Bird & Bird

Defence & Security Procurement 2022 Edition

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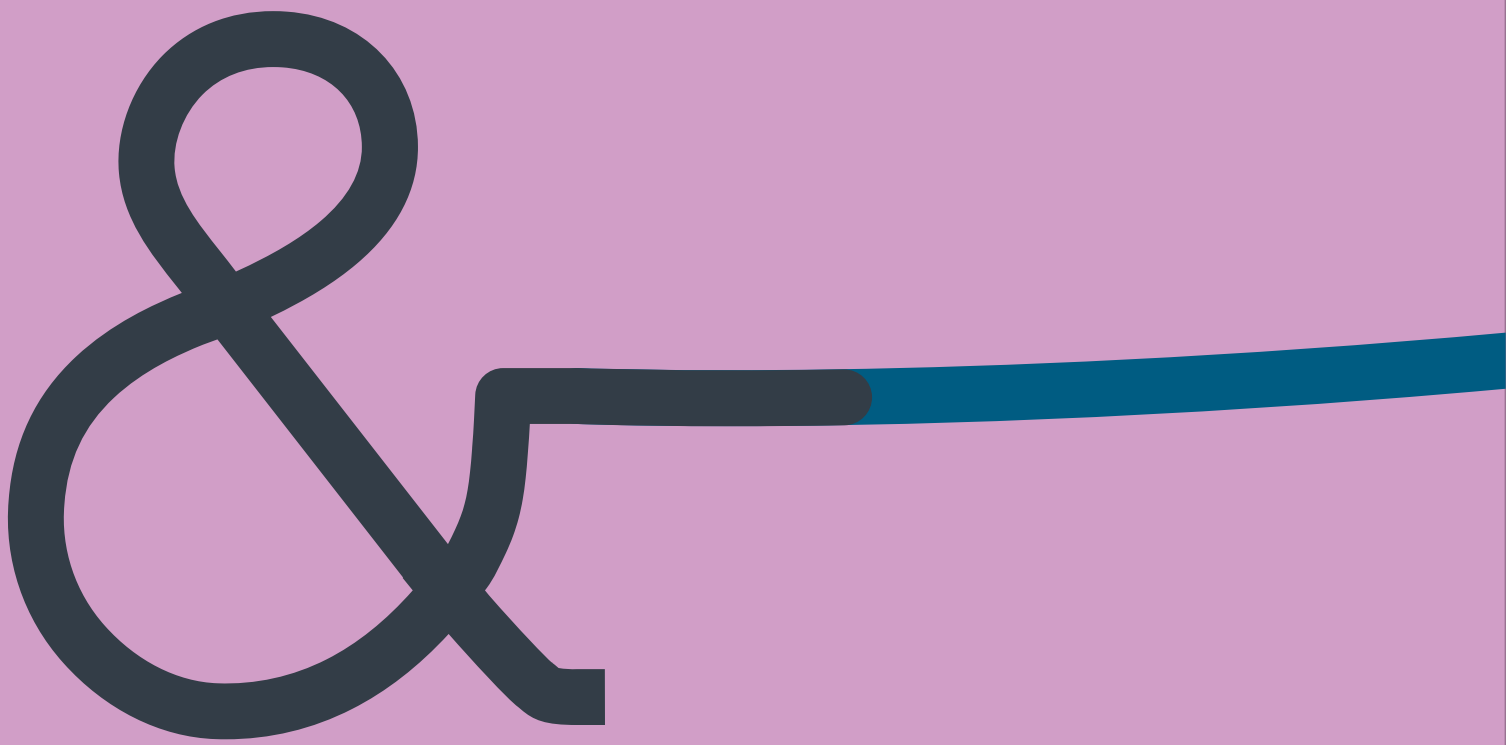

Bird & Bird's International Defence & Security team are delighted to have contributed to the global 2022 edition of 'Lexology: Getting the Deal Through: Defence & Security Procurement'. Our team has written the Global Overview and the UK chapters and Elizabeth Reid is contributing editor for the publication.

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.

Upon reaching the end of a challenging 2021, the defence industry remained fairly well insulated when compared with commercial aerospace, with manufacturing remaining stable in 2021.

The outlook for 2022 looks strong as countries seek to defend their democratic institutions from strategic threats while reinforcing innovative efforts in science and technology. Our experts analyse all the hot topics affecting the industry, including emerging developments in technology, Brexit, COP26, a continued trend toward globalisation, export controls and intellectual property.

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

DEFENCE & SECURITY PROCUREMENT 2022

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Getting the Deal Through

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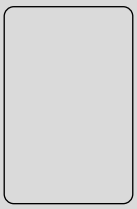

DEFENCE & SECURITY PROCUREMENT 2022

Contributing editor
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Lexology Getting The Deal Through is delighted to publish the sixth 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 also extend special thanks to the contributing editor, Elizabeth Reid of Bird & Bird LLP, for her continued assistance with this volume.

LEXOLOGY
Getting the Deal Through

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Contents

Global Overview

Elizabeth Reid

Bird & Bird LLP

Upon reaching the end of a challenging 2021, we look ahead to another year of global change and geopolitical tensions. Almost two years have passed since the emergence of the covid-19 virus. On 1 January 2021 the United Kingdom left the European Union – its largest trade and investment partner – and on 20 January 2021, Joe Biden became the 46th President of the United States. Notwithstanding all of this, the defence industry remained fairly well insulated when compared with commercial aerospace, with manufacturing remaining stable in 2021. The outlook for 2022 looks strong as countries seek to defend their democratic institutions and economies from strategic threats while reinforcing innovative efforts in science and technology.

Stable defence budgets

There is growing recognition that countries will need to adapt their own capabilities to ensure that defence and security remain stable and effective in increasingly hostile and unforgiving environments. Global defence spending increased in 2021, and as geopolitical tensions persist, it is expected that budgets will remain stable or even increase in 2022. President Biden has left the US defence budget largely intact. Last year, the United Kingdom committed to a £24 billion increase in defence spending over four years, against the 2020–2021 budget, the largest sustained increase in defence spending since the Cold War.

A slower global economic growth trend may emerge, which could place pressure on government defence budgets. The main challenges to the global economy in the next decade will come from a continued trend toward deglobalisation, highlighted by Brexit, and faster-than-expected inflation. The transition towards decarbonisation of economies in response to the United Nations' COP26 will also create challenges for global growth. There is also concern that as global focus shifts towards combatting climate change, this will ultimately be at the expense of defence and security. For instance, despite a flurry of criticism in early 2021, the Biden administration pledged to tackle climate change and framed the issue as a priority for national security.

Technological change and investment

Defence continues to be a sector being transformed by technology. Emerging threats in the Far East mean governments are looking for improved capabilities in fighter aircraft, space resilience, shipbuilding and cybersecurity. Countries also continue to bet heavily on artificial intelligence (AI) and autonomous technologies making a significant contribution to security and defence. As the headline statement from the UK Ministry of Defence's Defence Command paper suggests:

> *'AI-enabled autonomous capabilities will be essential to defence modernisation: accelerating decision-making and operational tempo; extending the range, persistence and mass of our capabilities; removing personnel from harm's way by undertaking "dull, dirty and dangerous" tasks; and delivering significant efficiency and affordability gains.'*

Emerging developments in augmented reality and virtual reality are having a major impact on military training with exponential growth in the use of these technologies.

Strong M&A activity

M&A activity in the defence sector was extremely strong in 2021, rebounding from a slower year in 2020. There remains a robust environment for deal-making activity in 2022. Strong global defence budgets together with technology innovations are expected to steer defence M&A activity in 2022 and beyond. We expect to see the further alignment of technology companies with the more traditional military sector, particularly as major defence corporates seek to invest in emerging technologies through the acquisition of innovative start-ups.

Geopolitical landscape

We live in an increasingly complex security environment, with China perceived as a challenge that is more acute than ever.

Brexit has exposed a considerable rift in opinion as to how security should be ensured across Europe. According to the Centre for European Reform, Brexit 'has weakened forces in the EU which favour integration' and put the European Union at risk. However, despite consistent doubt towards the collaborative nature of security on the European continent, going it alone in a world of power blocs and intensifying geopolitical rivalries risks little strategic gain. Therefore, it is clear that NATO will remain the foundation of collective security in our home region of the Euro-Atlantic.

Meanwhile, across the Atlantic, a landmark defence and security partnership was agreed upon by the leaders of Australia, the United Kingdom and the United States. In what is seen as an effort to counter China, the Aukus alliance aims to enhance the development of joint capabilities and technology sharing, ensuring global security and reinforcing shared goals. It will let Australia build nuclear-powered submarines for the first time, using technology provided by the United States and will also cover AI, cyber security and other technologies.

This alliance has far-reaching geopolitical and economic consequences with businesses in all three alliance countries already pressuring their governments to facilitate trade arrangements and investment flows. However, the alliance has irritated other major players such as China with the Chinese foreign ministry spokesman warning that Aukus risks 'severely damaging global peace . . . and intensifying the arms race'. It is therefore likely that relations between the alliance and China look set to continue on their current tricky path.

Therefore, we are pleased to present the sixth annual edition of *Lexology Getting the Deal Through – Defence & Security Procurement*.

India

Kabir Bogra
Khaitan & Co

LEGAL FRAMEWORK

Relevant legislation

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

India has no 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 Acquisition Procedure (DAP) and the Defence Procurement Manual (DPM) are the principal regulations for defence and security procurements undertaken by the Ministry of Defence (MoD). The DAP 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.

Introduced in 2020, the DAP 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 DAP and DPM, government procurements are also subject to the policies and directives issued by the Central Vigilance Corruption (CVC), the chief 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 (army, navy and air force) 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 the capability of Indian industry to manufacture the same. Each category has a separate procedure for the procurement process; and
- participation by foreign vendors in procurement contracts, for defence and security articles under the DAP 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 sequence is as follows:

- 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 approved by a committee constituted for this purpose. The committee provides its approval through an AoN;
- a 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 DAP also provides for the 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 a superior technical product at a higher price may be chosen; and
- after the 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 emergencies or crises undertaken through a fast track procedure;
- procurements for sensitive equipment and systems undertaken directly at intergovernmental 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 September 2020, with the issuance of the new DAP, which supersedes the 2016 iteration. 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 under the GFR and the DPM does not distinguish between IT and non-IT products and services, therefore, the process and rules remain identical for procurement. However, the latest version of the DAP, issued in September 2020, introduced a separate procedural framework for the procurement of information technology products (including software and hardware elements). This procedural framework is broadly similar to others under the DAP, but is customised to meet the characteristics of information technology contracts.

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 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 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 General Financial Rules 2017, may also permit dispute resolution through civil remedies through the courts of India.

Procurement contracts under the Defence Acquisition Procedure (DAP) and the Defence Procurement Manual 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 the 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. However, with the evolution of the DAP and the introduction of new procurement avenues, such as leasing of equipment, limited indemnities may be negotiated with the government depending on the nature of the transaction. The standard contract requires the contractor to indemnify the government against infringement of third-party intellectual property rights in the goods or services purchased from the contractor.

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 use of 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 DAP does not contain any clauses limiting the contractor's liability, however, contractors may negotiate for the inclusion of limitations on their liability. Regardless of whether the government agrees to limit the contractor's liability, the provisions of the Indian Contract Act 1872 permit an aggrieved party to seek compensation only 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 Ministry of Defence (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 of a 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 the MoD is required to make.

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 Defence Acquisition Procedure (DAP) or the General Financial Rules 2017 (GFR), the contract between the buyer and the vendor is the principal document governing the transaction.

Procurement frameworks such as the DAP and the GFR mandate certain clauses to be included in the contract executed between the buyer and seller. For example, the DAP mandates that standard clauses relating to the use of agents, the 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 Indian Contract Act 1872 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 the 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 DAP provides for cost-sharing for specific types of procurements in relation to products identified by the Ministry of Defence (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 Defence Procurement Manual on fixed-rate bases, the bidders are not required to provide costing information and must only submit their price bid for the procurement.

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

- the cost of basic equipment;
- the cost of technology transferred (if applicable);
- the cost of recommended manufacturer spare parts;
- the cost of maintenance tools and test equipment;
- the cost of operating manual and technical literature for equipment and spare parts;
- the cost of training aids such as simulators, films, charts, etc;
- the cost of the recommended training period;
- the cost of freight and transit insurance;
- the cost of annual maintenance; and
- the 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 apply 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 chief 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 the achievement of defined objectives. CAG reports are submitted to Parliament and are publicly accessible.

Internal audits of vendors and procurements may also be undertaken by an individual ministry. For example, the DAP empowers the MoD to conduct audits to ascertain compliance with indigenous content requirements, discharge of offset and costing claims under a procurement category. The MoD (as a customer) is also contractually permitted to access 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 DAP, entail outright purchases with minimal design and development requirements. Therefore, the creation of intellectual property during the performance of a 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 are 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 levels, which include benefits such as exemption from input taxes and refund of output taxes. State governments may also offer subsidised costs of utilities and waive statutory and administrative fees.

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 the 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. Currently, foreign investment is permitted up to 74 per cent and can be permitted up to 100 per cent if the investment provides access to modern and state-of-the-art technology.

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 requests can be denied. 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 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 on the RTI website of the relevant ministry or department. Each ministry and department a required to have a designated Public Information Officer (PIO), who reviews the application and decides on the disclosure of the information. Subject to such determination, the PIO will either supply or deny the information to the applicant. In cases of denial, the applicant is permitted to appeal against the withholding of information.

RTI applications seeking specific information or contracts from the MoD are usually denied on grounds of 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 request for proposal issued by the MoD is required to mention the applicable procurement category, which may, in turn, specify the eligibility criteria of suppliers. 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 DAP.

In terms of supply chain management, bidders for procurements under the DAP are required to assume responsibility for misconduct or non-performance by entities in their supply chain, including sub-vendors and offset partners. Therefore, the 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 requiring 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.

Export of SCOMET articles requires an exporter to apply for authorisation to the DGFT. Once applied, 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 General Financial Rules 2017 (GFR) or the Defence Acquisition Procedure (DAP), have a stated preference for domestic suppliers. 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 suppliers before considering foreign vendors. The preference for domestic sources includes requiring goods and services to incorporate a specified percentage of local content by value.

The DAP also specifies a preference for domestic suppliers. During the categorisation phase of initiating a procurement under the DAP, the Ministry of Defence (MoD) evaluates sources for procuring the articles and typically opts for categories allowing only domestic bidders, if such suppliers are available. Procurements from domestic suppliers also incorporate local content norms provided under the DAP.

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 have historically not been linked to any bilateral or multilateral treaties. Recently, India has executed several agreements with the United States 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 Iran, North Korea and Somalia. Further, India does not trade with 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 from foreign sellers, which are valued above 20 billion rupees, with exceptions for single-vendor situations and intergovernmental procurements. The governing principles for offsets are specified in the offset guidelines under the DAP 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 primary roles in the procurement process:

- formulating the offset guidelines;
- monitoring the discharge of offset obligations (including audit and review of yearly progress);
- participating in the 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 DAP, including the purchase of eligible products and services from the domestic industry, direct equity investment or supply of equipment to defence companies in India, transfer of technology to Indian companies, etc. The offset norms have undergone significant revisions with the DAP 2020 compared to previous iterations. The notable changes include enhanced multipliers for various offset routes, an overhaul of the list of products and services eligible for discharge of offsets, and improved viability of transfer of technology and investment-in-kind routes.

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 rolling claims to the DOMW along with documentary evidence in support of the claim of the 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, impose liquidated damages and blacklist or suspend dealings with the vendor for future contracts.

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 Indian government is undertaken through entrance tests. As employment with the government is a career decision, the government usually 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 a 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 advantages to government officials involved in the bidding process with a view to inducing awarding 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 framework.

For defence and security procurements under the DAP, 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 blacklisting, suspending dealings and initiating punitive proceedings under any other law.

Lobbyists

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

The General Financial Rules 2017 provides that each procuring ministry may require agents to be registered in such manner as the ministry may prescribe. Therefore, the requirement for the registration of agents varies across ministries. Typically, the use of agents in procurements is discouraged and in certain contracts may be entirely prohibited in certain procurement programmes.

The procurements by the MoD under the DAP require the 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 the 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 Ministry of Defence.

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?

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

From an international trade perspective, both the import and export of UASs is restricted. The import of a 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 have no presence in India. The labour and employment laws apply to entities that have been incorporated under the laws of India or have a 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 and 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, the Defence Acquisition Procedure (DAP) or the Defence Procurement Manual) read with advisories from the Central Vigilance Corruption, the chief anti-corruption monitoring institution in India. 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 DAP, 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 Ministry of Defence 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 General Financial Rules 2017 and the DAP 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 the import, manufacture or sale of regulated defence and security articles in India. The licensing requirements are extensive and vary based on the nature of the product, nature of the 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 at federal and state levels. The regulations apply to manufacturing 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 also apply to the importation of hazardous substances (including chemicals); but the burden of compliance is on the importer and not the foreign supplier.

The principal legislation governing environmental protection include:

- 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 legislations that apply 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 legislations. Failure to meet compliance is strictly enforced and can result in heavy penalties and the 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 receive no preference in government procurement.

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?

Due to the significant revision brought within the acquisition procedures in 2020, 2021 witnessed no significant decisions, judgments, policy and legislative developments with respect to defence and security procurements. However, the Ministry of Defence (MoD) has initiated the process of amending the Defence Procurement Manual and the new manual is expected to be released before the second quarter of 2022.

The other significant policy development was the announcement of the corporatisation of the Ordnance Factory Board (OFB). The OFB is a department of the MoD that owns and operates more than 40 factories across the country. The corporatisation process has resulted in the creation of self-sustaining, professionally managed public-sector undertakings. The corporatisation process has also diluted the product monopolies exercised by the OFB in the past.

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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 stipulated at a country level, such as the Public Accounting Act, as well as official directives and circular notices stipulated independently by the Ministry of Defence. These laws, regulations and official directives are undergoing reviews in light of changes in social circumstances and the environment that affect 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 follow.

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;
- the 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
- the Detailed Regulations on Administrative Handling of Contracts under the 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 and circular notices, etc, stipulated independently by itself or the Ministry of Defence. In this sense, procurement by the agency is treated separately from civil procurement.

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 procedure for the procurement of defence and security articles can be summarised as follows:

- to become a procurement counterparty, an entity applies to undergo bid participation eligibility screening and completes a screening process. If eligible, the applicant's name is recorded in the register of qualified bidders. The applicant is sent a notice with the results of the eligibility screening;
- if a general competitive bidding procedure is being followed, a public notice is made announcing the procurement. In cases of designated competitive bidding or if a discretionary contract is being offered, a regular notice is sent to the relevant counterparty;
- the selected counterparty pays a bid deposit to the Chief Secretary Treasurer of the ATLA (revenue), unless they are exempt from paying a deposit under the public notice or the regular notice; and
- the bid participant, or the 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 bidder offering the lowest tendered price, that is equal to or lower than the target price (or is equal or lower than the target price plus the sum of the consumption tax rate and the local consumption tax rate, expressed as a percentage) is the successful bidder.

However, if the bid is conducted following the Method of Comprehensive Evaluation, the bidder must indicate its price,

performance, capability, technology, etc, in its application. In these cases, the successful bidder is the bidder:

- that tenders a price within the target price;
- that has the performance, capability, technology, etc, to meet the requested minimum requirements of the bid, and that are critical to reaching the performance specified in the public notice or public announcement of the bid (including the bid instructions); and
- that receives the highest score out of the bidders, according to the Method of Comprehensive Evaluation.

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

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 of Japan. The Ministry requires companies that build information systems to implement measures pursuant to such standards (eg, ISO/IEC27001, ISO/IEC27002, JIS27001 and JIS27002), and constantly reviews measures by monitoring international standards and social trends.

In particular, the Ministry contractually requires counterparty companies to implement information security management systems for procurement, consisting of three parts:

- the Basic Policy ('securing information security of procurement of equipment and services');
- the Standards; and
- an (audit) Implementation Outline pursuant to international standards regarding information security management, etc.

Implementation of the above measures are ensured through voluntary audits carried out by the company and audits conducted by the Ministry.

Companies that build information systems for the Ministry are required to establish an information security management system similar to the three-part process summarised above. The information security management system and the company building it are subject to audits by the Ministry, pursuant to the (audit) Implementation Outline, to confirm the system complies with the Basic Policy and Standards implemented by the Ministry, and that the information security measures taken in accordance with the Implementation Outline prepared by the company are conducted properly.

The Ministry applies equivalent information security measures 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 subject to the Agreement on Government Procurement (GPA) and procurement of defence and security articles is conducted in accordance with the GPA. Further, government procurement is regulated by economic partnership agreements (EPAs) and therefore must be conducted in accordance with them. EPAs that Japan is a party to include:

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

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 (CHANS) established by the Cabinet Office.

There are no special dispute resolution procedures that are only applicable 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 resolutions are 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 paragraph 3, article 29 of the Constitution.

However, 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 (Yokohama District Court, Judgement, 15 November 2006; HT(1239)177), 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 entered into with the government. However, the government would rarely claim indemnity from a contractor unless required to in the Civil Code (eg, 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 a contract, or to restrict the defence and security articles contractor from recovering loss or damages from the government owing to a 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, it must normally conduct an 'act to assume national treasury debts' (article 15 of the Fiscal Act). As the necessary budget is secured by this act, there is no risk of non-payment.

Parent guarantee

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

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

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, the contract price, performance period and contract guarantee, and other necessary matters (paragraph 1, article 29–8 of the Public Accounting Act and 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 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 a 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?

As part of an effort throughout the government to 'ensure the appropriateness of public procurement', the Ministry of Defence has been expanding the use of the Method of Comprehensive Evaluation and streamlining its bidding procedures. Also, in response to several cases in 2012 of overcharging and manipulation of product test results by contractors, the Ministry of Defence has been working on measures to prevent a recurrence of these problems, such as enhanced system inspections, reviewing penalties and ensuring the effectiveness of supervision and inspections, and is putting more effort into the prevention of misconduct, improving fairness and transparency and ensuring contracts are appropriate.

Further, intending to strengthen checks and balances, the Acquisition, Technology and Logistics Agency (ATLA) has established an Audit and Evaluation Division to carry out internal audits, as well as conducting multi-layered 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, the members of which 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, the Ministry requires all rights to any copyright-protected work created during the performance of a contract to be transferred to the Ministry and a 'certificate of transfer of copyright' and a 'certificate of non-exercise of author's moral rights' to be submitted 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.

Advance preparations

Determine basic matters (eg, organisational form, stated capital, business descriptions and succession of assets) and check whether there is another company of the same trade name at the same location of the proposed head office with the legal affairs bureau.

Preparation of articles of incorporation

Determine the matters that must be stated in the original articles of incorporation (eg, the purposes, the trade name, the location of the head office, the minimum amount of contributed assets, the name or organisational name, and the address of the incorporator) and other matters, and have the articles of incorporation notarised by a notary public.

Contribution

The incorporator pays the money to be contributed in full, or tenders property, other than monies, with respect to the shares issued at incorporation without delay after subscribing for the shares that were issued at incorporation.

Appointment of officers at incorporation

The incorporator appoints directors at incorporation without delay after the completion of capital contribution. The company auditors are appointed; if required. The appointment of officers at incorporation is determined by a majority vote of the incorporators.

Examination by directors at incorporation

At incorporation, the directors at incorporation examine whether the capital contribution has been completed and whether any incorporation procedures are in breach of any laws, regulations or the articles of incorporation.

Appointment of directors at incorporation

If the company has a board of directors, a representative director at incorporation is appointed (decided by a majority vote of the directors at incorporation).

Registration of incorporation

The incorporation must be registered with the relevant government agencies (ie, the tax office, the prefectural tax office, the municipal government (regarding taxes or national pensions), the labour standards office (regarding employment insurance and workers' accident compensation insurance) and the pension office (regarding health insurance and employee pensions)) within two weeks from the latter of the date of termination of examination by the directors at incorporation or the date designated by the incorporator.

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 that the head of an administrative organ disclose administrative documents. This request must be complied with, except in the following cases.

Information concerning an individual

Where it is possible to identify a specific individual from a name, date of birth or other description contained in the information (including cases where it is possible to identify a specific individual through comparing the requested information with other information) and when it is not possible to identify a specific individual, but disclosure of the information is likely to harm the rights and interests of an individual.

However, the following information is excluded from these prohibitions:

- information concerning a business operated by the individual;
- information that is public, or that is scheduled to be made public, pursuant to laws, regulations or custom;
- information that must be disclosed to protect a person's life, health, livelihood or property; and
- information that, in whole or in part, pertains to the substance of an individual's duties, or his or her performance of these duties, when the said individual is:
    - a public officer;
    - an officer or an employee of an incorporated administrative agency;
    - a local public officer; or
    - an officer or an employee of a local incorporated administrative agency.

Also, the following exclusions apply to information concerning a juridical person or other such entities (excluding the state, incorporated administrative agencies, local public entities and local incorporated administrative agencies (juridical persons)), except where disclosure is required to protect a person's life, health, livelihood or property:

- information concerning the business of an individual operating the said business, except for information:
    - that is likely to harm the rights, competitive position or other legitimate interests of the juridical person or the individual if disclosed;
    - that is customarily not disclosed by a juridical person or an individual but was voluntarily provided in response to a request by an administrative organ on the condition of non-disclosure, or for which it is found reasonable that such a condition be set due to the information's nature or circumstances of the disclosure;
    - for which there are reasonable grounds for a head of an administrative organ to find that disclosure will likely:
        - harm national security;
        - harm a relationship of mutual trust with another country or an international organisation;
        - create a disadvantage in negotiations with another country or an international organisation; or
        - impede the prevention, suppression or investigation of crimes; the maintenance of prosecutions; the implementation of punishments; or other matters concerning maintenance of public policy; or
- that concerns internal deliberations, examinations or consultations conducted by or between state organs, incorporated administrative

agencies, local public entities or 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 of a state organ, an incorporated administrative agency, a local public entity or a local incorporated administrative agency, where disclosure is likely to hinder the proper execution of the said affairs or business or presents the following risks:
  - making it difficult to accurately understand the facts concerning affairs pertaining to audits, inspections, supervision, examinations, imposition or the collection of taxes; facilitate wrongful acts regarding such affairs, or make it difficult to discover such wrongful acts;
  - unjustly damaging a property benefit of the state, an incorporated administrative agency, a local public entity or a local incorporated administrative agency concerning affairs pertaining to contracts, negotiations or administrative objections and litigations;
  - unjustly hindering the fair and efficient execution of affairs pertaining to research and study;
  - hindering the maintenance of impartial and smooth personnel practices in the affairs pertaining to personnel management; and
  - causing damage to legitimate interests arising from corporate management regarding the business of an enterprise managed by a 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?

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) may not participate in competitive bidding, other than for construction work.

Also, the contracting officer may disallow a person falling under the following items to participate in competitive bidding if the sale, lease, contracting or another form of contract is put out to tender pursuant to paragraph 1, article 29–3 of the Public Accounting Act (an open tender), unless there are special grounds for allowing them:

- 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 their rights restored; or
- a person who falls under any of the items of paragraph 1, article 32 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).

A contract officer may also prevent a person who falls under the following categories (and their proxies, managers and employers) from participating in open tenders for a period of no more than three years:

1 a person who 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;
2 a person who obstructed the fair implementation of a tender, hindered a fair price from being reached or colluded with others to obtain an unlawful profit;
3 a person who obstructed a successful bidder from entering into a contract or obstructed a party to a contract from performing the contract;
4 a person obstructed an official from performing the official's duties regarding a supervision or inspection;
5 a person who has not performed a contract without a justifiable reason;
6 a person who intentionally, and based on false facts, claimed the price of fulfilling a contract exceeded the price that was fixed when signing the contract;
7 a person facing a denomination under the 'Outline of denomination, etc, concerning procurement of defence and security articles, etc and services'; and
8 a person who employs a proxy, manager or any other employee who is not eligible to participate in an open tender pursuant to items (1) to (4) above and (1) to (7) in the performance of a contract.

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, several acquisition methods are currently adopted, including domestic development, international co-development or production, domestic production under licence, utilisation of civilian goods, importing 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 Acquisition, Technology and Logistics Agency (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 to undergo eligibility screening to participate in tenders, which indicates that it is possible for foreign companies to directly participate in procurement tender. However, a Japanese trading company will usually carry out procurement on behalf of a foreign company.

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?

Exports

In Japan, export controls are conducted under the Foreign Exchange Act, the Export Control Order, the Foreign Exchange Order, and the Ministerial Ordinance on Goods.

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 to be exported include:

> *[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 and biological weapons and missiles.

'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.

Exports subject to approval includes all exports of articles bound for North Korea.

Imports

Primary import controls applicable to defence and security articles include restrictions on specified regions under which approval is required to 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 to import weapons originated or shipped from 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) originating or shipping from specified countries or regions.

Further, in terms of current economic sanctions, the approval of the Minister of the Economy, Trade and Industry is required to import any articles originating or shipping from North Korea; therefore, weapons originating or shipping from Liberia are effectively prohibited.

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

1 explosives;
2 military aircraft and engines for military aircraft;
3 tanks, other armed vehicles, and components thereof;
4 warships;
5 military armaments, guns and other firearms;
6 other weapons, bombs, swords, spears and similar weapons;
7 components of the items listed in (1) to (7); and
8 substances specified under the Chemical Weapons Control Act.

2017 Amendments to the Foreign Exchange and Foreign Trade Act

Amendments to the FEFT were promulgated on 24 May 2017 and came into effect on 1 October 2017. These strengthened penalties of regulations concerning the importing or exporting and trade of technologies, and administrative sanctions concerning import and export regulations.

2019 Amendments to the Foreign Exchange and Foreign Trade Act

The notice on inward direct investment was amended with effect from 1 August 2019 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 serious impacts 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 actions and appointments are generally prohibited.

- A public officer, while currently in office, communicating with an 'interested enterprise' (including enterprises defined by law) regarding the officer assuming a position in the enterprise or a subsidiary corporation, while he or she is offering a contract for defence and security articles to the enterprise or is executing or is obviously intending to offer to execute such a contract with the enterprise. (Contacts of less than ¥20 million are excluded from this prohibition.)
- A public officer engaging in communications with an enterprise (not limited to interested enterprises) who intends to have another public officer or former public officer assume a position in the enterprise or a subsidiary corporation.
- A former public officer, in the course of his or her duties as an employee of an enterprise, demanding or requesting that the division of the government agency he or she held a position in performs, or does not perform, certain acts in relation to a contract with the enterprise or in relation to administrative measures being made against the enterprise that employs them. In these cases, what actions are prohibited depend on the employee's position during his or her time in public office. There is no time limit on this prohibition regarding contracts and administrative measures employee was involved in as a public officer; it is two years with respect to other cases.

If a former public officer obtains a position at an enterprise immediately after leaving office, they will be suspected of breaching the restrictions on communications with enterprises. In practice, individuals wait at least three months before assuming a position in the private sector after leaving public office. These restrictions also apply to public officers with fixed terms of office and those hired under 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, while in office, they promise to assume a position in an enterprise after leaving office, or they assume a position in an enterprise within two years after retiring from a managerial position in public office (except where a notice in relation to promising to assume a position after leaving office was filed). Certain information contained in these notices filed is 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 by the offence of bribery under the Criminal Code. The main crimes under the Criminal Code regarding bribery that apply to enterprises are any bribe:

- made to a public officer in relation to the performance of his or her official duties;
- made 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;
- made upon request from a public officer in relation to the performance of his or her official duties to a person other than the said public officer (the person receiving the bribe is not required to be a public officer);
- made to a former public officer, in relation to the former officer conducting an unlawful act, or refraining from conducting a reasonable act, upon request while they were in office; or
- made to a public officer as a reward for conducting an unlawful act or refraining from conducting a reasonable act in the course of his or her duties upon request, or arranging for another public officer to do so.

The specifications of procured of defence and security articles are generally precise so there is no market price for them. 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. In such audits, 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.

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

Any enterprise that violates any of the restrictions or requirements stated above, engages in acts unfairly or in bad faith, makes false statements in tendering documents, performs a contract negligently without due care, or breaches a contract, will be denominated from procurements for defence and security articles for one month to three years depending on the degree of seriousness of the violation. In cases where an enterprise refuses to comply with system survey, which is a system survey prescribed in article 1, paragraph 2, item 3 of the Implementation Guidelines for Measures to Ensure the Reliability of Data Submitted by Contract Recipients, it will remain denominated until it resumes the research. Also, enterprises that have capital ties or personal relationships, which means a case where an officer of one company serves concurrently as an officer of another company with a denominated enterprise, may be barred from participating in open or 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, public officers are prohibited from engaging in the following acts:

1 receiving a gift of money, goods or real estate from an interested party;
2 borrowing money from an interested party;
3 receiving services free of charge from an interested party;
4 receiving an assignment of private equity from an interested party;
5 receiving entertainment and paid dining from an interested party (a public officer may dine with an interested party if the public officer pays his or her own costs, but a public officer must file a notice that must be filed with the Ethics Supervisory Officer if each party's payments exceed ¥10,000 for one party's cost, except in certain specific cases (eg, buffet parties));
6 indulging other forms of entertainment with an interested party (eg, going on a pleasure trip, playing golf or playing mahjong), whether or not the officer and the interested party (or parties) share the costs; and
7 demanding an interested party engage in the activities listed in (1) to (6) with a third party, (however, the prohibition does not apply if an interested party makes an offer to engage in such activities with a third party).

Any public officer violating items (1) to (7) can be subject to disciplinary action. There are no sanctions applicable to the interested party.

As defined in the Code, 'interested parties' includes 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 the public officer is involved in administering. Any interested party the public officer served within the previous three years are regarded as interested parties for at least three years after the transfer of this public officer. Also, if an interested party of a public officer contacts a second public officer to have the official exercise his or her influence, based on his or her government position relative to the first public officer, the interested party of the first public officer shall be deemed to be an interested party of the second public officer.

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 designing a system to convert military aircraft to civil use, and put a system in place for companies wishing to conduct such conversions in 2011. Technical documents for the conversion of the engines used on ShinMaywa US-2 rescue flying boats and Kawasaki P-1 fixed-wing patrol aircraft have been disclosed and published upon requests from commercial enterprises. In December 2016, the Acquisition, Technology and Logistics Agency announced it had entered into an agreement with IHI Corporation on the conversion to civil use of IHI's F7-10 engines

used on P-1 aircraft to sell F7-10 engines to the Japan Aerospace Exploration Agency.

The Ministry of Defence rarely procures aircraft configured for civilian use for conversion to military use, preferring 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, aircraft and rotorcraft with a structure that people cannot board and a gross weight of 150 kilogrammes or more fall under the definition of 'aircraft' and are subject to restrictions on methods of manufacturing and repair. The primary such restrictions are:

- the manufacturing or repair (including modification) of aircraft is subject to a licensing system (ie, the 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 identify the owners 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 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, are generally requirements to qualify for participating 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', an 'organised crime group member' being a person falling under any of the items of paragraph 1, article 32 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). 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.

Environmental legislation

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

Green Purchasing Act

The Green Purchasing Act came into force in 2001.

Following this Act, the national government must endeavour to select 'eco-friendly goods' with low environmental impact during procurement processes, in particular:

- goods featuring recyclable resources;
- products with low environmental impact, due to the ability to reuse or recycle the product, or being made from raw materials or parts with low environmental impacts; and
- services that have low environmental impacts.

In response to this, the Ministry of the Environment established a basic policy applicable to all governmental agencies in respect of a wide variety of procurement items. The Ministry of Defence also set its own corresponding procurement goals in 2016. However, the procurement goals of the Ministry of Defence primarily target stationery, office supplies, air conditioners, lighting and general official vehicles. In regard to goods and services that form key defence and security items, the targets are limited to the construction of public facilities, tires for passenger cars, two-stroke engine oil and disaster supplies.

Green Contract Act

The Green Contract Act came into force in 2007.

This Act went further than the Green Purchasing Act, requiring the national government to endeavour to promote procurement contracts with serious consideration for the reduction of greenhouse gas emissions. In its response, the cabinet 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 (such plans must guarantee that reductions in the cost of powering the renovated building will exceed the cost of the renovation);
- other building designs; and
- industry waste disposal.

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

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

Requirements for specific fuel consumption and other environmental performance indicators may be provided in the specifications for bidding on the six types of contracts covered by the Green Contract Act. These contracts are:

- the purchase of electricity;
- the purchase and lease of automobiles;
- the procurement of vessels;
- the design of governmental building renovations;
- other building designs; and
- industry waste disposal.

In such cases, enterprises must submit bids that meet such requirements. An evaluation will be conducted by the Acquisition, Technology and Logistics Agency, which is the agency managing procurement.

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

No. However, bids may be required to meet specific fuel consumption and other environmental performance indicators to be accepted.

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?

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 and 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 Agreement (EEA Agreement).

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

Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement (FOSA) is Norway's implementation of the EU Defence Procurement Directive, and applies to the procurement of specific defence and security materiel, or construction work or services in direct relation to such, unless article 123 of the EEA Agreement provides for a defence and security exemption.

Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013

Parts I and II of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (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 FOSA. Part V applies to procurement that is entirely exempt from the procurement regulations under article 123 of the EEA Agreement. These regulations are internal instructions for the Ministry of Defence and its agencies (see section 1-2 of DAR). They do not provide any rights to third parties and thus a breach of these 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?

Paragraph 1, section 1-3 of 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, or their requirements or specifications are classified, the entire procurement procedure may be exempt from ordinary procurement rules under article 123 of the EEA Agreement. In that case, only Part V of DAR applies, and the Ministry of Defence will also generally require offset agreements.

Conduct

3 | How are defence and security procurements typically conducted?

Section 7-3 of DAR 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 (sections 7-1 and 6-1 of DAR). 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 the 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 a 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 sections 5-2 and 5-3 of FOSA, 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 Chapter 14 of FOSA).

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 subject to offset purchases as Norway prioritises such technology under offset obligations in article 123 of the EEA Agreement.

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 trading with third countries that continue to be governed by the GPA.

Norway does use a national security exemption on occasion, so may deviate from Directive 2009/81/EC where the procurement has essential security interests and falls under article 123 of the EEA Agreement, or warrants an exception in accordance with the Operations Security Regulation. Such exemptions require approval from the Ministry of Defence.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Section 9-10 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR) 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.

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

Generally, disputes are resolved through negotiations, 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.

Section 9-10 of DAR 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 is 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 the 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 8 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 (section 26-4 of DAR). 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 sections 5-5 and 5-9, Parts I and II of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013.

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 procurement through a long-term strategy. The strategy is updated on an annual basis and is valid for a seven-year period. The current plan – Future Acquisitions for the Norwegian Defence Sector 2021–28 – is available from the Norwegian 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 the 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 paragraph 6, section 18-6 or section 36-2 of DAR, 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 section 23-7 of DAR). 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 its contract, such as 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 paragraph 1, section 26-9 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR)). 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 paragraph 2b, section 19-2 of DAR); or
- price contracts: the contractor is obliged to deliver the goods or services at an agreed price, regardless of the actual costs incurred (see paragraph 2a, section 19-2 of DAR).

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.

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 to monitor their performance under the contract (see paragraph 1, section 27-2 of DAR).

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 section 27-4 of DAR).

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.

Last, 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?

Section 24-3 of DAR 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 section 24-4 of DAR, is that the procuring authority shall acquire a non-exclusive licence to the intellectual property (IP) 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 section 24-5 of DAR, the procuring authority shall acquire the IP 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 section 24-6 of DAR).

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 section 24-10 of DAR).

Section 24-7 of DAR states that the procuring authority must ensure that a contract concerning IP rights contains provisions concerning, among other things, the possibility of the procuring authority making available documentation related to the IP rights to the entire defence sector within Norway, and 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 IP rights necessary to recover their costs through a resale. This clause must stipulate that the transferred IP 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;
- a 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, although its partners need not reside 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, the 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, although 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?

The 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 European Economic Area 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 the North Atlantic Treaty Organization (NATO), as well as certain countries with close relations to Norway;
- 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; and
- 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 is subject to sanctions by the United Nations, European Union or the Organization for Security and Co-operation in Europe (OSCE). As a 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 a single export of goods;
- service licence: valid for one year and a single export of services;
- technology transfer licence: valid for one year and a single export of technology;
- global export licence: valid for a maximum of three years and one or several exports of one or several defence-related goods to one or several specific recipients outside of the European Economic Area, within NATO or other countries with relations to Norway; and
- 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 an EEA member state, Norway also adheres to the Council Common Position 2008/944/CFSP (the Position) defining common rules governing control of exports of military technology and equipment, and has transposed its criteria listed in article 2 of the Position 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.

In accordance with article 3-2 of Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement (FOSA) 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. Section 34-2, Parts I and II of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 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 article 123 of the European Economic Area Agreement, 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 with Norway, which eases the exchange and certification of contractors with regard to classified information related to procurements. Members of the European Economic Area also have the advantage of a common transfer licence arrangement.

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 Regulation No. 974 of 12 August 2016 on Public Procurement;
- conducted in accordance with FOSA, where the contractor (and most of its subcontractors) are located within the European Economic Area: if the contractor is domiciled in the European Economic Area, but one of its subcontractors is not and the value of the subcontract exceeds 50 million Norwegian kroner, said subcontractor shall be made a party to an offset agreement with the procuring authority; and
- conducted with a contract price less than 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 less than 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.

Section 2-5 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 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 Norwegian defence.

The contractor shall inform the procuring authority if they have hired or otherwise used such personnel.

There are no general restrictions on private sector employees' appointment to public sector positions.

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 sections 387 and 388 of the Norwegian Penal Code).

Section 3-2 of DAR dictates that in any procurement that exceeds the current national threshold value at the time of the request for tender's publication, the procuring authority must contractually require the contractor to warrant that it has measures or systems in place 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, section 4-1 of DAR 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.*

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?

Lobbyists or commercial agents are not subject to any general registration requirements, although 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.

Paragraph 2, section 7-4 of DAR 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?

Norwegian law does not contain any limitations on the use of agents or representatives that earn a commission on transactions between a contractor and a 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 paragraph 7, section 17-3 of DAR).

If the contract falls under article 123 of the European Economic Area Agreement, the procuring authority may not enter into a contract with an agent (see section 36-3 of DAR).

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, followed by applicable procedures for registration of ownership, security and certification from the civil aircraft register.

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.

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 (section 3-1 of the Norwegian Defence Acquisition Regulations No. 1411 of 25 October 2013 (DAR)). 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 International Labour Organization (ILO) Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182.

Defence contract rules

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

The Armed Forces of Norway Form 5052 – General Purchase 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.

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 during a classified information disclosure, require that the prime contractor include clauses equivalent or similar to those as stipulated in the Parts I and II of DAR.

Section 9-10 of DAR 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.

Arbitration is rarely used in Norwegian defence contracts. Section 9-10 allows for deviations from Form 5052 (eg, accepting governing law or venue of a country other than Norway if the contract involves international aspects and the deviation is necessary owing to the nature of the negations and the safeguarding of Norwegian interests).

The procuring authority is entitled to compensation for direct losses caused by delay or defect (see Form 5052, sections 6.6 and 7.7). The contractor is 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 a 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.

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 (section 26-4 of DAR). 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.

As a main rule, the procuring authority shall request the right to review the contractor's accounting to monitor their performance under the contract (see paragraph 1, section 27-2 of DAR). 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 main rule, in accordance with section 24-4 of DAR, is that the procuring authority shall acquire a non-exclusive licence to the IP 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 section 24-5 of DAR, the procuring authority shall seek to acquire the IP rights or a whole or partly exclusive licence if this is considered necessary or appears to be the most economically advantageous option, or there are significant security considerations. 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 section 24-10 of DAR).

There are no general rules concerning counterfeit parts, although the contractor must certify that the deliverables conform in all aspects to the contract requirements (see the Armed Forces Form 5357 – Certificate of Conformity).

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 (section 3-1 of DAR). 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?

Section 4-1 of DAR 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 that are 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.

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 the inclusion of environmental requirements in both contracts and framework agreements (see sections 8-3 and 8-16 of Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement). 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?

A minor case was decided by the Public Procurement Complaints Board regarding the procurement of vehicles for the Home Guard under Regulation No. 1185 of 4 October 2013 on Defence and Security Procurement. The issue was whether the Norwegian Defence Materiel Agency had changed the interpretation of award criteria. After an assessment of the facts, the Board found that this was not the case (see KOFA–2018–362).

More importantly, the future structure of the armed forces was discussed by Norway's parliament in 2020 and the relationship between the armed forces and the defence industry was discussed by parliament in 2021. The government proposed a resolution on the acquisition of new main battle tanks for the army during 2021, as well as the acquisition of new helicopters for the special forces by 2024. Regarding the defence industry, parliament's commission on defence noted the importance of the cooperation between the Norwegian Defence Research Establishment and the defence industry on innovation and that there might be a need for more flexible forms of defence procurement to safeguard innovation and access to new technology. The industry assessment also emphasised the development within information technology and the intention to prioritise future development in this sector along with munitions, submarine technology and lifecycle management.

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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 procurement in Korea is the Defence Acquisition Program Act (the DAP Act). The statute is further implemented by the Enforcement Decree and Enforcement Rules thereof. The Defence Acquisition Program Administration (DAPA), an executive agency of the Ministry of National Defence, has several detailed administrative rules, such as the Defence Acquisition Program Management Regulation, Guidelines for Evaluation of Weapon System Proposals and the Offset Program Guidelines. In particular, among the administrative rules of the DAPA, the Procurement of Defence and Security Articles Management Regulation sets out the various aspects of procurement of defence and security articles, including the procedure for domestic and foreign procurement, the process for cost management works, and the procedure for reviewing contracts. In practice, these rules operate as standards.

Aspects that are not covered by the statutes and regulations regarding the defence acquisition programme are governed instead by the rules applicable to ordinary procurement contracts:

- the Act on Contracts to which the State is a Party;
- the Enforcement Decree; and
- the Enforcement Rules thereof.

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 and the Ministry of Defence, security procurement and civil procurement are distinguished by the identity of the procurer and the nature of the articles being procured. DAPA is the main procurer of defence and security articles. The army, navy or air force is each able to directly procure articles to a total value of up to 30 million won per year. By contrast, civil procurement (ie, procuring articles that are generally not used for defence nor security) is carried out by the Public Procurement Service.

The procurement of articles classed as 'weapons systems' is exclusively conducted by DAPA. Also, DAPA oversees the purchase of certain munitions necessary for operations, training and security, including the articles closely related to weapons systems; the articles procured in conjunction with equipment for efficient maintenance and management of the equipment; the articles that are subject to special security considerations; and the articles that have been imported from other countries, to name a few.

However, recent amendments in law have allowed the Public Procurement Service to participate in the procurement of certain defence and security articles. However, to enable DAPA to focus on defence force improvement projects, the Public Procurement Service is only in charge of purchasing munitions unrelated to weapons systems.

Conduct

3 | How are defence and security procurements typically conducted?

Defence and security procurements consist of defence force improvement projects and military forces management projects. Procurements for the improvement of defence capacities are the most general procurement of defence and security articles.

Procurements for the improvement of defence capacities is carried out according to the following procedure:

- requests are submitted from each armed force;
- a decision of the joint chiefs of staff is made;
- prior research is carried out;
- a project strategy is established;
- alignment of the project strategy with the Mid-Term National Defence Plan, which is a five-year plan that specifies the annual projects and financing arrangements for implementing the overall defence policy and strategy;
- budgeting;
- a bidding announcement is made; and
- the contract is concluded.

Proposed changes

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

The National Assembly is considering making the following changes to the defence and security procurement process:

- redefining the scope of 'defence projects';
- converting the concept of an 'offset programme' to 'industrial cooperation' with a renewed focus on exports of defence and security articles;
- monitoring the employment of former public officials in the defence industry;
- authorising the chairman of the joint chiefs of staff to form testing and evaluation plans for weapons systems and technologies;
- requiring the minister in charge of DAPA to monitor the use of counterfeit and obsolete equipment;
- requiring, by statute, that suppliers and bidders submit cost estimates and imposing criminal sanctions for any misrepresentations or forgeries;
- changing the term 'munitions sales agency' (ie, a broker or an agent that acts on behalf of a foreign contractor) into a 'defence programme agency', and requiring a defence programme agency to be registered;

- expanding the scope of application for integrity pledges;
- inserting agency provisions into the DAP Act;
- requiring DAPA to designate an agency to oversee the standardisation and management of munitions inventories;
- revoking a contract if the contractor is found to engage in the illegal acquisition, use or disclosure of technologies, or leaks or negligently discloses military secrets;
- expediting the procedure for approving exports of munitions;
- providing an end-user certificate to individuals who intend to import munitions for research and development;
- providing preferential treatment to articles made from domestically produced materials;
- revoking the registration of a munitions sales agency that allows a third party to operate its business under the agency's own name or that transfers or lends its registration certificate to a third party;
- strengthening deterrence by increasing the penalty for leaks or breach of defence industry technology during procurement of defence and security articles;
- authorising the Minister of National Defence and the Minister of the Defence Acquisition Program Administration to conduct a project feasibility study to draft a budget for large-scale improvements and maintenance of the defence capacity and forces and new facilities' projects;
- conducting the project feasibility study for the mass-production of weapons systems as part of the project feasibility study for research and development projects;
- permitting defence force improvement projects to be undertaken as pilot projects before the finalisation of its requirements, whereas previously the determination of its requirements and preliminary research were prerequisites to be conducted beforehand;
- restricting eligibility for bid participation if the supplier of military food service has violated laws relating to food safety; and
- guaranteeing the independence of the Ministry of National Defence by eliminating the requirement to consult with the Minister of Strategy and Finance when enacting or amending laws regarding payments of advance or interim payments under procurement contracts for defence and security articles.

Information technology

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

Generally, heightened security and interoperability are demanded when procuring IT goods and services. However, frequently, the underlying software of IT equipment is inseparable from its hardware, making it difficult to treat them differently.

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 within the framework of the World Trade Organization. However, this agreement does not apply when significant national security interests are at stake in connection with defence procurements. As a general principle, defence and security articles manufactured domestically in Korea are preferred over those manufactured overseas. Only those articles that are not available domestically are purchased overseas.

Korea has entered into free trade agreements with the Association of Southeast Asian Nations, Australia, Canada, Central America, Chile, China, Colombia, the European Free Trade Association, the European Union, India, New Zealand, Peru, Singapore, Turkey, the United States and Vietnam. There are procurement provisions in these agreements carving out national security exemptions.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

In principle, a dispute between the government and a defence contractor related to a bidding and procurement contract would be resolved by litigation.

Also, where the value of the procurement exceeds a certain amount (ie, 1 billion won for comprehensive construction contracts, 50 million won for purchase of goods contracts, and 50 million won for service contracts), parties may opt to use the appeal process under the Act on Contracts to Which the State is a Party (ACSP) or the mediation process provided by the State Contract Dispute Mediation Committee. With respect to penalties for delays, the Defence Acquisition Program Administration (DAPA) provides an internal examination procedure with the support of external experts. A defence contractor may directly file a lawsuit in court without having exhausted available alternative dispute resolution processes. Recently, the use of alternative dispute resolution (ADR) is becoming more frequent relative to litigation, and statutes and regulations relating to procurement are moving towards expanding the scope of ADR's application.

If a contractor has engaged in unfair bidding, misstated costs or has breached their contract, the government may restrict the contractor's eligibility to participate in future biddings by way of an 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 the procurement of weapons systems by using litigation or arbitration. In the case of domestic procurements, the parties generally resolve disputes through litigation. In the case of overseas procurements, it is common to resolve disputes through arbitration. However, in many cases disputes on international procurement do not often turn to alternative dispute resolution procedures; court litigation is the norm.

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 towards a defence contractor. The ordinary rules of contractual breach determine the scope of the government's and contractor's liabilities, subject to any particular provisions on the calculation of 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?

As a general principle, government contracts must comply with all relevant laws and regulations, and contracting officers generally have very little discretion when executing the contracts.

However, certain enforcement decrees limit the extent of a contractor's liability or their potential recoveries against the government.

For example, the Enforcement Decree of the Defence Acquisition Program Act prescribes that contracts relating to test products for research and development purposes or to the first mass production of weapon systems designated as 'defence material' must limit the amount of liquidated damages to 10 per cent of the contract price. The Enforcement Decree of the Act on Contracts to Which the State is a Party similarly prescribes that the liquidated damages in contracts subject to this legislation must not exceed 30 per cent of the contract price.

The DAPA's general terms and conditions for overseas procurements limit the maximum amount of a delay penalty to 10 per cent of the contract price.

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 its payment obligations under a procurement contract. The government is required to secure the full budget in advance before engaging in the procurement of defence and security articles. Even in special circumstances where the costs of procuring defence and security articles exceed the initial budget, the contracting party can always make a claim for payment of outstanding amounts from the Korean government pursuant to the contract.

Parent guarantee

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

No parent guarantee is required. Instead, the contractor is directly required to pay a performance bond to cover the risk of possible damages. In overseas procurement, for example, the contractor is required to pay a performance bond equivalent to at least 10 per cent of the contract price within 30 days after opening a letter of credit. The performance bond must be paid in cash or by an irrevocable standby letter of credit.

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 Defence Acquisition Program Administration (DAPA) prescribes the mandatory terms and conditions of procurement contracts.

One mandatory condition is the selection of the Korean law as the governing law for overseas procurements and conformity with the Act on Contracts to Which the State is a Party (ACSP). It is also important that DAPA or a contracting officer execute a procurement contract using the general terms and conditions and the contract form, as prescribed by the administrative rules in existence.

The procurement contract must also expressly stipulate the purpose, price, time period for performance, performance bond, risks and delay penalty.

Further, the ACSP and administrative rules of the Defence Acquisition Program Administration will apply to procurement contracts only if the procurement contract expressly provides for their application.

Cost allocation

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

While the allocation of costs is generally negotiable, the common practice is that the contractor bears the costs of execution. The DAPA's general terms and conditions stipulate that the contractor shall be responsible for:

- the administrative costs, bank charges and other related expenses (such as postal charges) incurred in performing its contractual obligations;
- the costs in obtaining government approval for exports; and
- delivery costs.

Disclosures

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

The contractor must make the following disclosures when bidding for a 'weapons system' procurement contract:

- the total price;
- sub-system prices;
- parts prices and cost factors;
- cost accounting standards and the exchange rate used to convert the contract price from US dollars to Korean won;
- detailed quotation prices for each component;
- proposed prices based on the work breakdown structure; and
- annual operation and maintenance costs.

Audits

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

In Korea, audits of defence and security procurements are conducted by the Board of Audit and Inspection. The Board audits DAPA and each armed force involved in a procurement. Where appropriate, the Board also engages administrative agencies to conduct daily audits known as 'prior consulting'.

The DAPA conducts audits of its own too. Its special inspector general for defence acquisition examines each stage of the procurement procedure. The DAPA's auditor's office or its ombudsman, established pursuant to the Defence Acquisition Program Act, inspect allegations of misconduct or complaints related to the procurement of defence and security articles.

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 a 'weapons system' procurement contract, the seller, in principle, retains the intellectual property rights in the same manner as in contracts for the purchase of general goods. However, the seller may choose to transfer technology to the government using a defence offset agreement. In such cases, the relevant technology, equipment and tools are transferred free of charge, and the government receives ownership or a licence to use the technology, equipment and tools.

On the other hand, licensing agreements may be concluded with respect to IP rights. For example, the government may obtain a licence to use the technical data and software provided by the contractor within the scope of the purpose of the contract.

In the past, the government was given sole ownership of intellectual property rights arising from contracts for defence research and

development in which the government had invested. But, following the enactment of the Defence Science and Technology Promotion Act on 1 April 2021, not only the government but also the private companies, universities and research institutions can also jointly own intellectual property rights arising from contracts for defence research and development under the terms of the contract or the contract made pursuant to public law where the government is a party or has entered into the contract pursuant to public law.

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 provides free trade zones or free economic zones to foreign defence and security contractors. These zones grant tax cuts and financial support to foreign entities domiciled in them. However, only a few foreign contractors have moved into these zones to date.

Forming legal entities

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

A company is formed under the mandatory procedures stipulated in Korean commercial law. The procedure for establishing a company by a foreigner is generally identical to that used by a Korean citizen. Additional requirements for foreign nationals include submitting a foreign investment notification and registering the company as a foreign-invested enterprise with the Ministry of Trade, Industry and Energy. This notification is also required for joint ventures between a foreign investor and a domestic investor.

A foreign national who intends to acquire shares or newly issued shares in a company that operates as a defence contractor must obtain permission in advance from the Minister of Trade, Industry and Energy. Violating this obligation is punishable by imprisonment of no more than one year or a fine not exceeding 10 million won.

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?

Public access to government records is permitted under the Public Records Management Act and the ACSP. The records are prepared, integrated, used and maintained by the DAPA, which records every defence procurement under progress from their beginning to end. Bidding announcements, progress and results are available for viewing on the Defense E-Procurement System website, although access to competitors' bids is not permitted.

Supply chain management

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

Contractors participating in bidding must register as 'procurement contractors', under the Guidelines on Procurement Contractor Registration Information Management. The DAPA manages suppliers and supply chains using an integrated management system.

Brokers or agents acting on behalf of a foreign contractor must register as munitions sales agents, and report brokerage fees they receive from foreign companies to the DAPA, which enables the DAPA to effectively manage the supply chain.

To protect against counterfeit parts, the government works with the Korea Customs Service to verify the original manufacturer's certification documents at every stage of delivery inspection. In the case of domestic procurements, an integrated test report management system is in place to prevent tampering with test reports. Moreover, the contracts for both domestic and foreign procurement include terms prohibiting counterfeits of parts and test results. Violating these terms could result in several sanctions, such as termination of contract or revocation of eligibility for participation in bids hosted by the Korean government for a certain period of time.

INTERNATIONAL TRADE RULES

Export controls

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

In Korea, the primary law governing the export and import of articles and technology is the Foreign Trade Act, which is administered by the Minister of Trade, Industry and Energy. The Foreign Trade Act prescribes a list of strategic articles that are subject to export controls and requires the approval of the Minister of Trade, Industry and Energy for exports of goods falling under the list of strategic articles. Provided, to export defence and security articles or defence science and technology that fall under the list of strategic articles, the approval from the Minister of the Defence Acquisition Program Administration must be obtained and the Defence Acquisition Program Administration oversees the export controls of defence and security articles.

Meanwhile, the Defence Acquisition Program Administration is cooperating with private companies to establish the Defence Export Promotion Centre, which aims to increase exports of Korean defence and security articles.

Domestic preferences

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

The laws and regulations relating to a defence acquisition programme give priority to the purchase of defence and security articles made domestically, and only as an exception where no domestic product is available that meets the required conditions can purchases be made of foreign products. A foreign contractor can participate directly in a bid for procurement that is conducted under the procedure set by the laws and regulations for the purchase of foreign products.

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.

Sanctions

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

Under the United Nations Security Council resolutions, the Korean government does not engage in any defence-related transactions with North Korea. The Korean government has also banned exports

of weapons to countries that are under arms embargoes, or countries designated as violating international peace and security.

Under the Foreign Trade Act, the Minister of Trade, Industry and Energy has the discretion to restrict imports and exports if there is a war, disaster or an event of force majeure, the trading country does not recognise the rights of the Republic of Korea under treaties or generally recognised international law, the trading country has imposed illegitimate trade sanctions or restrictions on the Republic of Korea, or there is a need to maintain international peace and stability.

Trade offsets

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

When the Korean government purchases over US$10 million worth of defence and security articles from abroad under the Defence Acquisition Program Act, the trade offsets are engaged in principle. The particular details of the procedure for trade offsets and its scope of application are found in the administrative rules of the Defence Acquisition Program Administration, Trade Offsets Management Guidelines. The Korean government promotes defence trade offsets when purchasing defence articles of more than US$10 million from overseas, to secure the technology necessary for defence improvement projects, logistics support capability for weapon systems that are to be procured, and the maintenance of the contracting partner's weapon systems. The Korean government may also conduct defence trade offsets to participate in the development and production of weapons systems or facilitate the export of domestic defence articles to foreign countries.

However, legislation is currently pending before the National Assembly that will replace offset programs with projects of 'industrial cooperation' for the purpose of promoting exports of Korea's defence and security articles.

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 prohibits government employees from working in the private sector under certain circumstances for three years following the termination of their public service.

The three-year prohibition applies to government officials of grade four or higher and to military officers of equivalent rank (that is a colonel in the army, air or marine forces, and a captain in the navy) who seek employment with a defence contractor or a commercial private company with annual sales exceeding 10 billion won and a capital scale exceeding 1 billion won. However, an exemption may be granted if there is sufficient screening of the employee from the work performed under the government (including the Korean armed forces) during the five years before retirement and the work currently being performed.

Also, after the three-year prohibition has lapsed, former government employees are prohibited from engaging in the same duties as they performed during their time in public office, and this rule applies equally to former military officers.

No specific regulations restrict a person in the private sector from taking a government appointment. On the contrary, there is a process in place for recruiting individuals who have accumulated relevant experience in the private sector. The scope of this recruitment process is expanding.

Addressing corruption

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

Domestic and foreign corruption is addressed by the Criminal Code, the Act on the Aggravated Punishment of Specific Crimes, and the Act on the Aggravated Punishment of Specific Economic Crimes. These laws punish:

- a person abusing their position or authority or violating laws to benefit themselves or any third party in connection with their duties;
- the act of causing damage to public institutions by expropriating public funds, 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.

Bribery to foreign officials is punished under the Act on Combating Bribery of Foreign Officials in International Business Transactions.

Further, defence contractors, their subcontractors and munitions sales agent (a Korean term for commercial agents working in the defence sector) are required to submit integrity pledges and to fully comply with them. If violated, they will be restricted from future bidding for up to five years.

In principle, bribery of domestic officials is punishable under the condition of reciprocity. However, the Improper Solicitation and Graft Act (commonly called the Kim Young-ran Act) punishes public officials who demand, accept or promise to accept anything valued at 1 million won (per single occasion) or 3 million won (per year) or more, regardless of whether it is connected with their duties.

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. There is no separate lobbyist registration system.

A commercial agent who works in the defence sector is defined as a 'munitions sales agent' in Korea. A munitions sales agent must be registered with the Defence Acquisition Program Administration (DAPA) in advance by submitting his or her:

- resumes of the representative and officers;
- employment information such as numbers and names of employees; and
- integrity pledge.

Acting as a munitions sales agent without being registered is illegal. Any person who violates this rule is punished by imprisonment of a maximum of one year or fines of up to 10 million won or both. A munitions sales agent who has been sentenced to imprisonment may not register as an agent for five years following the completion of his or her sentence. Similarly, an agent whose registration of a munitions sales agency business is cancelled by the minister of DAPA may not register again for two years.

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 involved in a procurement exceeding US$2 million is required to deal directly with DAPA, rather than through a munitions sales agent. However, if the DAPA determines

that the foreign company requires the use of a munitions sales agent, then submission of the application via the munitions sales agent is permitted.

A munitions sales agent must register with the DAPA in advance. Further, the munitions sales agent must report to the Minister of the Defence Acquisition Program Administration the amount of commission received in connection with his or her representation. In the case of violation, a punishment of a maximum of one year in prison or a fine of up to 10 million won may be imposed.

AVIATION

Conversion of aircraft

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

For the purposes of research and development, civilian to military mutual technology transfers, technical cooperation and standardisation of specifications, the Korean government encourages the spin-on, spin-off and the dual use of civilian and military aircraft technology. The government may give preference to the purchasing of defence articles developed by civilian and military technical cooperation projects. Such a procurement contract may proceed on a negotiated basis in lieu 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 or 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?

Drones and unmanned aircraft systems are subject to the rules found in the Aviation Act, which reflect the standards and methods adopted by the Convention on International Civil Aviation and Annexes thereto.

The manufacturing and sale of unmanned aircraft is permitted, but the design, manufacturing and maintenance of their physical frames must comply with the certification and airworthiness requirements of aircraft generally. If the weight of the aircraft (excluding fuel) is between 12 and 150 kilogrammes, a pilot certificate, owner notification and display of the notification number are required. Aircraft weighing less than 12 kilogrammes are exempt. The Act on the Promotion of Utilization of Drones is the general legislation addressing the drone industry and certification in Korea.

Unmanned military aircraft are required to obtain an airworthiness certificate issued by the Defence Acquisition Program Administration or by the armed forces under the Military Aircraft Airworthiness Certification Act.

The Act on the Promotion of Utilization of Drones addresses establishing a foundation for, and government support of, a drone industry (eg, financing for startups, provision of outcomes from drone-related research and development, and provision of testing equipment and facilities, etc). The Act also requires the government to relax some requirements for obtaining safety certifications and so on, designate advanced drone technologies and support relevant industries (eg, fast-track safety certifications applicable to drones that use the designated advanced technologies).

MISCELLANEOUS

Employment law

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

Foreign defence contractors must comply with the mandatory labour and employment rules of the place where the employee routinely provides his or her service (eg, Korea), even if the contract's governing law, as chosen by the parties, is a different jurisdiction.

Defence contract rules

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

The Defence Acquisition Program Act prescribes the procedures for domestic and overseas procurement. Details are found in the Defence Acquisition Program Management Regulation and the Procurement of Defence and Security Articles Management Regulation. The Defence Acquisition Program Administration (DAPA) has established standardised special terms and conditions to be used in the case of domestic procurement. 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 the formation of procurement contracts under the DAP Act, the Act on Contracts to Which the State is a Party and other relevant legislation. These laws will apply even where the contractor performs work exclusively outside of 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?

Personal information of directors, officers or employees of the contractor are not required, and there is no particular requirement to satisfy other than the submission of integrity pledges. However, the integrity contract must be signed and submitted not only by the representative director but also by the executive officers and directors. Also, a contractor must register as an overseas source in the Defense E-Procurement System to participate directly in the procurement bidding. To register, a registration application, notarised security pledge and business registration certificate must be submitted.

In cases of registering a domestic branch or a domestic munitions sales agent of a foreign company, the registree submits a domestic business registration certificate, a corporate registry, security measurement results (ie, background checks conducted by Korean intelligence agencies) an integrity pledge and an agency agreement signed by the foreign company.

Further, a civilian, regardless of his or her nationality, who needs to enter facilities or properties of the DAPA or a military unit in connection with the execution of a defence procurement contract for more than one month, 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 Defense E-Procurement System. The application must include a notarised security pledge, a business licence or business registration certification in the foreign jurisdiction, a manufacturer's certificate or a supplier's certificate to confirm the type of industry the registree is involved in and the employment certificate of the signatory of the procurement contract. Upon the submission of all those required documents, a registration certificate is issued to the foreign company and it will be eligible to participate in procurement bidding in Korea.

If a Korean branch, or a Korean munitions sales agent, of a foreign company wishes to participate in procurement bidding, it must register in the Korean Comprehensive E-Procurement System and the Defense E-Procurement System.

Environmental legislation

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

Contractors operating in Korea must comply with the following environmental laws and regulations, whether they are domestic or foreign entities:

- the Framework Act on Environmental Policy;
- the Natural Environment Conservation Act;
- the Environmental Health Act;
- the Clean Air Conservation Act;
- the Soil Environment Conservation Act;
- the Marine Environment Management Act;
- the Occupational Safety and Health Act;
- the Chemicals Control Act;
- the Nuclear Safety Act;
- the Water Environment Conservation Act;
- the Malodour Prevention Act;
- the Environmental Impact Assessment Act;
- the Environmental Dispute Adjustment Act; and
- the Wastes Control 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 prescribed by the Korean government. Environmental standards are established primarily by the Ministry of Environment, which has the authority to investigate breaches of these standards and may file criminal complaints with the prosecution service.

Hazardous substances that not only affect the environment, but also the working environment of employees, are addressed by the Ministry of Employment and Labour.

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

'Green' solutions provide an advantage in procurements, moreover, they have now become legal requirements in many government purchases of products.

The Act on the Promotion of Purchase of Green Products requires that the national government, government entities, local governments and public institutions purchase products, where available, that minimise emissions of greenhouse gases and pollutants by saving and using energy and resources efficiently.

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Also, the Environmental Technology and Industry Support Act requires that certain products be certified as 'eco-friendly' by the Ministry of Environment or by the Ministry of Trade, Industry and Energy to be eligible for purchase by the government. In the case of domestic procurement, eligibility to participate in bidding can be restricted based on whether a defence article to be procured is certified as an environmentally friendly product or an environmentally friendly technology by the Ministry of Environment. Further, if the defence and security articles that are unrelated to the weapons system have been certified as eco-friendly, additional points may be given at the bidding and evaluation process.

UPDATE AND TRENDS

Key developments of the past year

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

To grow the country's economy by establishing a favourable environment for the development of the defence industry and strengthening its competitiveness, the National Assembly extracted the provisions regarding the growth planning, financing, and funding of the defence industry from the existing Defence Acquisition Program Act and created independent legislation of its own called the Act to Develop and Support the Defence Industry, which entered into force on 5 February 2021.

Also, in light of the emergence of new technology with the fourth industrial revolution and the acceleration of technological development, the National Assembly, to systemise and ensure the continuous innovation of defence science and technology, extracted the provisions regarding research and development from the existing Defence Acquisition Program Act and created independent legislation of its own called the Act to Promote the Innovation of Defence Science and Technology, which entered into force on 1 April 2021.

Sweden

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LEGAL FRAMEWORK

Relevant legislation

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

The primary procurement legislation in Sweden regarding defence and security articles consists of:

- the Defence and Security Procurement Act; and
- the Public Procurement Act.

This legislation is based on EU directives and is a part of the harmonisation process within the European Union. The more specific law regarding the procurement of defence and security articles, The Defence and Security Procurement Act, is based on Directive 2009/81/EC of 13 July 2009. The purpose of the Defence and Security Procurement Directive is to provide a regulatory framework that is more flexible and better adapted to the conditions and needs of the procurement of defence and security articles. Meanwhile, the general legislation regarding public procurements, The Public Procurement Act, is based on Directive 2014/24/EU of 26 February 2014.

Identification

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

The Defence and Security Procurement Act shall be applied to procurements within the sphere of defence and security regarding:

- military equipment, including parts adherent to the equipment, components and parts of components;
- equipment of a sensitive nature, including parts adherent to the equipment, components and parts of components;
- construction contracts, goods and services that are directly related to the equipment in the above bullet points, during the article's entire period of use; or
- construction contracts and services specially intended for a military purpose or construction contracts and services of a sensitive nature.

In summary, the Defence and Security Procurement Act is applicable if what is to be procured or what the equipment, construction contract or service is intended for has a security purpose and includes, requires or contains protective security-qualified information.

The main difference between defence and security procurements and civil procurements is the applicable legislation. The Defence and Security Procurement Act and the Public Procurement Act are similar and coherent regarding regulations and structure, but there are some crucial differences. The Defence and Security Procurement Act, for example, contains regulations concerning requirements for the security of supply and information security.

Unlike civil procurement, the Defence and Security Procurement Act does not contain any provisions regarding open procedure. Instead, selective procedure, negotiated procedure and competitive dialogue are the procurement procedures that can be used. However, the general rule is that procurements shall be executed through competitive procurement and published in Tenders Electronic Daily, an electronic publication in which all procurements within the European Union are announced.

Regarding defence and security procurement, regulation concerning subcontractors is far more extensive than it is regarding civil procurement. For example, the contracting organisation may require a tenderer to use subcontractors. A contracting organisation may reject a subcontractor selected by the tenderer and may limit the proportion of the contract that is outsourced to subcontractors.

In comparison with civil procurement, the Defence and Security Procurement Act contains some other grounds for exclusion. In defence and security procurement, a tenderer may, under certain conditions, be excluded as a result of breaches of professional practice (eg, violation of legislation on export control), serious errors in professional practice (eg, by not having fulfilled its obligations regarding information security or security of supply in a previous contract) or if there is some form of evidence that shows that the tenderer is not as reliable as required in not risking Sweden's security.

There are some exceptions from the Defence and Security Procurement Act. One example is article 346 of the Treaty on the Functioning of the European Union, which gives EU member states the right to exempt certain defence procurements to protect essential national security interests. The Defence and Security Procurement Act also states that, for example, contracts awarded within a research and development cooperation programme between two or more EEA member states, aiming to develop new products, are exempt from procurement legislation.

Conduct

3 How are defence and security procurements typically conducted?

Defence and security procurements are conducted through the Defence Materiel Administration (FMV) and the armed forces conduct defence and security procurements. Since 1 January 2019, the armed forces can procure security and defence articles by themselves regarding storage, servicing and workshops, as well as for maintaining existing weapons systems. Other authorities also conduct defence and security procurements. However, the FMV is responsible for the majority of the defence and security procurements conducted in Sweden and is therefore the contracting organisation that will be mainly referred to throughout the chapter.

The contracting organisation can choose between several different methods based on various circumstances.

Selective procedure

During the selective procedure, all suppliers are welcome to show an interest in a procurement but only a select number of tenderers will be invited to submit a tender. The selection of the tenderers must be conducted according to the foundational principles of public procurements.

Negotiated procedure

A negotiated procedure without prior advertising means that the procuring organisation invites a selected number of tenderers to negotiate the tenders they have submitted, to adept the tenders to the requirements specified in the advertisement.

A negotiated procedure without prior advertising is accepted under certain circumstances, for example:

- when the procurement has failed and no tenders have been submitted;
- when what is to be procured, owing to certain reasons, can only be fulfilled by a certain supplier; and
- when it is absolutely necessary to award the contract.

Competitive dialogue

Competitive dialogue is used when procuring highly specialised types of goods and consultancy services, where the procurement cannot be conducted through the selective procedure or negotiated procedure. When competitive dialogue is used, information regarding the goods or service must be included in the advertisement of the procurement. The purpose of the dialogue is to identify and decide how the needs of the procuring organisation can best be met. Tenderers are requested to submit their final tenders when the dialogue is concluded.

Direct procurement

Direct procurement is most commonly used when the contractual value is below the set monetary limit. The limit for defence and security procurements is currently 1,142,723 Swedish kronor. The monetary limit is not limited to a specific contract, but to all contracts of the same kind procured during one financial year. Direct contracting can also be used if the contractual value exceeds the monetary limit. For direct procurement to be permitted in those cases, it is required that the criteria for using a negotiated procedure without prior announcement are met or that there are special reasons (eg, the opportunity to a very profitable contract or exceptional urgency).

Examining the tenders, award, contracting and review

When the time limit for submitting tenders has expired, the process is followed by an examination of tenders and the selection of a winner. The contracting organisation shall award the tenderer with the most financially beneficial tender. This should be calculated based on the best price-to-quality ratio, cost and price. All suppliers shall be informed about the award decision. After the award of the contract, the main rule is that the contract cannot be concluded for a period of at least the 10 following days, to enable time for review (the standstill period). After the standstill period, the contract can be concluded as long as the procurement is not under review. The General Administrative Court may review a procurement and the validity of a closed contract upon application by a tenderer claiming it has suffered or may suffer damage.

Protective security procurement

Contracting organisations that make certain types of procurements in connection with security sensitive activities must sign a protective security agreement with the tenderer, stating the requirements for protecting security that applies to the procurement.

The general idea within Swedish protective security is that security sensitive activities should have the same protection regardless of whether it is conducted by the authorities or private actors. If a procurement contains security classified information or a supplier is given access to certain security sensitive activities, the contracting organisation is responsible for ensuring that the tenderer or supplier has sufficient protective security. The contracting organisation must therefore set requirements for the same level of protective security for the tenderer or supplier as for its own activity. This applies to both the main supplier and subcontractors. The rules on protective security procurements are found in the Protective Security Act.

New and simplified rules for public procurement regarding the non-directive-controlled area

The government has proposed new public procurement rules from 1 February 2022. The proposals apply to defence and security procurement regarding the non-directive-controlled area, ie, procurements that Sweden may regulate itself since they are below the EU's threshold values, and entails new and simplified rules.

Proposed changes

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

A factor that will affect the defence and security procurement process is the ongoing review of the Swedish strategy regarding the supply of defence materiel. The review is a government inquiry that will present a strategy for the Swedish armed forces need for materiel and related research, technological development and services in peace, crisis, and war. The assignment includes clarifying the conditions for the supply of materiel, analysing the defence market and developing the government's relationship to the defence industry. The purpose of the strategy is to support the political decision-making and strategic decisions of relevant government agencies. The strategy will then be developed based on what conclusions have been drawn. The inquiry shall be finalised during the spring of 2022.

At present, the Swedish Defence Materiel Administration (FMV) applies the Swedish procurement rules in a way that is very closely linked to court practice, and based on that, FMV then acts towards the market. In other neighbouring countries, on the other hand, the authorities are looking more closely at defence policy tools in their defence industry strategies. These strategies express the political will and how the government is recommended to act in relation to the market. It is not unlikely that the Swedish inquiry will result in a strategy similar to the equivalents that exist in the other Nordic countries such as Denmark, Finland and Norway, focusing on a more long-term defence capability. Exactly how and to what extent the inquiry will affect the defence and security procurement process is not determined yet, but it can clearly be stated that it will be affected.

Information technology

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

There are no exceptions regarding information technology in the Swedish legislation.

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 Swedish legislation is a part of the harmonisation process within the European Union. The EU directives, which Sweden's national legislation on defence and security procurement is based on, were revised in accordance with the Agreement on Government Procurement (GPA) as the European Union is a member of the World Trade Organization (WTO). The individual EU member states are also WTO members in their own rights. Most defence and security procurements are thus conducted in accordance with the GPA but Sweden uses the national security exemption to procure within the areas of underwater warfare and combat aircraft, integrity-critical parts of the command area, such as sensors, telecommunications and cryptography.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

The choice of dispute resolution method is governed by the terms of the contract.

When it comes to procurements with the Defence Materiel Administration (FMV), the FMV's general terms and conditions provides that disputes regarding application and interpretation of the contract should be settled in the Stockholm District Court. For contracts that do not refer to the FMV's general terms and conditions, for example when it comes to large procurements, the most common dispute resolution method is arbitration in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

There is no clear definition of what is to be regarded as 'large procurements '. The concept is aimed at the nature of the contract rather than the contractual value. Factors that may indicate that it is a large procurement are, among other things, whether what is to be procured is of a sensitive nature, whether it concerns development and whether it is a significant price that is crucial.

The FMV has a long tradition of using arbitration as its main method of dispute resolution. When the FMV took over procurements from the Swedish armed forces in 2013, it continued to use arbitration and its cases were heard at Stockholm's district court. The Swedish armed forces have since regained responsibility for procurement, and they are keeping their old method for resolving disputes, that is, disputes are heard at Stockholm District Court.

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

The choice of dispute resolution method is governed by the terms of the contract.

The most common dispute resolution method for contracts with the FMV that do not refer to the FMV's general terms and conditions, for example when it comes to large procurements, is arbitration in accordance with the rules of the Arbitration Institute of the SCC.

There is no clear definition of what is to be regarded as 'large procurements'. The concept is aimed at the nature of the contract rather than the contractual value. Factors that may indicate that it is a large procurement are, among other things, whether what is to be procured is of a sensitive nature, whether it concerns development and whether it is a significant price that is crucial.

The arbitral tribunal is usually composed of three arbitrators unless parties in the individual case agree on a sole arbitrator, and the seat of arbitration shall be Stockholm, Sweden. If the arbitration tribunal consists of three arbitrators, the parties each choose one arbitrator and these arbitrators jointly select a chairperson. If there is to be a sole arbitrator to settle the dispute, the parties must agree that there should be a sole arbitrator and who it should be.

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?

According to the Sales of Goods Act, the contracting organisation, like any other counterparty, has to indemnify the supplier for direct losses arising from a breach of contract by the contracting organisation, provided that the direct losses are reasonably and foreseeably caused by the breach. This also applies to suppliers, which have to indemnify the contracting organisation for breaches caused by suppliers' actions.

The general terms and conditions of the Swedish Defence Materiel Administration (FMV) stipulate that the FMV or contractor only is held responsible for indirect losses, caused by grossly negligent.

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?

Generally, the Swedish Sales of Goods Act regulates the supplier's and the contracting organisation's respective rights to compensation and the amount of compensation. However, it will be decided what is expressed in the contract clauses. The limitations of a supplier's and the contracting organisation's liabilities vary depending on the nature of the contract. For smaller procurements, the general terms and conditions of the FMV are used, which provides that liability is limited to 5 million Swedish kronor and applies to both parties. For contracts that do not refer to the FMV's general terms and conditions, for example when it comes to larger procurements, an open-ended limitation of liability is standard practice. The FMV has traditionally only used open-ended liability limitations but is now willing to negotiate liability level caps in some cases.

There is no clear definition of what is to be regarded as 'smaller procurements' and 'larger procurements'. The concept is aimed at the nature of the contract rather than the procurement volume. Factors that may indicate that it is a smaller procurement are, among other things, whether what is to be procured is a standard product or service, whether no development is required, and whether it is not a significant price. Factors that may indicate that it is a large procurement are, among other things, whether what is to be procured is of a sensitive nature, whether it concerns development and whether it is a significant price that is crucial.

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 from the contracting organisation is generally non-existent and the contracts are therefore financially secure.

The Swedish armed forces has an investment plan and materiel plan based on the needs that exist. The long-term investment plan is approved by the Swedish parliament. The armed forces have thereby set aside funds for the procurements to be made and the procurements that of the Swedish Defence Materiel Administration conducts are thus financed.

Parent guarantee

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

The main rule is that tenderers have a far-reaching right to invoke the capacity of other suppliers for the execution of the contract. A tenderer has the opportunity to invoke the financial, technical and professional capacity of other companies. If the tenderer relies on the capacity of other entities, the tenderer shall supply a commitment by those entities, or in some other way show that it will have at its disposal the necessary resources to deliver under the contract. Such a commitment can be proved, for example, by providing a parent guarantee from the company whose capacity is invoked.

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, but some clauses are almost always included. For example, the Defence Materiel Administration (FMV) always requires that Swedish law is applicable. The FMV's right to cancel a contract due to an anticipated breach of contract is also always included. Further, the FMV has the right to fully or partly assign contracts to another Swedish government agency.

It can also be stated that FMV is working more and more with security of supply and, in the future, more and more demands will be placed on suppliers to be able to deliver even in times of crisis and war. These requirements are not mandatory to include, and they will not be read into the contract if they have not been included, but it is generally mandatory for FMV to set requirements about them in the procurement.

Cost allocation

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

The cost allocation looks different depending on whether the procurement is a competitive procurement or not. In competitive procurement, it is possible to compare different offers and thereby obtain what is a reasonable price for the purchase.

If it is not a competitive procurement, other rules apply. The contracting organisation must be able to justify the contract, as the contracting organisation is subject to the Swedish National Audit Office.

It also looks different depending on whether it is a long-term or a temporary business relationship. In long-term business relationships, an underlying business control is used, which is often based on different hourly rates and mark-ups.

In the case of a first-time supplier, it can generally be said that the contracting organisation usually accepts that the supplier charges fees in the form of hourly rates based on the cost base in the company, calculated on sales. The contracting organisation also considers that some costs are shared expenses and others are project-specific. Sometimes the activity based costing calculation methodology is used to achieve a correct and fair cost distribution. A guideline is that the contracting organisation preferably only want to pay for project-specific costs.

Disclosures

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

If it is not a competitive procurement, the contracting organisation's attitude is usually that they should receive as much information as the supplier itself possesses on the current cost and pricing. If the supplier has built up its cost and pricing based on different assumptions about the future, the contracting organisation wants to take part in the assumptions that the supplier has made. Based on this, the contracting organisation assesses whether they think it is reasonable or not. To analyse this, the contracting organisation may, in connection with the invitation to submit a tender, request a financial, technical or quality audit or both.

Audits

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

If it is not a competitive procurement it is not possible to compare different offers and thus arrive at what is a reasonable value for the purchase, and therefore the contracting organisation requests to conduct audits. The audit is conducted as a measure for the contracting organisation to be able to defend the purchase that the contracting organisation has made as the contracting organisation is subject to the Swedish National Audit Office.

During an audit, the contracting organisation wants to take part in how the supplier has arrived at the pricing and costs that are presented in the quotation. The audit may involve financial, technical or quality audits or both. The procurement documents must state the type of audit required. The contracting organisation may usually choose to carry out the audit itself or outsource it to a contracted third party, ie, a chartered accountant and their assistants.

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 rights to intellectual property depend on the terms of the contract. However, the general terms and conditions of the Swedish Defence Materiel Administration contain conditions that, among others, give the contracting organisation an unlimited right to, for its own needs and the needs of other Swedish government bodies within the sphere of activities of the Ministry of Defence, freely use and have others use data emanating from the supplier or its subcontractors when carrying out 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?

Not applicable.

Forming legal entities

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

Limited companies

The process for forming a legal person in the case of limited companies is regulated by the Companies Act.

A limited company is formed by one or more natural or legal persons. To start a limited company:

- decide on start-up and establish a memorandum of association and articles of association;
- subscribe and pay for shares;
- obtain a bank certificate;
- sign the memorandum of association;
- report and pay the fee to the Swedish Companies Registration Office; and
- report beneficial ownership within four weeks.

A public limited company requires a share capital of at least 500,000 Swedish kronor and a private limited company requires share capital of at least 25,000 Swedish kronor.

Other company forms

There are also other company forms in Sweden (eg, partnership, limited partnership and non-registered partnership) but then unlimited personal liability is required.

A partnership exists if two or more, natural or legal persons, have agreed to jointly engage in business activities, in a company and the company has been registered in the Swedish Companies Registration Office trade register. A limited partnership is a partnership in which one or more of the shareholders have limited liability. The other shareholders in the limited partnership have unlimited liability. Both of these company forms are legal persons.

If two or more natural or legal persons agree to work together to achieve a common goal, but do not intend to form a limited company, partnership or limited partnership, a non-registered partnership will be formed. In a non-registered partnership, shareholders can be registered in the Swedish Companies Registration Office trade register. The members are registered with their names, but no company name or organisation number is registered for the business. Agreements concluded become binding on the partners who have participated in the agreement. This company form is not a legal person.

The above provisions are governed by the Partnership and Non-registered Partnership Act.

Joint ventures

A joint venture means that two or more companies merge through agreements to run a business together. The joint venture parties draw up contracts where agreements are made on how to act in different situations.

Joint ventures can be operated in various civil law forms such as partnership, limited partnership and non-registered partnership. The most common form of a joint venture is when the parties start a new company together and share the decision-making, risks and possible profits. A joint venture can also be an alliance between two companies where extensive agreements govern how the cooperation should work.

Licensing

To be able to conduct business in the defence and security sector, a licence from the Authority for Inspection of Strategic Products, under certain conditions, is required. The license for a Swedish limited company or partnership may be combined with conditions that only a certain proportion of the shares, directly or indirectly, may be owned by foreign legal entities.

A licence for a limited company may also be combined with conditions that board members and deputies for them, as well as the executive managing director of the company, must be Swedish citizens and residents of Sweden.

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?

Swedish jurisdiction recognises the principle of public access to public records. The principle gives both Swedish citizens and foreigners the right to apply for copies of government records that are not classified. Applications are handed into the authority of interest and a confidentiality assessment is conducted by the authority. The same rules comply with past contracts**.**

Thus, the fundamental idea is that past contracts are public and can be disclosed. In exceptional cases, certain information may be classified. This applies, for example, if there is information that could harm the company or the contracting organisation if it leaks. In such situations, only that specific information may be classified, not the entire document.

Supply chain management

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

Before a contract is awarded, the contracting organisation must check the eligibility of the suppliers who have not been excluded. Swedish legislation demands that a supplier that is found guilty of organised crime, bribery, fraud, money laundering, terrorist financing, terrorist offences and human trafficking must be excluded from procurements. Exclusion may also take place in some other cases. After exclusion, the qualification of suppliers takes place. This means that the contracting organisation examines whether the tenderers meet the qualification requirements that have been set in the procurement. The contracting authority examines the tenderer's eligibility in terms of authorisation to pursue professional activities, certain financial standing and certain technical and professional capacity. The requirements are voluntary, which means that there are no demands for a contracting organisation to impose qualification requirements on the supplier.

In Sweden, there is no specific procurement legislation regarding supply chain management. However, the contracting organisation may set out special conditions regarding the security of supply in the procurement.

There is no specific procurement legislation regarding anti-counterfeit parts. The regulation most applicable is the one concerning intellectual property. Clauses regarding intellectual property may also be featured in the contracts.

INTERNATIONAL TRADE RULES

Export controls

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

There are regulations regarding manufacturing and supplying military equipment. These regulations are found in the Military Equipment Act and the Military Equipment Regulation.

The Inspectorate of Strategic Products (ISP) administrates control and compliance of military equipment and dual-use products. The ISP has provided the following guidelines regarding export in military equipment:

A licence to export military equipment, or other cooperation arrangements with someone abroad regarding military equipment, should be permitted only if such exports or cooperation is:

- *considered necessary to meet Swedish defence needs;*
- *otherwise, desirable in terms of security policy;*
- *not in conflict with Sweden's international obligations; and*
- *not in conflict with the principles and objectives of Swedish foreign policy.*

Another ISP licence is required to export dual-use products. Dual-use products are products that can be used both civilian and military. In practice, this means products that can be used to manufacture nuclear, biological or chemical weapons (weapons of mass destruction). The regulations are found in the Dual-use Products Act and the Dual-use Products Regulation.

The ISP also handles targeted sanctions, including trade restrictions. These sanctions may be based on a decision from the United Nations (UN), the European Union or the Organization for Security and Co-operation in Europe (OSCE) to take collective sanction measures. In addition, Sweden also adheres to the 2008 EU Common Position on arms export controls and is a signatory of the UN Arms Trade Treaty.

In 2018, export controls on military equipment were tightened. This was the result of a public inquiry that has sharpened Sweden's national political guidelines, which have been given a stricter view of exports of military equipment to non-democratic states. The tightened legislation has, for example, led to a democracy criterion being introduced in the Military Equipment Act.

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 restrictions in Swedish legislation regarding foreign suppliers. On the contrary, the legislation includes a non-discrimination principle and a principle of equal treatment. However, Sweden has recognised essential security interests within the areas of underwater warfare and combat aircraft, integrity critical parts of the command area, such as sensors, telecommunications and cryptography, which allows for exceptions from the procurement-law principles in these areas.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

Generally, Sweden is a promoter of free trade and has approached trade positively and without restrictions regarding a supplier's nationality. However, there are rules regarding cooperation within the European Union. In the procurement legislation, there are regulations regarding mutual recognition of certificates that are issued in another member state of the European Union or another country within the European Economic Area. There are also some generally issued permissions to export defence and security articles within the European Union, where the exporting entity does not need to apply for permission from the ISP.

In general, Sweden is interested in international cooperation but rarely enters into a development project without another funding state. On these occasions, there are some countries that Sweden prefers to cooperate with, such as Finland. In December 2020, the Swedish government decided to authorise the Defence Materiel Administration to negotiate and enter into international agreements with Finland regarding common procurement of materiel and services etc. The objective of the Swedish government is to procure larger quantities of materiel and services together with Finland and thereby, among, other things create cost efficiency.

Sweden also has intergovernmental cooperation with, for example, the United States. As Sweden has such an agreement with the United States, it is written in the US Defense Federal Acquisition Regulation Supplement (DFARS) that Sweden is a 'qualifying country'. In practice, this means that Sweden tries to remove all trade barriers between Sweden and the United States and instead focus on defence capability. In DFARS 206, it is stated that the US Army and US Department of Defense do not have to meet the requirements of the Buy American Act and may therefore purchase directly from Sweden. When it comes to Sweden buying defence and security articles from the United States, this can be done through a Foreign Military Sales (FMS) acquisition. This method has had a positive response from the Swedish government and has been used on several occasions.

Sanctions

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

Sweden adheres to the following boycotts, embargoes and other trade sanctions provided by the UN, European Union or the OSCE regarding defence and security articles.

UN weapons embargoes

The UN Security Council has decided on a weapons embargo against the following countries:

- Afghanistan (listed entities);
- the Central African Republic;
- the Democratic Republic of the Congo;
- Iraq;
- North Korea;
- Yemen;
- Lebanon;
- Libya;
- Somalia;
- Sudan; and
- South Sudan

EU weapons embargoes

The European Union implements all weapons embargoes decided by the UN Security Council. In addition, the European Union has independently decided on weapons embargoes, and for some countries, bans on equipment for internal repression. The decisions apply to the following countries.

Legally binding

- Belarus (including equipment used for internal repression);
- Myanmar (including equipment used for internal repression);
- Iran (including equipment used for internal repression);
- Libya (including equipment used for internal repression);
- Russia;
- Sudan;
- South Sudan;
- Venezuela (including equipment used for internal repression); and
- Zimbabwe (including equipment used for internal repression).

Politically binding

- China (Council declaration).

Other agreements

- Egypt (including equipment used for internal repression) (Council conclusions); and
- Syria (Council declaration)

Sweden is also party to the OSCE weapon embargo on Nagorno-Karabakh, which affects both Armenia and Azerbaijan.

Trade offsets

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

The main concern is that trade offset is to be abolished within the European Union as it is not considered to be compatible with the foundational purposes of the European Union. Within the European Union, there is only one exception in which trade offset may be used, which is when an offset is required to protect a member states' substantial security. Outside the European Union and the European Economic Area, a trade offset is still an available option. However, Sweden still does not use trade offset as a requirement for procuring articles.

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 general regulations regarding when and how former government employees may take up appointments in the private sector and vice versa. However, a government inquiry has been looking into the issue of 'revolving doors' on a generic basis between the public and private sectors. As a result, the Act on Restrictions on the Transfer of Ministers and State Secretaries to Other than State Activities, has been introduced. This legislation introduced a 'deferred period' and a 'subject restriction'. The 'deferred period' means that the minister or state secretary may not start a new assignment, employment or establish economic activity for up to 12 months after being terminated from their public sector position. 'Subject restriction' means that the individual beginning a new assignment, employment or establish economic activity may not deal with specified issues for a period of up to 12 months after they depart from the public sector.

If a minister or secretary of state wishes to start a new assignment, employment or establish economic activity within the 'deferred period', a special committee must consider the matter.

Addressing corruption

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

The Security and Defence Procurement Act provides a mandatory rule that states the following. If a tenderer is found guilty of corruption, it must be excluded from the procurement. If the tenderer is a legal person, the tenderer is considered guilty of corruption if a representative of the tenderer is found guilty.

Both the passive and the active sides of corruption are prohibited. This means it is a criminal offence both to receive and to offer a bribe. Bribery can be committed by a tenderer or supplier or an employee of the tenderer or supplier. The crime is committed if someone, for itself or someone else, receives, accepts a promise of or requests an improper benefit for the performance of their employment or assignment. Criminality also applies if the act was committed before the employee or tenderer or supplier received the position and after it has ceased. The offering of a bribe is committed if someone leaves, promises, or offers an improper benefit to an employee or tenderer or supplier for the performance of their employment or assignment. Corruption is considered a crime according to the Swedish Penal Code.

The Defence Materiel Administration (FMV) provides an extensive code of ethics concerning bribery to its employees. This consist of guidelines concerning tenderer or supplier offering to pay for meals and travel expenses or provide loans, etc.

The FMV general terms and conditions require compliance with anti-corruption regulations and maintenance of ethical standards from their suppliers. FMV has corresponding requirements for itself (eg, through policies and FMV's status as a government agency).

Lobbyists

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

There are no requirements regarding registration for lobbyists or commercial agents. Agents who sell defence and security articles to the Swedish government or suppliers are under certain circumstances required to have a manufacturing licence and a brokering licence from the Inspectorate of Strategic Products.

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 the Swedish jurisdiction.

AVIATION

Conversion of aircraft

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

All aircraft in Sweden require certification that proves that the aircraft is safe to use. Aircraft are typically only certified for either civil or military use, but there are no restrictions regarding running the two certification processes parallel to each other and can be used for both civil and military use. To convert an aircraft from military to civil use, or vice versa, a new certification process is needed if the aircraft does not have both certificates. There are also two different registers for the two types of aircraft.

Drones

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

There are no specific rules regarding the manufacture or trade of unmanned aircraft systems or drones. These products are subject to the same rules as all other controlled products. The Inspectorate of Strategic Products issues their licences according to the specific types of articles that can be manufactured or supplied.

MISCELLANEOUS

Employment law

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

Posted workers are guaranteed a certain level of protection, in particular through the Posting of Workers Act. The law applies in Sweden to all posted workers, regardless of nationality and the country from which they were posted.

Posting means that an employer sends a worker to another country to work there for a limited period of time. The employer must provide services across borders, and there must be a recipient of the services.

Posted workers have certain rights and protections under Swedish law while working in Sweden. The regulations state a minimum permitted level that must be guaranteed by the employer.

In particular, the following Swedish laws apply:

- the Work Environment Act;
- the Working Hours Act;
- the Annual Leave Act; and
- the Discrimination Act.

Examples of minimum conditions are that working hours are normally 40 hours per week and that one may not be discriminated against due to gender, ethnicity or age etc. Harassment or sexual harassment is not allowed.

There is no law on a minimum wage, but foreign employers can sign collective agreements that, among other things, regulate such.

The Swedish Work Environment Authority is the contact authority for postings to Sweden. They provide guidance on the laws that apply and provide collective agreements.

In all situations, the employer is responsible for notifying the posting to the Swedish Work Environment Authority and for ensuring that employees have their rights.

The Defence and Security Procurement Act does not have provisions on labour-law conditions. However, there are no obstacles to setting labour-law conditions in defence and security procurement. Which provisions shall apply if the work is carried out in countries where Swedish law is not applicable thus depends on what is stated in the contract.

Defence contract rules

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

Suppliers are bound by the terms and conditions of the contract. There are no mandatory clauses that must be included. It can be stated that it might be difficult for a contracting organisation to change the clauses in a concluded defence and security contract, due to the absence of amendment provisions for contracts in the Defence and Security Procurement Act. Thus, it is crucial what is actually stated in the contract, regarding which specific rules the suppliers are bound by in defence and security contracts.

One example that may be included specifically in defence and security procured contracts is provisions regarding security of supply. Another example is the supplier's responsibility to hold valid; and, for the line of business required, licenses for production, operation, sales, transport and everything that is required to deliver under the contract in accordance with all applicable laws and regulations. In defence and security contracts, this means that the supplier, when applicable, is required to have the necessary licenses from the Authority for Inspection of Strategic Products (ISP).

In the case of defence and security contracts, it is also common for the supplier to be bound by a protective security agreement.

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

In defence and security contracts it is crucial that what is actually stated in the contract regarding specific rules is what the suppliers are bound by. According to Swedish contract-law principles, contracts must be kept, and suppliers are thus bound by the content of the agreement regardless of whether the supplier performs its work in or outside of Swedish 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?

A contracting organisation may, under certain conditions, require a tenderer to provide information on training and professional qualifications, or equivalent information concerning managers in the company to prove the company's technical capacity. These requirements must be stated in the advertisement for the procurement.

Further, Swedish legislation requires that a tenderer found guilty of organised crime, bribery, fraud, money laundering, terrorist financing, terrorist offences and human trafficking must be excluded from procurements. The same rules apply if the person convicted of the crime is a representative of the tenderer. A contracting organisation may request evidence of these grounds for exclusion from a representative of the supplier. Evidence is provided in the form of a statement on oath of one's honour.

Protective security procurement requires more personal information about directors, officers or employees, as in connection with protective security procurement; security checks, personal investigations and register checks, etc, must be carried out.

Licensing requirements

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

There is no specific registration, licencing or requirement to operate in the defence and security sector in Sweden. However, two licences are required from the ISP to be able to manufacture and furnish military equipment: a manufacturing licence and a brokering licence.

Environmental legislation

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

Swedish defence-sector authorities have jointly developed 'The Defence Sector's Criteria Document – Chemical Substances, Chemical Products and Articles'. In this document, the supplier can find environmental requirements and how they may apply to procurement.

For some contracts, the Defence Materiel Administration (FMV) requires that the supplier establish an environmental plan describing how environmental measures will be taken during a project. The plan describes how environmental work or management will be applied in the supplier's commitment to the FMV, and what measures will be taken to ensure and confirm that legal requirements, internal requirements and the FMV's environmental requirements are met.

For some contracts, the FMV will require that a supplier produces a 'recycling manual' for the system in question. This manual aims to provide all the information needed to dispose of the system in a way that minimises the effects on people's health and the environment.

In the implementation of projects and the development of products on behalf of the FMV, environmental legislation, such as the Swedish Environmental Code and EU Regulation (EC) No. 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals, is followed.

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

The industries operating in Sweden play a large role in meeting Swedish environmental targets, and the targets set up by the European Union and the United Nations. Some specific rules and regulations must be

complied with to run a business in Sweden. These rules can be found in the Environmental Code. The legislation consists of both general environmental goals and more specific rules regarding conducting business that possibly harms the environment. The authorities conducting controls and making decisions according to the Environmental Code are the government, county administrations, municipalities, and regional environmental courts, the Environmental Court of Appeal and the Supreme Court of Sweden.

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

'Green' solutions do not automatically have an advantage in procurements. However, the Swedish National Agency for Public Procurement emphasises that procurement is an important instrument for achieving socio-political aims, such as environmental goals. A contracting organisation has a great opportunity to set far-reaching requirements for what is to be procured.

Due to these circumstances, the FMV may set up extensive environmental requirements for a procurement, which the supplier must be able to meet. The FMV works to set well-balanced and relevant environmental requirements for its suppliers to reduce the authority's indirect environmental impact.

UPDATE AND TRENDS

Key developments of the past year

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

There have been several developments over the past year, and it can be stated that many of them are symptoms and effects of the security policy development in the world. For example, Sweden's work to develop a new materiel supply strategy has progressed during the past year. The inquiry shall be finalised during the spring of 2022 and will affect the defence and security procurement process.

During the summer of 2021, the European Defence Fund (EDF) was established by the European Commission. This measure is made to streamline the market and create systems. The idea is to create EU market access that EU companies can take part in, maintain defence capability within the European Union and reduce duplication. It has so far been challenging for Sweden, and other countries, to use the EDF to its full potential. However, the EDF provides good opportunities to develop and research with other countries that, in the long run, can be decisive for Sweden's security policy choices. How Sweden will be able to use the EDF may also depend on the results of the Material Supply Investigation.

A clear overarching trend is increasing cyberthreats and the importance of protection against cyberattacks and other security threats. This means that there is more focus on protective security procurements. In general, the trend is also that potential suppliers will have to invest in their own cybersecurity to come into question for participation in future defence and security procurements.

Further, the Swedish Protective Security Act of 2019 has been updated to give the Swedish authorities the tools to investigate and approve foreign direct investments in Sweden, which have up until now been principally unregulated.

Security of supply remains an area of concern for the procuring organisation and firm commitments on the security of supply will likely be a key factor for winning coming defence and security contracts.

The Swedish armed forces are committed to gender equality and sustainability, which will be emphasised in future procurements, and are already urging the defence and security industry to be proactive and design their products with a gender equality and sustainability perspective today, rather than wait for the authorities to come up with such requirements. Defence and security industries that embrace gender equality and sustainability are very likely to have an advantage in coming Swedish defence and security procurements.

Further, Sweden has, in response to heightened regional instability, increased its defence spending significantly and will continue to increase its defence spending for the foreseeable future. Hence, Swedish procuring authorities are rapidly ramping up their procurement capabilities to invest in new defence materiel and services. Time is of the essence and delivery on time and at agreed cost will be a deciding factor for successful business in Sweden.

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LEGAL FRAMEWORK

Relevant legislation

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

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

The Single Source Contract Regulations 2014 (SSCRs) apply when the Ministry of Defence (MoD) awards qualifying defence contracts with a value of over £5 million without any competition. They are intended to ensure value for money is achieved even in the absence of 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 (£426,955 from 1 January 2022) or £4,733,252 for works (£5,336,937 from 1 January 2022) 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 Find a Tender (which has replaced the Official Journal of the European Union in the United Kingdom for procurements launched after 31 December 2020) as a procurement under the DSPCR. The MoD also uses the Defence Sourcing Portal to advertise its contract opportunities.

The key 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 (£138,760 from 1 January 2022) procured by central government departments (or £189,330 for sub-central authorities (£213,477 from 1 January 2022) 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 Find a Tender. Most procurement procedures involve a pre-qualification process, as part of which bidders must demonstrate their financial stability and technical capability, including experience in similar contracts. The way that the procurement proceeds depends on whether the authority has chosen a procedure that permits them to discuss the contract and requirements with the bidders (negotiated procedure with an advert, the competitive dialogue procedure or, under the civil rules only, innovation partnership) or not (restricted procedure or, under the civil rules only, the open procedure). It is increasingly common for negotiations on a contract to be limited, with many of the contract terms being identified as non-negotiable.

The evaluation process is undertaken on the basis of transparent award criteria and weightings, which are provided to bidders in advance 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 UK government ran a consultation on changes to the public procurement regulations (Green Paper: Transforming Public Procurement), which closed in March 2021. The Green Paper proposes a single, uniform procurement framework supplemented with sector-specific sections where different rules are required for effective operation or to protect the national interest (eg, in the defence sector). It was announced in the Queen's Speech in May 2021 that legislation to reform

public procurement would be brought forward when Parliamentary time allows but the UK government has stated that new legislation is unlikely to come into force until 2023 at the earliest.

Information technology

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

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

Relevant treaties

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

The majority of defence and security procurements are conducted in accordance with the Government Procurement Agreement or European Union treaties, but a minority of contracts are still awarded in the context of national security and other exemptions. The MoD published a five-year review of the application of the DSPCR in December 2016. It shows that 25 per cent of its contracts were considered exempt from the normal requirement to compete openly, mostly in reliance on the national security exemption contained in article 346 of the Treaty on the Functioning of the European Union (the terms of which have been imported into the DSPCR through amendments to the regulations), 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 MoD defence condition (DEFCON) 530, which provides for disputes to be resolved by way of confidential arbitration in accordance with the Arbitration Act 1996.

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

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

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

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

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

Indemnification

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

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

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

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

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

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

Some DEFCONs contain indemnities relating to these issues.

Limits on liability

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

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

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

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 Defence Form (DEFFORM) 24.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

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

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

Cost allocation

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

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

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

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

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

Disclosures

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

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

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

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

IP rights

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

The MoD's policy on the ownership of intellectual property (IP) arising under its contracts is that IP will normally vest with the contractor generating the IP, in exchange for which the MoD will expect the right to disclose, 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 a number of them with a single IP DEFCON (although 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.

Economic zones

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

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

Forming legal entities

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

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

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

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

Access to government records

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

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

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

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

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

Supply chain management

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

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

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

INTERNATIONAL TRADE RULES

Export controls

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

The Trade etc in Dual-Use Items and Firearms etc (Amendment) (EU Exit) Regulations 2019 retains and transposes the EU Dual-Use Regulation (EC) No. 428/2009 into national UK legislation following the end of the transition period on 1 January 2021. 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). 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 Defence and Security Public Contracts Regulations 2011 (DSPCR) applies, there is no scope for domestic preferences. However, where article 346 of the Treaty on the Functioning of the European Union has been relied upon to disapply the DSPCR, contracts were commonly awarded to national suppliers.

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

Favourable treatment

24 | Are certain treaty partners treated more favourably?

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

Sanctions

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

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

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

Trade offsets

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

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

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

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

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

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

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

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.

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 United Kingdom is based on free and open competition designed to achieve value for money for the taxpayer, with a high level of transparency of the procurement process and tender terms. Part of the objective is to discourage the perceived benefit of using intermediaries to liaise with government procurement officials and thereby put a given supplier at an advantage. As a result, it is uncommon to use success-fee-based agents and intermediaries in the way that happens in certain other markets, although some suppliers do use external assistance to help them understand the procurement process. However, there is no general prohibition on the use of agents or their levels of remuneration, although individual tenders may include specific disclosure requirements. Registration may be required where the agent's activity falls within the requirements described earlier.

A supplier who appoints an agent within the terms of the Commercial Agents' (Council Directive) Regulations 1993 to develop its presence in a given market may be obliged to pay additional compensation on termination. Otherwise, the 1993 Regulations do not prescribe 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 the United Kingdom unless they comply with the airworthiness regime established pursuant to Regulation (EU) 2018/1139 and now followed in the United Kingdom as retained EU law. Regulation (EU) 2018/1139 ordinarily requires a certification process in accordance with specifications originally promulgated by the European Union Aviation Safety Agency (EASA). Annex I to Regulation (EU) 2018/1139 permits EU member states to approve ex-military aircraft unless EASA has adopted a design standard for the type in question. Most military aircraft are designed in accordance with a certification basis that is very different from the civil requirements, so the process of civil certification is often prohibitive. In that event, the Civil Aviation Authority may issue a 'permit to fly' if satisfied that the aircraft is fit to fly with regard to its overall design, construction and maintenance. Ordinarily, such aircraft are unable to conduct commercial air transport operations or to fly outside the United Kingdom. Details governing operations are contained in Civil Aviation Publication 632 and maintenance standards in British Civil Airworthiness Requirements Chapters A8-23 and A8-25, all available from the Civil Aviation Authority.

The UK Military Aviation Authority regulates the certification and maintenance of military aircraft. Since 2010, military processes have been more closely based on the civil airworthiness philosophy than previously, but this is documented and administered separately from the civil process. Accordingly, a similar process is necessary if someone wishes to convert a civilian aircraft for military purposes, whereby the original certification 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 gave EASA greater control over the manufacture and operation of light unmanned aircraft systems (UAS). Until then, EASA regulation over UAS had been limited to those over 150 kilograms. Those under 150 kilograms were subject to regulation by EU member states, including the United Kingdom. In June 2019, under powers contained in the Basic Regulation, the European Commission adopted implementing and delegated regulations for design, production, operation and maintenance of UAS. These regulations disapply the normal provisions on certification and the role of EASA in the case of certain UAS.

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

In the United Kingdom, most requirements of the Air Navigation Order are disapplied for UAS operated within the open or specific categories. The United Kingdom had already introduced registration and competency requirements in a manner designed to comply with the anticipated EU regulations.

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

MISCELLANEOUS

Employment law

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

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

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

Defence contract rules

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

The answers above provide the detail of the laws, regulations and policies applicable to the Ministry of Defence (MoD) and

defence contractors, most notably the Defence and Security Public Contracts Regulations 2011 (DSPCR) and the Single Source Contract Regulations 2014.

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

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

Personal information

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

Companies will be asked to provide information about their directors and certain other employees as part of the pre-qualification questionnaire process, and will usually be required to sign a 'Statement Relating to Good Standing' certifying that directors and certain other personnel have not been convicted of 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 no specific licensing or registration requirements to operate in the defence and security sector in the United Kingdom.

The MoD may impose security requirements, but this is done by treating projects on a case-by-case basis and stipulating 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. For contracts that require a contractor to hold government information classified at 'secret' level or above, the contractor may be required to obtain a facility security clearance, currently known as a 'List X' clearance.

Environmental legislation

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

Contractors producing or supplying goods and services in, or importing them into, the United Kingdom will face different environmental legislation depending on their operations, product or service. Contractors could face regulations encompassing, inter alia, air emissions, water discharges, water pollution, noise and waste disposal, 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. In addition, from April 2022, the largest UK-listed companies and private companies above a certain threshold in terms of numbers of employees and financial turnover will be required to report on climate-related risks and opportunities under the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2021. Finally, in some circumstances, there are exemptions, derogations or disapplications from environmental legislation for defence and military operations.

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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 the EU Emissions Trading System allowances. Finally, companies may face individual targets (including reducing waste, chemical spills and water consumption) through their own environmental management system or corporate reporting initiatives.

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

The UK government has mandatory and best practice government buying standards, and a greening government policy that may be required of applicants to public tenders. The government buying standards mostly look to reduce energy, water use and waste when dealing with contracts for transport, textiles and electrical goods, among other things. Under the DSPCR, only environmental issues relevant to the contract itself can be taken into account – not the supplier's wider efforts. UK government policy requires social value to be evaluated

in all central government procurements, with a minimum 10 per cent weighting of the total score at the invitation-to-tender stage. One of the themes listed in the government social value model is 'fighting climate change', particularly activities that deliver additional environmental benefits in the performance of the contract (including working towards net-zero greenhouse gas emissions) and influence staff, suppliers, customers and communities through the delivery of the contract to support environmental protection and improvement. MoD policy lists 'fighting climate change' as one of three priority social value themes most relevant for defence. Social value is still a relatively new requirement in procurements – and, in our experience, green solutions do not tend to gain any significant advantage; 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 and the potential divergence between UK and EU legislation that is now possible is likely to have a far-reaching impact on many of the topics covered in this chapter – particularly procurement, labour, trade and export controls, aviation and environmental. The Single Source Contract Regulations 2014 (SSCRs) also remain a topic of interest and the Single Source Regulations Office has recently made certain recommendations for changes to the legislative framework that will be considered by the Secretary of State for Defence and are likely to lead to some changes to the SSCRs over the coming year.

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Thank you

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