

**SSRO**

Single Source  
Regulations Office

**Guidance on requiring the payment  
of referral-related costs**

Consultation draft

7 May 2021

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# 1. Introduction

- 1.1 The Single Source Regulations Office (SSRO) is an executive non-departmental public body, sponsored by the Ministry of Defence (MOD). It plays a key role in supporting the regulatory framework for single source defence contracts established by Part 2 of the Defence Reform Act 2014 (the Act) and the Single Source Contract Regulations 2014 (the Regulations). The regulatory framework specifies how contracts that meet the requirements for being qualifying defence contracts (QDCs) or qualifying sub-contracts (QSCs) must be priced and requires transparency about those contracts and the contractors who hold them.
- 1.2 The SSRO may be asked to give an opinion or make a determination on matters related to the regulatory framework in circumstances set out in the Act and Regulations. Separate from any powers provided under the Act that permit the SSRO to determine an adjustment to the price of a qualifying contract in some cases, Section 35(4) of the Act provides that the SSRO may, when giving an opinion or making a determination on any matter referred to it under the Act, require the payment by one party to another of such costs as it considers appropriate.
- 1.3 The SSRO expects that in most referrals there should be no need for it to require the payment of referral-related costs by one party to another. Our guidance establishes the general principle that the parties to a referral should bear their own referral-related costs. The parties to a referral may, however, agree between them that one party can recover some, or all, of their referral-related costs from the other. Exceptionally, either party to a referral may ask the SSRO to require the other party to pay some amount of their referral-related costs.
- 1.4 This document provides guidance on the approach the SSRO will follow when considering, upon request, whether to require the payment of costs by one party to another when giving an opinion or making a determination. It covers:
  - a. the regulatory framework and role of the SSRO;
  - b. how the SSRO will exercise its power under section 35(4);
  - c. when the SSRO may require the payment of costs and the factors it will consider in deciding if a payment is needed;
  - d. the costs the SSRO may require to be paid; and
  - e. the process to be followed by the SSRO and the relevant parties.
- 1.5 The guidance applies to all referrals accepted by the SSRO from 1 November 2021.
- 1.6 The SSRO has published [separate guidance on its website describing the procedures for making referrals to the SSRO](#) and by which it will consider such referrals. The procedures described in this document should be considered alongside the procedures for making and considering referrals.
- 1.7 As with its other statutory functions, in exercising its power under section 35(4) of the Act, the SSRO aims to ensure that good value for money is obtained for the UK taxpayer in MOD expenditure on QDCs and that single source suppliers are paid a fair and reasonable price under those contracts. The policy and procedures for requiring the payment of referral-related costs support the achievement of these aims.

- 1.8 The policy and procedures described in this document reflect the SSRO's practice at the date of publication. They may be revised from time to time to reflect changes in the law, good practice or learning obtained from their application. The SSRO may depart from the policy and procedures as it considers necessary or appropriate.
- 1.9 Questions related to the policy and procedures should be raised with the SSRO via [referrals@ssro.gov.uk](mailto:referrals@ssro.gov.uk) or 020 3771 4785.

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## 2. How decisions will be made

- 2.1 This guidance is concerned with the SSRO's power to require the payment of an amount of costs by one party to another when giving an opinion or making a determination. The decision whether to require the payment of costs in any referral shall be made by the Referral Committee convened to give the opinion or make the determination.
- 2.2 The SSRO appoints a three-person Referral Committee to give an opinion or make a determination on a case-by-case basis, in accordance with the Act and the SSRO's [Corporate Governance Framework](#). At least one member of the Committee will be independent of the SSRO, being neither a Board member nor an employee.<sup>1</sup> Potential conflicts of interest are considered before appointing the Committee.
- 2.3 The Referral Committee will be supported by a case team established for each opinion or determination (the Case Team). The parties to a referral will be provided with the contact details for the Case Team to aid communication with the SSRO during the referral process, including on matters related to any requirement to pay costs.
- 2.4 The SSRO's decision on payment of costs will be based on available evidence, including that provided by the parties to the referral. The SSRO will treat all commercially sensitive information appropriately and has published a [statement on how it handles such information](#).
- 2.5 The SSRO will comply with the requirements of the Act and the policy and procedures set out in this document when deciding whether to require the payment of any costs. In doing so, it will also have regard to other public law requirements, including procedural fairness.
- 2.6 If a party to a referral feels that the SSRO is acting unfairly in determining a requirement to pay costs or has not complied with a legal requirement or this guidance, they should raise their concerns with the Case Team at the earliest opportunity. Such concerns must be raised prior to the SSRO concluding its decision on the referral. The SSRO will deal promptly with any such concerns raised.
- 2.7 A party who is dissatisfied with the SSRO's response to an initial concern about requiring the payment of costs may raise a formal complaint with the SSRO in accordance with its [complaints policy](#). The SSRO aims to resolve all complaints within 20 working days of receipt. Where a complaint regarding a requirement to pay costs needs a quicker conclusion, we will set out an appropriate timeframe for dealing with the complaint.

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<sup>1</sup> A Referral Committee is appointed in accordance with the terms of reference set out in the [SSRO Corporate Governance Framework](#). A profile of both independent members and non-Executive Members from whom a Referral Committee may be drawn is available on the SSRO website.

## 3. When we may require the payment of costs

### Referrals in which we may require costs to be paid

- 3.1 The Act and Regulations specify matters that may be referred to the SSRO for an opinion or determination. The SSRO may require the payment of such costs as it considers appropriate when giving an opinion or making a determination on any of the following matters:
- a. an adjustment in a target price contract (section 16(2));
  - b. a profit rate adjustment (sections 18(3) and 35(1)(a));
  - c. allowable costs (sections 20(5) and 35(1)(a));
  - d. a final price adjustment (section 21(3));
  - e. the Secretary of State's conduct in accessing records (section 23(6));
  - f. an obligation of confidentiality which affects reporting (section 27(3));
  - g. an appeal against assessment as a qualifying sub-contract (section 29(6));
  - h. a notice of cessation as a qualifying sub-contract (section 30(4));
  - i. penalty notice matters (section 32(8));
  - j. cost recovery rates (section 35(1)(a));
  - k. the Secretary of State's behaviour in requiring an on-demand report (section 35(1)(a));
  - l. any matter related to a QDC or proposed QDC if jointly referred (section 35(1)(a));
  - m. the defined pricing structure and output metrics used in reports (section 35(1)(b));  
or
  - n. any matter related to a contract entered into before 18 December 2014 that would otherwise have been referred to the Review Board for Government Contracts (section 35(7)).

### Costs we may require to be paid

- 3.2 The costs that the SSRO may require to be paid (referred to in this document as 'referral-related costs') shall be limited to those that fall into one or more of the following categories:
- a. costs incurred by contractors or sub-contractors in the performance of obligations required by the Secretary of State which are the subject of the referral;
  - b. costs incurred in advance of the referral by either party as a result of their efforts to reach agreement on the matter which is the subject of the referral; and
  - c. costs incurred by either party as a result of participating in the SSRO's investigation of the referral.

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- 3.3 Further detail on the types of referral-related costs that will be considered for payment and how the amount of any such costs that is required to be paid will be calculated are provided in section 4 of this document.

#### **Which persons we may require to pay costs**

- 3.4 The Act and Regulations specify which persons the SSRO may require to pay costs when giving an opinion or making a determination and to which other person those costs should be paid. These are:
- a. in the case of a QDC, one party to the contract to the other;
  - b. in the case of a proposed QDC, one proposed party to the contract to the other;
  - c. in the case of a QSC, the sub-contractor to the Secretary of State, or the Secretary of State to the sub-contractor; and
  - d. in the case of a proposed QSC, the proposed sub-contractor to the Secretary of State, or the Secretary of State to the proposed sub-contractor.
- 3.5 The SSRO shall not require any payments to be made by any person or to any person other than in accordance with the provisions of the legislation described above. Requests to consider requiring such payments shall be declined.

#### **When a requirement to pay costs will be considered**

- 3.6 The SSRO expects that in most referrals there should be no need to require the payment of referral-related costs by one party to another. The general principle that guides the apportionment of referral-related costs is that the parties should bear their own costs, subject to any agreement between the parties for one party to recover some, or all, of their costs from the other.
- 3.7 Referral-related costs that are incurred by contractors in QDCs or sub-contractors in QSCs that satisfy the requirements specified in section 20(2) of the Act may be allowable costs under those contracts, subject to the requirements of the regulated pricing method used to determine the contract price. The SSRO provides separate [guidance](#) to assist the Secretary of State and contractors or sub-contractors to determine whether particular costs are allowable costs under qualifying contracts. The Secretary of State and contractors or sub-contractors must have regard to the allowable costs guidance when determining whether costs are allowable.
- 3.8 Exceptionally, either party to a referral may ask the SSRO to exercise its power under section 35(4) of the Act to require the other party to pay some amount of their referral-related costs.

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### Factors we will consider

- 3.9 The SSRO will consider the following factors when deciding, upon a request to do so, whether the circumstances require the payment of an amount of referral-related costs from one party to another:
- a. whether the party seeking to recover their referral-related costs brought this to the SSRO's attention:
    - i. in a timely way; and
    - ii. having regard to the procedures outlined in this document;
  - b. the extent of the costs under consideration and whether it would be proportionate to investigate them;
  - c. the conduct of both parties to the referral and whether they have behaved reasonably:
    - i. in advance of the referral, in relation to the matter referred and efforts to reach an agreement; and
    - ii. during the referral proceedings;
  - d. the extent to which the costs have been incurred as a consequence of the conduct of the parties;
  - e. the circumstances of the case, including any mitigating or aggravating factors;
  - f. what it was reasonable to expect in the circumstances;
  - g. whether the costs may be recovered in another way, for example, as allowable costs under a qualifying contract; and
  - h. the impact on the paying and receiving parties of a requirement to pay costs.
- 3.10 In considering these factors and reaching its decision the SSRO will rely on evidence provided by both the parties together with any other information it considers appropriate. Section 5 describes how the SSRO will gather evidence to support its determination on costs.

## 4. How costs will be calculated

### Types of cost that will be considered for payment

- 4.1 The SSRO has specified (in paragraph 3.2) three categories of referral-related costs that, having considered the facts of a case, it may require one party to a referral to pay to the other party. Examples of costs that the SSRO might consider for payment within these categories, whether directly or indirectly incurred, include:
- a. costs associated with staff or contractors;
  - b. legal or other expert fees;
  - c. materials; and
  - d. travel and subsistence.
- 4.2 The SSRO generally will not consider requiring any payment in respect of:
- a. consequential losses;
  - b. compensation for inconvenience, distress, aggravation, reputational damage, etc;
  - c. profit that otherwise may have been earned on costs; or
  - d. interest that otherwise may have been earned on any amount the SSRO requires to be paid to a party under section 35(4).

### Requirements for evidence

- 4.3 Before requiring the payment of any referral-related cost, the SSRO will look for evidence as to the following matters:
- a. that the party in whose favour the requirement would be made has incurred the cost;
  - b. the amount of the cost incurred;
  - c. the extent to which it was reasonable or appropriate to incur the cost;
  - d. the part of the cost attributable to the unreasonable behaviour of the party who would be required to pay.
- 4.4 The SSRO will take a proportionate approach when determining what type and standard of information is required regarding referral-related costs. Our expectations for evidence will be tailored depending on:
- a. the type of costs claimed;
  - b. the materiality of the costs; and
  - c. what evidence it is reasonable to expect would be available in each case.

## 5. The process

- 5.1 The stages in the process for identifying, considering and determining a requirement to pay referral-related costs are outlined below. The process should be viewed as indicative and may need to be adapted for the circumstances of the referral in which any requirement to pay costs is considered.

### Early engagement

- 5.2 The [SSRO's guidance on referrals](#) encourages any party or parties considering making a referral for an opinion or determination to seek early engagement with the SSRO in advance of doing so. As part of this engagement, where relevant to the case, the party or parties are encouraged to discuss with the SSRO any matters related to the recovery of referral-related costs.

### Requesting consideration of referral-related costs

- 5.3 The parties to the referral are encouraged to raise any request for the SSRO to require the payment of referral-related costs at the earliest opportunity in the referral process. The timing of any request will be considered by the SSRO in deciding whether to require they payment of costs. The SSRO will not consider requests made after it has issued its opinion or determination.
- 5.4 A party seeking costs should clearly submit the following:
- the nature and amount of any referral-related costs they wish the other party to pay;
  - why they consider the other party should be required to pay these costs;
  - why the costs cannot be recovered in another way;
  - relevant circumstances of the case, including mitigating or aggravating factors, that the SSRO should take into account;
  - information to assist the SSRO's consideration of the impact of a determination on costs.
- 5.5 The SSRO will notify affected parties if it plans to consider a requirement to pay costs as part of the referral.

### Investigating a requirement to pay costs

- 5.6 When a party to the referral seeks payment of referral-related costs, the SSRO will undertake a proportionate investigation of the facts of the case. This will help it determine whether a requirement to pay costs is appropriate in the circumstances and the amount of any costs that should be paid.
- 5.7 Where possible, the SSRO's investigation of a requirement to pay costs will be conducted alongside the investigation of the matter referred for opinion or determination. The extent of the SSRO's investigation of costs will depend on the type and amount of referral-related costs under consideration.

- 5.8 The most common ways in which information is likely to be obtained include:
- a. meetings with the parties – The SSRO may arrange to meet with any party to the referral for the purpose of clarifying its understanding of some aspect of the referral-related costs and the circumstances giving rise to them;
  - b. requests for information – The SSRO may make one or more requests for information from any party to the referral;
  - c. oral hearing – The SSRO may hold one or more oral hearings related to the substantive matter referred for opinion or determination. Where appropriate, these may be used to seek clarification on any questions concerning referral-related costs.
- 5.9 The separate guidance published by the SSRO describing the procedures for giving an opinion or making a determination provide more detailed information on the ways in which the SSRO may gather information during a referral investigation.

### **Submissions**

- 5.10 The SSRO will provide an opportunity for submissions to be made before requiring the payment of referral-related costs. In the interests of fairness, the SSRO will share the following material between affected parties:
- a. representations made by a party claiming costs; and
  - b. supporting evidence or facts.

### **Communicating the decision**

- 5.11 The Referral Committee's decision on any requirement to pay costs will normally be communicated with the opinion or determination to which the requirement relates. This will be sent to the parties to the referral in accordance with the procedures set out in the relevant SSRO guidance for the conduct of the referral.
- 5.12 In communicating its decision, the SSRO will provide a clear statement of how it weighed evidence in relation to the factors identified in paragraph 3.9.

### **Publishing the decision**

- 5.13 The SSRO's general approach is to publish a summary or redacted version of its opinions and determinations on its website. In publishing the outcome of the opinion or determination, the SSRO will publish such information about any requirement to pay costs as it considers is helpful to aid wider understanding about the operation of the regulatory framework.
- 5.14 In accordance with the general procedures for opinions and determinations, the SSRO will consider any representations from the parties to the referral about the content of any publication related to the referral decision.

### **Appealing against a decision**

- 5.15 There is no appeal mechanism provided for in the Act or the Regulations from a requirement made by the SSRO under section 35(4) for one party to pay costs to another. It is, however, open to parties to request a court to review the lawfulness of the decision through a judicial review process.

## **Feedback**

- 5.16 The SSRO welcomes face-to-face or written feedback about its decisions in relation to the payment of referral-related costs. We will use this information to help us improve our policy and procedures on an ongoing basis.
- 5.17 Feedback can be provided during or at the end of the referral process. Should any issues or concerns arise at any point in the process, they should be communicated to the Case Team at the earliest opportunity.
- 5.18 On conclusion of the opinion or determination, the SSRO will contact the parties engaged to seek feedback on the processes followed, including that related to its consideration of a requirement to pay costs.

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## 6. Termination of investigations

- 6.1 The SSRO may, at its own discretion, cease its investigation of matters related to costs under section 35(4) of the Act without determining any requirement to pay. This will typically occur when:
- a. the party to the referral seeking payment of referral-related costs withdraws their request;
  - b. the parties to the referral reach an agreement about referral-related costs;
  - c. the SSRO has been unable to obtain the information needed to determine whether a requirement to pay costs should be made; or
  - d. the SSRO is otherwise satisfied that there is no need to require the payment of referral-related costs by one party to another.
- 6.2 The [SSRO's guidance](#) indicates that the SSRO may terminate its investigation of an opinion or determination before a final decision is made if:
- a. the legislation permits; and
  - b. it is satisfied in the circumstances that an opinion or determination should not be given.
- 6.3 If the SSRO does not give an opinion or make a determination on a referral, any active consideration of whether to require the payment of referral-related costs will also cease. This is because the power to require the payment of costs is only exercisable when giving an opinion or making a determination.

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## Appendix 1: Statutory grounds for requiring the payment of costs

A1.1 Section 35(4) of the Act provides the basis for the SSRO's power to require the payment of costs, as follows:

- 35(4) When giving an opinion or making a determination in relation to any matter under or by virtue of this Part, the SSRO may require the payment of such costs as the SSRO considers appropriate—
- (a) in the case of a qualifying defence contract, by one party to the contract to the other, or
  - (b) in the case of a proposed contract, by one proposed party to the contract to the other.

A1.2 Regulations 64(9) and (10) modify section 35(4)(a) and (b) respectively, as follows:

- 64(9) Section 35(4)(a) has effect as if for “by one party to the contract to the other” there were substituted “by the sub-contractor to the Secretary of State, or by the Secretary of State to the subcontractor”
- 64(10) Section 35(4)(b) has effect as if for that subsection there were substituted—
- “(b) in the case of a proposed qualifying sub-contract—
  - (i) by the proposed sub-contractor to the Secretary of State; or
  - (ii) by the Secretary of State to the proposed sub-contractor.”