Bird & Bird

Defence & Security Procurement 2020 Edition

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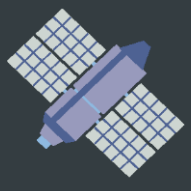

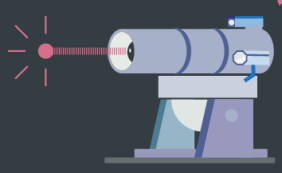

Bird & Bird's International Defence & Security team are delighted to have contributed to the global 2020 edition of 'Getting the Deal Through: Defence & Security Procurement'. Our *team has written the chapters for France, Germany, Italy, Poland and the UK and Elizabeth Reid is contributing editor for the publication.*

This annual publication provides excellent expert analysis of how government procurement works in this highly regulated sector and is an ideal tool for in-house counsel and commercial practitioners.

Technology continues to disrupt this sector: as the assets and services being procured become more complex, a fit for purpose procurement process is vital for both the procuring entities and suppliers. Our experts analyse all the hot topics, including single source regulations, competitive processes, intellectual property, standard form contracts, anti-bribery & corruption, export controls and sanctions.

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

Defence & Security Procurement 2020

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Defence & Security Procurement 2020

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Defence & Security Procurement*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Elizabeth Reid of Bird & Bird for her assistance with this volume. We also extend special thanks to Matthew L Haws of Jenner & Block LLP, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

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Getting The Deal Through

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Global overview

Elizabeth Reid
Bird & Bird

As the curtain closes on 2019, the world turns to face the prospect of another year of geopolitical turmoil across the globe. The forging and breaking of geopolitical alliances no longer takes place behind closed doors; instead, it is visible to all on Twitter. Inter-state conflicts are played out not just by boots-on-the-ground, but through cyberattacks and data theft. The boundaries of acceptable geopolitical conduct are blurred and their definition will not be found in treaties or conventions, but by how far one's neighbours can be prodded before they hit back. 2019 stands as a stark example of the new art of statecraft. Among all of this, large-scale military conflict remains a very real threat.

Notable flashpoints included escalation of the Sino-American trade war following President Trump's imposition of tariffs in 2018; as well as the continued enigmatic relationship between North Korea and the United States, which moved quickly from Twitter insults to handshakes at the DMZ then descended just as swiftly back into a war of words with the North Korean Foreign Ministry's 'dotard' remarks. With the continued imposition of economic sanctions, Deputy Foreign Minister Ri Thae Song has suggested that North Korea will resume long-range missile tests. Consistent with the light-hearted yet sinister undertones to the US-Pyongyang relationship, the minister then noted that 'it is entirely up to the US what Christmas gift it will select'.

Meanwhile, tensions continued to rise between the US and Iran. The tension was played out both diplomatically and on the ground. The US pulled out of the 2015 nuclear agreement and began tightening economic sanctions. May then saw an alleged Iranian attack on oil tankers anchored in the Persian Gulf, and June a torpedo attack on an American oil tanker in the Gulf of Oman. Both the US and Iran have made clear their preparedness and willingness for all-out war.

2018 saw global defence and security procurement spending rise to its highest level since the Cold War and, given the above examples, it is no surprise that this trend continued in 2019. The US and China continue to dominate global defence spending with heavy allocation of their budgets towards large-scale defence procurement. The Stockholm International Peace Research Institute report that the US was, unsurprisingly, still the biggest spender at $649 billion. Still with an appetite for more, on 12 December 2019, the US House of Representatives approved a $738 billion military spending bill which, notably, has given life to Trump's long-standing ambition for a US Space Force. The bill increases US defence spending by approximately 2.8 per cent (or $20 billion) and is set to prepare the US for battles in the final frontier.

However, 2019 was unique in that it saw states that were previously considered sedentary in the defence sector beginning to funnel money into defence procurement under policies of passive deterrence. The close of 2018 saw a Swedish election campaign with a sharper focus on defence, with all of the main parties campaigning on platforms of strengthening national defence. Finland, likewise (not a member of Nato and sharing an 830-mile border with Russia) has increased its military coordination with the US and Nato. Indeed, the Finnish Ministry of Defence announced on 16 August that its draft budget for 2020 would be €3.16 billion (1.26 per cent of GDP). This represents a €24 million increase compared with its 2019 defence budget.

Australia, too, as a not-too-distant neighbour of China, has upped its defence spending. The 2019-20 defence budget was increased by A$2.3 billion to A$38.7 billion and already A$175.8 billion has been projected for 2022–23. This budget brought with it an increased focus on cybersecurity with the establishment of cyber 'sprint teams' and a cybersecurity response fund following a cyberattack on the information technology systems of the Australian parliament in February.

The above geopolitical backdrop means that defence and security procurement inevitably involves the procurement of high-value, technologically complex, mission-critical assets. Technology is now disrupting the defence and security sector on an unprecedented scale, with big data, artificial intelligence and connectivity all bringing new challenges. Hybrid warfare strategies and unconventional domestic threats mean defence and security contractors are having to add new technological capabilities to their traditional offerings. Leveraging of commercial innovation is fundamentally important for any procurement entity. Questions are often asked as to whether defence and security procurement processes are fit for the purpose of acquiring complex technology.

To this end, we are pleased to present the fourth annual edition of *Getting the Deal Through – Defence & Security Procurement*.

Australia

Anne Petterd, Geoff Wood and Sally Pierce
Baker McKenzie

LEGAL FRAMEWORK

Relevant legislation

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

In Australia, defence and security procurement is undertaken by the federal government through the Department of Defence (Defence). Like other federal government agencies, Defence is subject to the Public Governance, Performance and Accountability Act 2013 (Cth) (PGPA Act), which establishes a framework for expenditure of public resources. Requirements for procurement are contained in the Commonwealth Procurement Rules (CPRs) issued under the PGPA Act. The central principle of the CPRs is value for money, and this is supported by further obligations to encourage competitive markets, ensure non-discriminatory purchasing practices and accountability for purchasing decisions, and to use efficient, effective, ethical and transparent procurement processes. The CPRs contain rules in two divisions: Division 1 applies to all procurements regardless of value, while Division 2 applies additional rules to procurements valued at or above the relevant procurement threshold (unless an exception applies). The Division 2 rules require a higher level of transparency (eg, stronger requirements to conduct open tenders and to follow certain rules in conducting the procurement). With respect to Defence, the procurement thresholds are as follows:

- other than for procurements of construction services, A$80,000; and
- for procurement of construction services, A$7.5 million.

The CPRs are supported by a range of related policies, including those addressing indigenous economic development, workplace gender equality and the maximisation of Australian industry participation in major projects. As the largest procurement agency in the federal government, Defence has established its own overarching procurement management framework, including the Defence Procurement Policy Manual (DPPM), and a series of policies and programmes for particular procurement matters including intellectual property, cost principles and risk. On 19 December 2017, a refreshed version of the DPPM was released, which incorporates the CPRs so that officials can find in one place the Commonwealth and Defence procurement-related policy that applies to them. The DPPM was re-written and published on 1 July 2019 to more clearly set out the mandatory policy with which Defence officials must comply when undertaking procurement. Defence has also developed its own suite of contracts, the Australian Standard for Defence Contracting (ASDEFCON) templates, for use across the range of its procurement projects.

Identification

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

Defence and security procurements are identified as those acquisitions made by Defence for the purpose of supporting the Australian Defence Force. Such acquisitions range from simple, low-value goods and services to complex military hardware. Defence procurement is subject to the same legislative regime as other federal government procurements, with several exemptions. Division 2 of the CPRs does not apply to procurements undertaken by the Defence Intelligence Organisation, the Australian Signals Directorate or the Australian Geospatial-Intelligence Organisation, nor to procurements that have been determined as necessary for the protection of 'essential security interests' in accordance with Rule 2.6 of the CPRs. These include goods that fall within certain US Federal Supply Codes and the procurement of specified services, including those relating to design and installation of military systems and equipment, operation of federal government-owned facilities, and the support of military forces overseas. Defence procurements are also exempt from several free trade agreements. For example, certain Defence procurements are excluded from Chapter 15 of the Australian–US Free Trade Agreement, the objective of which is to provide non-discriminatory access to the procurement framework of each country.

Conduct

3 How are defence and security procurements typically conducted?

All defence procurements must comply with the mandatory rules contained in Division 1 to the CPRs, while procurements at or above the relevant threshold must comply with the Division 2 rules unless an exemption applies. Pursuant to the CPRs, procurements at or above the relevant threshold must use an 'open tender' process, which involves publishing an open approach to market and inviting submissions from tenderers through a request for proposal. However, the DPPM provides that where a procurement is low risk and below the relevant threshold, it should generally be conducted on a limited tender basis. This involves a single potential supplier (or several potential suppliers) being invited to submit a response in lieu of the open tender process. Defence may also utilise a limited tender for a procurement at or above the relevant threshold where it is exempt from Division 2 under Appendix A to the CPRs or because it has been designated as an 'essential security interest', or because it meets the specified conditions for limited tender under Rule 10.3 of the CPRs.

In March 2017, the CPRs were updated to include an express requirement on all Commonwealth entities to consider and manage their procurement security risk in accordance with the Australian

government's Protective Security Policy Framework (PSPF). The PSPF provides guidance and best practice advice to assist agencies to identify their responsibilities to manage security risks pertinent to their people, information and assets. It comprises 16 core requirements that articulate what agencies must do to achieve the Australian government's desired protective security outcomes, covering issues of governance, personnel security, information security and physical security. The objective of these mandatory requirements is to ensure that official resources and information provided to agencies is safeguarded at all times and a culture of protective security is embedded. Most core requirements have a number of supporting requirements that are intended to facilitate a standardised approach to implementing security across government.

Proposed changes

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

While defence spending and the efficacy of Defence's procurement practices are subject to considerable political debate, there are no significant proposals pending to change the defence and security procurement process at this time.

Information technology

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

The procurement rules do not differ for the procurement of information technology. The ASDEFCON Strategic Materiel suite of contracts are usually used by Defence as the base documents for procuring complex and high-risk IT supplies.

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?

Australia has been an observer of the World Trade Organization (WTO) Agreement on Government Procurement since 4 June 1996. On 5 April 2019, Australia submitted its instrument of accession to the WTO, and the Agreement on Government Procurement entered into force for Australia on 5 May 2019. The domestic treaty-making process includes deliberation by the Australian government's Joint Standing Committee on Treaties. To a limited extent, defence relies on national security or similar exemptions contained in free trade agreements to procure supplies on a sole sourcing basis.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Defence's dispute resolution process encourages the parties to negotiate a resolution to the dispute before commencing litigation, although this does not prevent a party from seeking urgent interlocutory relief. The ASDEFCON template used for strategic materiel procurement contains clauses reflecting this objective. If negotiation fails to resolve the dispute, the parties may agree to use an alternative dispute resolution process (such as mediation or arbitration). If the parties do not agree to an alternative dispute resolution process or such process does not achieve the required outcome, either party may commence legal proceedings.

In April 2019, new CPRs were introduced to support the commencement of the Government Procurement (Judicial Review) Act 2018, which establishes an impartial and independent complaints mechanism for suppliers participating in government procurement processes. The Act gives suppliers the right to make formal complaints, and to seek injunctions and compensation where there has been a contravention of relevant CPRs. However, the Act only applies to a 'covered procurement', and essential security and defence-related procurements will often (but not always) fall outside the legislation's meaning of 'covered procurement'.

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

As noted above, alternative dispute resolution (eg, arbitration, expert determination or mediation) is preferred as a means of resolving disputes between Defence and a contractor. There are few recorded court cases of contractual disputes with Defence, indicating that confidential alternative dispute resolution is largely relied on to resolve Defence contractual disputes.

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?

Pursuant to a delegation issued under the PGPA Act, the Finance Minister has delegated to Defence the power to indemnify a contractor within stated rules. Approval from the Finance Minister is needed to give an indemnity outside the rules. In granting an indemnity, a Defence official must consider two overarching principles:

- that risks should be borne by the party best placed to manage them; and
- that the benefits to the federal government in relation to the indemnity should outweigh the risks involved.

Additionally, an official can only grant an indemnity to a contractor if the official is satisfied that the likelihood of the event occurring is remote (ie, it has a less than 5 per cent chance of occurring), and that the most probable expenditure if the event occurred is not significant (ie, it would be less than A$30 million). The indemnity cannot apply to certain costs (eg, no indemnity can be given for civil or criminal penalties of the indemnified party). Defence acknowledges in its procurement policy that it may be necessary, where a contractor is exposed to risks over which it has no control, or that would otherwise make the contract uneconomical for the contractor, for Defence to grant an indemnity on behalf of Defence. In practice, Defence will only provide an indemnity to a contractor in exceptional circumstances and after rigorous liability risk assessment, including considering the full potential cost of the liability to the Commonwealth.

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?

Defence has a stated preference for a contractor's liability to be determined according to principles of Australia's common law. However, Defence is able to agree to limit liability to achieve a value for money outcome. Defence has developed its own guide to capping liability for this purpose. Like other federal government agencies, Defence will not usually accept any limitation on a contractor's liability in respect of personal injury or death, third-party property damage, breach of

intellectual property rights, confidentiality, privacy or security obligations, fraud or dishonesty, unlawful or illegal acts, or indemnities provided by the contractor under the contract. A supplier seeking to cap its liability may be required by Defence to provide a risk assessment to support the requested cap. There are no general statutory or regulatory limits to the contractor's ability to recover against the government for breach of contract.

There are some statutory rights for the government to use copyrighted material (and material protected by some other intellectual property rights) without the rights owner's consent subject to using them for permitted government purposes and paying compensation determined by statutory rules. Such rights could have the effect of limiting a contractor's ability to recover from the government for breach of licence rights in a contract.

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 no material risk of non-payment of any amount that the federal government is required to pay under contract. The Defence budgeting process provides for commitments under existing contracts and planned procurements. On occasion, Defence may wish to commence a contract subject to budget appropriation of funds. This may occur, for example, where Defence enters into a supply contract that has budget funds allocated, but the associated support contract is to start in a later year and may not yet have had funds allocated.

Parent guarantee

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

In complex or high-value procurements, Defence will usually require that a contractor that is a subsidiary provide a deed of substitution and indemnity from a parent company (or other entity), which allows Defence to request substitution of the contractor for the guarantor if specified events occur. Defence may also consider accepting a conventional parent guarantee, or an unconditional bond to pay on demand issued by a creditworthy financial institution (known colloquially as a 'bank 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 DPPM provides that where an ASDEFCON template exists for a particular type of procurement, that template should be used for a new procurement of that type and should only be amended in accordance with relevant policy. The ASDEFCON contract templates for complex procurements contain mostly 'core' clauses that are intended to be retained. Such core clauses include the right of Defence to terminate for convenience, limitations on the contractor's liability and the indemnification of Defence by the contractor. While there is no express doctrine requiring certain clauses to be 'read into' the contract regardless of their express inclusion, certain terms may be implied into a contract pursuant to general principles of Australian contract law if permitted by the contract terms (eg, an implied obligation to act in good faith).

Cost allocation

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

The DPPM provides for a range of potential cost-allocation options depending on the complexity of the project and the level of risk to both Defence and the contractor. For example, the parties may agree for the contractor to be paid a fixed fee regardless of the costs actually incurred, subject to certain variations detailed in the contract. Alternatively, Defence may permit variations to compensate for increases in the cost of labour and materials. Defence may also agree fixed or variable labour rates and overheads where the amount of labour required under a contract is uncertain. Cost-sharing arrangements may be adopted in high-risk projects where the contract costs cannot be accurately determined.

Disclosures

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

The disclosures a contractor is required to make regarding its cost and pricing will depend on the fee structures chosen. For example, if a contract is for a fixed price and was formed following a competitive procurement process, a contractor is not typically required to provide costing information. However, cost details are often required for variations and supplies priced by reference to cost inputs. If a contractor requires an advance payment to meet upfront costs (eg, to pay manufacturers for raw materials), the contractor may need to provide to Defence invoices and orders relating to the advance payment.

Audits

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

The Auditor-General may access Defence contractors' and subcontractors' records and premises to conduct performance audits. In addition, the Australian National Audit Office conducts an annual review of major Defence acquisitions. The review, which is published in a major projects report, includes information relating to the cost, schedule and the progress towards delivery of required capability of individual projects as at 30 June each year.

IP rights

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

Defence has an intellectual property policy aligned with the federal government policy. Defence policy is to maintain a flexible approach in considering options for ownership, management and use of intellectual property. Defence is required to conduct a risk assessment to determine whether it should own any intellectual property developed under the contract. Defence will generally require the contractor to provide it with a licence to use the contractor's pre-existing intellectual property for broadly defined 'defence purposes'. If Defence sees a security risk in allowing the contractor to commercialise created intellectual property, Defence is more likely to wish to own such created intellectual property and limit the contractor's right of use.

On 10 May 2018, an updated version of the ASDEFCON (Strategic Materiel) template was released by Defence that incorporates a new framework for intellectual property. The objective of the new framework is to better reflect the importance of technical data and software and their relationship with intellectual property. The Commonwealth's

position is that the core clauses ensure the Commonwealth has the necessary rights to items of technical data and software that enable it to effectively and efficiently use the defence capability, as intended. We understand that Defence intends to introduce the new framework for intellectual property into the remaining pro forma documents that make up the ASDEFCON suite of contracting templates; however, at the time of writing, this has not yet occurred. Minor revisions have since been made to the framework for intellectual property on 8 July 2019.

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?

While programmes have been developed for the benefit of certain contractors, they are not typically amenable to use by foreign defence and security contractors.

Forming legal entities

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

In Australia, a joint venture describes an arrangement in which two or more parties enter into an agreement to pursue common objectives while remaining separate legal entities. Joint venture arrangements may be either unincorporated or incorporated. There is no legislation directly regulating arrangements of either type. Under an unincorporated joint venture, the respective rights and obligations of the participants are essentially determined by contract. The rights and duties of the participants are usually set out in detailed joint venture documents and may be interpreted and supplemented by reference to general contract law. A joint venture will often be conducted by a corporate entity owned by the joint venture participants. In this case, the participants normally enter into shareholder agreements and Australian corporations laws will apply to many aspects of their relationship. While Defence permits the submission of procurement bids by joint ventures, it will usually seek to enter into a contract with a single legal entity. Defence may sometimes contract with multiple parties as part of a public–private partnership or similar structure, although it will usually insist the multiple parties owe their obligations to Defence on a joint and several basis.

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?

The Freedom of Information Act 1982 (the FOI Act) grants a right of access to a document held by Defence (potentially including previous contracts). This extends to documents held by a party providing services (though not goods) to Defence under contract. If a document falls under one of the FOI Act's nine exemptions (including documents affecting national security, defence or international relations), Defence may refuse to release it or can redact the exempt sections. Documents falling under one of the FOI Act's eight conditional exemptions must be released, unless it would be contrary to the public interest to do so. In practice, freedom of information requests to access Defence contracts are often partially or fully rejected relying on an exemption but this result cannot be guaranteed. In addition, the Australian Geospatial Intelligence Organisation, the Australian Signals Directorate and the Defence Intelligence Organisation are excluded from the operation of the FOI Act. The CPRs also require federal government agencies to make available via the AusTender website contracts for goods or services valued at or above A$10,000 (including goods and services tax). This requirement is subject to the relevant FOI Act exemptions. A log of decisions by Defence on giving access to documents under FOI Act requests can be viewed on the Defence website.

Supply chain management

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

The Modern Slavery Act 2018 (Cth) came into force on 1 January 2019, and establishes a supply-chain reporting regime requiring commercial and not-for-profit entities with annual consolidated revenue of at least A$100 million to submit a Modern Slavery Statement to the Minister for Home Affairs each financial year. The Modern Slavery Statement is required to describe the structure, operations and supply chains of the reporting entity, any risks of modern slavery in the reporting entity's operations and supply chains, and actions taken by the reporting entity to assess and address those risks. Modern Slavery Statements will be published online on a central register, which is to be maintained by the Minister and made freely accessible to the public. Equivalent legislation applicable to commercial organisations has been passed in the Australian State of New South Wales; however, at the time of writing, state legislation has not yet commenced.

Further, the Global Supply Chain (GSC) Program is a federal government programme managed by the Centre for Defence Industry Capability. It involves working with eight 'prime' contractors to obtain opportunities for Australian companies to work within their supply chains. Each of the prime contractors are provided funding to set up a GSC team within their organisation. This team takes ownership of managing and identifying which Australian companies can be part of the organisation's supply chain, and liaises with the GSC teams from other prime contractors to foster growth of the Australian defence industry.

There are no specific rules regarding anti-counterfeit parts for defence and security procurements. The requirements for a procurement may require bidders to submit details on how they address this issue.

INTERNATIONAL TRADE RULES

Export controls

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

The Defence and Strategic Goods List (DSGL) published under the Customs Act 1901 identifies military and dual-use items regulated under Australia's export controls. Australia implements export controls on the export of controlled items in both tangible and intangible forms. Under the Customs (Prohibited Exports) Regulation 1958, it is prohibited to export controlled items from Australia without a permit. Since April 2016, under the Defence Trade Controls Act 2012, intangible transfer of export controlled items (DSGL technology) by a person within Australia to another person outside Australia is regulated as part of export controls. Intangible transfer can occur, for example, by a person emailing DSGL technology from a place within Australia to another person outside Australia. Intangible transfer can also occur by a person within Australia providing another person outside Australia with the means to access DSGL technology situated in Australia (eg, a password to access DSGL technology on a server). Unlike some jurisdictions, Australia does not apply export control rules to transfers of controlled items to foreign nationals within Australia. There are limited situations where no permit is required or where an alternative, easier-to-administer permit may be available. Defence Export Controls within

the Department of Defence is responsible for issuing permits and giving guidance on export controls.

Domestic preferences

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

Foreign contractors regularly successfully bid directly on Australian defence and security procurements. They also regularly bid using an Australian subsidiary or as part of a joint venture. A foreign contractor may directly bid on an Australian government defence and security procurement other than where the government relies on a trade agreement provision entitling the government to place limits on bidders or do selective sourcing.

Australia has agreed in the government procurement chapter of several free trade agreements to treat foreign suppliers no less favourably than the procuring entity accords to domestic suppliers for covered procurements. Defence procurement above a monetary threshold is usually a covered procurement. However, the free trade agreements contain some carveouts from this commitment, such as for procurement of supplies for identified essential security defence needs. Most free trade agreements to which Australia is a party also switch off the government procurement chapter obligations for any form of preference to benefit small-to-medium enterprises.

Australian domestic and foreign bidders for defence and security procurement are required to participate in the Australian Industry Capability (AIC). The AIC requirements applicable for a procurement are set out in the procurement terms. Requirements are generally more extensive if the procurement is estimated to be over A$20 million or for supplies relevant to the priority areas where the government wishes to develop Australian defence capability. The AIC programme commitments that bidders offer in their bids form part of the procurement assessment criteria and the contractual obligations of the successful bidder. While not a domestic preference, a foreign contractor may also face some practical challenges in meeting the criteria for an Australian defence and security procurement if the project requires substantial access to security classified information.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

There are measures benefiting trade in defence articles with US suppliers. The governments of Australia and the United States have agreed the Defense Trade Cooperation Treaty. A measure facilitated by the treaty is that US suppliers can apply to be members of the Australian Community. A member has been vetted to meet certain security requirements. As a result, the member should find that trade in controlled items is streamlined and subject to fewer licensing or permit requirements. Given their traditionally close defence relationship, the Australian and US governments have also established protocols for transfer of defence-related material and working on joint defence projects that can benefit participating suppliers.

Sanctions

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

The Australian federal government implements the United Nations Security Council sanctions and applies its own autonomous sanctions. The government does not tend to apply boycotts or embargoes in trading with a jurisdiction. Instead, the government prohibits without a permit direct or indirect trade with designated persons and entities and industry-sector targeted trade in certain goods and services connected with a sanctioned jurisdiction.

When sector sanctions are applied against a jurisdiction, the sanctioned supplies usually include exporting arms and related materiel to or providing services concerning arms and related materiel benefiting the jurisdiction.

The Department of Foreign Affairs and Trade (DFAT) administers Australian sanctions but consults with Defence Export Controls on arms and related materiel matters. DFAT generally treats all items listed on the DSGL as falling within the meaning of arms and related materiel.

Sanctions vary with changes to the political climate. At the time of writing, Australian sanctions apply on

- the Central African Republic;
- counter-terrorism;
- Crimea and Sevastopol;
- the Democratic People's Republic of Korea (North Korea);
- the Democratic Republic of the Congo;
- Eritrea;
- the Former Federal Republic of Yugoslavia;
- Guinea-Bissau;
- Iran;
- Iraq;
- ISIL (Da'esh) and Al-Qaida;
- Lebanon;
- Libya;
- Myanmar;
- Russia;
- Somalia;
- South Sudan;
- Sudan;
- Syria;
- the Taliban;
- Ukraine;
- Yemen; and
- Zimbabwe.

Trade offsets

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

The Australian government does not use trade offsets in its procurement regime.

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?

Former federal government employees are not usually prevented from taking up appointments in the private sector or vice versa. Former government employees are under ongoing duties of confidentiality to protect government information (disclosure of information protected under legislation can be subject to a fine or imprisonment). The former government employees may also agree specific commitments with their former employer to address conflict of interest concerns. Defence has a policy addressing post-separation employment giving guidance to the departing government employee and his or her new employer. It is not uncommon for a former Defence employee to agree for a period not to be involved in specified projects for his or her new employer where the employee was involved in that project while employed by Defence. The new employer might also be asked to make corresponding commitments. Typically, the period is one year. Government procurement

terms usually state that compiling a bid with the improper assistance of a former government employee is a breach of the procurement terms and can lead to exclusion from the procurement.

Addressing corruption

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

The federal Criminal Code contains offences for bribing a public official and for accepting a bribe. There are separate offences for bribing domestic (Commonwealth) and foreign public officials. Penalties include fines, imprisonment or both. The Code makes it an offence to offer or provide to a person an inducement that is not legitimately due with the intention of influencing a public official in his or her official duties to retain business or obtain a business advantage not properly due to the recipient of the benefit. The definition of 'Commonwealth public official' includes an officer or employee of a contracted service provider for a 'Commonwealth contract' and who provides services for the purposes (whether direct or indirect) of the Commonwealth contract. As part of their employment terms, Australian government officials are also subject to obligations to avoid conflicts of interest and comply with relevant policies. There are government policies addressing the limited extent to which government officials may accept gifts and hospitality and disclosure requirements. Defence has a detailed policy on gifts and hospitality.

Separately, the Foreign Influence Transparency Scheme commenced on 10 December 2018. The Foreign Influence Transparency Scheme Act 2018 (FITS Act) is aimed at providing more transparency regarding persons who undertake certain activities on behalf of 'foreign principals' (defined as foreign governments and related entities and individuals, as well as foreign political organisations). Under the FITS Act, a person who carries out specified types of activities on behalf of a foreign principal for the purpose of political or government influence must register with the Foreign Influence Transparency Scheme. Registrants must provide up-to-date information about their activities to the Secretary of the Department, in this case Defence, particularly during voting periods for federal elections. While certain exemptions apply, the FITS Act contains criminal offences for failure to comply with its requirements.

On 1 July 2019, the Commonwealth's Black Economy Procurement Connected Policy commenced with the purpose of improving procurement practices to protect honest business, increase integrity in supply chains and reduce black economy behaviour. All non-corporate Commonwealth entities are required to comply with the policy, while corporate Commonwealth entities are encouraged to comply. Businesses seeking to tender for Australian government procurement contracts valued at more than A$4 million, including for construction services, must comply with the following requirements of the Policy:

- provide a valid and satisfactory Statement of Tax Records from the Australian Taxation Office; and
- obtain and hold equivalent Statements of Tax Records for their first tier subcontractors.

Tenders must not be accepted if these requirements are not satisfied. The Australian Treasury has indicated that the policy will be reviewed and may be amended after one year.

Lobbyists

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

Aside from the Foreign Influence Transparency Scheme described above, there is no legislation regulating lobbying. The federal Department of the Prime Minister and Cabinet administers a lobbying policy that includes a requirement for persons conducting lobbying activities on behalf of a third-party client to register themselves and their clients on the publicly available lobbyist register. Government officials should not meet with a person who fails to meet a requirement to register on the lobbyist register. There are listed exceptions to 'lobbying activities' and 'lobbyist'. A person does not engage in lobbying activities when he or she makes communications to the government about a tender.

Limitations on agents

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

As long as it does not breach secret commission laws, there is no prohibition on the use in Australian government procurement of agents or representatives that earn a commission. However, the procurement terms may require disclosure of use of such agents or representatives and any commissions paid. Such a disclosure requirement is contained in some of the Defence template procurement terms. Secret commission laws could be relevant, for example, if the agent was acting for both the bidder and the customer and this fact was not properly disclosed or otherwise dealt with.

AVIATION

Conversion of aircraft

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

Aircraft used by Defence for a military purpose will usually be procured specifically for that purpose and will not be an aircraft converted from a civil use (and vice versa). Defence occasionally provides old military aircraft for foreign government military use and the aircraft would go through a refurbishment process to be suitable for the new owner's use. If Defence was to make military use aircraft available for disposal or converted to civilian use, the aircraft would go through a decommissioning process to have weapons and sensitive information removed. The Directorate of Military Disposals is responsible for the disposal of major Defence equipment and capability platforms.

Drones

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

The manufacture of unmanned aircraft systems or drones is permitted in Australia. Trade in these items is regulated if any component or technology used in the items is subject to export controls. Use of unmanned aircraft systems or drones is heavily regulated (including testing that might occur as part of the manufacturing process).

MISCELLANEOUS

Employment law

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

The domestic labour and employment rules applying to foreign defence contractors will depend on various factors, including whether the foreign contractor is incorporated in Australia, the nature of the work to be performed under the contract and whether the foreign contractor's employees are performing work in Australia. A foreign contractor may need to consider federal as well as state or territory labour and employment laws.

Employees of incorporated entities (whether Australian or foreign entities) that carry out trade or commerce in Australia, and who are working in Australia, are covered by the federal system of employment laws. The applicable employment laws differ for employees under industrial awards, collective workplace or enterprise agreements and employees under other non-regulated employment contracts. Federal, state or territory work health and safety laws will apply to work performed in Australia.

It will be an important matter for Defence that a contractor agrees to comply with the federal Work Health and Safety Act 2011 (the WHS Act) (or equivalent state or territory legislation) for work to be performed in Australia. Defence contracts may also require contractors to comply with certain laws even if the laws may not regulate a foreign contractor. For example, even if work is done outside Australia, Defence may contractually require the contractor to agree to comply with the WHS Act with respect to any contractor worksite that Defence personnel may visit. Defence contractors may also need to consider the application of Australian federal, state and territory anti-discrimination legislation particularly if employment of foreign nationals from certain jurisdictions may be problematic (eg, if security clearances are needed to perform the contract). Defence contractors may need to obtain exemptions from Australian anti-discrimination laws to exclude certain foreign nationals from hiring pools.

Defence contract rules

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

Several specific rules have been noted in the above responses. Other specific rules applying to working with Defence are usually imposed via contract. For example, contractors for Defence contracts are usually contractually required to comply with a range of Defence policies, such as policies regulating conduct on Defence premises.

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

As explained above, it is usually Defence and not a contractor who seeks to apply Australian laws and Defence policies when work is performed exclusively outside of Australia.

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?

Contractor personnel will need to provide personal information when they apply for a security clearance to access protected information. The level of personal information required will depend on the level of security clearance sought. Key personnel named for contracts will often need to provide resumes on their expertise. Identity details are also usually needed if a person is visiting Defence premises. Criminal convictions (or similar) certifications for employees are not usually sought unless Defence has assessed this is necessary for the procurement requirement (eg, for a person to be in a role of trust or handling monies for Defence). It may be a requirement in a tender that a bidder disclose any relevant criminal convictions imposed on it, its related entities and directors and officers.

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Licensing requirements

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

There is no registration or licensing requirement to be eligible to do business with Defence. Security clearances or other vetting may be needed to access certain programmes or procurements run by Defence. Industry participants can apply for membership of the Defence Industry Security Program (DISP), which is managed by the Defence Security and Vetting Service. The purpose of DISP is to enhance Defence's ability to monitor and mitigate the security risks associated with the contracting for, or outsourcing of, Defence services, functions and capabilities. DISP members must comply with the security standards required by the Defence Security Principles Framework, the PSPF, and the Australian Government Information Security Manual. Industry participants are generally required to obtain and maintain DISP membership if they are accessing, handling or storing classified information in their capacity as a prime contractor or sub-contractor to Defence.

Environmental legislation

38 | What environmental statutes or regulations must contractors comply with?

The applicable environmental statutes and regulations depend on the types of supplies. The contractor may be directly regulated by these laws or contractually required to comply with these laws because Defence is regulated. For example, the Environment Protection and Biodiversity Conservation Act 1999 imposes requirements on all Australian Government entities, including Defence, regarding management of their activities. Other laws called out as important by Defence include the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989, which gives effect to Australia's international obligations under the Montreal Protocol and establishes measures to protect the ozone layer and to minimise emissions of synthetic greenhouse gases. Defence also encourages contractors to follow the Australian Packaging Covenant in dealing with packaging waste. Environmental planning laws may need to be considered for certain land uses.

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

There is no specific environmental target set by Defence for companies to meet. There is substantial guidance issued by Defence on how it may take into account environmental protection, waste management and energy efficiency in procurement. If Defence had a specific environmental objective or requirement for a project, it would usually be set out in the procurement criteria.

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

Defence is required under federal government policy to consider energy efficiency in purchasing decisions. Defence gives considerable guidance on what may be relevant. Procurement terms may identify when environmental considerations form part of the tender evaluation criteria.

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?

Modern Slavery Act 2018 (Cth), Commonwealth's Black Economy Procurement Connected Policy, and the Foreign Influence Transparency Scheme as set out in other questions.

Canada

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LEGAL FRAMEWORK

Relevant legislation

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

The procurement of goods and services for defence and security is governed by laws and regulations that pertain to procurement law generally and to security requirements specifically associated with the goods and services that are typically identified as being related to defence and security.

At the federal level, laws and regulations of general application include the Government Contracts Regulations and any applicable policies promulgated by the Treasury Board and Public Services and Procurement Canada. The government procures defence and security articles in a manner similar to other goods and services and uses a competitive solicitation process. While Canada has exempted security and defence-related procurements from the procurement disciplines of international trade agreements (such as the World Trade Organization Agreement on Government Procurement (AGP) and the Comprehensive Economic Trade Agreement (CETA)), Canada nonetheless conducts such procurement in a manner consistent with those agreements by using competitive solicitation processes that (subject to security concerns) are open to foreign suppliers. Absent a specific exemption being applied on the basis of, for example, national security, defence-related procurements are subject to the Canadian Free Trade Agreement (CFTA). The CFTA is a domestic trade agreement between Canada's federal, provincial and territorial governments. It includes disciplines similar to those set out in the AGP and CETA. However, only Canadian suppliers may challenge non-adherence to those disciplines.

Laws and regulations that specifically apply to the procurement of defence and security articles include the Defence Production Act; the Controlled Goods Regulations; and Security of Information Act.

The Defence Production Act address two key issues:

- It grants the Minister of Public Services and Procurement Canada (whose department was formerly known as the Department of Public Works and Government Services) significant ministerial oversight of 'defence contracts' and powers to secure goods, technology and services necessary for the defence of Canada. For example, the Minister has the power to review amounts paid under a defence contract to ensure that a defence contractor is not being paid amounts 'in excess of the fair and reasonable cost of performing the contract together with a fair and reasonable profit'. Also, the Minister has the power to relieve a contractor 'from any claims, actions or proceedings for the payment of royalties for the use or infringement of any intellectual property rights' and to pay the holder of such rights 'reasonable compensation' for the infringement.
- It creates the legislative framework and statutory offences with respect to the handling of 'controlled goods' pursuant to the Controlled Goods Regulations. The Controlled Goods Regulations, which are made under the Defence Production Act, govern the transfer of 'controlled goods'. Controlled goods are those listed in the Schedule to the Defence Production Act, which lists various articles and associated data that have military applications. Pursuant to the Controlled Goods Regulations, a firm that handles controlled goods must register with the government's Industrial Security Directorate and handle and transfer such goods in the manner prescribed by the regulations. Subject to certain limited exemptions, a firm may only grant access to persons registered with the Industrial Security Directorate.

The Security of Information Act is legislation designed to ensure that classified or protected information is safeguarded against unauthorised disclosure. Pursuant to the Security of Information Act, the government has implemented a series of policies, procedures and protocols associated with accessing, storing and handling of classified or protected information, which are administered by the Industrial Security Directorate.

Identification

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

Defence and security procurements are not identified as such. However, the solicitation documents pertaining to defence and security procurements will reference requirements that are unique to defence and security procurements, such as being subject to the Defence Production Act, Controlled Goods Regulations and security requirements.

Conduct

3 How are defence and security procurements typically conducted?

Defence and security procurements are conducted in the same manner as other procurements in that the government will use a request for proposal process to solicit bids. Complex procurements or those that involve access to classified information may involve an initial vetting of potential suppliers through a 'letter of interest' process, whereby the government requests that potential suppliers indicate their interest in participating in the procurement and may conduct an initial assessment of potential suppliers to ensure that bidders meet minimum requirements.

Proposed changes

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

The procurement of sophisticated and expensive defence goods, such as ships, aircraft and vehicles is complex. The government continues

to look at ways of making the process more efficient and less time-consuming. Also, the government continues to assess how defence procurement can be leveraged to meet socioeconomic goals, such as increased domestic employment or subcontracting or business opportunities for Canadian-based business. However, defence and security procurements have not changed in a material way in recent years.

Information technology

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

There are no different or additional procurement rules for information technology. However, the contract resulting from the procurement will include provisions regarding ownership of intellectual property, which may be a specific concern to suppliers of information technology.

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?

Most defence and security procurements are conducted in a manner that accords with the GPA and other treaty-based procurement rules (such as the AGP and the CETA) in the sense that the solicitation documents reflect the procedural requirements of treaty-based procurement rules (such as including a clear statement of work, evaluation criteria, etc).

However, most defence and security procurements conducted in Canada are exempt from the GPA as defence and security goods are not included in Canada's schedule to the GPA, CETA and other international trade agreements. As a result, the non-discrimination and national treatment provisions of the GPA, CETA and other international trade agreements do not apply. Equally, the procurement dispute process under such treaties does not apply.

Having said that, the government is party to the CFTA with provincial and territorial governments. Absent the application of a specific exemption (such as national security), CFTA applies to the procurements for defence and security items. On that basis, CFTA prescribes the minimum procedural requirements for a procurement of defence and security articles and services and affords national and non-discrimination treatment to 'Canadian Suppliers'. Equally, 'Canadian Suppliers' have standing to bring a dispute to the Canadian International Trade Tribunal with respect to an alleged breach of the CFTA. The threshold to be considered a 'Canadian Supplier' is low and is defined as being 'a supplier that has a place of business in Canada' at which it 'conducts activities on a permanent basis that is clearly identified by name and accessible during normal business hours'. 'Foreign suppliers' often open an office in Canada as a means of supporting bidding efforts and also to qualify as 'Canadian suppliers'.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

In the context of a dispute regarding the procurement process, a supplier that qualifies as a Canadian supplier has standing under the CFTA to bring a procurement complaint to the Canadian International Trade Tribunal, which is Canada's bid dispute resolution authority. The government may invoke a 'national security exemption' that has the effect of precluding challenges under the CFTA or any other trade agreement.

Also, suppliers that cannot advance a complaint before the Canadian International Trade Tribunal owing to standing or jurisdictional considerations, may seek judicial review of the procurement decision by making an application to the Federal Court of Canada.

In a situation where the dispute relates to the contract between a successful bidder and the government, disputes will be resolved in accordance with any applicable contract provisions (such as mediation or arbitration) or otherwise resolved through the domestic court process applicable to contract disputes.

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

Government contracts often include the potential use of alternative dispute resolution processes. However, these are normally only available with the consent of the government. Without such provisions or in the event that the government does not consent to using alternative dispute mechanisms, the typical jurisdiction for resolution of contract disputes would be the superior court of a province, such as the Ontario Superior Court of Justice. The Federal Court of Canada has concurrent (but not exclusive) jurisdiction over contract disputes involving the government as a defendant. The Federal Court of Canada does not have jurisdiction over disputes between contractors and subcontractors. Put another way, a contractor may start a proceeding against the government in Federal Court or, alternatively, in the superior court of a province. All other contract claims would normally be advanced in the superior court of a province.

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?

Normally, the government limits its liability to a contractor to the full value of the contract. This would preclude claims for amounts that exceed the contract value.

It is only in rare circumstances that the government would put a limit on the contractor's liability. Often the government will seek guarantees from a contractor's parent company to ensure contractual performance.

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?

Yes, the government may agree to limit the contract's liability under the contract. However, the government tends to be reluctant to do so.

There are no statutory or regulatory limits to the contractors' potential recovery against the government for breach. However, the government's standard contracting documents limit liability to a stated amount, which is often identified as limitation of expenditure or limitation of liability.

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 contracting procedures used by the government require Treasury Board approval for major contracts, which entails that funds have been budgeted and allocated to meet the terms of payment. The government is not known to have defaulted on a payment owing to a lack of funds.

Parent guarantee

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

The government may seek a parent guarantee in circumstances where there is a concern regarding the contractor's financial capability to fulfil the contract requirements. The assessment of a contractor's financial capability is based on a review of its audited financial statements and other relevant information. In a situation where the contractor is a subsidiary of a larger corporate structure, the government will often require the parent organisation provides a guarantee, particularly with respect to complex or major procurements.

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?

At the most basic level, the Government Contracts Regulations require that Canada solicit bids for government contracts by giving public notice or inviting suppliers to participate.

Also, the Government Contracts Regulations include terms that are deemed to be included in any government contract such as: the contractor has not paid any contingency fee to obtain the contract; the contractor's accounts and records shall be subject to audit; the contractor has not committed any specified offences; and the Access to Information Act applies to information received under the contract.

Cost allocation

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

The allocation of costs between the contractor and government will vary depending on the contract.

For example, in the context of service type contracts that include the provision of commodity type goods that can vary in costs over time (such as fuel), the government may reimburse the contractor for such costs without any mark-up.

Also, in certain circumstances, the government may use a 'cost-plus' model where the contractor is compensated for its costs plus a reasonable mark-up for profit. In such circumstances, standard government contracting provisions apply to define what is an appropriate 'cost' for reimbursement.

Disclosures

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

This depends upon the contract. If a 'cost-plus' model is used, then there is significant disclosure regarding the contractor's costs and pricing. This is most often an issue in the context of contracts that have a large service component (such as retrofitting and repairs).

Also, standard government contracting clauses and legislation (such as the Defence Production Act) allow the government to conduct audits.

Audits

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

Audits are conducted by government officials pursuant to accounting and audit rules of general application, and pursuant to any applicable contract provisions.

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 Treasury Board's Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts provides that:

> *The objective of this Policy is to enhance Canada's economic growth by increasing commercialization of Intellectual Property. To this end, the contractor is to own the rights to Foreground Intellectual Property created as a result of a Crown Procurement Contract.*

This position is subject to certain exceptions and exemptions.

'Foreground intellectual property' means intellectual property 'first conceived, developed, produced or reduced to practice as part of the work under a Crown Procurement Contract'. The government would maintain a broad licence to any foreground intellectual property.

A variety of exceptions and exemptions exists with regard to this general position, including national security requirements; statutory and regulatory requirements or prior obligations of the government regarding the intellectual property at issue; and where the purpose of the procurement contract is incompatible with the contractor owning the foreground intellectual property, such as when the purpose of the contract is to generate knowledge and information for public dissemination or relates to the development of intellectual property owned by the government.

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?

No.

Forming legal entities

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

Legal entities, such as corporations, are formed pursuant to the Business Corporations Acts in effect throughout Canada's various jurisdictions (ie, federal, provincial and territorial). Joint ventures may take on the form of a corporate entity or may be formulated on the basis of a contractual relationship.

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?

The Access to Information Act allows a person to request documents in the possession of departments and agencies of the government. The process for making a request is simple. A requester completes a form describing the documents or information sought and the office in the

government department where the documents or information are likely to be stored. An initial nominal payment is required with the request. A further fee for making reproductions may also apply.

Contracts (or redacted portions thereof) may be exempt from disclosure on various grounds, including that the disclosure of the information would be contrary to national security interests, include personal information or include third-party information such as trade secrets, confidential commercial information or information the disclosure of which would prejudice the third party's competitive position.

The Access to Information process has been criticised as being slow in providing access to documents.

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 rules of general application. This would be addressed on a contract-by-contract basis.

INTERNATIONAL TRADE RULES

Export controls

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

Exports from Canada are subject to the Export and Import Permits Act, which authorises the creation of an Export Control List. The exportation of articles listed on the Export Control List must be specifically authorised by a permit issued by the Minister of Global Affairs.

Domestic preferences

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

A foreign contractor may bid on a defence and security procurement directly. Subject to security concerns, defence and security procurements are generally open.

However, major defence and security procurements require the successful bidder to commit to Industrial and Technological Benefits (ITB), which generally provide that the successful bidder is to make certain investments in Canada or carry out certain work in Canada. The ITB programme is designed to foster investment in Canada in specified sectors, including manufacturing, aerospace and technology. Normally, the ITB commitment is equivalent to the value paid by Canada to the successful bidder.

Favourable treatment

24 Are certain treaty partners treated more favourably?

No.

Sanctions

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

Yes, the government has imposed trade sanctions on various jurisdictions through the United Nations Act (which implements United Nations Security Council sanctions) and the Special Economic Measures Act (which implements autonomous sanctions issued by the government of Canada). Also, Canada recently adopted the Justice for Victims of Corrupt Foreign Officials Act, which allows Canada to impose an asset freeze and a dealings prohibition against individuals who, in the opinion of the Governor in Council, are responsible for or complicit in gross violations of internationally recognised human rights or are foreign public officials or their associates, who are responsible for or complicit in acts of significant corruption.

Measures under the United Nations Act and the Special Economic Measures Act are currently in place with respect to the following jurisdictions: the Central African Republic, Democratic Republic of the Congo, Eritrea, Iran, Iraq, Lebanon, Libya, Mali, Nicaragua, Myanmar, North Korea, Russia, Somalia, South Sudan, Sudan, Syria, Ukraine (linked to Russia's ongoing violations of Ukraine's sovereignty and territorial integrity), Venezuela, Yemen, and Zimbabwe.

Canada has also taken measures against specific individuals and groups on the basis of their activities or associations.

Trade offsets

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

Yes, defence trade offsets are part of Canada defence and security procurement regime. The government has adopted the ITB Policy. The ITB programme is administered by Industry Canada. Under the ITB Policy, contractors awarded defence procurement contracts are required to undertake business activities in Canada, equal to the value of the contract. Bidders are required to articulate the proposed business activities in their respective proposals submitted in response to the procurement and bids are evaluated on the basis of the 'value proposition' that the bidder proposes to Canada at the time of bid. After a contract is awarded, the contractor is required to start fulfilling its commitments and to identify further business activities in Canada, as may be required to meet its overall ITB obligation (ie, 100 per cent of contract value). For example, if contractor's value proposition includes specific commitments and activities equal to 75 per cent of the contract value, it will be required to identify additional activities equal to 25 per cent of the contract value after the contract is awarded.

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?

Former government employees are subject to restrictions associated with their employment. Generally, former government employees must undergo a 'cooling-off' period before they may join a private sector employer that has significant dealings with government.

The government hires employees from the private sector. Such employees are subject to conflict-of-interest guidelines.

Addressing corruption

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

Domestic and foreign corruption is addressed through criminal laws of general application, which include the Criminal Code and the

Corruption of Foreign Public Officials Act. Also, the government has adopted the Integrity Regime, which is a set of contractual provisions and associated policies (such as the Ineligibility and Suspension Policy) that have the effect of prohibiting bidders and contractors that have been convicted of specific offences from participating in procurements. The offences that may result in disqualification range from offices related to the participation in a criminal organisation, fraud against the government or bid rigging. Disqualification may result from the commission of

an offence as articulated as being part of Canada's domestic law or a foreign equivalent to a listed domestic offence.

Lobbyists

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

Lobbyists or commercial agents are required to register under lobbyist registry legislation. With respect to procurements conducted by the government, the applicable legislation is the Lobbying Act. The Lobbying Act requires lobbyist and commercial agents to file a registration identifying themselves, their clients, the topic of their lobbying activity and the government offices or officials that are being lobbied.

Limitations on agents

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

Yes. Pursuant to the Lobbying Act and standard contracting provisions, the paying of a commission to a third-party agent or representative is prohibited.

AVIATION

Conversion of aircraft

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

Not applicable.

Drones

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

Unmanned aircraft systems or drones for military purposes are subject to export and import controls.

MISCELLANEOUS

Employment law

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

Domestic labour and employment rules apply to work done in Canada.

Pursuant to the Federal Contractors Program, contractors who bid on an initial goods and services contract, a standing offer, or a supply arrangement estimated at C$1 million or more (including applicable taxes) with the government must first certify their commitment to implement employment equity by signing the Agreement to Implement Employment Equity prior to contract award. Once an eligible contract is awarded to the contractor, the contractor is then required to meet Federal Contractors Program requirements, which include collecting of information regarding employment equity, carrying out a work force analysis, establishing short- and long-term goals with respect to employment equity, and make reasonable progress and efforts in reaching those goals.

Defence contract rules

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

Not applicable.

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

Not applicable.

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?

The review of personal information of directors, officers and employees occurs in three contexts. First, to the extent that a security requirement applies to access sensitive or classified information either at the bidding stage or under the resulting contract, directors, officers or employees may be required to undergo a security check. Second, a security check is generally required to handle goods or technical information that are subject to the Controlled Goods Regulations. Third, the government has adopted the integrity regime, which consists of various contractual provisions that require bidders and contractors to certify that the bidder, contractor or related entities have not been convicted or charged with specified offences, which range from being part of a criminal organisation to competition law offences to frauds against the government.

Licensing requirements

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

There are no registration or licensing requirements that generally pertain to the defence and security sector as such. However, registrations may be required with respect to the handling of certain goods and technical data. For example, pursuant to the Controlled Goods Regulations, a company handling military-type goods or technical data is required to register with the Industrial Security Directorate and maintain a Controlled Goods Registration. Also, individuals who have access to classified or protected information and establishments that house such information will have to undergo a security assessment and adhere to relevant policies administered by the Industrial Security Directorate.

Environmental legislation

38 | What environmental statutes or regulations must contractors comply with?

Contractors are expected to comply with environmental statutes and regulations of general application. Environmental legislation exists at both the federal level of government and the provincial or territorial level of government. As such, legislative and regulatory requirements depend on the jurisdiction in which the work is being conducted. As a general example, contractors would be expected to comply with the Canadian Environmental Protection Act and environmental legislation applicable in the provinces or territories in which they operate such as, for example, the Ontario Environmental Protection Act.

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

At present, companies are not required to meet specific environmental targets. They are expected to meet any environmental laws of general application for work that is being conducted in Canada. The government has adopted the Policy on Green Procurement. This policy requires the procuring entity to consider the environmental impact of the procurement and to include measures in any resulting contract that lessen any

adverse environmental impacts and, to the extent such measures are included, the enforcement becomes an issue of contract law.

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

Green solutions do not have an advantage unless they are evaluated as part of the evaluation criteria expressly included in the solicitation documents.

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?

Canada recently amended the Canadian International Trade Tribunal Procurement Inquiry Regulations. The amendments remove the Tribunal's jurisdiction to conduct inquiries into procurement complaints in circumstances where the government has exempted the procurement from the application of the trade agreements on the basis of a national security exemption. Prior to the regulatory amendments, the Tribunal maintained jurisdiction to conduct an inquiry into procurements that were subject to a national security exemption. In such cases, the Tribunal would determine the ambit of the national security exemption at issue and then consider whether the Tribunal could inquire into, and provide a remedy regarding, the subject matter of the procurement complaint in light of the national security exemption. If so, the Tribunal would conduct its inquiry and make the appropriate remedy. If not, the Tribunal would decline to conduct an inquiry. The implication and effect of the regulatory amendments is that the Tribunal does not have any jurisdiction over a procurement that is subject to a national security exemption and may not conduct any inquiry when the exemption is invoked.

Canada also experienced significant controversy with respect to its application of deferred prosecution agreements (DPAs) under the Criminal Code. A DPA allows a person to avoid prosecution for specified offences if they agree to implement various measures to address alleged corrupt conduct and be subject to monitoring. The controversy arose when the attorney general was allegedly pressured to reconsider the use of a DPA with respect to a company accused of corrupt practices. The implications of this controversy are not known at this time. However, it is likely that there will be significant debate regarding the availability and use of DPAs in the future.

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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 implemented since 2001, and so the French government has recently integrated public procurement rules into 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 resulting in the development of three legislative acts governing defence procurement dated 2004, 2011 and 2016.

General principles derived from the EU Treaty also apply to defence procurement, 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 detailed below).

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:

- 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 is the case in particular for:

- 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 (see articles R. 2322–1 to R. 2322–14 of the PPC). In such case, the public entity is free to organise this procedure, but shall proceed in accordance with the normal principles of public procurement law.

Above certain specific thresholds (up to €443,000 HT for supplies and services and €5,548,000 HT 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 the 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.

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 apply only to contracts that expressly refer to them.

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 in its CCAP the provisions necessary for the management of these kind of contracts.

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 contract award is explained by the complexity of the transactions at stake, the necessity for comprehensive exchange of information prior to the contract being awarded, as well as by the willingness of the public authorities to support the industrial defence sector ('*Choice of contract type and performance: The case of public defense contracts*' by Jean-Michel Oudot, *Économie publique/Public economics,* issue 21, 2007/2). 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 amount 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 without prior publication.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Two types of dispute settlement are usually used to resolve disputes: 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 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 procedures described in question 7 only concern disputes between the administration and the contractor or the defence consortium and security contractor, so this referral is only possible for the administration and the contractor. Referral to the CCNRA is not possible if the dispute is among members of the defence consortium holding the contract, or between a contractor with a Tier 1 subcontractor, or a Tier 1 subcontractor with a Tier 2 subcontractor. However, there is nothing preventing any of the latter parties from trying to reach out-of-court settlements. If they choose to pursue litigation, the case can only be brought before a judicial judge, not an 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 unilateral 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 CAC Armement contains 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?

The government usually limits its own liability under the contract. The public entity may stipulate a clause in a CCAP that limits 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 DGA 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 clauses (CAC) are specific to the French Defence Procurement Agency (DGA). This document is part of the procurement contract and is common to all defence services. The DGA will typically seek to include certain standard clauses in its contracts. Primarily, these are the DGA standard clauses of 2014, which 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 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 MPDS (in 98 per cent of the cases, see the article by Jean-Michel Oudot cited in question 6). 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 a 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, the 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 the contract. Contractual relationships between public and private entities are governed by the French PPC and Chapter VII of the CAC Armement relating to intellectual property. The main difference regarding contractual relationships concerns the use of the services produced, rather than their property rights. In return for the ownership of intellectual property rights, the Ministry of Defence expects the right to disclose and use the intellectual property 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 intellectual property 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 and 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 (SAS) or a company with limited responsibility (SARL) structure is used for this). To establish a company, the parties must carry out the formalities of constitution 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 (CADA), 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 (see question 36).

Regarding supply chain management, the PCC 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 subcontractor used by the DSPCR is broader than in 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, for example, to require a supplier to openly compete some of the sub-contracts or to flow down obligations regarding information security (article 2393–3 of the PCC).

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 s.).

The production and trade of defence items is 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 European Union. The licences are delivered by the prime minister after advice from the Commission for Export of Defence Goods (CIEEMG), which assesses each project taking into account:

- 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 428/2009, and its Annex I giving the list of the items concerned by this regulation, the export of such items outside the EU is subject to the grant of a licence.

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 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.

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 which 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 the Authority for consideration as to whether the new private activities are compatible with his or her former functions.

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

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 him or her during his or her 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 he or she has carried out his or her duties.

Depending on the risks identified, the HATVP may declare the activity incompatible or formulate the 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 (eg, 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 in 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, where 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 practice, 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 the requirements described in question 29.

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 of a civil type certificate for military aircraft would often be too difficult and costly. Certificates of airworthiness can, nevertheless, be granted for specific use on a case-by-case basis. The process for obtaining a certificate of airworthiness is delegated to OSAC.

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 for Export from France (see question 22).

Civil drones will often be considered as dual-use goods and therefore be also subject to export control (see question 22). Indeed, civil drones often contain items covered by Category 6 of Annex I of EU Regulation 428/2009, 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 answers above provide the detail of the laws, regulations and policies applicable to defence contracts, most notably the CAC Armement 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 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, as mentioned above, the production and trade of defence items is subject to the grant of a specific authorisation (see question 22).

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, product or service. 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 (the 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 an MPDS contract 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?

In the judgment of the European Court of Justice dated 19 December 2018, Case C–216/17, the Court has interpreted article 1(5) and the fourth subparagraph of article 32(2) of former Directive 2004/18/EC on public procurements of 31 March 2004 and has stated that a contracting authority may act on its own behalf and on behalf of other contracting authorities that are specifically indicated but are not direct parties to a framework agreement, provided that the requirements as to advertising and legal certainty and, consequently, those relating to transparency are complied with; and it cannot be accepted that contracting authorities that are not signatories to the framework agreement refrain from determining the quantity of services that may be required when they conclude contracts pursuant to the framework agreement or determine that quantity by reference to their usual requirements, because, if they do so, the principles of transparency and equal treatment of economic operators with an interest in the conclusion of that framework contract will be infringed.

In another judgment of the European Court of Justice dated 21 March 2019, Case C–264/19 concerning civil defence, civil protection and danger prevention services, the Court has interpreted the article 10(h) of Directive 2014/24 in these terms. First, that it precludes public aid associations recognised in national law as civil protection and defence associations from being regarded as 'non-profit organisations or associations', within the meaning of that provision, in so far as, under national law, recognition as having public aid association status is not subject to not having a profit-making purpose. Second, that organisations or associations whose purpose is to undertake social tasks, which have no commercial purpose and which reinvest any profits to achieve the objective of that organisation or association constitute 'non-profit organisations or associations' within the meaning of that provision.

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LEGAL FRAMEWORK

Relevant legislation

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

Above the European Union 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 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.

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 ;
- the aforementioned Procurement Regulation for Construction Works; and
- the corresponding state procurement laws.

Identification

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

Defence and security procurement are defined in the 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 2020, €428,000 for goods and service contracts and €5,350,000 for works contracts. Contracts whose value is below these thresholds are not covered by the Defence and Security Directive.

It is precisely 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 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 of 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. The industry is involved in all phases of the process, within the limits set by public procurement law. The second area involves the procurement of standard and military goods and services for military missions. The third area involves the procurement of complex services. The Federal Office of Defence Technology IT and In-Service Support, and 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 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:

- no or no suitable tenders have been submitted within the framework of a restricted procedure or a negotiated procedure with prior publication of a contract notice;
- the contract may only be awarded to a specific supplier for technical reasons or reasons connected with the protection of exclusive rights;
- the time limits for a restricted or negotiated procedure with publication of a contract notice are incompatible with the urgency of the crisis for which goods or services are required; or
- the time limits for a restricted or negotiated procedure with publication of a contract notice cannot be complied with because of very urgent reasons caused by an unforeseeable event and not attributable to the contracting authority and, therefore, an exception is absolutely necessary.

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 Agreement on Government Procurement (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?

The Federal Ministry for Economic Affairs and Energy published a draft act with the intention to speed up procurement in defence and security. In the area of defence and security the military and civil authorities are facing new and difficult security challenges. The need to be able to respond quickly and effectively to security-related developments, both in Germany and abroad, is gaining in importance. The coalition agreement for the 19th parliamentary term, therefore, contains changes to streamline processes for the procurement of defence and security.

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 TFEU are still applied in many cases, especially in the field of arms procurement. However, there has been a decline in the use of these exemptions, largely as a result of strict judicial interpretation and a changing political climate.

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 all cases, public contracts are also subject to the price control provisions of Price Regulation No. 30/53, which contains binding rules on the pricing of public contracts.

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.

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, (ie, usually the Ministry of the Interior). The relevant ministry also reviews procurements at 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 are 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. Furthermore, 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 a right of access to 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 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. 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 (BAFA). Due to Germany's history, the 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 labour-market 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.

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 and GPA 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 by excluded from the tendering procedures.

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 statues. (See question 23.)

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 on the BAFA website.

As of 6 December 2019, embargoed countries include:

- Armenia;
- Azerbaijan;
- Belarus;
- Central African Republic;
- Congo;
- Eritrea;
- Iran;
- Iraq;
- Lebanon;
- Libya;
- Myanmar;
- People's Republic of Korea;
- People's Republic of China;
- Russia;
- Somalia;
- South Sudan;
- Sudan;
- Syria;
- Venezuela; and
- Zimbabwe.

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/or 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?

German Civil Service Law and the corresponding laws at state level require retired civil servants to notify the federal/state government if they intend to enter into any activity related to their former service responsibilities. The activity may be prohibited by government if official interests are in danger of being adversely affected.

Current and former government members must notify the government if they are planning civil activities in the private sector and if such activities might lead to a conflict of interests. If a politically neutral

advisory board concludes that an interference with public interest exists, the government may prohibit the activity for up to 30 months at the most. The duty to notify expires 18 months after leaving governmental office.

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 offenses 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. A federal competition register of economic operators whose employees have been found guilty of corrupt practices will begin operation in 2020. Checking the register before awarding a contract will be mandatory.

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 and/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.

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 (see question 22). In addition, if the contract involves access to classified information, contractors must observe all applicable regulations regarding the security of such information (see question 21). However, foreign security clearances from EU and Nato member states might by accepted on a case-by-case bases.

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 to the aforementioned regulations as well 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 (see question 21).

Licensing requirements

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

Aside from the aforementioned regulations governing access to classified information (see question 21) and manufacturing, trade, brokering and transport of military weapons and equipment as well as certain dual use goods (see question 22), 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.

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. The contracting authority might choose, however, to include environmental targets either as performance requirements or as evaluation criteria in a public procurement procedure. 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; however, see question 39.

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 federal cabinet passed an Act on Accelerated Procurement in the Field of Defence and Security on 30 October 2019. The act specifically modifies the procurement regulations to enable accelerated procurement for the military and civilian security authorities. The clarifications and typical examples are designed to help ensure that procurement procedures can be used more quickly and consistently by the procuring agencies. The Act still requires parliamentary approval and it is expected that it will come into force in early 2020.

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LEGAL FRAMEWORK

Relevant legislation

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

India does not have an overarching statute governing procurement of defence and security articles. Procurements by the government and its agencies are broadly governed by the General Financial Rules 2017 (GFR), which provides the framework under which all government procurements are undertaken.

The Defence Procurement Procedures (DPP) and the Defence Procurement Manual (DPM) are the principal regulations for defence and security procurements undertaken by the Ministry of Defence (MoD). The DPP and DPM are based on government procurement principles contained in the GFR, but hold the bidders and vendors to a higher standard of compliance and administrative scrutiny.

The DPP governs the procurement of long-term strategic assets (classified as capital procurements) and is indicative of the country's defence production policy. It also serves as an important tool to understand the manner in which defence procurement contracts are likely to be interpreted by the MoD in the event of an ambiguity. The DPM governs the procurement of non-strategic and bulk procurements of goods such as uniforms, non-military stores etc (classified as revenue procurements).

Apart from the DPP and DPM, government procurements are also subject to the policies and directives issued by the Central Vigilance Corruption (CVC), the apex anti-corruption monitoring institution in India. The CVC periodically issues binding instructions required to be followed across ministries for procurements.

Identification

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

Both defence and civil procurements are conducted under the principles provided in the GFR. A few noticeable differences in procedure between defence and civil procurements are as under:

- The defence establishment (navy, air force and army) seeking to procure articles is required to present a detailed report justifying the procurement, which is required to be approved by a committee. The approval is called the Acceptance of Necessity (AoN), which is the point of initiation of the procurement process.
- Procurements of defence and security articles follow a defined categorisation process, based on the domestic availability of the articles and capability of the Indian industry to manufacture the same. Each category has a separate procedure for the procurement process.
- Participation by foreign vendors in procurement contracts for defence and security articles under the DPP exceeding 20 billion rupees in value necessarily require offset obligations to be undertaken and discharged by the foreign bidder. The range of offset varies between 30 per cent to 50 per cent of the contract value.

Conduct

3 How are defence and security procurements typically conducted?

Defence procurements are usually conducted through an open tender system consisting of a two-stage bid process. The process follows the sequence as provided hereunder:

- The requirements are published as a Request for Information, soliciting interest from manufacturers.
- Based on the information received from the manufacturers, the technical requirements are formulated and approval by a committee constituted for this purpose. The committee provides its approval through an AoN.
- The Request for Proposal (RFP) is issued within six months of the AoN. The issuance of the RFP implies the formal initiation of the bid process.
- The bidders are invited to participate in a pre-bid meeting to seek clarifications on any technical, commercial or interpretative aspect of the RFP.
- Subsequently, the bidders are required to submit separate commercial and technical bids. The DPP also provides for establishment of several technical committees to evaluate each aspect of the bid.
- The technical bid is evaluated first and bidders that meet the technical requirements are invited to undertake field trials.
- Post completion of the field trials, the commercial bids are opened, and preference is typically given to the bidder that quotes the lowest price. However, in certain circumstances, a vendor with superior technical product at a higher price may be chosen.
- After selection of the vendor, contract negotiations are initiated to finalise the contract.

The procurement frameworks also envisage exceptional situations where an open tender system may not be feasible, such as:

- procurements below a de minimis value undertaken through direct orders placed on known vendors;
- procurements in emergency or crisis situations undertaken through a fast track procedure;
- procurements for sensitive equipment and systems undertaken directly at government levels; and
- procurements for products for which only a sole vendor is available.

For the above situations, the procurement process is curtailed, involves fewer procedural steps and is executed faster.

Proposed changes

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

The last significant amendment to the procurement process was undertaken in 2016 and 2017, with the issuance of the amended DPP and the GFR. As the amendments to the public procurement regime are recent, there are no significant proposals pending to change or overhaul the procurement process. Incremental amendments and revisions are frequently undertaken to facilitate the procurement process and provide operational guidance to bidders and contractors.

Information technology

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

The procurement process does not distinguish between IT and non-IT products and services, therefore, the process and rules remain identical for procurement. However, the MoD retains the discretion to customise procurement parameters if deemed necessary.

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?

India is not a signatory to the Agreement on Government Procurement (GPA) of the World Trade Organization nor to the model procurement law issued by the United Nations Commission on International Trade Law (UNCITRAL). Consequently, the Indian procurement laws are not modelled on either the GPA or the UNCITRAL Model Law.

The Law Commission of India has recommended the adoption of principles and concepts from the GPA and UNCITRAL model law. Based on the recommendation, the Public Procurement Bill, 2012 has been tabled before the parliament. However, the bill has been pending before the legislature for the several years and is not expected to be enacted into legislation in the foreseeable future.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Arbitration is the preferred mode of dispute resolution in government procurements, including those for defence and security articles. Certain frameworks such as the GFR may also permit dispute resolution through civil remedies before the courts of India.

Procurement contracts under DPP and DPM mandate arbitration to be governed by the laws of India and the seat of arbitration to be India. Subject to the nature, value and strategic importance of the procurement, the power to appoint arbitrators may vest solely with the buyer, with both parties or with an independent body such as the International Chamber of Commerce or its Indian counterpart. The burden of cost of arbitration may also be defined in the contract, which may be shared between the parties or left to the arbitrator or arbitral tribunal to decide.

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

Alternative dispute resolution through arbitration is the preferred and de facto mode of resolving conflicts between the government and contractors, and between the contractors and subcontractors.

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 government typically does not provide any indemnities under defence and security procurement contracts. On the contractor's side, the standard contract clauses will require the contractor to indemnify the government against infringement of third-party intellectual property rights in the goods or services purchased from the contractor.

While technically not an indemnity, defence procurement contracts also require the contractor to execute bank guarantees for performance parameters and anti-corruption compliances. It is not uncommon for these instruments to be invoked in defence procurement contracts for failure to adhere to certain aspects of the contract, such as indigenous content requirements, delivery schedule, quality parameters, bribery and undue influence, etc.

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 standard contract document under the DPP does not contain any clauses limiting the contractor's liability. However, under the provisions of the Indian Contract Act 1872 (ICA) an aggrieved party is only permitted to seek compensation to the extent of loss or damage that may naturally arise from a breach that could reasonably have been foreseen at the time of execution of the contract.

The courts in India consider damages to be restitutive and not punitive in nature, hence are reluctant to award punitive damages. Therefore, the liability of both the contractor and the MoD would be limited to direct losses, in the absence of any express clauses to the contrary.

There are no statutory or regulatory restrictions on any claim of damages sought against the government. The Indian courts do not accord any special privileges to the government with respect to contractual disputes.

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?

Defence and security acquisitions are undertaken based on firm budgetary allocations. Therefore, the likelihood for shortfall of funds in a defence procurement is extremely unlikely. Defence budgets are occasionally revised mid-year by allocating unspent funds by other ministries to meet the requirement of unforeseen procurements.

Parent guarantee

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

In circumstances where the prime bidder or contractor is unable to tender the bank guarantee mandated to be submitted as part of the bid, the MoD will require the parent to submit such guarantee on behalf of

the bidder or contractor. It is standard practice by the MoD to require bidders to submit bank guarantees against all payment streams that MoD is required to make to the prime bidder or contractor.

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?

India is a common law jurisdiction and upholds the sanctity of contracts and the intention of the parties as reflected in the contractual terms. Therefore, while the procurement process is governed by the relevant framework such as the DPP or the GFR, the contract between the buyer and the vendor is the principal document governing the transaction.

Procurement frameworks such as the DPP and the GFR mandate certain clauses to be included in the contract executed between the buyer and seller. For example, the DPP mandates that standard clauses relating to use of agents, penalty for use of undue influence, access to books of accounts, arbitration and clauses related to governing law must be accepted by the seller.

Apart from the above, general principles of law may be read into the contract under the laws of India. For example, the ICA mandates that a party to a contract must act in good faith. Therefore, even in the absence of an express clause in the contract, the courts may interpret the buyer to have a right to terminate the contract for mala fide acts undertaken by the vendor, such as misrepresentation of facts.

Cost allocation

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

Contracts involving outright purchase of goods and materials from the vendor typically do not demarcate costs between the contractor and the government. The vendor is responsible for all costs incurred up to the delivery of the goods, including the cost of conducting field trials. In certain procurements of high volume but low-value products, the government may reimburse the cost of goods used in trials.

The DPP provides for cost-sharing for specific types of procurements in relation to products identified by the MoD for long-term indigenous development and production. For such procurements, the MoD bears up to 100 per cent of the cost of development of the prototype and provides facilities, items and consumables for field trials and testing of the prototypes.

Disclosures

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

Cost and pricing disclosures depend on the applicable procurement framework and categorisation of the procurement. For certain types of procurements under the GFR or the DPM on fixed rate basis, the bidders are not required to provide costing information and must only submit their price bid for the procurement.

For procurements under the DPP, the bidders are required to make the following disclosures with respect to price:

- cost of basic equipment;
- cost of technology transferred (if applicable);
- cost of recommend manufacturer spare parts;
- cost of maintenance tools and test equipment;
- cost of operating manual and technical literature for equipment and spare parts;
- cost of training aids such as simulators, films, charts, etc;
- cost of recommended training period;
- cost of freight and transit insurance;
- cost of annual maintenance; and
- cost escalations due to inflation.

In addition to the above, it is standard practice for bidders to specify the validity period of the prices quoted in the tender submissions and to state that the cost and prices quoted are applicable only to the configuration offered for the procurement.

Audits

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

The Comptroller and Auditor General of India (CAG) is the apex constitutional authority that undertakes the audit of all government departments and procurements undertaken by them. The CAG conducts performance and compliance audits of all government procurements and issues a report containing its observations with respect to compliance with legal frameworks and achievement of defined objectives. CAG reports are submitted to the Parliament of India and are publicly accessible.

Internal audits of vendors and procurements may also be undertaken by an individual ministry. For example, the DPP empowers the MoD to conduct audits to ascertain compliance with indigenous content requirements, discharge of offset and costing claims under a procurement category. During such an audit, the MoD (as a customer) is contractually permitted to access the records maintained by the vendor and visit the manufacturing location to verify the authenticity of claims made by the vendor or its suppliers.

IP rights

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

Defence procurements under most categories of the DPP entail outright purchase with minimal design and development requirement. Therefore, creation of intellectual property during the performance of the contract is not common.

If the government funds the design and development of prototypes, it may retain a non-exclusive licence with government purpose rights in the technical data, software and technology created in the programme. It is pertinent to mention that the funding and development of prototypes is limited to a specific procurement category, namely the Make category, in which participation is restricted to only Indian-owned and controlled entities.

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?

The government is in the process of establishing defence manufacturing corridors in the states of Tamil Nadu and Uttar Pradesh in India. Apart from these two industrial corridors, several states have identified and allocated land for defence manufacturing. Establishing an industrial unit in these designated corridors does not provide any specific tax incentives but significantly reduces the administrative cost and effort to establish a business.

Industrial units established for export purposes are permitted a host of exemptions, available at both central and state level, which include benefits such as exemption from input taxes and refund of output taxes. State governments may also offer subsidised electricity rates and waiver of fees and approvals.

Forming legal entities

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

Legal entities such as companies and limited liability partnerships are formed under the procedures defined under their respective legislation. The standard process involves applying with the name of the proposed legal entity, the antecedents of the promoters, the proposed capital and the name, objects and by-laws governing the legal entity.

Joint ventures can be incorporated or unincorporated in nature. Unincorporated joint ventures are formed by parties without setting up a separate legal entity and are typically governed by the contractual terms between the party for the venture. Incorporated joint ventures follow the process outlined above for formation of legal entities.

In incorporated joint ventures, the ownership of the legal entity is governed by the shareholder agreements incorporated into the by-laws of the legal entity. Foreign ownership in joint ventures engaged in defence manufacturing is subject to ownership restrictions according to the foreign investment norms of India.

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?

The Right to Information Act 2005 (RTI) empowers any citizen of India to request information and documents pertaining to the functioning of a government ministry or department, including government-owned enterprises and autonomous organisations. However, the RTI mechanism contains certain exceptions based on which the government can deny the request for information. These exceptions include disclosure of information likely to compromise the national security of India, commercial and trade secrets, confidential information relating to the parliament or state legislatures, information likely to impede a running investigation, information likely to endanger the life or physical safety of any person, etc.

To obtain information under the RTI mechanism, the applicant (being an Indian citizen) is required to apply online on the RTI website of the relevant ministry or department. Each ministry and department is required to have a designated Public Information Officer (PIO), who reviews the application and decides whether the disclosure of the information would be subject to any of the exceptions under law. Subject to such determination, the PIO will either supply or deny the sharing of information with the applicant. In case of denial of information, the applicant may enter the appeal process to argue against withholding of the information.

RTI applications seeking specific information or contracts from the MoD are likely to be denied under the exception for national security. In the event any vendor specific information is sought to be obtained from the MoD, the MoD would be statutorily bound to seek the consent of the third party before offering such information.

Supply chain management

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

Each RFP issued by the MoD is required to mention the applicable procurement category, which may in turn specify the eligibility criteria of the supplier. For example, procurements under the Indian Designed Developed and Manufactured category can only be undertaken from companies owned and controlled by resident Indian nationals. In certain procurements, the MoD may also specify financial eligibility criteria to ensure the capability of suppliers to fulfil the contract. Entities related to blacklisted suppliers are also frequently denied participation in procurements under the DPP.

In terms of supply chain management, bidders for procurements under the DPP are required to assume responsibility for misconduct or non-performance by entities in their supply chain, including sub-vendors and offset partners. Therefore, discovery of any counterfeit parts by the MoD is likely to be considered as a material breach of the contract by the main contractor under the principal supply contract.

INTERNATIONAL TRADE RULES

Export controls

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

Export controls in India are specified under the Foreign Trade Policy issued by the Ministry of Commerce and administered through the office of the Director General Foreign Trade (DGFT).

Defence and security articles are defined under the Special Chemicals, Organisms, Materials, Equipment and Technology (SCOMET) list. The SCOMET list identifies categories of dual-use and military goods and technologies considered sensitive and require protection from unauthorised proliferation. These export controls have been instituted in pursuance of India's entry into multilateral non-proliferation treaties including the Wassenaar Arrangement and the Australia Group.

To undertake exports of SCOMET articles, an exporter is required to apply for authorisation to the DGFT. The application is reviewed by an inter-ministerial group to assess the end use and adequacy of proliferation controls in the destination country. The process usually takes 45 to 60 working days.

Domestic preferences

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

Defence and security procurements, whether under the GFR or the DPP, have a stated preference for domestic sources of procurements. Under the GFR, all procurements of a specified threshold value and available from domestic suppliers are required to be fulfilled from such suppliers. For larger procurements, the government is required to exhaust domestic sources before considering foreign vendors.

The DPP also specifies a preference for domestic suppliers. During the categorisation phase of initiating a procurement under the DPP, the MoD evaluates sources for procuring the articles and typically opts for domestic sources if suppliers are available. Global bids are invited if the domestic industry is unable to supply the articles. In a global tender, foreign vendors are permitted to bid independently or in partnership with an Indian entity. However, participating with an Indian entity in a global tender does not accord any preference to the bidder.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

Defence procurements undertaken by India historically have not been linked to any bilateral or multilateral treaties. Recently, India has executed several agreements with the United States of America for cooperation in military logistics and communications interoperability. However, adherence to the agreements is not contingent on either country procuring defence products and articles from each other.

Sanctions

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

India has implemented trade sanctions announced by the United Nations Security Council. Therefore, India prohibits trade in specified goods with the Republic of Iran, Democratic People's Republic of Korea, the Islamic Republic of Iran and Somalia. Further, India does not trade with the Islamic State and Al-Qaeda affiliates. It is relevant to highlight that India does not recognise unilateral sanctions imposed by any individual country.

Trade offsets

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

Offsets are applicable to procurements under the DPP undertaken from foreign sellers and valued higher than 20 billion rupees. The governing principles for offsets are specified in the offset guidelines under the DPP and are administered by a specialised body under the supervision of the MoD, called the Defence Offsets Management Wing (DOMW). The DOMW has the following role in the procurement process:

- formulating the offset guidelines;
- monitoring the discharge of offset obligations (including audit and review of yearly progress);
- participating in technical and commercial evaluation of offset proposals; and
- administrating penalties under offset contracts.

The standard offset obligation is defined as 30 per cent of the value of the procurement contract, but may be higher subject to the discretion of the MoD. Offset obligations may be discharged through specified routes in the DPP, including purchase of eligible products and services from the domestic industry, direct equity investment into defence companies in India, transfer of technology to Indian companies, etc.

In terms of the procurement process, offset obligations are incorporated into the Request for Proposal issued by the MoD to eligible vendors. As part of the bid submissions, bidders are required to submit separate technical and commercial offset proposals for the same. The vendor is required to select eligible Indian partners and notify the quantum of offsets that will be fulfilled through each partner. The vendor may modify its Indian partners and their share of the offsets, subject to the overall offset obligation remaining the same.

The vendor has to undertake the mandatory compliance to submit quarterly and annual progress reports to the DOMW along with documentary evidence in support of the claim of fulfilment of offsets. If the vendor is unable to meet its offset obligations within the prescribed period, the MoD may choose to terminate the main contract or impose liquidated damages and fines under the offset guidelines.

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?

Government employees may take up appointments in the private sector either by taking voluntary retirement or after reaching the age of superannuation, subject to service rules applicable to their employment. Service rules typically specify a period between one to two years of retirement, within which the employee must take prior permission from the government to take appointments in the private sector. After such period, government employees are not required to take permission but may be required to make certain declarations to their parent organisation before accepting appointments.

Employment with the government in India is undertaken through entrance tests. As employment with the government is a career decision, the government does not have a mechanism to employ people from the private sector beyond the selection process. Appointments from the private sector are usually undertaken on temporary contractual basis for advisory positions in special committees and task forces.

Addressing corruption

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

Government procurements in India are required to adhere to a high standard of ethical conduct. All procurement frameworks prohibit both buyers and sellers from engaging in any activity that may be construed as having influenced the decision to award the contract.

The scope of such activities includes the offer or supply of any bribe, gift, consideration, reward, favour, any material or immaterial benefit or other advantage to government officials involved in the bidding process with a view to induce award of the contract to a vendor. Further, bidders are prohibited from engaging any person to intercede, facilitate or recommend the award of the contract. Collusion between bidders to influence the outcome of the procurement also constitutes unethical conduct under the procurement frameworks.

For defence and security procurements under the DPP, prospective bidders are required to submit a legal undertaking, in the form of an Integrity Pact, to refrain from unethical and corrupt activities specified in the regulations. Further, bidders are also required to furnish a bank guarantee as security against such conduct. If the MoD gains knowledge of the bidder having engaged in such activities, the bank guarantee is typically invoked in addition to initiation of punitive proceedings under any other law.

Lobbyists

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

The GFR provides that each procuring ministry may require agents to be registered in such manner as the ministry may prescribe. Therefore, the requirement for registration of agents varies across ministries. Typically, the use of agents in procurements would either require registration or be prohibited completely.

The procurements by the MoD under the DPP require mandatory registration of commercial agents. The process of registration involves applying to the MoD with details of the bidder and its agents, including the contractual and commercial terms agreed between the parties. Failure to register or declare agents would attract penal implications that extend to fines, rescinding of contract or blacklisting of a vendor from future procurements.

Limitations on agents

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

Depending on the framework applicable to the procurement, commission structures for agents are either regulated or prohibited. Further, where permitted, the scope of the agent's role plays an important part in determining whether the commission arrangement steps into the boundaries of unethical conduct. Most procurement frameworks read with applicable vigilance guidelines prohibit remuneration for an agent based on the success or failure in obtaining a contract.

AVIATION

Conversion of aircraft

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

India does not have a clearly defined legislative framework for conversion of military aircraft to civil aircraft and vice versa. A civil aircraft can be deployed for military uses, subject to requisite permissions from the MoD.

Military aircraft sought to be used either temporarily or permanently for civil purposes would require registration with the Directorate General of Civil Aviation (DGCA). Further, such aircraft would be subject to compliances and applicable standards under the Aircraft Act 1934, the Aircraft Rules 1937 and the Civil Aviation Requirements prescribed by the DGCA.

Drones

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

Manufacture of unmanned aircraft systems (UAS) is a regulated activity and requires both the product and the manufacturing facility to be licensed. The sale and operation of unmanned aircraft is also regulated by the DGCA. The DGCA categorises UAS based on their weight and flying range and provides for specific operational conditions for each category of UAS. Any person seeking to use unmanned aircraft in India is required to obtain an operator permit from the DGCA.

From an international trade perspective, both import and export of UAS are restricted. Import of UAS into India requires a licence from the DGCA, whereas exports are subject to restrictions under the Wassenaar Arrangement and require prior authorisation from the Ministry of Commerce.

MISCELLANEOUS

Employment law

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

Domestic labour and employment rules are not applicable to companies that do not have any presence in India. The labour and employment laws are applicable to entities that have been incorporated under the laws of India or have presence in the country through a permanent establishment.

India has mature jurisprudence with respect to labour and employment laws, and the applicability of the laws varies based on the nature and size of the business. The Indian labour and employment laws cover aspects such as minimum wages, employee remuneration including bonus and gratuity, health and life insurance benefits, employee safety, maternal benefits, etc.

Defence contract rules

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

Defence contracts are governed by the procurement framework governing the transaction (ie, DPP/DPM) read with the CVC advisories. Accordingly, defence contractors are bound by the terms of the contract, which in turn is derived from the procurement framework.

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

Defence procurement frameworks such as the DPP are not expressly extra-territorial in their scope and applicability. However, any act undertaken at any place in violation of undertakings and representations given by the contractor in the procurement process would entail the MoD exercising its contractual rights, which include the right to cancel the tender or terminate the contract, blacklist the vendor, invoke bank guarantees and initiate criminal prosecution in India.

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?

The GFR and the DPP do not require directors, officers and employees of the contractor to provide personal information or certifications. However, the government reserves the discretion to require key management personnel of the contractor to submit information in certain eventualities, for example, foreign citizens visiting secured facilities are required to submit personal information for verification by the Ministry of Home Affairs.

Licensing requirements

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

Foreign vendors supplying defence and security articles manufactured outside India are typically not required to procure registrations or licences in India. Registration and licensing requirements are triggered if the operations involve import, manufacture and sale of regulated defence and security articles in India. The licensing requirements are extensive and vary based on the nature of activity, distribution model and location of operations.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

Environmental safety in India is administered and enforced both by the central government and the state government. The regulations are applicable on manufacture and production activities undertaken in India. Such activities necessitate compliance with air, ground and water standards and may require industries to install specialised pollution control equipment or establish emission treatment plants. Environmental regulations are also applicable on import of hazardous substances (including chemicals); however, the burden of compliance for such imports is on the importer and not the foreign supplier.

The principal legislation that governs environmental protection is the Environmental Protection Act 1986, the Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention and Control of Pollution) Act 1981 and the rules framed under these laws. The

environmental law regulations also include specialised legislation that is applicable to specific industries.

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

Entities that have industrial facilities in India are required to adhere to applicable environmental norms on emissions and waste disposal, enforced jointly by the Central Pollution Control Board and the State Pollution Control Boards constituted under environmental legislation. Failure to meet compliance is strictly enforced and can result in heavy penalties and closure of units.

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

India does not recognise environmental responsibility as a qualification or procurement criteria, therefore 'green' solutions are not provided any preference or advantage in government procurements.

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 are no updates at this time.

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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 falling 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 – military or classified items; works, supply and services related to military and classified items; works and services aimed at specific military purposes – determines the application of the MPC to contracts above EU special thresholds (currently €387,000 for supply and services and €4,845,000 for works).

The MPC introduces a number of exceptions to the 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?

General EU Treaty principles apply to all defence and security procurement. Three of the five types of tender procedure envisioned by civil procurement rules are provided for by the MPC (restricted, negotiated with or without a prior notice and competitive dialogue). A notice published 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/tenderers. Such a pre-qualification phase may or may not be joint with the actual submission of technical and economic bids, with the most economically advantageous tender being the more frequent award criterion. Note, however, that 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 economic operators often 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?

Major legislative initiatives are currently focused on redrafting the PPC and its enactment provisions. The EU Commission had opened an infringement procedure against Italy and other EU countries in early 2018, claiming that the number of direct awards of defence contracts was a source of concern. However, the procedure was closed in June 2019 mainly as a consequence of explanations provided by Italy.

Information technology

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

No. Information technology (IT) 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 EU Treaty 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 of the EU Treaty as an exception to be narrowly interpreted and affirm the applicability of EU Treaty 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 to 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 alternative dispute resolution (ADR) in the MPC. ADR models (eg, arbitration and amicable settlement) are provided by the PPC and are applicable to defence and security contracts. Arbitration – which is admissible only if provided by the initial tender notice or invitation and authorised by the governing body of the contracting authority – is traditionally very common in works contracts and long-term supply and service contracts, and more frequent 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 Public Procurement Authority (ANAC).

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 their non-performance, but normally do not provide any indemnity for contractors. Contractors are usually required to indemnify the contracting authority in relation to a number of issues that may cause liability during contract performance, mainly resorting to insurance policies (eg, third-party claims, product liability or 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 in general – including military and defence contracts – normally do not provide limitations of 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 and 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 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 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. 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 secret, or is not classified, can be disclosed upon request, including versions of previous contracts. A trend towards enhanced transparency in public contracts is under way, 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 export of military and dual use items, national enactment legislation (law 9 July 1990, No. 185 for military items; 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 differing from the EU Military list and the Annexes to EU dual-use regulation (No. 428/2009).

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 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 (GPA) signatories, EU members and countries that have bilateral treaties with Italy granting reciprocity of treatment are the only partners that 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?

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 post termination of employment (the anti-pantouflage rule). In the event of an infringement both the ex-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. ANAC – the national anti-bribery and public procurement independent regulatory authority – has anti-bribery enforcement powers and supervises 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 into 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 EASA policing, military aircraft airworthiness is largely left to each state. It is, therefore, quite complex to convert military aircraft to civil use, but it has been made several times (eg, helicopter EH101, originally designed as a military helicopter, 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?

National rules on drones complement EU regulations on unmanned aircraft systems (UAS) recently adopted and expected to enter 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 Italian civil aviation authority (ENAC) has since 2013 regulated UAS and has updated its regulation on 11 November 2019 to incorporate requirements provided by the new EU regulations (such as UAS operator registration and marking of individual UAS). Military UAS are subject to military items restrictions – a government licence is required to manufacture, sell, hold, maintain, import and export them. Military UAS are also considered strategic assets and make entities manufacturing or developing military UAS subject to foreign direct investment restriction provisions set forth by Law D ecree 12 January 2012, No. 21. Such provisions afford the government broad special power to impose conditions or veto transactions or corporate decisions affecting entities developing UAS technology or manufacturing UAS.

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 above 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 described above 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, production or manufacturing process. Procurement contracts and tender selection rules can incorporate environmental purposes and require economic operators to meet environmental minimal 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. As stated above, environmental targets and criteria can be part of the procurement process. Furthermore, broader environmental targets may derive from general policies (eg, greenhouse gas reduction, 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 allow contracting authorities to award premium points to bids containing environmental-friendly solutions with respect to production of goods and services and life cycle management. Minimal environmental criteria are set out in PPC enactment legislation and 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.

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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?

New public procurement legislation has been under scrutiny since its entry into force in 2016 for not having brought about the simplification and streamlining of procurement processes that was expected. The attempt to confer wide, 'soft' regulatory powers to the ANAC has created a lot of new guidelines and regulations that have nevertheless failed to yield significant change. A new general enactment regulation, aimed at replacing ANAC guidelines is now in the process of being drafted, along with a number of amendments to the PPC.

Japan

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LEGAL FRAMEWORK

Relevant legislation

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

Procurement by the Ministry of Defence is governed by a complex set of laws and regulations, including the Public Accounting Act, stipulated at a country level, as well as official directives and circular notices stipulated independently by the Ministry of Defence. These laws, regulations, official directives, etc, are to undergo reviews and in light of changes in social circumstances and the environment affecting defence and security procurement and other factors. In particular, on 1 October 2015, following the establishment of the Acquisition, Technology and Logistics Agency (ATLA), amendments were made to a large number of related rules and regulations. The main laws and regulations governing the procurement of defence and security articles are listed below.

Laws and regulations

- The Public Accounting Act;
- the Act on Prevention of Delay in Payment under Government Contracts;
- the Act on the Responsibility of Government Employees who Execute the Budget;
- the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting;
- Temporary Special Provisions of Cabinet Order on Budgets, the Settlement of Accounts, and Accounting; and
- the Rules on Administrative Handling of Contracts.

Official directives

- The Official Directive regarding the Implementation of Procurement of Equipment and Services;
- the Official Directive regarding Supervision and Inspection of Procurement Items;
- the Official Directive regarding Calculating Basis for Target Price of Procurement Items; and
- Detailed Regulations on Administrative Handling of Contracts under jurisdiction of the Ministry of Defence.

Official directives of the ATLA

- The Official Directives regarding Contract Administration at the ATLA;
- the Official Directive regarding Supervision and Inspections of Procurement Items procured by Central Procurement;
- the Official Directive regarding the Administration of Target Price Calculation by the ATLA; and
- the Official Directive regarding Cost Audit Administration by the ATLA.

Notices, circular notices, etc, of the ATLA

- The Outline of Contract Administration Handling;
- the Administration Outline for Administration of Target Price Calculation by the ATLA;
- the Administration Outline for Official Directive regarding Cost Audit Administration by ATLA; and
- the Implementation Outline of System Investigation and Import Investigations, etc, for Central Procurement.

Identification

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

The procurement of defence and security articles is, for the most part, the responsibility of the ATLA. This agency is subject to official directives, circular notices, etc, stipulated independently by the Ministry of Defence or the ATLA, as outlined above. In this sense, procurement by the agency is treated separately from civil procurements.

Conduct

3 How are defence and security procurements typically conducted?

According to the Guidance for Bid and Contract (ATLA Public Notice No. 1 of 1 October 2015, as amended), the procedures for defence and security articles procurement can be summarised as follows:

- As a rule, to become a procurement counterparty, one must apply for bid participation eligibility screening and go through the screening process. If eligible, the applicant's name is recorded in the register of qualified bidders, and notice is sent to the applicant with the results of the eligibility screening.
- Public notice is made in the case of a general competitive bidding, and notice is sent to the counterparty in the case of a designated competitive bidding or discretionary contract.
- The counterparty pays a bid deposit to the Chief Secretary Treasurer of the ATLA (revenue), unless exempted from deposit by public notice or regular notice.
- The bid participant or government counterparty negotiating a discretionary contract submits a bid document or an estimate. There is also an electronic bidding and bid-opening system (central procurement).

The process of determining the successful bidder can be summarised as follows.

The bidder who offers the lowest tendered price equal to or lower than the target price (the target price or the target price plus the sum of the consumption tax rate and the local consumption tax rate, expressed as a percentage) will be the successful bidder.

However, if the bid is conducted by the comprehensive evaluation method, the bidder must indicate its price, performance, capability, technology, etc, in its application, and the successful bidder will be the bidder:

- whose tendered price is within the target price;
- whose performance, capability, technologies, etc, relating to the bid (performance) meet all the minimum requests and requirements critically required for the performance specified in the publication or public notice of such bid (including the bid instructions related thereto); and
- that receives the highest score according to the Method of Comprehensive Evaluation.

When the successful bidder is determined, or when negotiation results in agreement in the case of a discretionary contract, the counterparty submits a contract in accordance with the prescribed procedures, and pays the contract deposit (unless exempted). The contract is deemed concluded when the certifying officer certifies the contract and thereafter an officer in charge of 'acts to assume debts' signs and seals the contract together with the counterparty.

Proposed changes

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

At the time of writing, no legislative bills have been submitted to the Diet.

Information technology

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

The Ministry of Defence has established information security management standards by importing international standards commonly used by private companies inside and outside Japan. The Ministry requires companies that build information systems to implement measures pursuant to such standards, and also constantly reviews measures by monitoring international standards and social trends.

In particular, the Ministry of Defence contractually requires the counterparty company to implement the following measures, with the implementation of such measures ensured via voluntary audits by the company itself and audits conducted by the Ministry of Defence:

- implementation of information security management system for procurement consisting of three stages:
  - Basic Policy ('securing information security of procurement of equipment and services');
  - Standards; and
  - the (audit) Implementation Outline pursuant to international standards regarding information security management.

Companies that build information systems for the Ministry of Defence are required to establish an information security management system similar to the above; and there are audits by the Ministry of Defence pursuant to the (audit) Implementation Outline to confirm that the information security management system built by the relevant company is in compliance with the Basic Policy and Standards implemented by the Ministry of Defence, and that the information security measures taken in accordance with the Implementation Outline prepared by the company are conducted properly.

In addition, considering the importance of information security, the Ministry of Defence also applies information security measures equivalent to those detailed above to the supply of certain equipment other than information systems.

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 Ministry of Defence is a procurement agent subject to the GPA, and procurement of defence and security articles is conducted in accordance with the GPA. Further, government procurement is regulated by economic partnership agreements with the following countries, and thus procurement must be conducted in accordance with the:

- Japan–Mexico Economic Partnership Agreement;
- Japan–Chile Economic Partnership Agreement;
- Japan–Republic of Indonesia Economic Partnership Agreement;
- Japan–Philippines Economic Partnership Agreement;
- Japan–Republic of India Economic Partnership Agreement;
- Japan–Peru Economic Partnership Agreement;
- Japan–Australia Economic Partnership Agreement;
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership; and
- Japan–European Union Economic Partnership Agreement.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

In addition to regular litigation proceedings, complaints regarding government procurement can be resolved at the Office for Government Procurement Challenge System established by the Cabinet Office (CHANS).

There are no special dispute resolution procedures applicable only to defence and security contractors.

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

Litigation is the typical method used to resolve conflicts, and out-of-court dispute resolution is rarely used. Since 1996, there have been no cases filed with CHANS against the Ministry of Defence.

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?

Indemnity by the government is conducted in accordance with article 29, paragraph 3 of the Constitution.

On the other hand, as a rule, the government is not allowed to enter into guarantee agreements with respect to liabilities owed by companies or other juristic persons (article 3 of the Act on Limitation of Government Financial Assistance to Juridical Persons). However, in a court precedent, a loss indemnity agreement by a local government was deemed null and void as being in breach of article 3 of the Act on Limitation of Government Financial Assistance to Juridical Persons.

The liability of a contractor under a defence and security articles procurement agreement is provided in the contract it enters into with the government, and thus depends on the individual case. However, the government would rarely claim indemnity from a contractor unless required in the Civil Code (defect liabilities, etc).

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?

There are no laws or regulations that restrict the government from limiting the liability of a defence and security articles contractor under the contract, or restrict the defence and security articles contractor from recovering loss or damages from the government owing to breach of contract. Limitations, if any, are subject to the terms and conditions of each contract.

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?

When the government enters into a procurement contract, normally it must conduct an 'act to assume national treasury debts' (article 15 of the Fiscal Act). As the necessary budget is secured by such act, there is basically no risk of non-payment.

Parent guarantee

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

A parent guarantee would be necessary if it is clearly required under the bid terms. A parent guarantee may be required when procurement is conducted through a special purpose vehicle, for example.

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?

When the government determines the successful bidder in a tender or the counterparty to a discretionary contract, the contract officer, among others, must prepare a written contract that includes the particulars of the purpose of the contract, contract price, performance period and contract guarantee and other necessary matters (article 29–8, paragraph 1 of the Public Accounting Act; article 100 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting). For the Ministry of Defence, a contract must be prepared for 'each successful bid, etc', and a contract must be prepared for all defence and security articles, without exception.

Further, a contract will not become final and binding until signed and sealed by both the contract officer and the counterparty, and the preparation of a written contract by such signing and sealing is one of the requirements for the conclusion of contracts.

There are no particular clauses that would be read into a contract without actually being included therein.

Cost allocation

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

The General Terms and Conditions published by the Ministry of Defence do not refer to contract expenses. It is considered normal for each party to bear its own expenses.

Disclosures

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

The contractor must submit a bid form or an estimate sheet to the Ministry of Defence.

The contractor has no legal obligation to disclose any information, but when the government enters into certain contracts specified by cabinet order or statute that cause expenditures to be incurred by the national government, the government must publish information concerning the contract price, among other things.

Audits

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

To improve the fairness and transparency of defence and security procurements, the Ministry of Defence takes measures to ensure the appropriateness of contracts and to enhance checks and balances.

First, as part of an effort throughout the government to 'ensure appropriateness of public procurement', the Ministry of Defence has been expanding the use of a 'comprehensive evaluation bid method' and streamlining its bidding procedures. In addition, in response to a number of cases in 2012 of overcharging and manipulation of product test results by contractors, the Ministry of Defence has been steadily working on measures to prevent recurrence of these problems, such as enhanced system inspections, reviewing penalties and ensuring the effectiveness of supervision and inspections, and otherwise putting more effort into prevention of misconduct, improvement of fairness and transparency and ensuring contracts are appropriate.

Further, with the aim of strengthening checks and balances, the ATLA has established an Audit and Evaluation Division to carry out internal audits, as well as conducting multilayered checks on the ATLA from both inside and outside through audits by the Inspector General's Office of Legal Compliance and deliberations at the Defence Procurement Council, whose members are external academics. Further, it is also making efforts towards raising compliance awareness by enhancing its education division and providing thorough education on legal compliance to its personnel.

In the case of defence and security procurement, the supplier's records of costs are inspected in relation to the production cost of procured defence and security articles, in accordance with the contractual terms, etc (eg, a 'special clause regarding securement of reliability of documents and implementation of system inspection' or a 'special clause on securement of reliability of documents related to contracts concerning import goods, etc, and implementation of import procurement inspections') and whenever needed, cost audits are conducted to confirm that the price of each item's cost and consumption quantity is appropriate.

IP rights

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

Under the special terms published by the Ministry of Defence, any copyright-protected works created during the performance of a contract are required to be transferred and a 'certificate of transfer of copyright' and 'certificate of non-exercise of author's moral right' to be submitted together with the work product.

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?

No.

Forming legal entities

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

The process for forming legal entities is described below:

- advance preparations:
  - determine basic matters (such as organisational form, stated capital, business descriptions and succession of assets); and
  - check whether there is any other company of the same trade name at the same location of head office at the legal affairs bureau;
- preparation of articles of incorporation:
  - determine the purposes, trade name, location of the head office, minimum amount of contributed assets, name or organisational name and address of the incorporator (matters required to be stated in the original articles of incorporation) and other matters;
- notarisation of articles of incorporation by notary public;
- contribution:
  - the incorporator pays the money to be contributed in full or tender all property other than monies with respect to the shares issued at incorporation without delay after subscribing for such shares issued at incorporation;
- appointment of officers at incorporation:
  - the incorporator appoints directors at incorporation without delay after the completion of capital contribution;
  - in the case of a company with company auditors, company auditors are appointed; and
  - appointment of officers at incorporation is determined by a majority of the voting rights of the incorporators;
- examination by directors at incorporation:
  - directors at incorporation examine whether the capital contribution has been completed and whether any incorporation procedures are in breach of any laws and regulations or the articles of incorporation;
- appointment of directors at incorporation:
  - in the case of a company with a board of directors, a representative director at incorporation is appointed (as decided by a majority of the directors at incorporation);
- registration of incorporation:
  - registration of incorporation must be made within two weeks from the later of the date of termination of examination by the directors at incorporation and the date designated by the incorporator; and
  - notification to the relevant government agencies (ie, tax office, prefectural tax office, municipal government (tax or national pension), labour standards office (employment insurance, workers' accident compensation insurance) and pension office (health insurance, employee pension), etc).

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?

In accordance with the Act on Access to Information Held by the Administration, any person may request the head of an administrative organ to disclose administrative documents, and the head of such administrative organ who receives such request for disclosure must disclose such administrative documents except in the following cases:

- information concerning an individual (excluding information concerning the business of an individual who operates the said business), where it is possible to identify a specific individual from a name, date of birth or other description contained in the information concerned (including cases where it is possible to identify a specific individual through comparing the said information with other information), or when it is not possible to identify a specific individual, but disclosure of the said information is likely to cause harm to the rights and interests of an individual. This is provided however, that the following information shall be excluded:
  - information that is made public, or information that is scheduled to be made public, pursuant to the provisions of laws and regulations or by custom;
  - information that is found necessary to be disclosed to protect a person's life, health, livelihood or property; and
  - if the said individual is a public officer; officer or employee of the incorporated administrative agencies; local public officer; and officer or employee of the local incorporated administrative agencies;
- when the said information pertains to the performance of his or her duties, the portion of the said information pertaining to the job of the said public officer, etc, and the substance of the said performance of duties;
- information concerning a juridical person or other entities (excluding the state, incorporated administrative agencies, local public entities and local incorporated administrative agencies (juridical person)), or information concerning the business of an individual who operates the said business, which corresponds to the following, provided that information that is found necessary to be disclosed to protect a person's life, health, livelihood or property shall be excluded:
  - information that, when disclosed, is likely to cause harm to the rights, competitive position or other legitimate interests of the said juridical persons or of the said individual; and
  - information customarily not disclosed by the juridical person or the individual, which has been voluntarily provided in response to a request by an administrative organ on the condition of non-disclosure, or information for which it is found reasonable to set such a condition in light of the nature of the information or the circumstances at the time;
- information for which there are reasonable grounds for the head of an administrative organ to find that disclosure is likely to cause harm to national security, cause damage to the relationship of mutual trust with another country or an international organisation, or cause a disadvantage in negotiations with another country or an international organisation;
- information for which there are reasonable grounds for the head of an administrative organ to find that disclosure is likely to cause impediments to prevention, suppression or investigation of crimes, the maintenance of prosecutions, the execution of punishment and other matters concerning maintenance of public policy;
- information concerning deliberations, examinations or consultations internally conducted by or mutually conducted between state organs, incorporated administrative agencies, local public entities

and local incorporated administrative agencies, where disclosure is likely to cause unjust harm to the open exchange of opinions or the neutrality of decision-making, cause unjust confusion among citizens, or bring unjust advantages or disadvantages to specific individuals; and

- information concerning the affairs or business conducted by a state organ, an incorporated administrative agency, a local public entity or a local incorporated administrative agency, where disclosure is likely to have the following risks or is likely to hinder the proper execution of the said affairs or business owing to the nature of the said affairs or business:
  - risk of making it difficult to accurately understand facts concerning affairs pertaining to audits, inspections, supervision, examinations, imposition or collection of tax, or facilitating wrongful acts regarding such affairs, or making it difficult to discover such acts;
  - risk of causing unjust damage to the property benefit of the state, an incorporated administrative agency, local public entities or a local incorporated administrative agency concerning affairs pertaining to contracts, negotiations or administrative objections and litigations;
  - risk of causing unjust hindrance to the fair and efficient execution of affairs pertaining to research and study;
  - risk of causing hindrance to the maintenance of impartial and smooth personnel practices in the affairs pertaining to personal management; and
  - risk of causing damage to the legitimate interests arising from corporate management with regard to the business of an enterprise managed by the state or a local public entity, an incorporated administrative agency or a local incorporated administrative agency.

Supply chain management

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

As a condition of participating in competitive bidding (other than for construction work), any person who meets the following conditions may not participate in competitive bidding:

- any person who falls under the descriptions of articles 70 and 71 of the Cabinet Order on Budgets, the Settlement of Accounts, and Accounting (article 70 of the foregoing Cabinet Order);
- if a sales, lease, contracting or other contract is put out to tender pursuant to article 29–3, paragraph 1 of the Public Accounting Act (hereinafter referred to as an 'open tender'), the contract officer may not permit a person who falls under any of the following items to participate, unless there are special grounds for doing so, for example:
  - a person who is incapable of concluding the relevant contract;
  - a person who received an order of commencement of bankruptcy proceedings and has not had the person's rights restored; or
  - a person who falls under any of the items of article 32, paragraph 1 of the Act on Prevention of Unjust Acts by Organised Crime Group Members (Act No. 77 of 1991) (article 17 of the foregoing Cabinet Order);
  - if a contract officer determines that a person who wishes to participate in an open tender falls under any of the following items, the contract officer may prevent the person from participating in open tenders for a period of not more than three years. The same applies to the proxies, managers and employers of such a person:
    - if the person has intentionally carried out construction, manufacturing or any other service in a careless manner or acted fraudulently with regard to the quality or volume of an object in the course of performing a contract;
    - if the person has obstructed the fair implementation of a tender or has hindered a fair price from being reached or colluded with others to obtain an unlawful profit;
    - if the person has obstructed the successful bidder from entering into a contract or obstructed a party to a contract from performing the contract;
    - if the person has obstructed an official from performing the official's duties in a supervision or inspection;
    - if, without a justifiable reason, the person has not performed a contract;
    - if, under a contract, the price is to be fixed after the signing of the contract, and the person has intentionally claimed an excessive amount as such price based on false facts; and
    - if the person has employed a proxy, manager or other employee who is not eligible to participate in an open tender pursuant to this paragraph (not including this item) in the conclusion or performance of a contract; and
- any person who currently faces a denomination under the 'Outline of de-nomination, etc. concerning procurement of defence and security articles, etc and services'.

There are no specific rules regarding supply-chain management and anti-counterfeit parts relating to defence and security procurements.

INTERNATIONAL TRADE RULES

Export controls

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

With regard to export controls that limit international trade in defence and security articles, the Foreign Exchange and Foreign Trade Act stipulates certain provisions relating to security trade controls, which are enforced by the Ministry of Economy, Trade and Industry.

Domestic preferences

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

There is no mechanism for applying domestic preferences to defence and security procurements. For the acquisition of defence and security articles, a number of acquisition methods are currently adopted, including domestic development, international co-development or production, domestic production under licence, utilisation of civilian goods, import, etc. The appropriate method is selected depending on the characteristics of the particular defence and security articles in question. The Analysis and Assessment of the Acquisition Program, the new Acquisition Strategy Plan and Acquisition Plan published by ATLA on 31 August 2017, adopts a policy of domestic development, production and maintenance for certain items.

The Guidance for Bid and Contract (ATLA Public Notice No. 1 of 1 October 2015) contains provisions pursuant to which foreign business operators may apply for screening of eligibility for participation in tender, which indicates that it is possible for foreign companies to directly participate in procurement tender. However, in the case of procurement from a foreign company, this is usually done by a Japanese trading company on their behalf.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

There are no treaty partners that are treated more favourably.

Sanctions

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

Export

There are export controls that require the permission or approval of the Minister of Economy, Trade and Industry.

Defence and security articles that require permission include export of 'weapons, articles related to weapons of mass destruction, articles related to conventional weapons and articles that are likely to be used for development, etc of weapons of mass destruction or conventional weapons'. 'Articles related to weapons of mass destruction' refers to articles related to nuclear, chemical weapons, biological weapons and missiles, and 'articles related to conventional weapon' refers to state of the art materials processing, electronics, computers, communication devices, sensors or lasers, navigation equipment, marine-related equipment and propulsion devices.

Those subject to approval include all exports of articles bound for North Korea as the place of destination.

Import

Primary import controls applicable to defence and security articles include restriction on specified regions under which approval is required for import from specified countries of origin or places of shipment. Pursuant to this restriction, approval of the Minister of the Economy, Trade and Industry is required for import of weapons of which the country of origin or place of shipment is Eritrea, and Type I Designated Substances defined in the Act on the Prohibition of Chemical Weapons and the Regulations of Specific Chemicals (Chemical Weapons Control Act) of which the counties of origin or the places of shipment are specified countries or regions. Further, in terms of current economic sanctions, the approval of the Minister of the Economy, Trade and Industry is required for the importation of any articles for which the country of origin or the place of shipment is North Korea, and the importation of weapons for which the country of origin or the place of shipment is Liberia, are effectively prohibited as a result.

Articles that require approval regardless of the country of origin or the place of shipment include:

- explosives;
- military aircraft, engines for military aircraft, tanks and other armed vehicles and components thereof, warships, military armaments, guns and other firearms, other weapons, bombs, swords, spears and other similar weapons, and components of the foregoing items; and
- specified substances under the Chemical Weapons Control Act.

2017 Amendments to the Foreign Exchange and Foreign Trade Act (FEFT)

The amendments to the FEFT were promulgated in 24 May 2017 and came into effect on 1 October 2017. These, in particular, strengthen penalties for the regulations concerning the import or export and trade of technologies; and administrative sanctions concerning import and export regulations.

2019 Amendments to the Foreign Exchange and Foreign Trade Act (FEFT)

The notice on Inward Direct Investment was amended with effect from 1 August 2019 in order to effectively prevent the outflow of security-critical technologies and damage to the foundation of Japan's national defence industry and technologies, and similar situations that could have a serious negative impact on Japan's national security. The amendments also introduced a requirement to give advance notification of inward direct investment in businesses related to cybersecurity.

Trade offsets

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

There are no trade offsets at the moment, although the Ministry of Defence is considering their introduction.

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?

There are no restrictions preventing former public officers from taking-up appointments in the private sector, or vice versa.

However, the following is a summary of appointments that are prohibited as a rule:

- a public officer currently in office, engaging in communications with an 'interested enterprise' (including enterprises defined by law), who has executed, offered or is obviously intending to offer to execute a contract for defence and security articles (excluding those where the total amount of the contract is less than ¥20 million) for the purpose of assuming a position in such enterprise or its subsidiary corporation (in summary, a corporation directly or indirectly holding a majority of voting rights);
- a public officer engaging in communications with an enterprise (not limited to the interested enterprises) for the purpose of having another public officer or former public officer assume a position in such enterprise or its subsidiary corporation; and
- a former public officer who currently holds a position in the enterprise demanding or requesting performance or non-performance of acts in the course of his or her duties in relation to a contract for such enterprise, or in relation to administrative measures against such enterprise (the scope of prohibited acts differs depending on the position the public officer had at the time of office) to the division within the government agency where said public officer had held a position while he or she served as a public officer. The prohibition period after departure from public office is unlimited with respect to the execution of contracts and administrative measures that said former public officer himself or herself handled, and is two years with respect to other cases.

Getting a position at an enterprise immediately after leaving public office will lead to suspicion of a breach of the foregoing restrictions on communications. In practice, there is a cooling-off period of at least three months before assuming a position in the private sector after leaving office as public officer.

The above-mentioned restrictions also apply to public officers with fixed terms of office, and public officers hired on a public–private personnel exchange.

Further, to ensure transparency, public officers or former public officers must file notices with certain prescribed persons including the Minister of Defence if:

1 they promise, while in office, to assume a position in an enterprise after leaving office; and
2 after having held a managerial position in public office, they assume a position in an enterprise within two years after retirement (except where a notice in relation to item (1) has already been filed).

Certain information, contained in notices filed as above, is also made public.

Addressing corruption

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

There are no special restrictions related to bribery that specifically target government procurement. Such matters are generally covered under the offence of bribery under the Criminal Code. The main crimes under the Criminal Code regarding bribery and applicable to enterprises are the giving, offering or promising of bribes, as listed below:

- any bribe to a public officer in relation to the performance of his or her official duties;
- any bribe, upon request, to a potential public officer in relation to the performance of official duties for which he or she is expected to be responsible;
- any bribe, upon request from a public officer in relation to the performance of his or her official duties, to a person other than said public officer (who is not required to be a public officer);
- any bribe to a former public officer in relation to said former public officer having conducted an unlawful act or refraining from conducting a reasonable act upon request while in office; or
- any bribe to a public officer as a reward for said public officer arranging or having arranged for another public officer to conduct an unlawful act or refrain from conducting a reasonable act in the course of his or her duties upon request.

In the procurement of defence and security articles, the specifications thereof are generally very specific and there is no market price. In many cases, contracts are executed upon calculating an estimated price using cost accounting with a view to preventing overcharging by contractors. Contractual special clauses are generally required for cost accounting and management for the purpose of preventing overcharging by contractors, and cost audits are conducted. See question 16 for more details.

Other than the above, cartels (bid rigging) and other similar acts are prohibited under the Anti-Monopoly Act, obstruction of auctions is prohibited under the Criminal Code, the Unfair Competition Prevention Act and the Act on Elimination of Involvement in Bid Rigging, etc. There are also punishments for failure to act, and criminal penalties or administrative monetary penalties apply in the case of violation.

Any enterprise that has violated any of the restrictions or requirements stated above, or otherwise engaged in acts unfairly or in bad faith, making false statements in tendering documents, performing a contract negligently without due care, or breaching a contract will be denominated from procurements for defence and security articles for a certain period (one month to three years depending on the degree of seriousness of the violation, and in the case of refusal to comply with system research, until the same resumes). In addition, enterprises that have capital ties or personal relationships with an enterprise that was de-nominated may barred from participation in open and selective tendering procedures for agreements for similar types of defence and security articles.

Public officers are subject to the National Public Service Ethics Code to ensure public trust in the fairness with which public officers execute their duties. Pursuant to this Code:

- the following acts with interested parties, as defined in the Code, including enterprises with which a public officer has executed, offered to execute or obviously intends to offer to execute a contract for defence and security articles in relation to which such public officer is involved in administering. Any interested parties to a post that a public officer served within the past three years shall continue to be regarded as interested parties for at least three years after the transfer. In addition, where any interested party of a public officer contacts another public officer, such interested party will also be regarded as an interested party of the other public officer depending on the expectation of influence asserted by such interested party, and as such prohibited as a rule from:
  - receiving a gift of money, goods or real estate;
  - borrowing money;
  - receiving services free of charge;
  - receiving assignment of private equity;
  - receiving entertainment and paid dining;
  - going on a trip, playing golf and other entertainment (such as mah-jong) together (including in the case of splitting the bill); and
  - demanding any interested party have a third party conduct any of the above; and
- it is not prohibited to dine together if the public officer pays his or her own costs, but where the cost of their respective payments exceeds ¥10,000, notice needs to be filed with the Ethics Supervisory Officer, except in certain specific cases such as buffet parties.

Any public officer who has violated the foregoing is subject to disciplinary action. There are no provisions on sanctions that would be directly applicable on the interested party side.

Lobbyists

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

There are none.

Limitations on agents

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

No.

AVIATION

Conversion of aircraft

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

In August 2010, the Ministry of Defence finalised guidelines for the design of a system for conversion to civil use, and in 2011 put in place a system for companies wishing to conduct conversion to civil use. Up to now, technical documents for conversion to civil use of F7 engines loaded onto ShinMaywa US-2 rescue flying-boats and Kawasaki P-1 fixed-wing patrol aircraft have been disclosed and published upon request from commercial enterprises. In December 2016, ATLA announced that it had entered into an agreement with IHI Corporation on conversion to civil use in respect of F7-10 engines loaded onto P-1 fixed-wing patrol aircraft in order to sell them to the Japan Aerospace Exploration Agency. The Ministry of Defence rarely procures aircraft configured for civilian use for conversion to military use, preferring instead to purchase equipment that has already been converted for military use.

Drones

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

Under the Aircraft Manufacturing Industry Act, airplanes and rotorcraft with a structure that people cannot board and with a gross weight of 150 kilograms or over are included in the definition of 'aircraft' subject

to restrictions on the method of manufacturing and repair. Below are the primary restrictions:

- the manufacturing or repair (including modification) of aircraft is subject to a licensing system. Permission of the Minister of Economy, Trade and Industry is required for each plant;
- manufacturing or repair must be conducted by permitted business operators in a manner approved by the Minister of Economy, Trade and Industry, which must also be confirmed by an aircraft inspector; and
- permitted business operators may, as a rule, only deliver a manufactured or repaired aircraft to others along with a manufacturing confirmation document prepared by an aircraft inspector.

On 10 December 2015, the Ministry of Economy, Trade and Industry announced it would request manufacturers, importers and sellers of unmanned aircraft to make voluntary efforts to ascertain the owner of unmanned aircraft.

MISCELLANEOUS

Employment law

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

Labour and employment rules are domestic laws and as such do not apply unless a contractor has an office and employs employees in Japan. If an enterprise has an office and employs employees in Japan, it must pay Japanese labour insurance and employee pension insurance. Having the proper labour insurance and employee pension insurance policies in place and not being slack in payment of premiums will generally be a requirement for qualification to participate in open and selective tendering procedures.

Defence contract rules

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

No.

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

Not applicable.

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?

One trigger for disqualification from bidding is being a 'juridical person or other organisation in which a designated organised crime group member serves as an officer thereof' (see question 21). As a result, enterprise bidders are required to submit a pledge at the time of bidding, declaring that none of their 'officers, etc' belongs to an organised crime group.

Licensing requirements

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

There are no registrations or licensing requirements.

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Environmental legislation

38 | What environmental statutes or regulations must contractors comply with?

Green Purchasing Act

The Green Purchasing Act came into force in 2001.

In the procurement process, the national government must endeavour to select 'eco-friendly goods' with low environmental impact (in particular, recyclable resources; products that have low environmental impact based on the ability to reuse or recycle or through the use of raw materials or parts with low environmental impact; and services that have low environmental impact). In response to this, the Ministry of the Environment has established a basic policy applicable to all governmental agencies in respect of a wide variety of procurement items. The Ministry of Defence has also set its own corresponding procurement goals for 2016. However, the procurement goals of the Ministry of Defence primarily target stationery, office supplies, air conditioners, lighting, general official vehicles, etc. In regard to goods and services that are key defence and security items, the targets are limited to construction of public facilities, tires for passenger cars, two-stroke engine oil, disaster supplies, etc.

Green Contract Act

The Green Contract Act came into force in 2007.

Going further than the Green Purchasing Act, the Green Contract Act requires the national government to endeavour to promote procurement contracts with serious consideration for the reduction of greenhouse gas emissions, etc. In response thereto, the Cabinet has established a basic policy that covers six types of contracts:

- the purchase of electricity;
- the purchase and lease of automobiles;
- the procurement of vessels;
- the design of governmental building renovations that include a guaranteed reduction in the cost of electricity and fuel, etc, by operation of governmental buildings that is greater than the renovation cost;
- other building designs; and
- industry waste disposal.

In response to the above, specific fuel economy and other environmental performance requirements may be specified in procurement specifications for many defence articles, among other things.

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

As mentioned in question 38, for the six types of contracts covered by the Green Contract Act, requirements for specific fuel consumption and other environmental performance may be provided in the specifications for bidding. In such cases, enterprises must submit bids that meet such requirements. Evaluation will be conducted by the ATLA, which is the agency managing procurement.

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

Nothing other than that which is specified in question 38.

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 are no updates at this time.

Korea

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LEGAL FRAMEWORK

Relevant legislation

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

The primary legislation governing defence and security procurements in Korea is the Defence Acquisition Program Act (DAP Act). The statute is further implemented by the Enforcement Decree and Enforcement Rules thereof. For matters not stipulated in the DAP Act, the Act on Contracts to Which the State is a Party (ACSP) generally applies along with the Enforcement Decree and Enforcement Rules thereof.

The Defence Acquisition Program Administration (DAPA), an executive agency of the Ministry of National Defence, has detailed administrative rules, such as the Defence Acquisition Program Management Regulation (DAPMR), Guidelines for Evaluation of Weapon System Proposals, and Offset Program Guidelines.

Identification

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

Among the articles owned and controlled by the government, the items managed by the Ministry of National Defence and its agencies, the joint chiefs of staff or the army, navy and air force are defined as 'defence articles'. Defence articles are divided into:

- weapon systems (ie, all weapons to exert combat power, including guided missiles, aircraft and naval ships, along with equipment, parts, facilities, software and other items necessary to operate such weapons); and
- support systems (ie, equipment, parts, facilities, software and items other than those of weapon systems).

In principle, defence articles are procured by the DAPA. However, under the DAP Act, if it is efficient for the army, navy or air force to directly procure defence articles (eg, items with an annual procurement amount of less than 30 million won), such procurements can be carried out by each armed force. If the manufacturing and supply characteristics of a defence article are the same as those of a commercial product, and the item meets certain requirements (eg, value of more than 50 million won), the procurement of such item may be delegated to the Public Procurement Service, an executive agency under the Ministry of Strategy and Finance.

Conduct

3 How are defence and security procurements typically conducted?

Defence and security procurements are generally conducted to improve defence capacities or to manage military forces. Procurements for the improvement of defence capacity involve purchase, new development, performance improvement and research and development (research and development) of weapons, coupled with installation of accompanying facilities, to improve military capacities. Procurements for the effective management of military forces relate to the normal operations of the army, navy and air force.

Procurements for the improvement of defence capacities are carried out through the following procedures:

- requests from each armed force;
- decision of the joint chiefs of staff;
- prior research;
- establishment of project strategy;
- adjustment to reflect the Mid-Term National Defence Plan;
- budgeting;
- bidding announcement; and
- contract conclusion.

On the other hand, procurements for the management of military forces are conducted by the DAPA upon the request for specific items made by each armed force in compliance with the Procurement Planning Guidelines issued by the Ministry of National Defence.

Proposed changes

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

Proposals currently pending in the National Assembly that would change the defence and security procurement process if passed include the following:

- A proposal to clearly define defence projects as the projects of enhancing defence power, promoting the defence industry, and procuring military supplies as necessary for establishing a foundation for defence of the country.
- A proposal to convert the concept of offset programme to that of 'industrial cooperation'. With respect to the projects of purchasing weapons, equipment, and parts from abroad, this proposal seeks to convert offset programs adopted thus far, under which knowledge or technology is transferred from foreign counterparts of the contract concerned, or domestic weapons, equipment or parts are exported abroad, or otherwise certain considerations are provided in return for the weapons, equipment, and parts purchased from abroad, to 'industrial cooperation' under which weapons, equipment, parts or technology will be developed or produced jointly or joint investments therein will be made.
- A proposal to monitor and check former public officials' employment activities in the defence Industry, for 15 years after their retirement from the public office.
- A proposal to authorise the Chairman of the Joint Chiefs of Staff to build the plans of testing and evaluating weapon systems and key

technologies, instead of the Minister of National Defense, who has so far taken charge of such plans. According to this proposal, the Chairman of the Joint Chiefs of Staff should build the testing and evaluation plans and ensure such testing and evaluation results satisfies the respective needs of armed services.
- A proposal to require the Minister of Defense Acquisition Program Administration to build monitoring plans to prevent the use of parts that are no longer available or counterfeited.
- A proposal to authorise the government to request contract counterparts or potential suppliers to submit cost documents as necessary to calculate costs and execute contracts, such as the contracts for procurement of military supplies. According to this proposal, the contract counterparts or potential suppliers, if requested, should provide cost documents unless there is a justifiable reason to refuse such a request.
- A proposal to revoke the status of a 'defence contractor' if the representative or officials or employees of the contractor acquired, used, or disclosed any defence technology or military secrets.

Information technology

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

As software that supports and operates a weapon system is inseparable from the main equipment (or hardware), it is generally required to be integrated into the main equipment (embedded software) or as a separate item (supporting software) through the procedures as discussed in question 3.

As heightened security and interoperability are required for IT goods and services compared with non-IT goods and services, a more rigorous process applies when verifying the reliability of procurements of IT goods and services.

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?

Korea is a party to the Government Procurement Agreement (GPA) within the framework of the World Trade Organization. However, the GPA does not apply when it is necessary to protect significant national security interests in connection with defence procurements. As a general principle, defence articles manufactured domestically have preference over those manufactured overseas. Only those articles that are not domestically available can be purchased overseas by the government.

Korea has also entered into free trade agreements with ASEAN, Australia, Canada, Central America, Chile, China, Colombia, EFTA, the European Union, India, New Zealand, Peru, Singapore, Turkey, the United States and Vietnam. Government procurement provisions included in those free trade agreements also carve out exceptions that apply where necessary to safeguard significant security interests in connection with defence procurements.

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 over bidding or contract-related issues involved in defence and security procurements, such as bidding procedures, bidding outcomes or delay penalties, are settled through civil litigation.

In addition, in the case of defence and security procurements of more than a certain amount (3 billion won for a construction contract; 150 million won for a commodity contract; and 150 million won for a service contract), disputes between the government and a defence contractor may also be settled through the appeal process under the ACSP or through the mediation process by the State Contract Dispute Mediation Committee. A defence contractor may directly file a lawsuit in court without exhausting dispute resolution processes outside the court system. Alternative dispute resolution processes are not frequently used in practice.

On the other hand, if a defence contractor has committed unfair bidding, misstatement of cost, or breach of contract, the government (ie, the DAPA in the case of a contract administered by the DAPA, and the Ministry of National Defence in the case of a contract administered by the national defence authorities) may restrict the defence contractor's eligibility to participate in bidding for a certain period of time. Disputes over such restriction are resolved by administrative appeal or administrative litigation.

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

The DAPA resolves disputes related to procurements of weapon systems through litigation or arbitration. In the case of domestic procurements, the parties generally stipulate in their contract to resolve disputes through litigation. In the case of overseas procurements, it is common to resolve disputes through arbitration. However, in some cases, disputes related to overseas procurements may also be stipulated to be resolved through litigation in Korea.

The arbitration clause included in the DAPA's general terms and conditions stipulates that disputes shall be finally settled by arbitration conducted in Seoul, Korea in accordance with the Commercial Arbitration Rules of the Korean Commercial Arbitration Board. The arbitration clause may be modified depending on negotiations between the DAPA and the contractor.

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 is no particular limitation on the scope of the government's liability toward a defence contractor. Accordingly, where the government breaches the defence procurement contract, it shall be responsible for damages caused to the contractor in the same way as ordinary contracts – provided that a special clause about damages of delayed payment is included in the defence procurement contract to stipulate that the damages shall be calculated by multiplying the number of days of delay by the average lending rate of financial institutions for the given month.

On the other hand, if the contractor fails to perform the contract, it shall be liable to the government in accordance with general legal principles, unless otherwise specifically provided in the contract.

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?

As a general principle, government contracts must be entered into in compliance with all relevant laws and regulations, and contracting

officers generally have very little discretion in executing contracts. In other words, contracting officers are restricted from arbitrarily limiting the contractor's liability under the contract.

On the other hand, the Enforcement Decree of the Defense Acquisition Program Act prescribes that under the contracts on the production of test products for research and development of weapon systems and key technologies or the contracts on the first mass production of the weapon systems designated as 'defense material', the liquidated damages should not exceed 10 per cent of the contract price, and the Enforcement Decree of the Act on Contracts to Which the State is a Party prescribes that the liquidated damages of other contracts should not exceed 30 per cent of the contract price.

The DAPA's general terms and conditions for overseas procurements partially mitigate the liability of the contractor by limiting the total amount of delay penalty to 10 per cent of the contract price. In addition, depending on negotiations with the contractor, the government may further agree to limit the scope of product liability claims as suggested by the contractor.

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 little risk that the Korean government will not meet payment obligations under procurement contracts. A weapon system is not procured without first securing a budget and the Korean government is responsible for executing payment obligations under government procurement contracts from the single national treasury, even if they are signed by an individual government agency such as the DAPA. The Korean government maintains a sound level of reserves to perform such payment obligations.

Parent guarantee

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

A parent guarantee is not required in a government procurement contract. The contractor is directly required to pay a performance bond to cover the risk of potential damages at each stage of the conclusion and performance of the contract. In particular, in the case of overseas procurements, the government demands a performance bond of at least 10 per cent of the contract value within 30 days after opening a letter of credit or within a period specified in the contract. The performance bond must be paid in cash or by an irrevocable standby letter of credit. If the contractor fails to pay the performance bond within a specified period without justifiable grounds, the DAPA reviews and determines whether the contract should be terminated. Bond deposits are attributable to the Treasury when the contractor does not fulfil its contractual obligations.

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?

A contracting officer is statutorily required to ensure that a procurement contract expressly states the purpose of the contract, contract price, contract period, performance bond, risks and delay penalty. A contracting officer is also required to execute a procurement contract by signing it. The DAPA or a contracting officer executes a procurement contract using the general terms and conditions, and the contract form, as prescribed by administrative rules in advance.

In addition, the DAPA's general terms and conditions for overseas procurements stipulate that the contract is governed by the laws of Korea in terms of its formation, validity and performance and that the provisions of the contract shall not be interpreted against the ACSP.

Cost allocation

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

Cost allocation varies depending on negotiations between the parties, but as a common practice, the contractor is responsible for the cost of contract execution. The DAPA's general terms and conditions provide that the contractor shall:

- bear administrative costs, bank charges and other related expenses (such as postal charges) incurred while fulfilling contractual obligations;
- obtain the government approval required for export of contract articles at its own risk and expense; and
- deliver contract articles at its own risk and expense.

Disclosures

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

In general, in the case of a weapon system procurement contract, in its proposal request, the DAPA requires data, prepared in a prescribed form, on:

- the total price;
- sub-system prices;
- part prices and cost factors;
- contract price conversion;
- detailed quotation prices for each component;
- proposed prices based on work breakdown structure; and
- annual operation maintenance cost.

In accordance with this request for proposal, defence contractors must present their proposal with supporting materials related to the proposed price and cost calculation.

Currently, the government has submitted a proposed amendment to the Defense Acquisition Program Act to the National Assembly. Under the proposed amendment, the government may request the contract counterparts and potential suppliers to provide cost data as required to calculate costs for execution of military supplies procurement contracts. The contract counterparts and potential suppliers, upon receiving such a request, should provide such data unless there is any justifiable reason to refuse such request.

Audits

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

The Board of Audit and Inspection has a special audit department, which frequently or periodically conducts audits of the DAPA and each armed force concerning defence and security procurements. In addition, the DAPA's special inspector general for defence acquisition examines each stage of the procurement projects. The auditor's office or ombudsman of the DAPA, established pursuant to the DAP Act, also conduct inspections and audits of misconducts or complaints related to defence and security procurements.

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 case of a weapon system procurement contract, in principle, the seller retains the intellectual property rights in the same manner as contracts for the purchase of general goods. However, technology may be transferred to the government through a defence offset agreement. In such cases, the relevant technology, equipment and tools must be provided to the government free of charge, and the government retains the ownership or licence of the technology, equipment and tools.

On the other hand, licensing agreements may be concluded with respect to intellectual property rights. Terms of such agreements vary from case to case. In some cases, the government retains the right to improve technical data and software provided by the contractor within the scope of the purpose of the contract.

Currently, the proposed Act on the Promotion of Innovations of National Defense Science is pending at the National Defense Committee of the National Assembly for deliberation. Under the proposed bill, any results of development created in the course of national defence research and development projects are subject to the joint ownership between the government and the research and development institute concerned or participating research and development institutes concerned.

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?

The Korean government has designated a free trade zone or a free economic zone, and grants benefits such as tax reduction and financial support to foreign-invested enterprises residing in such zones. However, very few foreign defence contractors have moved into free trade zones or free economic zones in Korea.

Forming legal entities

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

There are five types of company recognised by Korean laws:

- partnership companies;
- limited partnership companies;
- limited liability companies;
- stock companies; and
- limited companies.

Most of the companies established in Korea are corporations. There are two ways of incorporation: promotion and subscription. In either way, the promoter who intends to incorporate a company prepares the company's articles of incorporation. The promoter may acquire the entire shares by paying the full par value (incorporation by promotion), or acquire part of the shares, allowing other shareholders to subscribe the remaining shares (incorporation by subscription). Thereafter, the shareholders' general meeting and the board meeting are held, incorporation of the company is registered and registration tax and other taxes are paid. The incorporation process is complete once the company is registered with the local tax office.

In the case of incorporation of a company by a foreigner, foreign investment notification is required before the registration of incorporation and the company needs to be registered as a foreign-invested enterprise after the registration of incorporation. Other than that, the procedures of establishing a company by a foreigner are identical to those by a Korean citizen. The notification applies when a foreign investor and a domestic investor form a joint venture.

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?

Documents related to government contracts are archived or disclosed as prescribed under the Public Records Management Act and the ACSP. The DAPA prepares records of all progress and actions taken in each defence procurement project from the time of filing the request to the end of the project, and maintains and uses such records by inputting them, with the exception of confidential documents, into the integrated project management information system. Such records, which include all documents relating to the contract, negotiations between the DAPA and the contractor and selection of the model, are kept permanently.

Through the Defence E-Procurement System, the DAPA discloses such records as prescribed by the ACSP, including records of bidding announcements, bidding progress and results of successful bidder decisions. The contractor can view or obtain copies of records of its own contract through the Defence E-Procurement System, but cannot access other companies' contracts (past or current).

Supply chain management

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

The DAPA requires the companies that intend to participate in the bidding for procurements to register as procurement contractors in compliance with registration requirements (eg, registration in the Defence E-Procurement System, business licence) under the Guidelines on Procurement Contractor Registration Information Management. The DAPA also manages suppliers and supply chains through an integrated management system.

In general, the government screens for counterfeits by identifying the original manufacturer's certification documents at the stage of delivery inspection or, if in doubt, confirming the documents related to the import and export in cooperation with the Korea Customs Service. In the case of domestic contracts, an integrated test report management system has been implemented to prevent tampering with test reports, while requiring the contractor to check the authenticity of the test report on the quality of the parts supplied by the subcontractor.

Currently, a proposed amendment to the Defence Acquisition Program Act, under which the Minister of Defense Acquisition Program Administration will build monitoring plans to prevent the use of parts that are no longer available or counterfeit, is pending at the National Assembly.

INTERNATIONAL TRADE RULES

Export controls

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

The DAPA is the agency responsible for administering the export of defence and security articles. In order to export defence and security articles, the exporter must file a report with the DAPA as a defence article exporter or agent, and obtain approval of each export transaction from the DAPA.

The DAPA is cooperating with companies by establishing the Defense Export Promotion Center for management and development of the Korean defence industry's exports.

Domestic preferences

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

In defence and security procurements, the DAPA has an obligation to apply domestic preferences to defence and security articles manufactured domestically. Procurement of foreign articles is only allowed in exceptional cases where domestic articles are not available. Accordingly, if there are domestic defence articles with the same performance and price as foreign articles, the DAPA must purchase domestic articles over foreign ones. However, procurement of certain defence articles with low relevance to the national security interests can be carried out through international bidding, and foreign contractors can bid directly on such procurements.

Favourable treatment

24 Are certain treaty partners treated more favourably?

In principle, the Korean government does not treat any country more favourably than others regarding the purchase of defence and security articles from foreign contractors. The government has concluded treaties to cooperate with various countries concerning the defence industry. It is not bound by any treaty to apply preference to weapons of a specific country.

Sanctions

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

According to the resolution of the United Nations Security Council, the Korean government does not engage in any transactions with North Korea concerning the defence industry or other related industries. It also bans the export of weapons to countries subject to arms embargo under international treaties, or countries threatening international peace and security, such as those assisting in international terrorism and drug supply, or countries that may develop or proliferate weapons of mass destruction.

Trade offsets

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

The Korean government promotes defence trade offsets when purchasing defence articles of more than US$10 million from overseas. However, defence trade offsets may not be used in certain circumstances. For example, they are not used:

- when the government purchases repair parts, key parts for use in research and development for the development of core weapon systems in Korea or basic raw materials, such as oil;
- when the government procures defence articles through a contract with a foreign government; and
- when the Defence Acquisition Program Promotion Committee decides not to proceed with offset trades in consideration of national security and economic efficiency.

Defence trade offsets must:

- secure the technology necessary for defence improvement projects;
- secure logistics support capability for weapon systems to be procured;
- allow the Korean government to participate in the development and production of weapon systems;
- enable the Korean government to facilitate the export of domestic defence articles to foreign countries; or
- secure maintenance of the weapon systems of the contracting partner.

They must also meet at least a certain percentage of the main contract amount. (Offset Program Guidelines can be found at the DAPA website.)

According to the proposed amendment to the Defense Acquisition Program Act that is pending at the National Assembly, offset programmes will be replaced with projects of industrial cooperation between the Korean defence industry and overseas defence industries.

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 Public Service Ethics Act restricts former government employees from taking up appointment in the private sector under certain circumstances. For example, the president, prime minister, cabinet members, members of the National Assembly, head of each local government, public officials of Grade 4 or higher, and officers over colonel or civil employees equivalent thereto may not take up employment, for three years following the termination of their public services, with a commercial private company of a certain size or above that is closely related to the work of the organisation or department to which they have belonged for five years.

In contrast, there is no specific regulation that restricts persons in the private sector from taking up appointments in the government.

Addressing corruption

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

The Criminal Code, together with the Act on the Aggravated Punishment of Specific Crimes and the Act on the Aggravated Punishment of Specific Economic Crimes, punishes corruption of public officials, including:

- the act of abusing their position or authority or violating laws for benefits of themselves or any third party in connection with their duties;
- the act of causing damage to public institutions in using public budgets, or in acquiring, managing or disposing of public property, or in concluding and performing a contract to which a public institution is a party, in violation of laws and regulations; and
- the act of forcing, recommending, suggesting or inducing the execution or concealment of any of the aforementioned acts.

In addition, any person who offers, or promises to offer, or indicates willingness to offer, bribery to foreign officials in connection with their duties for the purpose of obtaining improper profits in international business transactions will be punished by imprisonment or fines under the Act on Combating Bribery of Foreign Officials in International Business Transactions.

Furthermore, the Improper Solicitation and Graft Act (commonly called the Kim Young-ran Act), which was enacted in 2016, punishes public officials who demand, accept or promise to accept anything of value of 1 million won (per single occasion) or 3 million won (per year), regardless of whether it is connected with their duties.

As another measure to prevent corruption, representatives and executives of defence contractors (and their subcontractors) and defence trade agents are required to submit integrity pledges and then fully comply with them. Defence contractors, companies or research institutions that breach integrity pledges may be restricted in their eligibility to participate in bidding for up to five years.

Lobbyists

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

Except for lawyers, no one is allowed to lobby the government, public institutions or public officials on behalf of others for commercial purposes. The act of lobbying is interpreted as a lawyer's job, and there is no separate lobbyist registration system.

However, a defence trade agent (ie, a person who intends to act as an intermediary or agent for a foreign company in the process of concluding and performing a contract between the foreign company and the DAPA) must be registered with the DAPA in advance.

Limitations on agents

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

As a general rule, a foreign contractor is required to deal directly with the DAPA rather than through a defence trade agent in the procurement of more than US$2 million. However, when a foreign company inevitably needs to use a defence trade agent, it is commonly allowed to use one as long as there is no special issue.

As discussed above, a defence trade agent must register with the DAPA in advance. Acting as a defence trade agent without registration will lead to punishment.

Those who have been sentenced to imprisonment without forced labour, and where five years have not passed from the date when the execution of sentence was completed (or deemed to be completed), are not eligible to register as defence trade agents. For registration as a defence trade agent, a registration application must be filed with the DAPA accompanied by:

- resumes of the representative and officers;
- employment information such as numbers and names of total employees and employees related to the defence industry;
- an integrity pledge; and
- a security pledge.

AVIATION

Conversion of aircraft

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

In connection with defence procurement programmes, the Korean government is pursuing not only the enhancement of military capability but also the promotion of defence science and technology as well as the overall development of the defence industry and other related industries. Accordingly, the government encourages the spin on, spin off and dual use of civilian–military combined technologies by strengthening research and development through technical cooperation between the military and civilian sectors, and expanding civilian–military mutual technology transfer through the standardisation of specifications.

The government may apply preference to the purchase of defence articles developed by civilian–military technical cooperation projects, and the procurement contract may proceed on a negotiated contract basis instead of competitive bidding. In the case of transferring defence technology to the private sector, the head of the central administrative agency concerned classifies technologies as military and non-military, prepares a list of technologies that can be mutually transferred, chooses technology transfer projects and makes relevant technologies available to the private sector.

Drones

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

The Aviation Act governs the safe navigation of aircraft in accordance with the standards and methods adopted by the Convention on International Civil Aviation and Annexes thereto. The unmanned aircraft system is regulated as a type of aviation.

The manufacture and sale of unmanned aircraft are not prohibited or restricted, but the design, manufacture and maintenance of their physical frames are regulated through the certification or airworthiness that applies to aircraft in general. If the weight of the aircraft (excluding that of the fuel) is in the range of 12kg to 150kg, pilot certificate, owner notification and display of the notification number will be required. Aircraft with a weight of less than 12kg will not be subject to such requirements.

Unmanned aircraft or unmanned rotating wing aircraft of less than 25kg, and unmanned airships with a weight of less than 12kg (excluding that of the fuel) and a length of less than 7 metres are allowed to fly at altitudes less than the minimum flight altitude (150 metres) in an area that is not a controlled zone or no-fly zone without further permission. Even so, it is prohibited to fly such aircraft in densely populated areas.

Military unmanned aircrafts are required to obtain airworthiness certification conducted by the DAPA or the armed forces under the Military Aircraft Airworthiness Certification Act.

On 30 April 2019, the government enacted the Act on the Promotion of Utilization of Drones and the Establishment of Foundation Therefor, of which intent is to develop the unmanned aerial vehicle industry, designate a special area for deregulation of unmanned aerial vehicles, and set up a drone traffic management system. It plans to implement the act on 1 May 2020.

MISCELLANEOUS

Employment law

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

The parties to the employment agreement may choose the governing law of the agreement. However, despite the parties' choice of governing law, the employee shall not be deprived of the rights and protections that the employee is entitled to under mandatory laws of the country where the employee routinely provides services. For instance, a Korean employee will be entitled to the rights and protections under Korean labour laws, even if the governing law of the employment agreement is determined to be the laws of a foreign jurisdiction that may not recognise the same rights and protections as provided by Korean labour laws.

Defence contract rules

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

The DAP Act prescribes domestic procurement procedures and overseas procurement procedures. The details are further expanded upon in the DAPMR. The DAPA has established standardised special terms and conditions to be used in the case of domestic procurements.

Unless there is a special reason, domestic procurement contracts are generally entered into using such terms and conditions. The DAPA has also established general terms and conditions for foreign procurements, and negotiates with foreign contractors based on such terms and conditions.

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

Procurement contracts between the Korean government and a foreign contractor must comply with the provisions concerning conclusion of procurement contracts under the DAP Act, the ACSP and other relevant legislation. These laws will apply even where the contractor performs work exclusively outside Korea.

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?

To participate directly in the procurement bidding, the contractor must register as an overseas source in the Defence E-Procurement System. For the registration, a registration application, notarised security pledge and business registration certificate must be submitted. In the case of the registration of a domestic branch or domestic defence trade agent of a foreign company, it must submit a domestic business registration certificate, corporate registry, security measurement results, integrity pledge and an agency agreement signed by the foreign company. Personal information of directors, officers or employees of the contractor is not required, and there is no particular qualification that they are required to satisfy. However, when a civilian (regardless of their nationality) needs to enter the DAPA or a military unit in connection with the execution of a defence procurement contract for more than one month, he or she may be required to provide personal information for a background check.

Licensing requirements

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

To register as an overseas source, a foreign company must apply for registration in the Defence E-Procurement System. The application includes a notarised security pledge, business licence or business registration certification in the foreign jurisdiction, manufacturer's certificate or supplier's certificate to confirm the type of industry, and employment certificate of the signatory of the procurement contract. Upon the submission of all those required documents, the registration certificate will be issued to the foreign company, and will become eligible to participate in procurement bidding in Korea.

On the other hand, for a Korean branch or Korean defence trade agent of a foreign company to participate in procurement bidding, it must

- register in the Korean Comprehensive E-Procurement System their eligibility to particulate in competitive bidding;
- register with the Defence E-Procurement System;
- obtain security qualification from the Defence Security Command; and
- submit a document proving the relationship between the foreign company and its domestic branch or domestic defence trade agent.

Environmental legislation

38 | What environmental statutes or regulations must contractors comply with?

Contractors operating within the territory of Korea must comply with obligations as prescribed by environmental laws and regulations of Korea in connection with their business activities, regardless of whether they are domestic or foreign entities. Korean environmental laws include the:

- Framework Act on Environmental Policy;
- Natural Environment Conservation Act;
- Environmental Health Act;
- Clean Air Conservation Act;
- Soil Environment Conservation Act;
- Marine Environment Management Act;
- Occupational Safety and Health Act;
- Chemicals Control Act;
- Nuclear Safety Act;
- Water Environment Conservation Act;
- Malodour Prevention Act;
- Environmental Impact Assessment Act; and
- Environmental Dispute Adjustment Act.

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

Companies exporting products to Korea or operating within the territory of Korea must comply with environmental standards as prescribed by the Korean government, and may be subject to criminal penalties if they fail to comply with the standards. Environmental standards are established mostly by the Ministry of Environment in accordance with the aforementioned environmental laws. The Ministry of Environment has the authority to investigate whether a company has complied with environmental standards, and may file a criminal complaint with the prosecutor based on the results of the investigation.

The Ministry of Oceans and Fisheries has the authority to investigate and deal with pollution of the marine environment.

In addition, in the case of regulations on hazardous substances that affect not only the environment but also the working environment of employees, the Ministry of Employment and Labour determines risk standards.

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

The Act on the Promotion of Purchase of Green Products provides that the national government, government entities, local governments and public institutions must purchase products with greenhouse gas reduction technology, efficient energy utilisation technology, clean production technology, clean energy technology, resource circulation and environmentally friendly technology, and technology to minimise pollutant emission as long as such products are available. In addition, the Environmental Technology and Industry Support Act requires the Ministry of Environment to certify eco-friendly products or to get them certified by the Minister of Trade, Industry and Energy as products that conserve resources or promote recycling so that the government may purchase such products. Furthermore, in the case of domestic procurements, the eligibility to participate in bidding can be further restricted based on whether the defence article to be procured has been certified by an environment friendly product or environment technology by the Ministry of Environment.

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 upper limit of liquidated damages has been adopted to prevent the liquidated damages regarding test products or the first products manufactured in mass production from exceeding 10 per cent of the contract price, and the upper limit of contract deposits has also been prescribed not to exceed 20 per cent of the contract price if the products concerned are test products or the first products manufactured in mass production. Further, the organisation of the DAPA has been changed. In the past, project divisions and contract divisions were separated, but such divisions have been unified to project divisions so that projects and contracts can be managed and implemented on a consolidated basis to ensure the efficiency of the defence power enhancement projects and strengthen the responsibilities of the divisions concerned.

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LEGAL FRAMEWORK

Relevant legislation

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

Article 134 of the Mexican Constitution provides the general principles for public procurement in Mexico at the federal and state levels. The Law of Acquisitions, Leases and Services of the Public Sector (the Public Procurement Law), together with its ruling (the Regulation of the Public Procurement Law) comprise the main legal framework under which all federal public procurement for defence and security matters are regulated, and detail the general constitutional principles.

At the local level, procurement for security goods and equipment is regulated in state and municipality's public procurement legal framework, all of which contain somewhat similar provisions to those contained in the Public Procurement Law and its ruling.

Identification

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

Defence and security procurements are identified as cases for exceptional procedure under article 41, subsection IV of the Public Procurement Law. Owing to their special status, they are treated differently from standard civil procurements in the understanding that all defence and security procurements are exempt from being mandatorily awarded by means of a prior public procurement public bidding process. This is the general principle followed by all public agencies before engaging in any commercial relationship with third parties to ensure the best contractual conditions available in the market for Mexico.

Conduct

3 How are defence and security procurements typically conducted?

The Public Procurement Law provides that, prior to the execution of any public procurement agreement (including those related to defence and security), market research must be conducted to verify: the existence and availability of the required goods and assets; whether the respective manufacturer or distributor is national or foreign; and the estimated price.

After market research has been duly conducted, the respective defence or security government body that requires the acquisition of defence- and security-related assets must substantiate its reasons in connection to why such procedure should not be executed via the traditional public bidding process but by a direct award process instead.

At the local level, this procedure might differ from those contemplated in the local applicable law.

Proposed changes

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

Currently, there are no pending proposals or amendments in the Federal Congress to the Public Procurement Law and its ruling that could amend or modify the defence and security procurement process, nor its legal framework.

Information technology

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

No. Nevertheless, the Public Procurement Law, the defence or security government body interested in acquiring or leasing any goods or services that require or have advanced technical specialities or technological invocations, must use the 'points and per centages' or 'price--performance ratio' evaluation methods.

The points and per centages evaluation method is used to grade the proposals of all bidders in a public bidding process in which certain points are attributed to: disabled bidders, or companies that employ disabled persons (at least 5 per cent of their total employees are disabled); small and medium companies that produce innovative technological goods; and companies that have put in place and practice gender equality policies.

The price–performance ratio evaluation method is used to assure the best price in accordance to the benefit to be obtained by a certain acquisition or lease to be executed by the federal defence government bodies.

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?

All defence and security procurements are conducted in accordance with the national security rules and regulations (including the exemption to procure them).

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

According to Chapter 6 of the Public Procurement Law, there are different dispute resolution procedures that may be applied to solve disputes between the government and the contractors:

- Nonconformity procedure: this procedure is purely administrative; it is filed before the Ministry of Public Affairs when the dispute relies in procedural grounds regarding the different instances of a public bidding.
- Conciliatory procedure: this procedure is filed before the Ministry of Public Affairs whenever a party of a public procurement agreement considers that the other party to such agreement has breached its obligations. The Ministry of Public Affairs conducts a conciliatory hearing to try to negotiate a solution between the parties, and this agreed solution is written in a binding special agreement.
- Arbitration and other alternative dispute resolution methods: the parties to a certain public procurement agreement can agree to an arbitration procedure or other dispute resolution procedures, such as mediation and conciliation, with regard to the interpretation or execution of the agreements. However, parties are forbidden from agreeing to an alternative dispute resolution method with regard to disputes in connection to the early termination of the agreements, and termination by breach.
- Administrative courts: if no alternative dispute resolution method has been agreed to by the parties, or if such methods are forbidden by law, the disputes will be resolved by the competent federal courts of Mexico.

These dispute resolution procedures are applicable only to federal public procurement processes, and such process may differ from those contained in the local public procurement laws and regulations. We strongly recommend reviewing the specific local applicable law, since each of the 32 Mexican states have a specific applicable law.

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

The alternative dispute resolution procedures are commonly used by contractors and government agencies to solve disputes. A clause stating the aforementioned is usually included in the public procurement contracts.

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?

Governmental indemnification

All payments in favour of the contractor to be paid by the corresponding government body must not exceed 20 calendar days after delivery of the corresponding invoice, the delivery of the goods or assets, or the rendering of the corresponding services. In the case of a breach to the payment obligations of the corresponding government body, the government body must pay all financial expenses (limited to the interest rate established in the Federal Income Law, for extension regarding unpaid taxes). These financial expenses will be calculated over all unpaid amounts and counted in calendar days until the contractor is fully paid.

Contractor indemnification

As stated in the Public Procurement Law, all contractors must guarantee: the advanced payments (for their total amount); and the full compliance of the agreement. Usually, this is 10 per cent of the total amount of the agreement (this last guarantee may be waived in all public procurements related to defence and security procurements). Also, contractors are obliged to guarantee all latent defects of the goods delivered or services rendered.

Parties are allowed to agree on a contractual penalty in the case of delay in delivery by the contractor of the goods, assets or services under the corresponding public procurement agreement. Such penalty must not exceed the total amount of the agreement compliance guarantee (required to be granted by contractor in favour of corresponding government body) and be determined taking in consideration the goods and assets or services that were not timely delivered or executed.

The above-mentioned indemnification provisions are only applicable to federal procurement processes. Indemnification provisions may vary at local level and, therefore, we strongly suggest reviewing the specific local applicable law, since each of the 32 Mexican states have a specific applicable law.

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?

All contractors must guarantee the full compliance of the agreement. The amount of this guarantee is determined by the corresponding government body in the bidding documents, executed in the case of non-compliance of the agreement, and will constitute the limit of the contractor's liability under the corresponding contract.

In the case of breach to the payment obligations of the corresponding government body, the government body pays to the contractor all financial expenses (limited to the interest rate established in the Federal Income Law, for extension regarding unpaid taxes). These financial expenses will be calculated over all unpaid amounts and counted in calendar days until the contractor is fully paid.

The above-mentioned provisions are applicable only to federal procurement processes. Liability limitation provisions may vary at local level and, therefore, we strongly suggest reviewing the specific local applicable law as each of the 32 Mexican federal states have a specific applicable law.

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?

Yes. Although all federal government expenses and contracting procedures are originally approved and stated in the Federal Expenditure Budget, there is still a minor risk of payment default. Nevertheless, by request of the contractor, the corresponding government body pays to the contractor all financial expenses in accordance with the rate established in the Federal Income Law until the contractor is fully paid.

Parent guarantee

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

The Public Procurement Law provides that all contractors guarantee:

- all advanced payments (for their total amount);
- full compliance with the agreement. Usually, the corresponding guarantee is for the 10 per cent of the total amount of the agreement (this last guarantee may be waived in all public procurements related to defence and security procurements); and
- contractors are also obliged to guarantee all latent defects of the goods delivered or services rendered.

Government officials of the corresponding government body will set the conditions and amounts on which the guarantees will be granted, taking into consideration the compliance history of the contractor.

The above-mentioned guarantees will be granted either in favour of the Treasury or in favour of the contracting government body,

depending on which government body is a party to the main public procurement agreement.

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?

Yes, all public procurement agreements must contain the following:

- the name or corporate name of the government contracting body;
- the nature of the procedure by which the agreement was granted to the contractor;
- information regarding the authorisation of the budget granted to the corresponding government body to execute the agreement;
- information that proves the legal existence of the contractor;
- a description of the goods, assets or lease, subject matter of the public procurement agreement;
- a consideration price to be paid for the goods, assets or services rendered by the contractor;
- the terms of payment;
- guarantees to be granted by the contractor;
- cases in which extensions may be granted;
- grounds for termination of the agreement;
- latent defects provisions;
- the general terms and conditions of the applicable contractual penalties;
- liabilities regarding the breach of intellectual property; and
- dispute resolution procedures.

Moreover, if no dispute resolution procedure has been agreed and included in the corresponding public procurement agreement, all disputes will be resolved in the Mexican federal courts.

Cost allocation

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

All costs arising from or regarding the public bidding process and in connection with the execution of the public procurement agreement are to be bear by the contractor.

Disclosures

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

The contractor must disclose the price per unit and the total price of the goods or services to be rendered. Also, if applicable, the contractor must disclose the way in which the final price is determined.

The contractor should also indicate if the price is fixed or variable. If it is variable, the contractor should indicate the formula by which an increase in the price will be calculated.

Audits

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

Pursuant to the Public Procurement Law, the Ministry of Public Affairs may verify, at any moment, that all public procurement agreements have been duly executed in accordance with the applicable laws. At the local level, the applicable laws may allow certain local governmental body to conduct such audits.

Moreover, the Ministry of Public affairs may conduct visits and inspections to the government bodies that requested and executed the corresponding public procurement agreements, and may also request, from the involved officials and contractors, all related data and information.

The Ministry of Public affairs may also conduct product quality verifications.

There is no exception with regard to audits of defence and security procurements as such. The only exemption is that all defence and security procurements executed through a direct award and not via public bidding must not be reported by the corresponding government body to justify their exemption from the traditional public bidding process.

IP rights

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

Unless there is a specific prohibition or impediment, the ownership over all intellectual property created during performance of the contract will be granted to the contracting government body.

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?

During the past federal administration, Mexico implemented a special economic zones programme. These zones are designated geographical areas in which economic, tax and other administrative advantages are to be granted to the private sector, which operates in them. They were designed as an instrument to boost economic development in underdeveloped regions. Each special economic zone has a specific niche and, therefore, only certain industrial or commercial activities can be developed in such regions, and only those activities will be subject to the advantages contemplated in the Federal Law of Special Economic Zones. If a special economic zone is declared in which defence and security related goods or assets are to be manufactured or produced, then the manufacturer or producer installed in such zone may be subject to certain economic, tax and other administrative advantages.

Notwithstanding the aforementioned, the new Federal Administration recently announced the cancelation of the special economic zones that were created during the past administration. However, the Federal Law of Special Economic Zones is still in full force and effect, and, although it is unlikely, the creation of new special economic zones in the future may not yet be discarded.

Forming legal entities

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

Legal entities, such as corporations and companies are incorporated pursuant to the provisions contained in the General Law of Business Corporations. Certain steps must be taken to incorporate a legal entity in Mexico. In general, these are the following:

- getting the approval of the Ministry of Economy for the use of the desired corporate name;
- after drafting the articles of incorporation (which must contain all information stated in the Business Corporation Law), such articles will be formalised before a Mexican notary public and constitute the articles of incorporation of the newly formed legal entity.

These articles of incorporation must also be registered in the corresponding Public Registry of Commerce;
- other important information must be contained in the articles of incorporation, such as the company's attorneys-in-fact and their corporate authority, the appointment of the board of directors and managers, etc; and
- the newly formed entity should also be registered before the Mexican Internal Revenue Service.

This process usually takes no longer than two to three weeks and its costs are relatively low.

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?

In terms of the Federal Law of Transparency and Access to Public Government Information, all public entities must provide each year, general or specific information via 'CompraNet' (the official website regarding government procurements) no later than 31 January, all information regarding their annual procurement programme, with respect to the ongoing fiscal year.

Nonetheless, certain contracts (and related documentation) may be exempt from disclosure, since such information may be sensitive and thus pose a risk to national security.

Supply chain management

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

As stated in the Public Procurement Law, persons will not be eligible to execute a contract if:
- they share a personal or business interest with their employer, such as that which may provide personal benefits or advantages;
- they are employed or have a position or commission with the public service or legal entities that involved, without prior authorisation by the Public Service Ministry;
- they are a supplier that the ministry or legal entity that executed the contract cancels or rescinds such contract with;
- they are disabled by a resolution of the Public Service Ministry in terms of the Public Procurement Law;
- the suppliers are delayed in the delivery of the goods and supplies with respect to prior executed contracts;
- they have been declared in a bankruptcy process or any other similar process;
- they are suppliers or legal entities who file certain propositions in the same field of a good or service in a contracting procedure that may be related;
- they are suppliers or legal entities who pretend to participate in a contracting procedure and that are part of a holding corporation that has been or is currently involved in another contract;
- they are suppliers or legal entities that execute contracts with respect to matters regulated by the Public Procurement Law, without express faculties to use intellectual property rights;
- they use unduly provided privileged information;
- they contract advice, consulting services or any other support in terms of governmental contracts; or
- they are bidders who did not formalise the contract for unjustified causes.

With respect to supply-chain management, there are no general rules or regulations that establish how to proceed; a supply-chain agreement will be valid even if it is executed by and between the government and any other part. However, regarding anti-counterfeit parts, any contractor that commits fraud or acts in bad faith in any of the government procurement contracts will be subject to the fines and penalties established in the Public Procurement Law.

INTERNATIONAL TRADE RULES

Export controls

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

In principle, the export of goods from Mexico is regulated by the Mexican Customs Law, the Mexican General Import and Export Duties Law and any other applicable law (national or international) depending on the tariff code in which the defence and security article is covered.

In this regard, on 25 January 2012, Mexico joined the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (WA), becoming the 41st state participant in the agreement. The WA has been established to contribute to regional and international security and stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. The aim is also to prevent the acquisition of these items by terrorists.

At the national level, on 16 June 2011, Mexico published in the Mexican Official Gazette the 'Agreement in which the export of conventional weapons, their parts and components, dual-use goods, software and technologies that could be diverted for the manufacture and proliferation of conventional arms and weapons of mass destruction are subject to a prior permission from the Ministry of Economy'.

On the other hand, on 30 January 2007, the 'Agreement that establish the classification and codification of goods whose importation or exportation is subject to Regulation by the Secretary of National Defence' was published in the Mexican Official Gazette.

In this regard, the defence and security articles will be regulated depending its tariff code and may need permission form the Ministry of Economy and National Defence.

Present information does not include nuclear material or use of pesticides, fertilisers and toxic substances.

Domestic preferences

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

Since all defence and security procurements are exempted from the traditional bidding process and may granted via direct award instead, there are no applicable domestic preferences.

Favourable treatment

24 Are certain treaty partners treated more favourably?

No.

Sanctions

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

As part of the United Nations, Mexico agreed to comply with the decisions of its Security Council and, through its national policies, ensure that transfers of arms, dual-use goods and technology do not contribute

to the development or enhancement of military capabilities that undermine these goals, and are not diverted to support such capabilities.

In this regard, on 29 November 2012 Mexico published in its official gazette the 'Agreement establishing measures to restrict the export or import of various goods to the countries, entities and persons indicated', by which Mexico restrict the exportation, among others, of defence and security articles to the countries established in such Agreement.

Trade offsets

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

Not applicable.

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 Government Employees' Responsibilities Federal Law provides that former government employees are subject to restrictions associated with their office or ministry. Former government employees must allow a specific period before they join a private or public sector employment that has significant dealings with the government or has any other restriction with respect to their job.

Addressing corruption

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

In connection with public procurement, domestic and foreign corruption is addressed by several different approaches and measures. In all public procurement agreements of which the total amount is above 5 million days of minimum wage (around 441 million Mexican pesos) or that may have certain impact in the programmes of the contracting government body, individuals who are known as 'social witnesses' must participate. These individuals are in charge of supervising the procurement process to prevent and detect potential corruption or irregularities in the procurement process.

Also, as a means to prevent corruption, certain public procurement bidding may be executed through electronic means in accordance with applicable law.

To be eligible, contractors must register with the Contractors Sole Registry, in which they will have to disclose certain vital information of their own and their activities.

The Ministry of Public Affairs will be in charge of managing a government public procurement electronic system, which will contain all documentation in connection with all public procurement acts executed. All information must be kept for a period of at least three years.

In general, all domestic and foreign corruption is addressed and prevented by certain general provisions stated in the Federal Anti-Money Laundering Law, in the Criminal Code and in the Public Officials Liabilities Federal Law.

Lobbyists

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

There are no specific rules of general application regarding the registration of lobbyists or 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 specific rules of general application regarding the use of agents or representatives that earn a commission on the transaction.

AVIATION

Conversion of aircraft

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

According to current Mexican legislation, there are no provisions regarding the conversion of an aircraft from military to civil use or vice versa.

Drones

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

Pursuant to mandatory rule 'CO AV23/10 R4', issued by the Ministry of Communication and Transportation by virtue of the General Civil Aviation Directorate, to market remote piloted aircraft (RPA), manufacturers must:

- install an automatic mechanism on the RPA preventing the pilot from flying the aircraft beyond the pilot's horizontal distance;
- install an automatic mechanism on the RPA preventing pilot from flying the aircraft beyond a certain altitude;
- add or install a mechanism allowing the RPA automatic identification (only applicable to the 'heavy' RPA category); and
- type approval or type certificate issued by the aviation authority.

Further, RPA sellers must comply with the following as set forth in such mandatory rule:

- the RPA package must include information that alerts the RPA owner that registration of the RPA with the Ministry of Communication and Transportation through a specific website General Civil Aviation Directorate is necessary, and that the owner must comply with the requirements and technical limitations established on such mandatory rule; and
- every time an RPA with a maximum take-off weight of 250g is sold, the form found on mandatory rule 'CO AV23/10 R4' must be completed and filed with the General Civil Aviation Directorate.

On 14 November 2019, the Ministry of Communication and Transportation published in the Official Gazette of the Federation a Mexican Official Standard that outlines the requirements for the manufacturing, commercialisation and operation of remote piloted aircraft system in Mexican airspace, such Mexican Official Standard resumes most of the obligations applicable for the operators, manufacturers and traders under the mandatory rule CO AV23/10 R4. The Mexican Official Standard entered into effect on 3 January 2020.

MISCELLANEOUS

Employment law

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

In accordance with the Federal Labour Law, the companies must employ 90 per cent of Mexican employers and a maximum of 10 per cent of employer's workers. For every employer that has a source

of employment in Mexican territory, the applicable law will be the Employment Law.

Defence contract rules

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

Contractors are bound by the legal framework outlined in the previous answers.

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

The defence contracts are governed by the Mexican public procurement laws (excluding the place of performance of the corresponding works).

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?

The contractors will not be disqualified to contract with the Mexican government if they do not fall under 14 causes contemplated in the Public Procurement Law, among others:

- if the contractor has any ties and interests, either personal or business, with a public servant involved in the procurement process that may benefit him or her, his or her family members, or any third party with whom he or she maintains any professional, employment or business relationships;
- if the contractor is employed or in charge of any area or division in the public service, or any corporation of which a public servant is a member of, without prior approval from the Ministry of Public Affairs; and
- all contractors that have incurred in breach of more than one public procurement agreement, within a period of two years since the corresponding notification of breach was issued.

Moreover, certain information regarding the contractor's shareholders and legal representatives must be disclosed by the contractor for its registration under the Contractors Sole Registry to be approved as a government contractor. The information to be provided by contractors is the following:

- corporate name, nationality and address;
- incorporation files and any amendments to their by-laws;
- a list of their current shareholders;
- name of their legal representatives and their corresponding appointments;
- the expertise and experience of the contractor;
- information regarding their technical and financial capacity; and
- record of contractor in prior public biddings.

Licensing requirements

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

As any other contractor with the Mexican government, defence and security contractors can only be registered as approved contractors in the Contractors Sole Registry.

The above-mentioned requirement is applicable only to federal procurement processes. The registration or licensing requirements may vary at local level and, therefore, we strongly suggest reviewing the specific local applicable law since each of the 32 Mexican federal states have a specific applicable law.

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Environmental legislation

38 | What environmental statutes or regulations must contractors comply with?

Contractors are expected to comply with environmental statutes and regulations of general application established in such law and in the Mexican legal framework concerning the protection of the environment and sustainable development.

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

Environmental targets should be met by companies during the performance of the procurement contract. The compliance with these laws is determined by the Ministry of Environment and Natural Resources (regulatory authority) and the Federal Prosecutor's Office for Environmental Protection (sanctioning authority).

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

No, since all bidders must comply with the regulations contained in the Public Procurement Law and with the Mexican legal framework regarding the protection of the environment and sustainable development.

However, contractors must ensure in the bidding process the best available conditions in terms of energy efficiency, responsible use of water, optimisation and sustainable use of resources, as well as environmental protection.

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 are no updates at this time.

Norway

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LEGAL FRAMEWORK

Relevant legislation

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

The following acts and regulations govern the procurement of defence and security articles in Norway:

- Public Procurement Act No. 73 of 17 June 2016; and
- Regulation No. 974 of 12 August 2016 on Public Procurement (RPP).

The above constitute the general legislation on civil public procurement. They apply to procurements by the armed forces or the Ministry of Defence, unless the category of procurement is exempt under the Regulation on Defence and Security Procurement or article 123 of the European Economic Area (EEA) Agreement.

Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement (FOSA)

FOSA is the Norwegian implementation of the EU Defence Procurement Directive and applies to procurement of specific defence and security materiel, or construction work or services in direct relation to such, unless EEA article 123 provides for a defence and security exemption.

Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR)

Parts I and II of the DAR apply to all defence-related procurement. Part III applies to defence procurement under the Public Procurement Act and Regulation. Part IV applies to procurement under the FOSA. Part V applies to procurement that is entirely exempt from the procurement regulations under EEA article 123.

These regulations are internal instructions for the Ministry of Defence and its agencies (see DAR section 1–2). They do not provide any rights to third parties and thus a breach of the rules cannot be relied on in court by a dissatisfied contractor.

Regulation No. 2053 of 20 December 2018 on Organisations' work on Preventative Safety (Operations Security Regulations)

This regulation applies where the procurement procedure requires a security classification.

National Security Act No. 24 of 1 June 2018

The National Security Act applies where the procurement procedure requires a security classification.

Identification

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

Section 1–3, paragraph 1 of the FOSA defines defence and security procurements in accordance with article 2 of EU Directive 2009/81/EC.

The procedures vary according to the nature of the goods and services to be procured. If the goods are not classified, ordinary civil procurement law applies. Where the goods or services are highly sensitive and the requirements or specifications are classified, the entire procurement procedure may be exempt from ordinary procurement rules under EEA article 123. In that case, only DAR Part V applies, and the Ministry of Defence will also generally require offset agreements.

Conduct

3 | How are defence and security procurements typically conducted?

DAR section 7–3 requires the procuring authority to assess the nature of the procurement, and to assess which set of regulations applies.

All defence procurement must be based on a formal market study, which forms the basis for a need assessment with realistic requirements for materiel and services (DAR sections 7–1 and 6–1). As a main rule, all contracts are subject to competitive bidding and published on Doffin, the Norwegian national notification database for public procurement.

The procuring authority may select the procuring procedure, with due care shown to the need for competition and national security interests. Outside the RPP and FOSA, there is no requirement for prior publication of a contract notice. Depending on certain circumstances related to EEA threshold values and the type of procurement, the procuring authority may choose to conduct the procurement without competition through single-source procurement, to engage in selective bidding, competitive dialogue or a negotiated procedure with or without prior publication of a contract notice.

Use of competitive dialogue or a negotiating procedure without prior publication of a contract notice is contingent on the fulfilment of the conditions in FOSA sections 5–2 or 5–3, respectively.

The procuring authority will evaluate offers, and then decide whether to accept an offer. Normally, the procuring authority imposes a grace period between the decision and the contract-signing to allow for any complaints concerning the procurement from competing contractors (see FOSA Chapter 14).

Proposed changes

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

No.

Information technology

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

No, but certain forms of command and control systems and components technology, including software, may be liable for offset purchases as Norway prioritises such technology under offset obligations in EEA article 123.

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?

Both the European Union and Norway are members of the World Trade Organization, and are consequently parties to the Agreement on Government Procurement (GPA). Directive 2009/81/EC does not govern arms trade with third countries – this continues to be governed by the GPA.

Norway does use a national security exemption on occasion (see EEA article 123). For further clarification, see question 23.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

DAR section 9–10 prescribes that the procuring authority requires contracts in the defence and security sector to dictate Norwegian law as the governing law, with Oslo District Court as the governing venue. See question 8 on dispute resolution under the armed forces standard procurement contract.

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

Generally, disputes are resolved through negotiation, and if this is unsuccessful, through the Oslo District Court (see Armed Forces of Norway Form 5052 – General Purchase Conditions section 15). These conditions are used in small and medium-sized contracts, whereas larger contracts may require supplementary or alternative contracts and terms. Normally, larger contracts are based on the same contract principles and conditions that are used in Form 5052.

Arbitration is rarely used in Norwegian defence contracts.

Although the relationship between a prime contractor and a subcontractor is usually considered an internal matter, the procuring authority may, in certain circumstances, such as classified information disclosure, require that the prime contractor include clauses on conflict resolution equivalent or similar to those as stipulated in DAR.

DAR section 9-10 allows for deviations, such as accepting another country's jurisdiction or laws, if the contract involves international aspects and the deviation is necessary owing to the nature of the negations and the safeguarding of Norwegian interests. Whether to deviate is a matter of a case-by-case assessment and, in general, a foreign contractor ought not to rely on a requirement to apply national laws when negotiating with the Norwegian government.

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 procuring authority is entitled to compensation for direct losses caused by delay or defect (see Armed Forces of Norway Form 5052 sections 6.6 and 7.7). The contractor will also be liable for indirect losses caused by his or her negligence. In larger contracts, the procuring authority may accept a limit on the contractor's liability for direct or indirect losses.

Form 5052 section 10.1 provides that the procuring authority must indemnify the contractor from any claim owing to the use of drawings, specifications or licences provided by the procuring authority. The contractor must, in turn, indemnify the procuring authority from any claim owing to patent infringement or other immaterial rights related to the completion of the agreement.

In accordance with Armed Forces of Norway Form 5055 – General Terms for Cost Control, the following costs are considered unallowable should they incur in any contract:

- penalties;
- fines and compensatory damages; or
- costs and legal fees for legal action or preparation of such.

Further, the standard procurement contract states that, in the event of default, the armed forces shall pay interest in accordance with Act No. 100 of 17 December 1976 Relating to Interest on Overdue Payments etc. (See Armed Forces of Norway Form 5052 section 5.2.) As such, the maximum interest rate is currently set at 9.25 per cent.

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?

If the procurement is time-sensitive or otherwise warrants it, the procuring authority must contractually require the contractor to pay liquidated damages upon failure to meet any deadlines (DAR section 26–4). Liquidated damages shall incur at 0.001 per cent of the contract price per working day, related to the part of the delivery that is unusable owing to the delay. Normally, the maximum liability shall be set at 10 per cent of the price for the same part.

The procuring authority may also exempt the contractor from liquidated damages or accept an extension of time in the implementation and execution of the procurement. If the waiver exceeds 500,000 Norwegian kroner, the procuring authority must request prior approval from the Ministry of Defence (see DAR sections 5–5 and 5–9).

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 Norwegian government budgets future procurements through a long-term strategy plan. The plan undergoes an update on an annual basis and is valid for a seven-year period. The current plan – *Future Acquisitions for the Norwegian Defence Sector 2019-26* – is available from the Norweigan government's website.

The risk of non-payment for contractual obligations, excluding contract disputes, is non-existent as the procuring authority evaluates budgetary limits before entering into a contract.

Parent guarantee

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

The contractor must have financial strength that is proportionate with the financial risks entailed by the contract in question. If the procuring entity has doubts concerning the contractor's financial ability, it may request adequate security of performance of the contract. The procuring authority calculates the need for security based on the perceived consequences for the defence sector, should the contractor incur financial problems.

In accordance with DAR section 18–6, paragraph 6, or section 36–2, such security could be in the form of a guarantee from a bank, financial institution or insurance company, or a parent guarantee. In the case of parent guarantees, the guarantee must be issued by the highest legal entity in the corporate group and reflect the contractor's obligations under the contract.

In larger contracts, the use of a performance guarantee is usually the norm and the guarantee used is often that of a parent guarantee.

The main rule in Norwegian defence procurement is payment upon delivery or the achievement of milestones. Under certain circumstances, the procuring authority may pay the contractor prior to fulfilment. In such situations, the contractor shall provide a surety for payments due before delivery (see DAR section 23–7). The surety shall cover the full amount of any outstanding payment.

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 procuring authority must include a number of clauses in the contract, for example, clauses on termination, damages, transparency and warranties. The exact wording and depth of such clauses fall under the discretion of the procuring authority.

Cost allocation

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

The allocation of costs between the contractor and the government is dependent on the choice of the contract (see DAR section 26–9, paragraph 1). The procuring authority may use the following contract types concerning aspects of the delivery and costs:

- cost contracts: the contractor is only obliged to deliver the goods or services if they receive payment of the relevant costs under the contract (see DAR section 19–2, paragraph 2b); or
- price contracts: the contractor is obliged to deliver the goods or services at an agreed price, regardless of the actual costs incurred (see DAR section 19–2, paragraph 2a).

Disclosures

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

The procuring authority will list the contractor's completion of the Armed Forces of Norway Form 5351 – Specification of Pricing Proposal as a qualification criterion where a cost analysis is required (see question 16).

Audits

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

Normally, the procuring authority shall request the right to review the contractor's accounting in order to monitor their performance under the contract (see DAR section 27–2, paragraph 1).

Additionally, the procuring authority shall contractually require the contractor to supply specific information in a number of circumstances, for instance, where cost controls are required, where there is suspicion of economic irregularities or when the contractor is foreign. The procuring authority may also demand that the contractor include contract clauses with subcontractors belonging to the same company group as the contractor, or in whom the contractor has a controlling interest, or vice versa, allowing the procuring authority equivalent rights to information and to audit (see DAR section 27–4).

If the procurement has uncertain price calculations, or if the procuring authority conducts the procurement without competition, the procuring authority shall perform a cost control of the contractor's offer regardless of contract type, both before work commencement and during the fulfilment of the contract.

Additionally, cost control on accrued expenses and costs is required regardless of competition for all cost contracts (incentive, fixed or no compensation for general business risks, or cost sharing) as well as price contracts with limited risk compensation or incentive.

Lastly, the procuring authority shall perform cost control on procurement from a foreign sole contractor.

The procuring authority conducts the cost control in accordance with Armed Forces of Norway Form 5055 – General Terms for Cost Control.

Upon confirming the correctness of its costs in Armed Forces of Norway Form 5351 – Specification on Pricing Proposal, the contractor shall give the procuring authority the right to audit the costs in accordance with Form 5055.

IP rights

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

DAR section 24–3 obliges the procuring authority to consider the legal opportunity, wholly or partly, to acquire the intellectual property rights covered by the contract, including any right of use.

The main rule, in accordance with DAR section 24–4, is that the procuring authority shall acquire a non-exclusive licence to the intellectual property rights, if this meets the needs of the armed forces and constitutes the most economically advantageous option. A non-exclusive licence shall include interface documentation and the rights of usage.

Under DAR section 24–5, the procuring authority shall acquire the intellectual property rights or an exclusive licence if this is considered necessary or appears to be the most economically advantageous option, or there are significant security considerations. If the procuring authority is unable to acquire a wholly exclusive licence, it shall consider whether to partly acquire the rights, or enter into both exclusive and non-exclusive licence agreements (see DAR section 24–6).

If Norway has financed the research and development of a deliverable, the procuring authority is obliged to enter into a royalty agreement with the contractor, normally requiring 5 per cent of the sale price (see DAR section 24–10).

DAR section 24–7 states that the procuring authority must ensure that a contract concerning intellectual property rights contains provisions concerning, among other things:

- the possibility for the procuring authority to make available documentation related to the intellectual property rights to

the entire defence sector within Norway. This possibility shall also extend to other countries' armed forces should it prove necessary; and
- a clause that if the deliverable is not fully developed, produced, industrialised or commercialised, the defence sector receives the intellectual property rights necessary to recover their costs through a resale. The clause must stipulate that the transferred intellectual property rights may be subject to completion, development, production, industrialisation or commercialisation by another contractor, or resold to cover the defence sector's share of the costs.

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?

Not applicable.

Forming legal entities

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

Limited liability company

To form a limited liability company, the shareholders must compile and sign the following documentation:
- a memorandum of association;
- articles of association;
- confirmation from a bank, financial institution, attorney or auditor that the share capital has been paid. The share capital requirement for a limited liability company is 30,000 Norwegian kroner, while public limited liability companies have a requirement of 1 million Norwegian kroner; and
- a declaration of acceptance of assignment from an auditor, or minutes of a board meeting if the company has decided against using an auditor.

Following this process, the company registers in the Register of Business Enterprises with the documents enclosed. Registration may be done electronically and takes, in general, no more than one to five business days. Registration must be completed before the company commences commercial activities, and within three months after signing the memorandum of association at the latest.

Partnerships

Norwegian law recognises three forms of partnerships: a general partnership with joint liability, general partnership with several (proportionate) liability and limited partnerships.

To form a partnership, the partners must sign and date a partnership agreement and register the partnership in the Register of Business Enterprises with the agreement enclosed, before the company commercially activates and within six months of signing the partnership agreement. The partnership's headquarters must be located within Norway, though its partners do not need to be resident there.

Joint venture

It is usual to form a joint venture by establishing a separate company. While several forms of incorporation are available, parties generally choose a limited liability company.

Another way to establish a joint venture is through a simple cooperation or joint venture agreement between the parties.

Norwegian-registered foreign enterprises

While Norway does not consider a Norwegian-registered foreign enterprise (NUF) to be a separate legal entity, foreign companies frequently use them owing to their practical nature.

When a foreign company wants to register a branch in Norway, said branch can register as an NUF. To form an NUF, or to conduct business within Norway in general, the foreign company must register in the Register of Business Enterprises. The foreign parent company is fully responsible for the activity of its branch owing to the lack of recognition of its separate legal status.

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?

Anyone seeking access to information from Norwegian ministries is entitled to request any unclassified information, including previous contracts, under Act No. 16 of 19 May 2006 on the Freedom of Information. The responsible ministry receives any requests for information and performs a case-by-case review of whether to approve the request. This review also entails the assessment of whether to approve the request with or without redactions.

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 general rules concerning counterfeit parts, though the contractor must certify that the deliverables conform in all aspects to the contract requirements (see the Armed Forces Form 5357 – Certificate of Conformity).

The procuring authority often requires materiel and deliveries to be accompanied by relevant certificates of quality and specifications, such as allied quality assurance publications, which also allows the procuring authority to conduct inspections at the contractors' and subcontractors' place of production. The procuring authority may also require a certificate of origin to ensure that the deliverable is not from an embargoed country, among other things.

INTERNATIONAL TRADE RULES

Export controls

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

Export of certain defence-related goods, technology and services, or services related to trade or assistance concerning the sale of such deliverables, or the development of another country's military capability, are conditional on acquiring a licence from the Ministry of Foreign Affairs in accordance with Regulation No. 718 of 19 June 2013 on the Export of Defence-related Products, Dual-use Items, Technology and Services, which only governs the export and import between Norway and other EEA countries.

The export of such products to the EEA is subject to general transfer licences covering specific product categories and recipients, global transfer licences covering specific defence-related product categories (and services) or recipients for a period of three years, and finally, individual transfer licences covering the export of a specific quantity or specific defence-related product to a recipient in one EEA state.

For countries other than those belonging to the EEA, the Ministry of Foreign Affairs distinguishes between the following categories:

- Group 1: the Nordic countries and members of NATO.
- Group 2: countries not belonging to Group 1 that the Ministry of Foreign Affairs have approved as recipients of arms.
- Group 3: countries not belonging to Group 1 or 2 and to which Norway does not sell weapons or ammunition, but which can receive other goods as listed in Annex I of Regulation 2009/428/EC.
- Group 4: countries that are located in an area with war, the threat of war, civil war or general political instability that warrants the deterrence of export of defence-related goods and services or that the United Nations, EU or Organization for Security and Co-operation (OSCE) in Europe sanctions. As member of the UN, Norway is a state party to the UN Arms Trade Treaty.

For export to Groups 1 to 3 (above), the Ministry of Foreign Affairs may grant the following licences in accordance with their guidelines:

- Export licence: valid for one year and for a single export of goods.
- Service licence: valid for one year and for a single export of services.
- Technology transfer licence: valid for one year and for a single export of technology.
- Global export licence: valid for a maximum of three years and for one or several exports of one or several defence-related goods to one or several specific recipients outside of the EEA, within NATO or other countries of relations.
- Project licence: valid for one or several exports of defence-related goods, services or technology to one or several collaboration partners or subcontractors in conjunction with development projects where a state within Group 1 is the final end user.

For Group 4, an export licence valid for one single export may be granted in certain situations.

As a member state of the EEA, Norway also adheres to the Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, and has transposed its criteria listed in article 2 when assessing whether to grant a licence.

Domestic preferences

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

Norwegian defence procurement is generally not conducted with domestic preference, and the possibility of making direct bids will vary with the rules governing the procurement procedure (see questions 1 to 3).

In accordance with FOSA article 3–2 and DAR's preamble, all procurement shall as far as possible be based on competition, and the procuring authority shall not discriminate against a contractor owing to nationality or local affiliation. DAR section 34–2 allows the procuring authority to conduct the procurement without competition in certain specific circumstances similar to the exemptions from competition under ordinary EEA procurement law.

Further, Norway may deviate from Directive 2009/81/EC where the procurement has essential security interests and falls under EEA article 123, or warrants exception in accordance with the Operations Security Regulation . Exemptions require approval from the Ministry of Defence.

The aforementioned exemptions may, under certain circumstances, result in the procuring authority allowing only Norwegian contractors to submit offers for the request of tender.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

Certain countries enjoy the benefit of bilateral security agreements, which eases the exchange and certification of contractors with regard to classified information related to procurements. Members of the EEA also have the advantage of a common transfer licence arrangement (see questions 22 and 37).

Sanctions

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

Norway enforces mandatory UN and EU arms embargoes and sanctions.

Additionally, Norway enforces the embargo on Artsakh, also known as Nagorno-Karabakh, which remains internationally recognised as being part of Azerbaijan, through its membership of the OSCE.

Trade offsets

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

Offset agreements are required in the procurement of defence and security articles from foreign contractors. This also includes contractors based in Norway if they produce essential parts of the delivery abroad. Exceptions to this rule are procurements that are:

- conducted in accordance with the RPP;
- conducted in accordance with FOSA, where the contractor (and most of its subcontractors) are located within the EEA. However, if the contractor is domiciled in the EEA but one of its subcontractors is not and the value of the subcontract exceeds 50 million Norwegian kroner, said subcontractor shall be made party to an offset agreement with the procuring authority; and
- conducted with a contract price below 50 million kroner, provided that the contract does not include future options or additional procurement that may exceed this threshold or the procuring authority expects that the contractor will enter into several contracts below 50 million Norwegian kroner over a period of five years.

The procuring authority manages trade offsets by enclosing the provisions contained in the Regulation for Industrial Co-operation related to Defence Acquisitions from Abroad to the request for tender. The foreign contractor compiles a proposal on the offset requirement and delivers it to the Ministry of Defence or Norwegian Defence Materiel Agency. The offset agreement is a precondition for accepting the contractor's tender. Consequently, the procuring authority conducts negotiations for the procurement contract, while the Ministry of Defence or Norwegian Defence Materiel Agency conducts simultaneous negotiations concerning the offset agreement.

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?

There is no mandatory waiting period for former government employees wanting to enter the private sector.

However, certain government employees have a duty to inform the Board of Quarantine, which is tasked with deciding whether the employee would have to undergo a waiting period before entering into the private sector or receive a temporary ban on their involvement in specific cases.

DAR section 2–5 prescribes that if the contractor's personnel have been employed by the Ministry of Defence or in the defence sector within the past two years, or are retired, they are prohibited from being involved in the contact between the contractor and the Norwegian defence. The contractor shall inform the procuring authority if they have hired or otherwise used such personnel (see questions 28 and 36 on the use of the ethical statement).

Private sector employees face no general restrictions on appointment to positions in the public sector.

Addressing corruption

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

Corruption within Norway is punishable by law and carries a maximum penalty of 10 years in prison (see the Norwegian Penal Code sections 387 and 388).

DAR section 3-2 dictates that in any procurement exceeding the current national threshold value at the time of the publication of the request for tender, the procuring authority must contractually require the contractor to warrant that measures or systems have been effected in order to prevent corruption or the abuse of influence. Such measures or systems may entail internal controls or ethical guidelines.

For procurements exceeding the aforementioned threshold value, DAR section 4-1 requires that the procuring authority issue to the contractor or attach to any request for tender the Ethical Statement for Suppliers to the Royal Norwegian Ministry of Defence with underlying agencies (DAR appendix 5).

The statement obliges the contractor to adhere to the ethical guidelines and not:

> *[. . .] to offer any gift, benefit or advantage to any employee or anyone else who is carrying out work for the MoD or underlying agencies, if the gift, benefit or advantage may be liable to affect their service duties. This rule applies regardless of whether the gift, benefit or advantage is offered directly, or through an intermediary.*

Also, see question 36.

Failure to comply with these requirements may lead to rejection of the contractor's current and future offers to the Ministry of Defence or its underlying agencies.

Lobbyists

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

Lobbyist or commercial agents are not subject to any general registration requirements, though commercial agents who directly engage or provide assistance in the export of certain defence and security articles require an export licence from the Ministry of Foreign Affairs.

DAR section 7-4, paragraph 2 dictates that the procuring authority shall provide contractors, at the request for tender, with the guidelines on prudence, non-disclosure and conflict of interest (DAR appendix 3):

> *The name of any lobbyist acting on behalf of the supplier must be reported to the Defence sector. If a supplier fails to act with openness and strict adherence to good business practices and high ethical standards, this may undermine trust in the relationship between the supplier and the Defence sector, and potentially also the rating of the supplier's bid in the final decision process.*

Limitations on agents

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

As a main rule, Norwegian law does not contain any limitations on the use of agents or representatives that earn a commission on the transaction between the contractor and the procuring authority.

If the contract in question is between the procuring authority and an agent, the procuring authority may require disclosure of the commission or agreement between the agent and the contractor (see DAR section 17–3, paragraph 7).

If the contract falls under EEA article 123, the procuring authority may not enter into a contract with an agent (see DAR section 36–3).

AVIATION

Conversion of aircraft

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

When converting military aircraft to civilian use, the process is subject to a case-by-case pre-conference review by the Civil Aviation Authority, which reviews the relevant documentation, with applicable procedures for registration of ownership, security and certification from the civil aircraft register to follow.

When a civilian aircraft is considered converted for military use, the armed forces perform a case-by-case assessment of the aircraft's military use and capabilities, and requirements concerning the aircraft's safety and airworthiness. Upon acceptance of the conversion, the armed forces notify the Civil Aviation Authority and the aircraft receives the appropriate marking and certification in the military aircraft register.

Deletion of the aircraft's certification in the civil aircraft register is a prerequisite for certification in the military aircraft register.

Drones

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

There are none.

MISCELLANEOUS

Employment law

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

The Working Environment Act No. 62 of 17 June 2005 and Regulation No. 112 of 8 February 2008 on Wages and Working Conditions in Public Contracts will apply if the contractor is operating or performs work within Norway.

Contractors performing work within Norway on procurements exceeding 100,000 Norwegian kroner, excluding value added tax, shall provide the contracting authority with a health, safety and environment (HSE) statement warranting that the contractor complies with all legal requirements pertaining to HSE (see FOSA sections 3–13 and 8–18).

See question 35 for further information.

Defence contract rules

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

See questions 2, 3 and 13 for further information.

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

The procuring authority shall contractually require the contractor to adhere to the national legislation related to wages and working conditions in the country where the contractor carries out work (DAR section 3-1). Further, the contractor shall adhere to the prohibition against child, forced and slave labour, discrimination and the right to organise in accordance with the UN Convention on the Rights of the Child and ILO Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182.

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?

DAR section 4–1 mandates that the procuring authority issue to the contractor the Ethical Statement for Suppliers to the Royal Norwegian Ministry of Defence with underlying agencies. The procuring authority shall issue the statement (DAR appendix 5) to the contractor together with the request for tender or otherwise.

The statement places a duty on the contractor to inform the procuring authority if the contractor, its employees or associates have:

> *[. . .] been convicted by a final judgment of any offence concerning its professional conduct, such as, for example, infringement of existing legislation on the export of defence and/or security equipment [or] criminal acts of participation in a criminal organisation, corruption, fraud, money laundering, financing of terrorism or terrorist activities [or] been guilty of grave professional misconduct, such as, for example, a breach of obligations regarding security of information or security of supply during a previous contract.*

The contractor may see his or her current and future offers rejected by the Ministry of Defence or its underlying agencies, should he or she fail to comply with the information duties imposed by the statement.

Licensing requirements

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

The Directorate for Civil Protection and Emergency Planning requires contractors operating within Norway to adhere to the regulations concerning the production, storage and transport of materiel of a chemical, biological, explosive or otherwise dangerous nature. In that regard, the Directorate may perform inspections and require prior notification, certificates and permissions.

Regulation No. 718 of 19 June 2013 on the Export of Defence-related Products, Dual-use Items, Technology and Services governs the possibility for Norwegian companies to acquire certification to receive defence-related goods from other EEA countries operating under a general transfer licence. Such goods may include materiel used for production.

The certification is subject to a case-by-case review where, among other things, the department factors in the company's reliability and defence-related experience.

Environmental legislation

38 | What environmental statutes or regulations must contractors comply with?

Contractors transporting or storing deliverables or operating within Norway must comply with the environmental rules in Act No. 6 of 13 March 1981 Concerning Protection against Pollution and Concerning Waste, as well as any requirements imposed in the contract with the procuring authority.

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

The procuring authority may impose environmental targets on contractors through inclusion of environmental requirements in both contracts and framework agreements (see FOSA sections 8-3 and 8-16). If the procuring authority requires documentation that shows the contractors are adhering to certain environmental standards, the procuring authority should refer to the Eco-Management and Audit Scheme or other European or international standards.

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

Green solutions do not have an outright advantage in procurements as such, but may have an advantage in the sense that the procuring authority is obliged to consider the life-cycle costs and environmental consequences of the procurement when it designs the requirements of the deliverable. As such, environmentally conscious contractors may be better able to meet these requirements depending on the desired deliverable in question.

If possible, the procuring authority should require the contractor to meet certain environmental criteria concerning the deliverables performance or function. Additionally, the procuring authority may give green solutions an advantage in accordance with the applicable rules and regulations.

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 are no updates at this time.

Poland

Tomasz Zalewski and Karolina Niewiadomska
Bird & Bird Szepietowski i wspólnicy sp.k.

LEGAL FRAMEWORK

Relevant legislation

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

Procurement of defence and security articles in Poland is governed, in principle, by the Act of 29 January 2004 Public Procurement Law (PPL), which implements the EU Defence and Security Directive (2009/81/EC) into Polish law (in particular, Chapter 4a of the PPL).

In cases of the procurement of arms, munitions or war materiel 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 (the Ministry of Defence) No. 367/MON of 14 September 2015 shall be used. This decision regulates the principles and procedure 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 procedure of defence procurement to which Decision No. 377/MON applies.

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

The PPL does not apply to procurement of defence and security articles in the situations described in article 4b of the PPL (eg, where the procurement is subject to a special procedure under an international agreement or in case of government-to-government procurement). 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.

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 (such as the Ministry of Defence) falls within the scope of the PPL when the contract has a value equal to or greater than EU financial thresholds for good and services (from 1 January 2020 this value is €428,000 for goods and services), and €30,000 for works if the procurement covers:

- the supply of military equipment, including any parts, components or subassemblies;
- the supply of sensitive equipment;
- works, supplies and services directly related to the equipment referred to above; or
- works and services for specifically military purposes or sensitive works and sensitive services.

The procurement will be advertised in the Official Journal of the European Union (OJEU) in case of public procurements having a value equal to or greater than the EU threshold or in the Public Procurement Bulletin in case of public procurements below the EU threshold.

The key differences between procurements carried out under the specific defence rules (in comparison to civil procurement) 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);
- broader catalogue of the circumstances justifying the exclusion of economic operators from the procurement procedure;
- power of the contracting authority to restrict the involvement of subcontractors in certain situations;
- limiting the number of contract award procedures which may be applied (only procedures for awarding contracts in which an initial qualification of contractors is possible (eg, restricted tender or a negotiated procedure with prior publication));
- wider range of tender assessment criteria (other than standard criteria, such as viability, security of supply, interoperability and operational characteristics);
- 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 application of the provisions of the PPL is excluded because of the existence of a fundamental security interest state) imposes more stringent requirements regarding procurement. It limits the scope of procurement procedures to just three: negotiations with one supplier, negotiations with several suppliers or exceptionally negotiated procedure with prior publication. In addition, it does not provide the mechanism for appealing the decisions of the contracting entity to the National Appeals Chamber. This Chamber can only consider procurement disputes regulated by the PPL. In the case of procurement under the Decision 367/MON, contractors can only file claims to civil courts.

Conduct

3 How are defence and security procurements typically conducted?

The procurement of standard defence and security products is usually conducted as public procurement regulated by 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 foreign military sales programme).

Under the PPL, there are two procedures available for defence and security procurement:

- 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.

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 depends on whether the authority selects a procedure that permits them to negotiate the contract and requirements with the bidders.

The negotiations phase is usually limited, with many of the contract terms being identified as non-negotiable. The evaluation process is undertaken on the basis of 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 provides that the procurement procedure may be performed in the model 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?

The current PPL will be in force until the end of 2020 and on 1 January 2021 it will be replaced by the Act of 11 September 2019 – Public Procurement Law (New PPL).

The PPL currently in force has been amended dozens of times during recent years; several of these amendments have been very extensive. The result of this is that it has been deemed to be too complicated for average contractors, hence the rewritten PPL.

The major changes in the New PPL include:

- solutions introducing better tender procedure preparation;
- a new principle of public procurement law – the principle of efficiency;
- introduction of procedural simplifications, in particular for contracts below the EU thresholds;
- better balance between the position of contracting authorities and contractors;
- greater transparency of tender procedures;
- introduction of an out-of-court dispute resolution mechanism; and
- changes to public procurement agreements, including regulation of the valorisation of contracts.

The above changes will have an impact on all procurement procedures, including defence procurement.

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 Agreement on Government Procurement (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 GPA, 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 remedies framework that 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 PPL. Disputes between the contracting authority and a contractor are resolved by the National Appeals Chamber (NAC) in Warsaw – a state entity (quasi-court) specialising in such disputes. Disputes are usually resolved within 14 days of submitting an application and usually after one hearing.

Disputes are resolved by the NAC in accordance with the dispute procedure regulated by the PPL and the Polish Civil Procedure Code. A ruling issued by the NAC may be appealed to a regional court of venue for the contracting entity's registered office. The NAC has power to resolve disputes related to the procedure of awarding public contracts, while other disputes regarding (eg, the public contract performance, are resolved by common courts).

In most of the procurement proceedings conducted on the basis of exemption from the PPL (eg, where Decision 367/MON applies) the disputes are resolved by the common state courts. In practice it means that a 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 in comparison to procurement based on the PPL.

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

Typically, there is no formal alternative dispute resolution used to resolve conflicts between a contracting authority and a contractor. As stated above, the NAC, as a quasi-court, resolves conflicts at first instance. In practice, proceeding before the NAC may be considered as way of alternative dispute resolution. The procedure is very fast, simplified and aimed at obtaining a quick decision.

After the contract is awarded any disputes regarding the contract performance are resolved in accordance with the contract.

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 defence procurement.

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 on 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).

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 liability under the contract. 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 that a contracting entity's liability towards contractors is limited to the amount of the contract value. The contract award procedure used by the contracting authority will determine the extent to which the limitation of liability is negotiable.

In addition, public contracts usually include provisions on the payment of liquidated damages. According to the Civil Code, the result of introducing such clauses eliminates further liabilities through 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 nonpayment

11 Is there risk of nonpayment 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 its budget. 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, the purchase of equipment for defence needs by the Ministry of Defence is done on the basis of the updated Plan for Technical Modernisation of the Polish Armed Forces for the years 2017–2026. Under this plan, the Ministry of Defence is entitled to conclude multi-year contracts with flexible budgets. The Ministry of Defence assumes that 185 billion zlotys will be spent during 2017–2026.

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 a security of performance of the contract; this is customary for large contracts. The procurement regulations contain a list of forms in which security of performance of the contract should be provided. These include, primarily, bank guarantees and insurance guarantees (performance bonds).

The submission of a performance bond is only mandatory in 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 on the basis of the PPL. There are also numerous provisions of the Polish Civil Code and other legal acts that will apply regardless of their inclusion in a defence procurement contract. The most important are mandatory provisions that cannot be modified by the parties in a contract (eg, scope of the public contract, termination, duration). Other non-mandatory provisions mainly stem from the Polish Civil Code (eg, those regarding payments, liabilities and warranties) 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 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 rate would need to be included in the price.

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 their calculation).

Additionally, if there is concern that the offered price is abnormally low, the awarding entity has a right to require more detailed information regarding cost and pricing.

Audits

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

Audits of defence and security procurements may be conducted by:

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

If the procurement is financed from EU funds there might be additional audit undertaken related to the correctness of spending of EU funds.

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 usual policy on the ownership of intellectual property arising under public contracts is that intellectual property that was created before the signing of the contract will normally vest with the contractor generating

the intellectual property, in exchange for which the awarding entity will expect the right to disclose and use the intellectual property for the contracting authorities' purposes (ie, a licence). However, the awarding entities will expect the contractor to transfer the intellectual property rights to it that have been created by the contractor exclusively for the awarding entity in performance of the contract.

The detailed scope of the licence depends on the subject of the contract.

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 entrepreneurs. 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 south 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, such as:

- limited liability companies (LLC);
- general partnerships;
- limited liability partnerships (LLP);
- limited partnerships;
- limited joint stock partnerships; or
- joint stock companies.

Business activities may also be conducted in the form of individual business activity, a civil partnership (under a contract) or a branch office of a foreign company.

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 liability company registered in Poland), which would be an independent legal entity able to contract in its own right and the joint venture parties are its shareholders. It is relatively straightforward and inexpensive to establish a company (required share capital for an LLC is 5,000 zlotys). The parties must file a motion together with respective attachments (eg, articles of association and so on) at registry court and pay the applicable filing fee. The company will gain its legal personality upon its registration in the National Court Register. The shareholders (ie, 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 into 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, on the face of it this right would extend to contracts and records held by the Ministry of Defence – allowing anyone to request documents related to both the procurement and the contract performance phase.

However, Polish law indicates a few exemptions from disclosure of information related to the contract award procedure, which cover:

- primarily classified information at the levels of restricted, confidential, secret and top secret information; or
- information that is regarded as a business secret of the contractor; in such case a contractor is entitled to request information of a technical, technological, organisational or other nature, which is of economic value, not be disclosed by that contracting entity.

The proceedings 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 these proceedings 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 PPL obliges an authority to reject tenders from bidders that have been convicted of certain serious offences. It also gives 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 subcontractors, as well as giving them broad rights (eg, to require a supplier to disclose all subcontracts or to flow down obligations regarding information security). In cases of procurement based on decision 367/MON, the awarding entity 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 may be applied for by operators established in one of the member states of the EU or the European Economic Area, or a state with which the EU or the Republic of Poland has entered into an international agreement concerning these contracts. The contracting authority may specify in the contract notice that a contract for defence and security may also be applied for by economic operators from states other than those listed above.

In defence and security procurements, the contracting entities may influence 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 its 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 nondiscriminatory manner; or
- refuse to consent to a subcontract with a third party if that party does not comply with the conditions for participation.

INTERNATIONAL TRADE RULES

Export controls

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

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 as long as, where appropriate, an authorisation has been obtained.

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 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 TFEU is relied upon in order to exclude the application of the 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 EU member states or signatories of the GPA are able to benefit from the full protection of the PPL. Contractors from other countries may be less favourably treated, including 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.

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 are required only if both the procurement itself and the related offset are justified by the existence of an essential 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. Offset requirement can be justified on the basis of article 346 of the TFEU, if it is necessary for the protection of the essential security interests of the state.

Offsets are not performed in public procurement proceedings under the PPL. They are admissible only in proceedings 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 sending to the contractor offset assumptions drafted by the Ministry of Defence and submission by the foreign contractor 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 PPL and Decision 367/MON;
- the Act of 21 August 1997 regarding Limitation of Conducting Business by Persons Exercising Public Functions; and
- the Act of 11 September 2003 on Professional Military Service.

Both the PPL as well as Decision 367/MON state that an economic operator who 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 a proceeding. Under the PPL, the exclusion is not mandatory if the distortion of competition thus caused can be remedied otherwise than by excluding that operator from participation in a procedure.

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

On the basis of the Professional Military Service Act, professional soldiers cannot be employed or undertake employment on the basis of another title in businesses conducting activity in the production or trade of defence goods if, during three years prior to the date of his or her dismissal from professional military service, he or she participated in a procurement procedure concerning products, supplies, works and services or took part in the performance of a contract related to 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 sentenced for corruption by a final judgment. Such contractors must be excluded from the procurement proceedings.

Also, on the basis of Decision 367/MON at the stage of a contract's signing, 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 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 and Senate regulations. Persons performing intermediation services in executing contracts concerning military equipment need to possess the relevant licence in accordance with the Act of 22 June 2001 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 Regulation of the Minister of Transport, Construction and Maritime Economy of 6 June 2013 on the register of civil aircraft and signs and inscriptions on aircraft entered in that register.

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 or drones for 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 unmanned aerial vehicles (UAVs) 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. They will harmonise the law in the EU in this field. These regulations are the Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 and Commission Implementing Regulation (EU) 2019/947 of 24 May 2019. From June 2020, the registration of drones will be mandatory. On the basis of new regulations, drones' manufacturing and trading will be subject to a number of exploitation requirements for the purpose of 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 PPL, the Decision 367/MON and the offset law. 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.

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 a specific number of the members of the management board of the company need to be citizens of Poland or an EU/EEA member country. 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 disapplication 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 EASA.

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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 requirements may obtain an advantage.

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?

Adoption of the New PPL is the most important legislative development of 2019. The New PPL will enter into force on 1 January 2021. However, most changes will not influence defence procurement substantially. The local procurement defence legislation, such as the Decision 367/MON, remain unchanged since 2015.

In October 2019, the Polish the Ministry of Defence signed a new Technical Modernization Plan for the period 2021–2035, also covering 2020. The plan envisages modernisation expenditure in the total amount of 524 billion zlotys. The most important programmes included in the plan are:

- Harpia – acquisition of 32 fifth generation multi-role combat aircraft;
- Narew – short-range air defence system;
- Cyber.mil.pl – modern cryptographic and information technology hardware, expenditure is to be contained in an amount of 3 billion zlotys;
- Wisła – medium-range air defence system;

- Gryf – tactical UAVs;
- Ważka – micro UAVs;
- Płomykówka – maritime patrol aircraft;
- Miecznik – coastal defence vessels;
- Orka – submarines;
- Regina – Krab howitzer squadron fire module elements;
- Rak – self-propelled mortars based on the Rosomak APC;
- Homar – long-range rocket artillery;
- Pustelnik – light anti-tank guided missile launchers;
- Borsuk – infantry fighting vehicles; and
- Mustang – high mobility passenger/cargo vehicles.

Portugal

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LEGAL FRAMEWORK

Relevant legislation

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

The basic procurement rules for defence and security contracts are set forth by the Public Procurement Law in the Fields of Defence and Security (PPDS), approved by Decree-Law 104/2011 of 6 October 2011, which implemented the EU Directive 2009/81/EC into Portuguese Law. The PPDS establishes the fundamental principles and rules applicable to awarding certain contracts in the areas of defence and security.

The PPDS establishes the special rules applicable to procurement in the sectors of defence and security, but the Portuguese Public Contracts Code (PCC), approved by Decree-Law 18/2008 of 29 January 2008, which is considered the key legislation regulating the award of public contracts and was recently amended by Decree-Law 111–B/2017 of 31 August 2017, is the main legal reference applicable on a subsidiary basis.

Finally, reference must be made to the Administrative Procedure Code, approved as an appendix to Decree-Law 4/2015 of 7 January 2015 and the Administrative Courts Procedure Code, approved by Law 15/2002 of 22 February (as amended by Law 118/2019 of 17 September), which are all applicable to public procurement procedures in general.

Identification

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

A procurement by a Portuguese contracting authority falls within the scope of the PPDS when contracts have a value, excluding value added tax above the threshold established in article 8 of EU Directive 2009/81/CE and the objective of which is:

- 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, supplies and services directly related to military or sensitive equipment for any and all stages of its life cycle; and
- works and services for specifically military purposes, or sensitive works and sensitive services.

Military equipment is defined as the type of product included in the list of arms, munitions and war material, approved by the Decision of the Council No. 255/58 of 15 April, interpreted according to the progressive character of said technology, procurement policy and the military requirements, on the basis of the Common Military List of the European Union.

As mentioned above, defence and security procurement is subject to a special procurement regime and, although the regime is similar to the general public procurement rules in terms of structure and basic principles, it differs from the general rules in various aspects owing to the sensibilities and importance of the sector. Moreover, defence and security contracts present, as the principal object, elements related to sensitive work, equipment and services for security purposes. In general, defence and security procurements are treated differently because they require the application of particular protection measures.

Conduct

3 How are defence and security procurements typically conducted?

There are four procurement procedures under the PPDS:

- negotiation procedure with a prior notice;
- negotiation procedure with no prior notice;
- competitive dialogue; and
- limited tender with prior qualification.

The general rule is for procurement procedures to be conducted through a negotiation procedure with prior notice or a limited tender with prior qualification. Nonetheless, the competitive dialogue and the negotiation procedure with no prior notice can be implemented provided such decision is well-grounded.

As mentioned above, defence and security procurement is typically conducted following the rules provided by the PPDS and the PCC.

Most procedures involve a pre-qualification process at the first phase of the competitive procedure, during which tenderers must demonstrate their financial and technical capability, including experience in similar contracts.

Proposed changes

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

In Portugal, there is no particular legal update process or a significant proposal regarding defence and security procurement processes.

Information technology

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

The national legal framework does not provide for different or additional procurement rules for 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?

Portugal is a member of the European Union and has signed the Agreement of Government Procurement (GPA). For that reason, and following the implementation of EU Directive 2009/81/EC on contracts in the fields of defence and security into Portuguese law through Decree-Law 104/2011, in most procurement procedures Portugal follows the GPA and the EU principles and rules on public procurement in the defence sector.

However, in some cases, the national security exemption and the exemption for armament and information pursuant to article 346 of the Treaty on the Functioning of the European Union (TFEU) is still used. Nonetheless, the use of these exemptions is declining.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Public contracting authorities and private contractors' disputes are dealt according with the general regulations on settlements between contract authorities and contractors.

Under Portuguese law, the disputes between public and private contractors in the defence and security sectors are usually resolved in judicial courts. However, some recently signed contracts already contain arbitration clauses.

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

Alternative dispute resolution is a possible instrument, considering what is prescribed in the Portuguese legal framework, and can be used to solve conflicts in public procurement in general, as well as in the defence and security fields, especially through arbitration, which is starting to be viewed as a more efficient alternative to the common judicial litigation. In fact, for a dispute related to defence and security procurement, the arbitration procedure ensures a very swift procedure.

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 defence and security sectors do not follow any specific rules regarding the ability to indemnify. In general, the government – as any private party – must indemnify the contractor for damages arising from a breach of contract by the government, provided that damages are reasonably and foreseeably caused by the breach. Vice versa, the private contractor also has to indemnify the government for the damages that arise from a breach by the contractor. Therefore, the government administration's liability obligation is not limited by specific elements. The administrative courts and the arbitration courts can set the value of the contractor's compensation and the relative government obligations in accordance with the rules on administrative proceedings.

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 government is free to negotiate and accept a limitation of liability of the contractor. There are no statutory or regulatory limits to the contractor's potential recovery against the government.

Risk of nonpayment

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

In Portugal, public contracting authorities – as well as private parties – are bound by the contracts they have entered into, regardless of whether adequate funds are available. Therefore, a contractor may take legal action against the government for default and enforce a judgment against the government at any time.

Parent guarantee

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

A contractor has to provide a parent guarantee only if the contractor itself does not meet the minimum requirements for financial and economic standing set by the contract.

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 procurement clauses that must be included in, or that will be read into, a defence contract as a matter of law, except for certain requirements relating to the protection of classified information, as well as certain price control rules.

However, there are specific rules applicable to contracts involving access to classified information at levels 'Confidential' or higher. These contracts must include certain clauses obliging the contractor to observe the applicable rules and procedures for the protection of such information.

Contracts are construed in accordance with the PCC, including the principles applicable to public law contracts, as the principle of good faith.

Cost allocation

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

Costs regarding defence procurement contracts are allocated between the contractor and the government and, usually, costs concerning the contract's documentation are carried by the contractor. However, the specific allocation of costs between the contractor and government in these cases depends on the specific agreement signed.

Disclosures

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

Contracting authorities may require some additional explanations on the prices proposed so that they can verify their veracity.

Audits

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

Generally, procurement is subject to auditing by the Court of Auditors as well as investigations by the contracting authority about compliance to general requirements and the professional competence of contractors. The administration verifies whether a business is qualified to perform public works, and verifies the technical, professional, economic and financial capacities to confirm whether the defence and security purposes can be met by the contractors.

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 allocation of intellectual property rights created during the performance of the contract vary from case to case, depending on the specific contract signed.

Nonetheless, the general rule is that the ownership rights to intellectual property belong to the contracting authority. This rule is contained in the PCC and is applicable to defence and security 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?

In Portugal, there are no specific economic zones or special programmes that are reserved for foreign businesses.

Forming legal entities

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

Portuguese company law has two main types of incorporated entities: the public limited liability company (SPA) and the private limited company (SRL).

Public limited liability companies

A SPA has the following characteristics:

- a minimum of five members, designated by holders, which may be natural or legal persons, and does not accept non-monetary contributions;
    - an SPA can be constituted with a single shareholder, provided that the partner is a company;
- the liability of members is limited to the value of the shares subscribed for themselves;
- the capital cannot be less than €50,000 and is divided into equal par value; and
- the name of the company shall contain the words 'limited liability company' or 'SA'.

Private limited companies

A SRL has the following characteristics:

- two or more members that can be natural or legal persons; it does not accept non-monetary contributions;
- the liability of members is limited to the capital provided when becoming a shareholder, except in cases where the law provides otherwise;
- social capital can be set freely by the partners, except in companies regulated by special legislation;
- the share value (quota value) can be variable, but not less than €1;
- the contract of the company shall state the amount of each share and the identification of the respective holder; and
- the name of the company must contain the words 'Limited' or 'Ltd'.

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 general principle of transparency and according to the general duty of administrative bodies to state the reasons of their decisions, all public procedures are public and anyone who demonstrates a legitimate interest in having access to information (documents and others) regarding a certain procedure is entitled to it and to ask for copies of the documents of such procedures.

Regarding public procurement procedures, Law 96/2015 of 17 August 2015 establishes the legal framework for the access and use of electronic platforms for public procurement purposes, which allows for all communications and decisions taken under a certain public procurement procedure to be public to all the bidders at the same time. In fact, during the whole public procurement procedure, all bidders have access to the documents submitted by the parties and issued by the jury as well as by the contracting authority, except in relation to documents that bidders have requested to be classified.

Despite the general principle of transparency, there are certain exceptions to this principle. Public authorities may decide not to disclose certain information, including in relation to public procurement procedures, when and insofar as its release would impede law enforcement or otherwise be contrary to the public interest, in particular to the interests of defence and security, harm the legitimate commercial interests of contractors or could prejudice fair competition between them.

Supply chain management

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

According to Law 49/2009 of 5 August 2009, all companies engaged in defence activities are subject to an authorisation (licence) issued by the Minister of Defence. Besides that authorisation, there are no specific rules regarding the eligibility of suppliers in the defence and security sectors. The general rule applicable for defence and security contracts is the same applicable in accordance with the PCC.

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the PCC, which are equivalent to the ones foreseen in the EU Public Procurement Directives, contracting authorities are only permitted to assess whether private contracting entities are qualified to participate in a tender procedure in accordance with the economic and financial standing of the bidder and to its technical and professional ability. Those qualitative criteria must be related and proportionate to the subject matter of the contract.

There are no specific requirements regarding supply chain management and no specific rules regarding anti-counterfeit parts for defence and security procurements either.

INTERNATIONAL TRADE RULES

Export controls

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

Law 37/2011 of 22 June 2011 transposed to the national framework Directive 2009/43/EC of 6 May 2009 and Directive 2010/80/EU, of 22 November 2010, which aims to simplify the rules and procedures applicable to the intracommunity transfer of defence-related products to ensure the proper functioning of the single market.

The Portuguese government (specifically, the Ministry of Defence) is the national authority responsible for the authorisation of the transfer of defence-related products between member states. Moreover, exportation is subject to various layers of national control performed by different authorities, such as the Foreign Ministry, the Defence Ministry and also by the customs authority.

Domestic preferences

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

There are no domestic preferences applied to defence and security procurement since Portuguese public procurement procedures, including the fields of defence and security, are based on competition, equal treatment and non-discrimination.

Foreign contractors can bid on procurements directly. Under the PPDS, tenderers which, under the law of the member state in which they are established, are entitled to participate in public procurement procedures, shall not be rejected solely on the ground that, under the Portuguese law, they would be required to be either natural or legal persons.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

There are no rules providing for more favourable treatment of contractors from any particular country.

Sanctions

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

Portugal is a member of the United Nations and the EU and adheres to the boycotts, embargoes and other trade sanctions put in place by these organisations.

The UN Security Council imposes sanctions through Security Council Resolutions. The European Union acts on these by adopting a common position and where appropriate, an EU regulation directly applicable to member states is introduced.

Trade offsets

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

Portugal used to have an offset legal regime. Nonetheless, after the approval of Directive 2009/81/EC and its transposition into the Portuguese legal framework, defence trade offsets are no longer possible in Portugal as those kinds of agreements are incompatible with EU public procurement principles.

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?

Under Portuguese law, government employees and public administration employees are not able to cumulate the exercise of public and private activities, although there are certain exceptions specifically provided in the law.

In relation to former government employees being able to take up appointments in private sector and vice versa, the rule is the same and the introduction of a cooling-off period is common. Nonetheless, no limitation is applicable when the future functions are not related to the defence and security sectors and the impartiality of the decisions (prior and future) will not be affected.

Addressing corruption

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

Contractors are obliged to commit themselves to transparency standards during the execution of activities related to defence and security procurement contracts.

Lobbyists

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

Portugal does not have any legislation regarding lobbyists, so lobbyists and commercial agents are not generally required to register with any government entity (in addition to general business registration requirements).

Limitations on agents

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

Law 49/2009 of 5 August 2009, provides that all intermediation acts must be authorised in advance by the Portuguese Minister of Defence.

Moreover, the Portuguese Minister for Foreign Affairs is required to give its opinion on the opportunity and convenience of the intermediation act in as regards foreign policy issues.

AVIATION

Conversion of aircraft

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

There is a distinction between military-use aircraft and civil-use aircraft. Military aircraft belong to a special category because of their military end-use and are registered in accordance with specific principles and rules. Accordingly, civil-use aircraft are subject to a specific registration process led by the Portuguese Civil Aviation authority.

There may be circumstances in which civil aircraft can be used as military aircraft. The use of a civil aircraft for military purposes requires that the aircraft is under control of the military, and the prior approval by the inspection and by the office of the Portuguese military.

Drones

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

The aviation laws and regulations ruling the inspection, approval and operation of unmanned aircraft are approved by the National Civil Aviation Authority.

The National Civil Aviation Authority also approved, on 14 December 2016, Regulation No. 1093/2016, which provides a framework for the operation of drones in Portugal. The regulation applies to all civil drones, except those operating in closed or covered areas. The regulation entered into force on 13 January 2017.

MISCELLANEOUS

Employment law

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

Domestic labour and employment rules apply to foreign defence contractors which execute contract activities in Portugal. Foreign defence contractors must observe Portuguese labour and employment rules to the extent that they run operations in Portugal.

Defence contract rules

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

There are no specific rules applicable to contractors, foreign or domestic, in defence contracts, except in what refers to confidentiality issues and classified information.

In fact, if contracts refer to confidential or classified information, contractors need a specific authorisation to access that information.

The Portuguese legal framework has several rules ensuring the protection of classified information.

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

Contractors performing work abroad are bound by the international rules applicable to defence contracts. Moreover, they are also bound by the laws and regulations of the country in which they are performing the specific work at stake.

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?

All directors, officers or employees of a contractor must ensure that they comply with the general eligibility criteria set for public procurement contracts. If they fail to comply with said criteria, they may see future offers being rejected on those grounds.

Moreover, if the contracts at stake involve access to classified information, more stringent security measures are applicable.

Licensing requirements

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

Law 49/2009, of 5 August 2009, sets forth the conditions to carry out military activities.

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In accordance with said law, military activities shall be executed in accordance with the general principles applicable to the safeguard of national defence and security and with the international agreements entered into by the Portuguese Republic.

Moreover, any activity regarding the practice of goods and military technology market and industry have to be licensed by the Ministry of Defence.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

Environmental protection during the execution of a public procurement contract is an important issue that contractors must consider.

The Portuguese legal framework concerning public procurements, including defence and security procurements, provides for specific obligations on environmental protection.

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

In Portugal, there are no specific environmental standards for the defence sector. Nonetheless, the general environmental standards are also applicable to the defence sector and some contracting authorities may also include environmental criteria relating to the subject matter of the contract, such as energy efficiency or emissions, into the technical specifications or the award criteria.

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

Green solutions only provide advantages in procurement if environmental criteria are set for the evaluation of the offers submitted.

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 final version of the Military Programming Law was approved by the Assembly of the Republic May 2019 and entered into force last June 2019. This was the most widely supported vote of all the Military Programming Laws in Portugal, and provides for the investment,

equipment and transformation of the Portuguese Armed Forces, putting them on a path of modernisation and preparation for a new strategic environment.

The Military Programming Law is the main multi-annual financial instrument for public investment in defence and the Armed Forces. It is the primary source of equipment, the development of the National Defence Technological and Industrial Base, and support for research and development, with a direct impact on the military capabilities required to pursue the multiple missions of the Armed Forces.

The Military Programming Law foresees a global allocation of €4.74 billion, €1.58 billion higher than the current Military Programming Law, which corresponds to an increase of 50 per cent. It includes seven structuring projects, which represent about one-third of the proposal and will provide in the long term:

- five strategic and tactical air transport aircraft (€827 million);
- six ocean patrol vessels (€352 million);
- a cyberdefence programme (€51 million);
- a soldier combat systems programme (€43 million);
- five evacuation helicopters (€53 million);
- a multipurpose logistical vessel (€150 million); and
- a refuelling vessel (€150 million).

Qatar

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LEGAL FRAMEWORK

Relevant legislation

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

Law No. 24 of 2015 Promulgating the Law Governing Tenders and Auctions (the Tender Law) governs the procurement of contracts by government ministries and other public bodies.

However, the armed forces, police and other military entities are not required to comply with the Tender Law when the tender relates to a matter that is considered confidential in nature (article 2 of the Tender Law).

In practice, all contracts procured by the armed forces and the police are considered confidential in nature so will not be subject to the Tender Law.

Identification

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

As above, the armed forces, police and other military entities are not required to comply with the Tender Law when the contract relates to a matter that is considered confidential in nature.

Conduct

3 How are defence and security procurements typically conducted?

Defence and security procurement is usually conducted directly by the relevant entity. For example, the army, air force, navy and the Ministry of Interior will usually conduct their own procurement exercises.

Where the matter is considered confidential in nature, the procurement process may be restricted to certain preferred bidders or the procurement may be made directly with a single supplier.

Proposed changes

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

Not as far as we are aware. The most recent version of the Tender Law came into force in June 2016, so (as of the time of writing) we are not expecting any further substantial changes.

Information technology

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

Information technology procurement is not treated differently. If an information technology contract is procured by the armed forces, police or another military entity then, in most cases, it will be considered confidential in nature and the Tender Law will not apply.

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?

Qatar is not a signatory to the GPA. Qatar has entered into bilateral defence treaties with several important defence partners such as the United States and France. However, the provisions of these treaties do not impact the way the defence contracts are procured.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Owing to the confidential nature of the issues involved, arbitration agreements are usually included in contracts between state entities and international defence contractors. The arbitration is usually conducted under the rules of the International Chamber of Commerce, the London Court of International Arbitration or the Qatar International Center for Conciliation and Arbitration. It is important to ensure that state entities are authorised to enter into an arbitration agreement.

Most disputes are resolved before formal arbitration proceedings are commenced.

Contracts will generally be governed by the laws of Qatar, but there are precedents of state entities accepting a foreign law (such as Swiss law) as applicable to a defence contract.

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

As above, most contracts include an arbitration agreement. Other forms of alternative dispute resolution, such as mediation, conciliation and expert determination, are relatively unusual in Qatar.

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 term 'indemnification' is not specifically recognised under Qatar law, and there are no statutory provisions limiting the state's ability to indemnify contractors or specifically requiring defence contractors to indemnify the state.

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?

Most contracts in the defence sector include both a total cap on liability (this is often the purchase price or total fee) and an exclusion of indirect and consequential loss and loss of profit.

These limitations and exclusions are generally enforceable but must be carefully drafted because article 170(2) of the Qatar Civil Code (Law No. 22 of 2004) provides that they will be interpreted narrowly (ie, to limit the scope of the exclusion).

On the basis that most significant defence contracts will not be subject to the Tender Law (see questions 1 and 2), there will be no statutory or regulatory limitations on the liability of the state or of the defence contractor.

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?

State entities need to agree a budget with the Ministry of Finance before entering into a contract. Payment delays can occur where that budget is exceeded, for example, because of variations.

Parent guarantee

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

For major contracts, the state will likely insist that a parent company guarantee is provided. A performance bank guarantee (payable on demand) will also be required for almost all contracts.

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 provisions specifically relating to the procurement of defence contracts, but there are mandatory provisions under Qatar law that will apply to all contracts. These include:

- an obligation to act in good faith (article 172 of the Civil Code);
- article 171(2) of the Civil Code, which provides that the court may reduce a party's obligations to a reasonable limit where there is an event that:
  - is exceptional;
  - could not have been foreseen;
  - renders performance of a party's obligations onerous; and
  - threatens that party with substantial loss; and
- article 266 of the Civil Code, which permits a court to reduce the amount of liquidated damages agreed between the parties where the debtor can show that they are excessive or that the obligation was partially fulfilled.

Cost allocation

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

Most contracts will be a fixed price, but there is no defined method of procuring defence contracts and the procurement method will depend on the nature of the thing being procured.

Disclosures

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

There are no statutory requirements and this will depend on the express provisions of the tender and contract.

Audits

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

It is unclear if there are any audits being conducted on the procurement process conducted by the various state agents. A body called the State Audit Bureau has, in theory, the power to audit procurement processes. However, the law regulating the powers of the State Audit Bureau specifically excludes defence and security matters from its jurisdiction.

IP rights

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

Foreground intellectual property management in Qatar needs to be considered carefully; in particular, there are statutory restrictions on future assignment of copyright that can often be difficult to manage. Qatar does not have a 'works for hire' doctrine in its intellectual property legislation and there are prohibitions around the waiver of moral rights (the Qatari Copyright Law, articles 10 and 11). The assumption, therefore, is that the individuals who provided the creative input would be the first owners.

Depending on the specific nature of the defence and security project, original equipment manufacturers and other vendors in the sector are generally amenable to granting certain exclusivity. However, the commercial terms are often heavily negotiated. With intellectual property rich projects with any sort of industrial element in Qatar and the wider Gulf region, there is a greater emphasis on ancillary know-how licences and knowledge-sharing obligations upon the foreign licensor.

With regard to patent protection, Qatar became bound to the Patent Cooperation Treaty system in August 2011 and had enacted its first domestic patent law in 2006 with Law 30 of 2006. Notwithstanding this, patent filings from Qatar remain relatively low.

If defence and security projects in Qatar have the potential to yield jointly developed novel inventions, a protocol around disclosure and management of a filing programme should be considered in the relevant contract.

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 is a separate and distinct regime for establishing companies in the Qatar Financial Centre (QFC) and in free zones administered by the Qatar Free Zones Authority (QFZA), which allow 100 per cent foreign ownership.

The QFC has been put in place primarily to attract international financial services companies (but also some support functions and since 2014 wider activities outside the financial services sector) to come to Qatar.

The QFC was established by the government of Qatar and is located in Doha.

The QFC was originally intended to provide an environment solely to attract international and domestic financial services institutions and service providers in support of those institutions to encourage participation in the growing market for financial services in Qatar and elsewhere in the region.

However, the QFC is now willing to accept applications for business registration from other types of service providers that are not associated with the financial services sector, for example, in the fields of engineering-related scientific and technical consulting activities; and project management.

The QFC has recently approved applications from defence contractors to set up entities dedicated to business development and provision of technical assistance services (provided there is no import or export of equipment).

The process for incorporation in the QFC is more user-friendly than in 'mainland' Qatar, and after initial meetings are held with the QFC Authority to determine the 'strategic fit' of an applicant company, the QFC Authority appoints a representative with whom an applicant can coordinate regarding documents to be prepared and submitted during the process.

The QFZA now accepts applications from foreign companies wishing to establish in either of the two free zones that have been established to date, namely Ras Bufontas – Airport Free Zone, which seeks to attract industries including logistics, consumer products, light manufacturing, services, technology and applications, and pharmaceuticals; and Umm Al Houl – Port Free Zone, which seeks to attract industries including maritime, polymers and plastics, advanced manufacturing and logistics.

Forming legal entities

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

As far as mainland Qatar is concerned, foreign investors may invest in Qatar in accordance with the provisions of the Foreign Capital Investment in Economic Activities Law (No. 1 of 2019) (the Foreign Investment Law).

In summary, the Foreign Investment Law.

Repealed the previous Foreign Investment Law No. 13 of 2000;

- Makes it clear that foreign investment can be up to 100 per cent in all economic activities, except for banking, insurance (unless an exemption is issued by the Council of Ministers), commercial agencies and certain government-owned entities.
- Requires an application to be made with the Ministry of Commerce and Industry. A decision must be made within 15 days from date the application is complete. An appeal against a rejection can be made to the Minister, who must make a decision in relation to the appeal within 30 days.

The Ministry of Commerce and Industry to issue Executive Regulations that will set out more detail about the implementation and means of enforcement of the Foreign Investment Law, but at present it is not clear when those Executive Regulations will be issued. Until such time, the previous regulations shall apply to the extent they are not contrary to the new Foreign Investment Law.

The incorporation and organisation of companies is governed by the Commercial Companies Law (No. 11 of 2015) (the Commercial Companies Law), which came into effect in August 2015. The Commercial Companies Law regulates the types of company that may be established in Qatar.

The following are required in order to incorporate a company and obtain a commercial registration:

- memorandums and articles of association in Arabic, which conform with the standard form provided by the Ministry of Commerce and Industry and have been approved by the Ministry;
- notarised, authenticated and consularised copies of the foreign company's certificate of incorporation, memorandum and articles of association and board resolution or power of attorney authorising someone to act on its behalf to establish a company in Qatar;
- a letter from a Qatar bank indicating the deposit of the share capital at that bank; and
- Qatar Chamber of Commerce Registration (issued simultaneously with the Commercial Registration certificate, which will confirm Chamber membership).

Once the company has been incorporated and the Commercial Registration issued, the share capital can be released to the company's directors or the general manager for the purposes of running the company. The following licences must then also be obtained:

- a commercial licence;
- a signage licence; and
- an immigration card.

A foreign company that has a contract with the government of Qatar or a quasi-government entity may be able to register a branch office (as opposed to incorporating a Qatar company) if it is awarded a contract in respect of a 'government qualified project'. Historically, most defence contractors have established themselves as a branch office, on the basis of a contract with the Qatar armed forces or the Ministry of Interior.

The following are required in order to register a branch office and obtain a Commercial Registration:

- a stamp to be affixed by the government entity on an application containing the particulars of the contract;
- authorisation from the Ministry of Commerce and Industry to establish a branch;
- notarised, authenticated and consularised copies of the foreign company's certificate of incorporation, and memorandum and articles of association;
- a notarised, authenticated and consularised power of attorney from the foreign company to the manager of the branch; and
- Qatar Chamber of Commerce Registration (issued simultaneously with the Commercial Registration Certificate, which will confirm Chamber membership).

Once the branch has been approved and the Commercial Registration issued, the following licences must also be obtained:

- a commercial licence;
- a signage licence; and
- an immigration card.

If applicable, the company or branch may also need to be entered in the Importers' Register or Contractors' Register.

It is also possible to register a trade representative office (TRO), which may essentially only be used to promote a foreign company in Qatar so as to introduce it to Qatari companies and projects, through marketing and promotions. A TRO may not be engaged in selling or entering into contracts in Qatar. Business must be carried out by the foreign entity (where the contract can be performed substantially outside Qatar) or by a company or branch authorised to do business in Qatar.

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?

There is no formal process to access such records.

Supply chain management

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

Not applicable.

INTERNATIONAL TRADE RULES

Export controls

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

There is no home-grown defence industry in Qatar to date, and therefore no export of locally manufactured weapons. Export control regulations from the defence suppliers' countries of origin usually contain restrictions on the ability for a state client to re-export equipment to other countries. Each force purchasing foreign equipment will be in charge of managing its export control obligations.

Domestic preferences

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

The preference is to contract directly with a foreign contractor who will set up a branch office to perform the local part of the contract. However, there are recent examples where the Qatar armed forces request the incorporation of a subsidiary with a designated joint venture partner.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

Qatar has signed defence cooperation treaties with a number of countries, the two main partners being the US and France. In particular, there is a SOFA (Status of Forces Agreement) between the United States and Qatar to serve as a legal basis for the presence of a large US military base in Qatar. However, Qatar tends to diversify its alliances and has recently signed a defence cooperation agreement with Turkey. The existence of such defence treaties tends to signal a strategic relationship. Yet, to the best of our knowledge, the treaties do not grant any more favourable treatment from a commercial or legal perspective when it comes to buying equipment.

Sanctions

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

Qatar has issued the Qatar Israeli Boycott Law No. 13 of 1963. This law is still in effect and has not been formally amended. The effect of the law is that it prohibits any commercial dealings with Israeli citizens or persons directly or indirectly, which would include any such persons exercising any contractual rights under contracts. In addition, sanctions implemented by Qatar from time to time should be assessed, which can affect transfers or payments with relevant countries, or certain entities or individuals within those countries.

On 5 June 2017, three GCC member states, namely the Kingdom of Saudi Arabia, the United Arab Emirates and Bahrain, together with other states in the MENA region, such as Egypt, moved to cut diplomatic ties, trade, and transport links with Qatar. The measures adopted included a closure of land, sea, and air access and the expulsion of Qatari officials, residents, and visitors from those countries. This has become known as 'the Blockade'. Kuwait and Oman, the remaining two member states of the GCC, have maintained ties with Qatar and, as of the date of publication, the former is mediating between Qatar and the relevant governments. As of November 2019, the Blockade continues.

Trade offsets

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

There is no formal defence offset regime in Qatar, but we have seen some recent examples where delivering some added value locally (beyond maintenance and training) was considered favourably by the Qatar armed forces.

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?

There are no restrictions relating to former government employees joining the private sector or former private sector employees joining government entities.

Addressing corruption

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

There is no specific law in Qatar governing corruption. However, the Qatar Penal Code (Law No. 11 of 2004) includes provisions relating to the bribery of public officials, which is widely defined to include employees and those working in ministries, other government agencies, authorities and public institutions as well as:

- arbitrators, experts, administrators, liquidators and receivers;
- chairmen and members of the board of directors and all other employees in private institutions and associations, cooperatives and companies if one of the ministries, or other government agency, authority or public institution is a shareholder therein;
- anyone who carries out work relating to public service upon instructions from a public official; and
- chairs and members of legislative committees and the municipality committees and others who have a public representative type role whether appointed or elected.

Additionally, government entities, including ministries and other authorities (with some exceptions), as well as companies in which the government holds a majority shareholding, private institutions for public benefit and pensions funds are subject to the supervision of the State Audit Bureau. Pursuant to Law No. 11 of 2016, the State Audit Bureau has the right to review the accounts of entities subject to its supervision and to prosecute the perpetrators of any financial irregularities.

The provisions of the Qatar Tender Law No. 24 of 2015, which apply to all government ministries and other public institutions (with certain exceptions), provide for a contract awarded to a contractor being void if it is proven that the contractor used fraud or manipulation in obtaining or performing the contract or if it is proven that the contractor either directly or indirectly bribed a government official.

There are no provisions relating to foreign corruption. However, Qatar has ratified the United Nations Convention against Corruption and the 2010 Arab Convention for Fighting Corruption, which include definitions of foreign public officials (ie, public officials who may be in Qatar but exercising the function on behalf of a foreign country). However, there are no specific provisions reflected in domestic law.

Lobbyists

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

Generally, any person undertaking business activities in Qatar needs to be licensed by the Ministry of Commerce and Industry and various other agencies. In addition, commercial agencies in Qatar fall into two categories. There is a category of registered agents that are governed by the Commercial Agencies Law (Law No. 8 of 2002: Registered Agencies) and unregistered agencies that are governed by the Commercial Code (Law No. 27 of 2006: Unregistered Agencies). Registered agencies must be registered at the Ministry of Commerce and Industry. There may be internal rules and practices within government departments that require that only 'approved' intermediaries be used.

Limitations on agents

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

There are no such limitations in laws. However, internal rules and practices within government departments may impose such limitations.

The general position under Qatar law is that the parties are free to contract and as such there are no restrictions on the amounts to be paid. However, the law governing registered agencies imposes a limit on commission received. Such commission must be restricted to 5 per cent of the value of the goods sold.

AVIATION

Conversion of aircraft

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

Not applicable.

Drones

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

In March 2017, Qatar's civil aviation authority issued Regulation No. 5 of 2017 covering the registration requirements and permissible uses of unmanned aircraft systems (UAS), depending on the category to which a UAS belongs.

MISCELLANEOUS

Employment law

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

Except for Qatar Petroleum (and its related companies), security guards, housemaids and agricultural workers, all private sector contracts of employment are governed by Labour Law No. 14 of 2004. Such contracts must be in Arabic (or bilingual) and approved and registered with the Ministry of Administrative Development, Labour and Social Affairs.

In particular, employers outside the QFC should be aware of the requirement to pay an end-of-service benefit to employees who have been employed for at least 12 months. Such benefit must not be less than three weeks' salary for every year of employment.

Companies established and regulated under the QFC have their own employment regulations governing the relationship between the QFC employer and the QFC employees.

For the time being, employees of companies established in one of the free zones administered by the QFZA are subject to Labour Law No. 14 of 2004. However, we understand that the QFZA may be preparing its own employment regulations which will apply instead to such employees.

In the case of mainland Qatar, the QFC and the QFZA, companies will need to obtain residence and work permits for their expatriate staff.

All expatriate employees must be sponsored by their corporate employer, who is responsible for them while they are in Qatar.

Defence contract rules

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

There are no specific rules except in terms of procurement process (see question 3).

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

Not applicable.

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?

There is no such specific requirement prior to entering into a contract. When an employee of a defence contractor wishes to become a resident, he or she should, however, tender a legalised and translated police clearance certificate from his or her country of origin.

Licensing requirements

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

See question 19.

Environmental legislation

38 | What environmental statutes or regulations must contractors comply with?

No specific regulations apply. Any industrial activity carried out in Qatar would, however, need to comply with Law No. 30 of 2002 on Environmental Protection.

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

Not applicable.

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

Not applicable.

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?

Foreign Capital Investment in Economic Activities Law (No. 1 of 2019) (the Foreign Investment Law) was issued and published in the Official Gazette on 24 January 2019. The Foreign Investment Law repealed the previous Foreign Investment Law No. 13 of 2000, and came into force on 24 February 2019. (See question 19.)

In addition, the QFZA now accepts applications from foreign companies wishing to establish in either Ras Bufontas – Airport Free Zone or Umm Alhoul – Port Free Zone. (See question 18.)

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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), which implement the EU Defence and Security Directive (2009/81/EC) into UK law. 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. European and domestic case law is also influential in interpreting the applicable laws.

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 competition.

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 (£378,660 for goods and services or £4,733,252 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 in the Official Journal as a procurement under the DSPCR.

The key difference 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 £122,976 for goods and services contracts procured by central government departments (or £189,330 for sub-Central authorities) and the same threshold 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 in the Official Journal of the European Union (OJEU). 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 depends on whether the authority has chosen a procedure that permits them to discuss the contract and requirements with the bidders (negotiated procedure with 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 in 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?

The European Commission reviewed the 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 and, in particular, it feels that too many contracts are awarded without any competition.

It seems highly likely that the UK will review the defence procurement regime when it leaves the European Union, although the extent to which changes will be made remains unclear.

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 GPA or the 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 (TFEU), but that there were also other exemptions, 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 DEFCON 530 (DEFCONs are MoD defence conditions), 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 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 the remedies available (which differ depending on whether the contract has been entered into or not).

Where the SSCRs apply, either of the disputing parties may request that the Single Source Regulations Office (SSRO) 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 says the MoD can offer a limited range of indemnities for specific risks, but 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, or personal injury or death;
- damage to government property;
- product liability claims;
- infringement of a third party's intellectual property; 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?

In principle, the government can agree to limit the contractor's liability under the contract. However, the MoD's policy is to not accept a limit unless it represents value for money. The contract award procedure used by the government will determine the extent to which this position is negotiable.

For certain heads of loss not restricted by statute, the government can limit its own liability under contract. This is unusual but would limit the contractor's potential to recover against the government for breach.

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 the MoD procures 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 for an undisputed, valid 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 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 MoD will typically seek to include certain standard clauses in its contracts. Primarily, these are the 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.

Cost allocation

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

Where the 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 SSRO 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 contracts.

Under 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) that 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 (see question 15).

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, though the MoD guidance sets out when this 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 arising under its contracts is that intellectual property will normally vest with the contractor generating the intellectual property, in exchange for which the MoD will expect the right to disclose, use and have used the intellectual property for UK government purposes (including security and civil defence).

This is achieved through the inclusion of intellectual property-related DEFCONs in the contract. These DEFCONs are currently under review – the MoD intends to replace them with a single intellectual property DEFCON (though this new DEFCON would still align with MoD's policy on intellectual property ownership).

MoD policy does specify certain scenarios when it expects that it should own the new intellectual property 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 without 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 UK.

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 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 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.

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 (such as 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 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 has adopted the Council Common Position 2008/944/CFSP defining common rules governing 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 EU member states into their own national legislation.

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).

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 within the Department for International Trade (DIT). The UK's HM Revenue and Customs is 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 DSPCR applies, there is no scope for domestic preferences. However, where article 346 TFEU is relied upon to disapply the DSPCR, contracts are commonly awarded to national suppliers.

Within the MoD, there are specific approval levels for anyone wanting to rely on article 346 to award a contract without competition.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

Only those that are member states of the European Union or signatories of the GPA 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 EU implements embargoes and (financial) sanctions imposed by the UN and may also implement EU autonomous embargoes and sanctions. All of these embargoes and sanctions are implemented through EU regulations, which have direct legal effect in each member state. The UK makes statutory instruments (such as Orders) to provide for the enforcement of, and penalties for, breaches of the EU and 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 UK government website. The Department for International Trade (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 (OFSI) which is part of the 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 MoD, wishing to take up 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; for example, 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, SCS3-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.

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.

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

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 or the Serious Fraud Office.

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. 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.

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 UK 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 on 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 in question 29.

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 maximum or minimum levels 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 Europe unless they comply with the airworthiness regime established pursuant to Regulation (EC) 2018/1139 or, if they fall within Annex I thereto, 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 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 CAP632 and maintenance standards in BCAR 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 has to 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 came into force which enabled EASA to assume greater control over the manufacture and operation of light unmanned aircraft system (UAS). Hitherto, in Europe, EASA regulation over UAS has been limited to those over 150kg. Those under 150kg were subject to regulation by member states. The Basic Regulation confers powers on the European Commission to adopt implementing and delegated regulations, in accordance with the Essential Requirements at Annex IX to the Basic Regulation, for design, production, operation and maintenance of UAS. These regulations may provide that UAS are not subject to the normal provisions on conventional certification and the role of EASA.

The Commission implementing regulation and delegated regulation were published in June 2019. These regulations 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. Both regulations came into force on 1 July 2019; however, while the delegated regulation applies from that date, the implementing regulation does not apply until 1 July 2020. If the UK leaves the EU before 1 July 2020, the implementing regulation will not come within the EU law 'acquis', which forms part of English law following exit day. The UK would need to take additional steps to bring the implementing regulation into force if it wishes the two regulations to operate as a package, which is the intention behind them.

In the UK, most requirements of the Air Navigation Order are disapplied for small UAS (those under 20kg), in favour of a simple set of operational rules. Recent changes, on matters such as registration and competency, are designed to be compliant with the anticipated EU regulations.

UAS specially designed or modified for military use always require a licence for export from the UK. Likewise, a licence is required for export of dual-use UAS as defined in EU and UK regulations. Dual-use UAS include certain UAS designed for beyond line of sight operations with high endurance, with a range over 300km 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 detriment or being dismissed for whistle-blowing (from day one of employment);
- rights to the national minimum wage, a minimum amount of paid holiday and a 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 MoD and defence contractors, most notably the DSPCR and the SSCR.

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 UK.

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 certain 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 not 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 particular 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.

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 UK 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, and face responsibility for electrical waste and 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. Finally, in some circumstances, there are exemptions, derogations or disapplications from 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 – individual permits are required for specific industrial activities and 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 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 taken into account – not the supplier's wider efforts. In our experience, green solutions do not tend to gain any significant advantage; they do not 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 as it could have a far-reaching impact on many of the topics covered in this chapter – particularly procurement, labour, trade and export controls, aviation and the environment. The SSCRs also remain a topic of interest as the contract profit rate and reporting requirements in those regulations in particular continue to be reviewed and amended.

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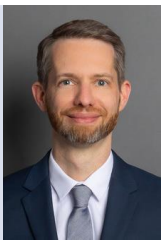

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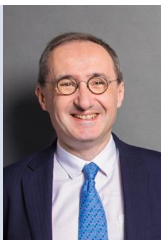

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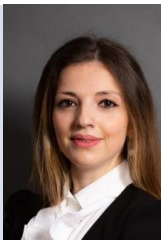

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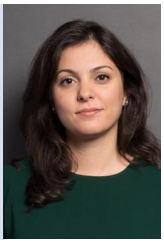

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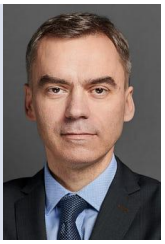

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