Bird & Bird

Defence and Security Procurement - UK Edition

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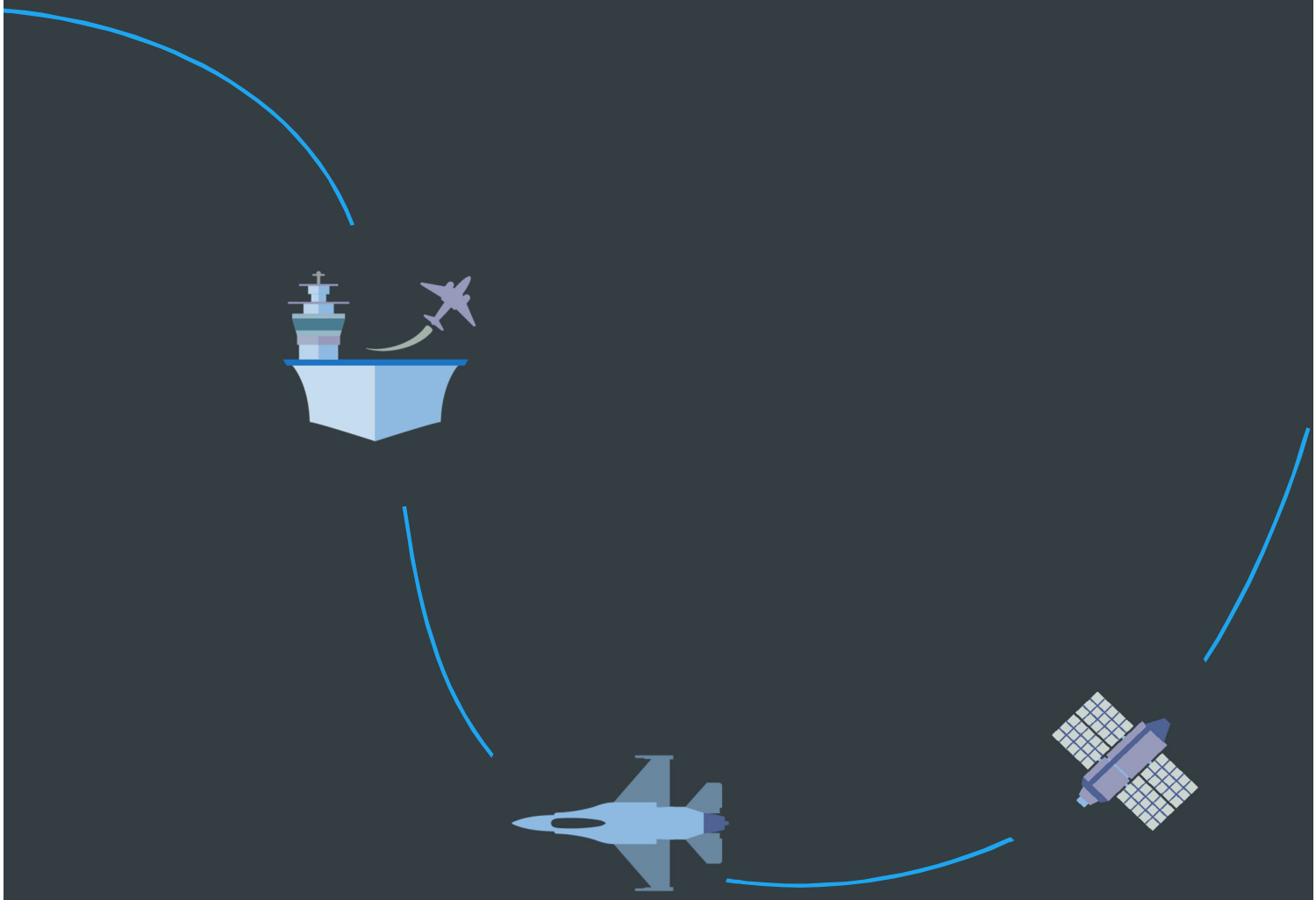

Foreword

Our London Defence & Security team are delighted to have written the UK chapter for "Getting the Deal Through: Defence & Security Procurement".

This 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.

We focus on a number of hot topics and trends in the sector, such as the defence procurement law framework (including Single Source Contract Regulations), MoD's approach to risk allocation (e.g. indemnities and liability caps), EU/UK International Trade Rules and the Anti-Corruption regime.

Defence & Security Procurement

Contributing editor
Mark J Nackman

2017

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2017
ISSN 2513-9924

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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United Kingdom

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Legal framework

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 UK 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 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.

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 (approximately £100,000) 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.

3 How are defence and security procurements typically conducted?

There are three different procurement procedures under the DSPCR and four different procedures under the normal civil rules. Most procurements involve a pre-qualification process, during 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 with the bidders (competitive procedures with negotiation or the competitive dialogue procedure) or not (restricted procedures and, for 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).

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 and amend the defence procurement regime when it leaves the EU, although the time frame and scope of this is currently unclear.

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 is undertaken through centralised framework agreements awarded by the Crown Commercial Service.

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 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, 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

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 ADR procedures, before commencing arbitration. The most appropriate form of ADR depends 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 commence proceedings, which provides an opportunity for the parties to try and 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 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.

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.

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.

The government can limit its own liability under contract (although this is unusual), but this would limit the contractor's potential to recover against the government for breach.

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 contracts. However, the MoD's policy (even if the MoD procure 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.

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

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.

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).

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

Where the SSCRs do not apply then 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.

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.

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

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

This is achieved through the inclusion of IP-related DEFCONs in the contract. These DEFCONs are currently under review – the MoD intends to replace them with a single IP DEFCON (though this new DEFCON would still align with MoD's policy on IP ownership).

MoD policy does specify certain scenarios when it expects that it should own the new IP created by the contractor, but in such cases the MoD will not unreasonably prevent the contractor from using the skills and expertise developed in carrying out the work without charge for its internal business purposes.

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.

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

A joint venture (JV) could either be a corporate or commercial JV. A corporate JV would involve the JV 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 that 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 (JV 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 JV does not involve any separate legal entity, and the parties contractually agree each party's roles and responsibilities.

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.

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

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 Organisation within the Department for International Trade. The UK's HM Revenue & Customs is responsible for enforcing the legislation.

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 in order 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.

24 Are certain treaty partners treated more favourably?

Only those who are member states of the European Union or signatories of the GPA are able to benefit from the full protection of the DSPCR.

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 https://www.gov.uk/guidance/current-arms-embargoes-and-other-restrictions.

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. However, the UK has introduced an alternative to offsets, the Defence and Security Industrial Engagement Policy (DSIEP). Overseas defence suppliers bidding for contracts in the UK defence sector can voluntarily sign up to the DSIEP. The DSIEP does not impose any targets, commitments or penalties on those who sign up, except for a commitment to report annually on investments into the UK, including information on their UK supply chain, R&D investment, etc.

Ethics and anti-corruption

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, have had official dealings with their prospective employer or have 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 under 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.

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.

Update and trends

The 2014 SSCRs are still relatively new to the UK, and government and contractors are still working to understand and interpret them. This understanding will continue to grow in the foreseeable future, especially as the SSCRs are due to be reviewed at the end of 2017.

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.

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 Regulations do not prescribe maximum or minimum levels of remuneration.

Aviation

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) 216/2008 or, if they fall within Annex II thereto, are approved by individual member states. Regulation 216/2008 requires a type of certification process in accordance with certification specifications promulgated by the European Aviation Safety Agency (EASA). Annex II 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.

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

The unmanned aircraft system (UAS) sector is controlled by restrictions on operation, rather than on manufacture. In the UK, UAS over 150kg are subject to regulation by EASA and may not be flown without a certificate of airworthiness. Those under 150kg fall within Annex II and are subject to regulation by member states.

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.

In late 2016, EASA published a Prototype Regulation to indicate how it proposes to govern UAS in anticipation that the current regime will be amended to give it jurisdiction over UAS below 150kg. This may come into force during 2018. It would contain more detailed requirements on equipment fit so as to automatically limit flight in restricted airspace. That regime is likely to include specific obligations on retailers to ensure dissemination of information about safe operation of small UAS.

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

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.

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 of the UK.

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.

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

There are not any specific licensing or registration requirements to operate in the defence and security sector in the UK.

The MoD may impose security requirements, but this is done by treating projects on a case-by-case by 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.

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 incorporate energy efficiency, carbon emissions and energy consumption (eg, the Energy Savings and Opportunity Scheme or the CRC Energy Efficiency Scheme). Contractors involved with nuclear substances are subject to a separate or additional set of environmental obligations as well as strict nuclear waste disposal restrictions.

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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 may impose targets and limits for air emissions, water discharges, etc. 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.

Getting the Deal Through

Acquisition Finance
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Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
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Construction
Copyright
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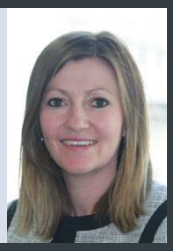

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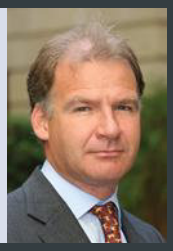

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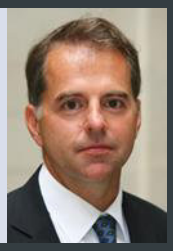

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