Unit (ECJU) within the Department for International Trade (DIT). The UK's HM Revenue & Customs,Border Force and Crown Prosecution Service are responsible for enforcing the legislation.

Domestic preferences

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

If the Defence and Security Public Contracts Regulations 2011 (DSPCR) applies, there is no scope for domestic preferences. However, where article 346 of the Treaty on the Functioning of the European Union (the terms of which have been imported into the DSPCR through amendments to the regulations) has been relied upon to disapply the DSPCR, contracts were commonly awarded to national suppliers.

Within the Ministry of Defence (MoD), the use of article 346 exemption to justify the awarding of a contract without competition requires specific approval levels.

Favourable treatment

24 Are certain treaty partners treated more favourably?

Only EU member states or signatories of the Government Procurement Agreement are able to benefit from the full protection of the DSPCR.

Sanctions

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

The United Kingdom implements embargoes and sanctions imposed by the United Nations and may also implement UK autonomous embargoes and sanctions. All of these embargoes and sanctions are implemented through sanctions regulations, which are based on the Sanctions and Anti-Money Laundering Act 2018 (the Sanctions Act). The specific sanctions regulation provides for the enforcement of, and penalties for, breaches of the UK embargoes and sanctions and for the provision and use of information relating to the operation of those sanctions.

Embargoes and sanctions, depending on their type and ultimate aim, are targeted at individuals, entities, sectors or countries. The current arms-related and financial sanctions can be found on the government's GOV.UK website. The DIT implements and enforces trade sanctions and other trade restrictions, whereby it is overseen by the Secretary of State for International Trade. Financial sanctions are implemented and enforced by the Office of Financial Sanctions Implementation, which is part of HM Treasury.

Trade offsets

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

The MoD does not use offsets in its defence and security procurement.

ETHICS AND ANTI-CORRUPTION Private sector appointments

27 When and how may former government employees take up appointments in the private sector and vice versa?

Civil servants, including those employed by the Ministry of Defence (MoD), wishing to take up an appointment in the private sector are bound by the Business Appointment Rules (the Rules).

For most civil servants, the Rules are triggered in certain circumstances, such as when an individual has been involved in developing a policy affecting their prospective employer, has had official dealings with their prospective employer or has had access to commercially sensitive information regarding competitors of their prospective employer. In these circumstances, the individual must apply for approval from the relevant department before accepting any new appointment for up to two years after the individual leaves the civil service. Approval can be given unconditionally or can be subject to specific restrictions.

Separate and more onerous obligations apply to senior civil servants (permanent secretaries, Senior Civil Service 3-level employees and equivalents) under the Rules. Similar provisions apply to members of the armed forces, intelligence agencies and the diplomatic service.

These Rules do not have legislative force but, as regulations issued by the Minister for the Civil Service, they are binding on both the government and its employees.

Further information is available in a briefing paper published in April 2019 by the House of Commons Library, which also addresses criticisms of the system.

Private sector employees are not subject to any specific regulations governing the commencement of employment by the government. They may, however, be subject to specific restrictions detailed in their employment contracts and should be mindful of any potential conflict of interest.

In addition, persons wishing to take up a role as a senior civil servant (whether public or private sector employees at the time) will need to comply with the Civil Service Nationality Rules, which place restrictions on which nationals may take up particular roles. Only UK nationals may be employed in 'reserved posts'; these being posts involving sensitive work that is deemed to require special allegiance to the Crown. Candidates for senior civil service roles may also need to undergo enhanced national security vetting.

Addressing corruption

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

The Bribery Act 2010 criminalises domestic and overseas bribery in the private and public sectors. It also provides for the corporate offence of failing to prevent bribery.

Giving, offering or agreeing to give a bribe is an offence, as is accepting, asking for or agreeing to accept a bribe. The bribe may be anything of value, whether monetary or otherwise, provided it is intended to influence or reward improper behaviour where the recipient performs public or business functions and is subject to a duty of trust or good faith. When the recipient is a foreign public official, the impropriety requirement does not apply.

Commercial organisations are strictly liable for any primary bribery offences (except receipt of a bribe) committed by anyone performing services on behalf of the organisation. This almost invariably includes employees, agents, intermediaries and other service providers. The organisation has a defence if it has 'adequate procedures' in place to prevent bribery. The Ministry of Justice has issued guidance on what is 'adequate', identifying six principles of bribery prevention:

- risk assessment;
- proportionate procedures;
- due diligence;
- communication and training; • top-level commitment; and
- monitoring and review.

Prosecution of bribery offences is handled by the Director of Public Prosecutions (DPP) or the Serious Fraud Office in line with the joint prosecution guidance on the Bribery Act 2010, issued in 2019 by the Director of the Serious Fraud Office and the DPP.

Lobbyists

29 What are the registration requirements for lobbyists or commercial agents?

The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 requires that anyone in the business of consultant lobbying be registered with the Registrar of Consultant Lobbyists. Consultant lobbying includes any personal oral or written communication to a Minister of the Crown or permanent secretary relating to any contract or other agreement or the exercise of any other function of the government, including proposals to make to amend legislation, where such communications are made in the course of business and in return for payment from the person(s) for whom the lobbyist is acting. Such a business must then record details of the company and its directors, of any code of conduct that it adopts and, on a quarterly basis, the names of any entities on whose behalf it has actually submitted any communications, or from whom it has received payment for consultant lobbying activity.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Public-sector procurement in the United Kingdom is based on free and open competition designed to achieve value for money for the taxpayer, with a high level of transparency of the procurement process and tender terms. Part of the objective is to discourage the perceived benefit of using intermediaries to liaise with government procurement officials and thereby put a given supplier at an advantage. As a result, it is uncommon to use success-fee-based agents and intermediaries in

the way that happens in certain other markets, although some suppliers do use external assistance to help them understand the procurement process. However, there is no general prohibition on the use of agents or their levels of remuneration, although individual tenders may include specific disclosure requirements. Registration may be required where the agent's activity falls within the requirements described earlier.

A supplier who appoints an agent within the terms of the Commercial Agents' (Council Directive) Regulations 1993 to develop its presence in a given market may be obliged to pay additional compensation on termination. Otherwise, the 1993 Regulations do not prescribe any maximum or minimum level of remuneration.

AVIATION

Conversion of aircraft

31 How are aircraft converted from military to civil use, and vice versa?

Civil aircraft may not fly in the United Kingdom unless they comply with the airworthiness regime established pursuant to Regulation (EU) 2018/1139 and now followed in the United Kingdom as retained EU law. Regulation (EU) 2018/1139 ordinarily requires a certification process in accordance with specifications originally promulgated by the European Union Aviation Safety Agency (EASA). Annex I to Regulation (EU) 2018/1139 permits EU member states to approve ex-military aircraft unless EASA has adopted a design standard for the type in question. Most military aircraft are designed in accordance with a certification basis that is very different from the civil requirements, so the process of civil certification is often prohibitive. In that event, the Civil Aviation Authority may issue a 'permit to fly' if satisfied that the aircraft is fit to fly with regard to its overall design, construction and maintenance. Ordinarily, such aircraft are unable to conduct commercial air transport operations or to fly outside the United Kingdom. Details governing operations are contained in Civil Aviation Publication 632 and maintenance standards in British Civil Airworthiness Requirements Chapters A8-23 and A8-25, all available from the Civil Aviation Authority.

The UK Military Aviation Authority regulates the certification and maintenance of military aircraft. Since 2010, military processes have been more closely based on the civil airworthiness philosophy than previously, but this is documented and administered separately from the civil process. Accordingly, a similar process is necessary if someone wishes to convert a civilian aircraft for military purposes, whereby the original certification must be revalidated in accordance with military standards.

Drones

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

In September 2018, the new Basic Regulation (EU) 2018/1139 of 4 July 2018 gave EASA greater control over the manufacture and operation of light unmanned aircraft systems (UAS). Until then, EASA regulation over UAS had been limited to those over 150 kilograms. Those under 150 kilograms were subject to regulation by EU member states, including the United Kingdom. In June 2019, under powers contained in the Basic Regulation, the European Commission adopted implementing and delegated regulations for design, production, operation and maintenance of UAS. These

regulations disapply the normal provisions on certification and the role of EASA in the case of certain UAS.

The Commission Implementing Regulation and Delegated Regulation applied fully, as a package, from 31 December 2020, and thus now apply in the United Kingdom as retained EU law. They establish three categories of UAS operation: open, specific and certified. They concentrate on the details applicable to the open and specific categories. The process for the certified category is expected to borrow heavily from existing manned aircraft standards. The Implementing Regulation contains rules and procedures for the operation of unmanned aircraft, including an Annex on UAS operations in the 'open' and 'specific' categories. The Delegated Regulation prescribes product criteria for UAS for open category use, limits marketing of UAS that do not meet those criteria, and governs third-country operators of UAS.

In the United Kingdom, most requirements of the Air Navigation Order are disapplied for UAS operated within the open or specific categories. The United Kingdom had already introduced registration and competency requirements in a manner designed to comply with the anticipated EU regulations, and these have now been superseded by the requirements in the retained Implementing Regulation. Published regulations relating to the certified category are still awaited in the UK.

UAS specially designed or modified for military use always require a licence for export from the United Kingdom. Likewise, a licence is required for the export of dual-use UAS as defined in EU and UK regulations. Dual-use UAS include certain UAS designed for beyond-line-ofsight operations with high endurance, with a range over 300 kilometres or with autonomous flight control and navigation capability. The general export control regime is supplemented by country-specific measures, such as those in force in relation to Iran.

MISCELLANEOUS Employment law

33 Which domestic labour and employment rules apply to foreign defence contractors?

There are no specific statutory or common law employment rules that apply exclusively to foreign defence contractors, and the parties can choose the governing law that applies to the employment contract. However, regardless of the parties' choice of governing law, certain mandatory laws will apply if the employee habitually works in England or Wales to the extent that they give greater protection than the governing law of the employment contract. These mandatory laws include (but are not limited to):

- the right not to be unfairly dismissed (provided that the employee has two years of service);
- protection from discrimination and from suffering detriments or being dismissed for whistle-blowing (from day one of employment);
- rights to the national minimum wage, a minimum amount of paid holiday and statutory redundancy payment, where applicable; • certain maternity and parental rights; and • rules relating to working hours.

Defence contract rules

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

The answers above provide the detail of the laws, regulations and policies applicable to the Ministry of Defence (MoD) and defence contractors, most notably the Defence and Security Public Contracts Regulations 2011 (DSPCR) and the Single Source Contract Regulations 2014.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

If a contractor provides goods or services to the UK government, the laws, regulations and policies detailed above will apply even if the work is performed outside the United Kingdom.

Personal information

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

Companies will be asked to provide information about their directors and certain other employees as part of the pre-qualification questionnaire process, and will usually be required to sign a 'Statement Relating to Good Standing' certifying that directors and certain other personnel have not been convicted of particular offences.

An awarded contract (or security aspects letter) may require directors or employees to submit to security clearance – so employees' personal information would need to be provided to the MoD in that scenario so that relevant checks could be carried out.

Licensing requirements

37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

There are no specific licensing or registration requirements to operate in the defence and security sector in the United Kingdom.

The MoD may impose security requirements, but this is done by treating projects on a case-by-case basis and stipulating certain requirements depending on the nature of the particular project and its degree of sensitivity. Those requirements will typically be included in a security aspects letter that will bind the contractor upon contract award. For contracts that require a contractor to hold government information classified at 'secret' level or above, the contractor may be required to obtain a facility security clearance, currently known as a 'List X' clearance.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

Contractors producing or supplying goods and services in, or importing them into, the United Kingdom will face different environmental legislation depending on their operations, product or service. Contractors could face regulations encompassing, inter alia, air emissions, water discharges, water pollution, noise and waste disposal, including responsibility for electrical waste, electronic equipment and restrictions on hazardous substances in such equipment. Applicable requirements may also cover energy efficiency, carbon emissions and energy consumption targets

and reporting obligations (eg, the Energy Savings and Opportunity Scheme and the Streamlined Energy and Carbon Reporting Regime). Contractors involved with nuclear substances are subject to a separate or additional set of environmental obligations as well as strict nuclear waste disposal restrictions. In addition, from April 2022, the largest UK-listed companies and private companies above a certain threshold in terms of numbers of employees and financial turnover will be required to report on climate-related risks and opportunities under the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2021. Finally, in some circumstances, there are exemptions, and derogations from, or disapplications of, environmental legislation for defence and military operations.

39 | Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

There are several areas to consider. First, general targets in legislation such as the Climate Change Act and Renewable and Energy Efficiency Directives will indirectly lead to targets for individual operators through more specific legislation and regulation. Next, for example, the Environment Agency leads on the integrated environmental permitting regime where individual permits are required for specific industrial activities and it may impose targets and limits for air emissions, water discharges and so on. Also, for example, the EU Emissions Trading System (managed by the Department for Business, Energy and Industrial Strategy) requires participating companies with, for instance, larger generating capacity or heavy industrial operations to cover their greenhouse gas emissions by surrendering the EU Emissions Trading System allowances. Finally, companies may face individual targets (including reducing waste, chemical spills and water consumption) through their own environmental management system or corporate reporting initiatives.

40 | Do ‘green’ solutions have an advantage in procurements?

The UK government has mandatory and best practice government buying standards, and a greening government policy that may be required of applicants to public tenders. The government buying standards mostly look to reduce energy, water use and waste when dealing with contracts for transport, textiles and electrical goods, among other things. Under the DSPCR, only environmental issues relevant to the contract itself can be considered – not the supplier’s wider efforts. UK government policy requires social value to be evaluated in all central government procurements, with a minimum 10 per cent weighting of the total score at the invitation-to-tender stage. One of the themes listed in the government social value model is ‘fighting climate change’, particularly activities that deliver additional environmental benefits in the performance of the contract (including working towards net-zero greenhouse gas emissions) and influence staff, suppliers, customers and communities through the delivery of the contract to support environmental protection and improvement. MoD policy lists ‘fighting climate change’ as one of three priority social value themes most relevant for defence. Social value is still a relatively new requirement in procurements and, in our experience, green solutions do not tend to gain any significant advantage; nor do they carry significant weight in evaluation methodologies.

UPDATE AND TRENDS Key developments of the past year

41 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Brexit remains an issue for both UK and non-UK entities and the potential divergence between UK and EU legislation that is now possible is likely to have a far-reaching impact on many of the topics covered in this chapter – particularly procurement, labour, trade and export controls, aviation and environmental. The Single Source Contract Regulations 2014 (SSCRs) also remain a topic of interest and, in April 2022, the UK government published a Command Paper 'Defence and Security Industrial Strategy: reform of the Single Source Contract Regulations'. This is likely to lead to some changes to the SSCRs over the coming year.

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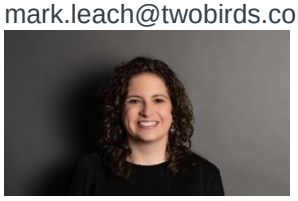

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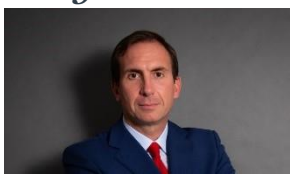

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