

SSRO

Single Source
Regulations Office

**Opinions and determinations
guidance review**

Consultation response

Issued on 1 April 2019

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1. Introduction

- 1.1 The Defence Reform Act 2014 (the “Act”) and the Single Source Contract Regulations 2014 (the “Regulations”) establish the grounds on which, and the circumstances in which, the SRRO may be asked to give an opinion or to make a determination in relation to a proposed or agreed qualifying defence contract (QDC) or sub-contract (QSC).
- 1.2 The SSRO has published guidance on its processes, which is intended to assist parties who seek an opinion or determination from the SSRO or become involved in such a request. The SSRO’s guidance documents, one focused on opinions and one focused on determinations, were first issued in March 2015 and updated in February 2016.
- 1.3 The SSRO has reviewed its guidance on opinions and determinations and has considered:
 - the opinions given and the determinations made since the last guidance update;
 - views expressed by internal and external stakeholders, including feedback from the Ministry of Defence and contractors who have been involved in an opinion or determination;
 - procedures applied by regulators that have adjudicative functions; and
 - comments received to the draft guidance for consultation issued on 10 December 2018.
- 1.4 This consultation response document sets out the scope of the review (Section 2). Section 3 sets out the comments received on the proposed changes to the guidance, together with the changes the SSRO has decided to make to the draft proposals. Section 4 sets out the significant changes made to the draft guidance.

2. Scope of the review

- 2.1 The SSRO issued a consultation document on proposed changes to its opinions and determinations referrals guidance, together with draft guidance documents, on 10 December 2018. The consultation closed on 25 January 2019. The SSRO received seven written responses¹, together with input from two members of the SSRO's External Referral Panel.
- 2.2 The SSRO is grateful to all those who took the time to send a written response. The purpose of this document is to make it clear how these views have been considered in producing the final guidance.
- 2.3 The SSRO asked the following five summary consultation questions in the guidance consultation:
- Do the proposed revisions make the guidance clear?
 - Do the proposed revisions make the guidance helpful?
 - Are there any other suggestions you have on how the guidance could be clearer or more helpful for parties?
 - Do you have concerns regarding any areas of significant changes in the guidance (set out in the table within this document) or the proposed text in the guidance itself?
 - Are there any issues in the topic areas covered in this guidance that have not been adequately addressed in the proposed guidance changes?
 - Do you have any concerns regarding the proposed publication and application dates of the revised guidance?
- 2.4 Of the five industry responses received to the summary consultation questions:
- three respondents provided full response to the summary consultation questions; and
 - two stated that either the changes were sound or had no fundamental issues with the proposal; and
 - three of the above stated they agreed with the fuller response provided by one of the respondents.
- 2.5 The MOD and an interested party also provided detailed comments in respect of the proposed changes but did not answer the summary consultation questions.
- 2.6 Table 2 provides a brief summary of the views on the questions posed.

¹ MOD, ADS, Boeing, Babcock, Leonardo, Rolls-Royce and one consultant.

Table 2 – Summary responses to consultation questions

Question	Summary comments
a)	All three respondents who answered the consultation questions agreed that the proposed revisions to the guidance made it clearer. A further two either thought the changes were sound or had no fundamental issues with the proposals.
b)	Three respondents agreed that the changes made the guidance helpful. There were no other responses to the question.
c)	All parties either made their own suggestions to amend the guidance or supported amendments by one of the respondents.
d)	The comments made in response to this question have been addressed in section three below.
e)	No respondents to the consultation questions raised other issues to be addressed in the guidance.
f)	No concerns were raised regarding the proposed publication and application dates of the revised guidance.

2.7 Responses received to the consultation are consolidated on the SSRO's website.

3. Comments on proposed guidance changes

- 3.1 Comments received from respondents have been summarised below, by reference to each section of the proposed guidance documents. The substantive suggestions are presented, followed by the SSRO's (boxed) responses to the feedback.
- 3.2 Some of the comments made by respondents related to the general drafting of proposed changes to the guidance. Individual amendments have been made in each case where it is accepted that the suggested change improves the clarity of the guidance but have not been made to all such suggestions.
- 3.3 Such changes include the use of more directive language, such as "will" in preference to "may". These suggestions have been accepted in some places, but in others the word "may" has been retained because it is considered to better reflect the intention of the guidance. There are instances where the SSRO intends to retain a discretion, so that it has the flexibility to adapt its procedures to the circumstances of individual referrals. For example, not all determinations will necessarily require the SSRO to issue its own statement of facts to parties and so the word "may" is used rather than "will".

Introduction

- 3.4 The MOD suggested it would be helpful to have a new paragraph defining what is meant by a 'determination', and how it differs from an opinion (which could then cross-reference the separate guidance on opinions).
- 3.5 An interested party suggested the following changes:
- making parties aware in the introduction that a determination may be published. It is important that contractors and MOD to understand the reputational risk a referral for a binding determination to the SSRO could expose them to;
 - requesting clarification on the exclusion of appeals and notices of cessation from the guidance;
 - suggesting an alternative model of delivering determinations based on the Alternative Dispute Resolution confidential expert binding determination using, for example, the structure and process set out within "The Academy of Experts, Rules for Expert Determination"; and
 - clarifying why the guidance included a reference to the SSRO's aim 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.

A 'determination' should be defined in accordance with its ordinary use by reference to the Act/Regulations and the guidance. The guidance sets out the effect of a determination, and Appendix 1 of the guidance provides clarity on the circumstances in which a determination can be made. Jointly, these are considered to be more helpful than a strict definition and so no change has been made.

The guidance sets out the SSRO's general justification for publishing a determination and the process it will follow. The SSRO considers the guidance is sufficiently clear that an opinion (refer to section 8 of the guidance) or determination (refer to section 9 of the guidance) is likely to be published.

The SSRO's Corporate Plan for 2019-2022 includes a proposal for the development of further guidance, including appeals and notices of cessation. The revised guidance does not preclude appeals or notices of cessation being raised with the SSRO, but requests parties contact the SSRO directly while formal guidance is being developed.

The SSRO has considered the Rules for Expert Determination. These have some significant differences from the current procedure which would prevent adoption, including that the Rules do not reconcile with the statutory powers, duties and procedures prescribed by the Act and Regulations which govern the conduct of the referrals process. Some of the Rules are similar in principle to those already proposed in the guidance but are less developed and would therefore likely be less helpful to referring parties. As a result, the SSRO has no further plans at this stage to make changes.

The SSRO has a statutory aim to ensure that good value for money is obtained in government expenditure on QDCs and QSCs and that parties (other than the Secretary of State) are paid a fair and reasonable price under those contracts. Section 13 of the Act provides that the SSRO must discharge this aim when carrying out its functions, and so reference to the aim in the context of referrals is relevant.

General conduct of referrals

- 3.6 An industry respondent sought clarification regarding selection of an independent panel member for a Referrals Committee as well as further explanation of the composition and selection of the Case Team.
- 3.7 An interested party also raised a potential conflict of interest issue if a member of the Case Team was involved in hearing a complaint and requested clarification on the function of the Case Team.

The SSRO has added a link in the guidance to its Corporate Governance Framework, which sets out:

- how appointments are made to Referrals Committees; and
- the terms of reference of each Referrals Committee.

The SSRO's website contains profiles of the SSRO's panel of independent persons who can be appointed to a Referrals Committee.

Appointments to the Case Team are specific for each referral to reflect the needs and circumstances in each case (paragraph 2.2). The Case Team's role is to provide support to the Referral Committee, who retain decision-making responsibility. No further change is considered necessary.

The guidance specifies that the parties to a referral will receive a letter setting out the composition of the Referral Committee and the roles and names of the Case Team (paragraph 5.7). Parties are offered an opportunity to raise any concerns.

The SSRO notes the concern regarding a potential conflict if a member of the Case Team was engaged in hearing a complaint. The guidance references the SSRO's Complaints Policy, which makes clear how concerns or complaints (which include those concerning conflicts) may be raised and how they are dealt with. The SSRO would expect to take considerations such as potential conflict of interest into account when addressing a complaint.

Summary of stages in making a determination

- 3.8 The MOD and an industry respondent made suggestions to improve the flowchart. The proposed changes include clarifying which party was responsible for an action at each stage and including a timescale for pre-engagement.
- 3.9 Clarification was also requested on paragraph 3.2 on circumstances in which the SSRO may depart from the stages, which an interested party thought read as caveat emptor. The same respondent also thought that the legislation does provide a basis under which certain disputes that could not be resolved by the parties to a qualifying contract would be resolved without equivocation. A query was also raised on whether the provisional determination is published.

The SSRO has made changes to the flowchart to help parties understand who is responsible for the action described at each stage. However, a timescale for pre-engagement has not been included at this stage, as:

- the time required for pre-engagement is likely to vary significantly from case to case, being dependent on factors such as the extent to which the proposed referral question is clear and meets the statutory requirements, the quality of information provided, and the responsiveness of the parties; and
- at present, there is insufficient evidence available to the SSRO to set a reliable timescale for this stage.

The duration of the pre-engagement stage will be kept under review.

The flow diagram in section 3 shows stages of the process which are optional, such as holding a site visit. In addition, section 6 identifies examples of circumstances where the SSRO may vary the timescale or suspend the process. A cross-reference to section 6 has been added in section 3 of the guidance. Reference to the optional stages and section 6 assist parties to understand where the SSRO may deviate from the guidance.

The grounds as summarised in Appendix 1 to the guidance sets out the circumstances where the SSRO must or may accept a referral and therefore make a determination or give an opinion where two parties do not agree.

An amendment has been added to section 8 of the Determinations guidance to clarify that a provisional determination is not published.

Engaging with the SSRO before referring matters for determination/opinion

- 3.10 One industry party:
- commented that the section read as though it was intended only for joint referrals;
 - suggested that paragraph 4.4 implies that the referrals process could be extended to include parties other than the referring parties and asked whether this was intentional; and
 - suggested adding extracts from the Invitation to Tender (ITT) as an example document under paragraph 4.8 to the opinion guidance, as a contract may not exist.
- 3.11 An interested party commented that SSRO engagement should only be sought when there is a matter of principle that needs to be resolved and a consistent understanding established; however, the legal framework makes no such limitation. Matters, where the legislation and statutory guidance are clear, should be resolved between the parties. The SSRO should only exclude referrals, made within the scope of the legal framework, where there is a sound reason to publicly reject providing an expert determination. The SSRO should not seek to refuse because the legislation uses 'may' rather than 'must'. The same party expressed concern that the process could be frustrated if a party did not provide information and that the SSRO should be able to proceed and draw its own conclusions. The respondent also suggested that the SSRO establish a structure and size limit for submissions.
- 3.12 The MOD also expressed concern that the process could be frustrated, providing the example that in respect of an opinion concerning the reasonableness of a request by the Secretary of State for information, the SSRO could refuse to proceed without seeing the information the contractor wishes to withhold.
- 3.13 The MOD further suggested clarification of the statement: "reasons they feel the decision is appropriate and justified", given that no decision has been made at this stage of the referral, and suggested providing an example of the legislative provision under which the SSRO is requested to give an opinion or make a determination.

The intention is that the guidance will apply to all referrals, whether made jointly or by a single party, but adapted where appropriate. Changes have been made to this section to make clear that it applies to both categories of referral.

The SSRO confirms that the wording in paragraph 4.4 is intended to cover a referral from a single party, in which case the reference to parties is to the parties to the QDC/QSC. The guidance has been amended to make the intention clear.

The SSRO's guidance includes examples of relevant documentation which parties may submit to the SSRO. As a contract may not have been entered into when an opinion is requested, the SSRO has amended the opinion guidance to provide an example of alternative documentation which may be submitted to the SSRO.

In response to comments on the SSRO's engagement and circumstances where the SSRO may exercise discretion, it is for the parties to make a decision on whether to seek a referral. Appendix 1 to the guidance provides assistance in setting out the provisions where parties may seek the SSRO's involvement. The SSRO has addressed concerns over whether there is a preference to exercise its discretion to exclude accepting a referral in paragraph 3.14 to this document.

The point has been made that a failure by one party to provide information to the SSRO could frustrate the referral process. Paragraph 4.9 has been amended to clarify that *sufficient* information to enable an understanding of the issue is necessary to accept the referral. As the SSRO does not require *all* information to be submitted before accepting a referral, the reliance on sufficient information should not frustrate the process.

Consideration has been given to establishing a structure and size limit for submissions. The SSRO accepts that it is important to promote the quality and relevance of information and that some greater direction could assist in this regard. However, it must be recognised that referrals may vary widely in terms of the number and complexity of issues. This raises a concern that attempts to limit the size and structure of submissions may artificially restrict the contents and have an adverse impact on quality. In the circumstances, it is proposed to keep this under review, rather than restricting the length of submission or imposing a requirement to use a template at this time.

In the revised guidance, the SSRO requires the parties to provide the question on which the SSRO is asked to give an opinion or make a determination, including the reasons they feel the decision is appropriate and justified. The SSRO has now clarified this to ask parties for their view on the question and the reasons for their view. The SSRO also asks the party or parties to provide the legislative provision under which the SSRO is being requested to give an opinion or make a determination. Examples of legislative provisions have now been added to paragraph 4.5.

Assessing whether to accept the request for an opinion or determination

3.14 An interested party queried:

- whether there was an appeal process if a party believed the SSRO accepted a request for an opinion or determination which was beyond the scope of its powers, or the SSRO did not accept a request for a referral;
- that the SSRO looks to strongly indicate a preference to exercise its discretion to exclude accepting a referral;
- that in communicating the question referred to the parties, the SSRO appeared to have a role in setting the scope of the question itself;
- that there was no purpose in publishing the acceptance of a request for an opinion or determination, suggesting this could be reported in the Annual Report and Accounts; and
- if the SSRO could be clearer on the information required to enable the SSRO to accept a request for a referral.

3.15 An industry response to consultation provided the following response for this section:

- text could be added to highlight the importance of the parties agreeing the information to be supplied at the pre-engagement phase; and
- the process could be terminated and restarted if the parties wished to vary the question significantly.

3.16 The MOD requested clarification of what was meant by software requirements in the context of security measures for communication.

There is no formal appeal process in respect of the SSRO's decision to accept an opinion or determination. The SSRO has added a cross-reference in the guidance to the complaints policy and the possibility of a party challenging the lawfulness of the SSRO's decision through a judicial review. The guidance has been amended to clarify that reasons for not accepting a referral would be provided in writing to the party or parties.

It is not the SSRO's intention to convey a preference for rejecting referrals. The guidance in this section has been reviewed, by reference to whether it incorrectly conveys such a preference. Paragraphs 5.3 and 5.4 of the guidance sets out factors the SSRO will take into consideration when deciding whether to accept a referral where it has discretion. The SSRO consider these paragraphs are necessary to provide transparency in the decision making and do not indicate a preference to reject referrals where the grounds are discretionary.

Before accepting a referral, the SSRO will engage with the party or parties to understand the issue being referred and, following such discussions, the party or parties may decide to revise the question. The SSRO's role is to decide whether to accept the question referred. To clarify that the SSRO does not set the scope of the question, the guidance has been amended to say that the SSRO will confirm the agreed question, rather than communicate the question, to the party or parties.

The SSRO's Annual Report and Accounts provide a summary of referral activity in each year. This does not provide an alternative to the proposal to publish receipt of a referral, as it represents a historic record rather than being published at the time of receiving the request for a determination or opinion.

The information required from the parties to enable the SSRO to accept a referral will vary for each referral. The guidance makes clear the factors the SSRO will consider in deciding whether to accept a referral (paragraphs 5.2 to 5.4) and provides a summary of the relevant circumstances in which referrals may be made in Appendix 1. The information provided needs to be sufficient for the SSRO to understand the issue before acceptance.

The SSRO agrees that pre-engagement is important in the referral process. The SSRO has amended the guidance in paragraph 5.4 to reinforce the importance of pre-engagement to establish an understanding of the information required for a request for a referral. The SSRO acknowledges that if the referring party or parties wish to amend the referral question significantly, it may be better to restart the referral rather than reset the timescale. The guidance in paragraph 5.9 has been amended to reflect this.

The consultation version of the guidance in paragraph 5.7 referred to "security measures for communicating with the parties and any software required". The SSRO agrees that the reference to software requirements may be unhelpful and has removed it.

Setting a timeframe

- 3.17 One industry respondent made suggestions, including:
- that the SSRO should encourage parties to agree a joint statement of facts; and
 - that the SSRO should state that a joint statement of facts will reduce the timescale.
- 3.18 An interested party suggested that parties should be able to record and jointly communicate the matters they agree and disagree with. Provision of supporting information on arguments relating to matters upon which they disagree should be included within the submissions made by each of the parties at a later date. The same respondent also suggested that paragraphs which explain circumstances in which the timeframe may be stayed were too detailed.
- 3.19 The MOD also made editorial suggestions to amend language, including use of the term “suspended” rather than “stayed”.

The guidance makes it clear in paragraph 6.3 that the parties may agree a joint statement of facts. The SSRO considers the addition of text in paragraph 4.2, encouraging parties to agree on issues where appropriate, addresses the issue raised. The guidance provides that an agreed joint statement of facts may shorten an investigation. The SSRO is cautious about giving an undertaking that submission of a joint statement will *always* shorten the timeframe for a referral. It may not do so in every case, and the provision of such a statement should not restrict the SSRO from conducting such investigation as it considers reasonably necessary before providing its opinion or making a determination.

The SSRO has amended the guidance in paragraph 4.2 to encourage parties to agree on issues, including information to be provided in a submission. This amendment covers the suggestion for parties to jointly record and communicate matters upon which they agree and disagree. Paragraph 4.9 indicates that the SSRO requires sufficient information, not all information, to progress the referral, which allows parties to provide further information, including points of disagreement, at a later date. Section 7 of the guidance makes it clear that further information will be gathered during the course of the investigation. The SSRO does not consider that further amendment to the guidance is required.

As the option to suspend a referral is a new stage in section 6 of the guidance, the SSRO believes it is helpful to set out in reasonable detail the different circumstances in which suspension may be considered.

In response to the feedback, the guidance has been amended to refer to circumstances in which the timeframe of a referral may be suspended, rather than using the word “stayed”.

Investigating the referral

3.20 One interested party suggested the following:

- the section sounded as though the SSRO set its own scope for the referral;
- where the SSRO used its own data, this should be provided to the parties in anonymised form, together with the basis for consistency;
- information should not be shared with parties to the contract who are not parties to the referral;
- parties should be able to rebut information provided by other parties without the invitation of the SSRO;
- the SSRO should only consider information available to both parties;
- a party making a submission to the SSRO should make a simultaneous submission to the other party;
- the obligation should rest with the SSRO to seek approval to share information request;
- the SSRO should seek approval from the parties if it wished to publish any information which was not in the public domain;
- meetings should be with both parties;
- an interested party commented that the other party should be invited to observe the site visit and both parties should be invited to the oral hearing; and
- the SSRO's role is to make factual findings and that facts are not always agreed between parties.

3.21 The MOD suggested:

- the SSRO should not share all information;
- replacing reference to the "target cost incentive fee adjustment" in paragraph 7.2 with alternative text in relation to the matters to which the SSRO must have regard in making a determination on Allowable Costs;
- the oral hearing should take place on a neutral venue and that the SSRO should not allow parties at the site visit to present a case; and
- the SSRO should centrally produce data packs for use at the oral hearing.

3.22 An industry respondent asked for examples of what constituted interested parties and third parties, and commented that there may be issues of confidentiality, security classification and ITAR issues to address in respect of such parties. There was also the question of what could happen if an interested/third party declined to respond or allow its response to be disclosed to the Referral Committee or Case Team.

3.23 The same industry respondent thought it would be helpful to provide a distinction between the joint statement of facts submitted by referring parties and the statement of facts issued by the SSRO as part of the investigation stage.

The SSRO has reviewed this stage of its guidance to consider whether it suggests the SSRO sets its own scope for a referral. The SSRO believes the guidance sets out the processes it will follow to obtain sufficient information to reach a decision. Paragraph 7.2 sets out considerations that the SSRO will address in reaching a decision; however, the SSRO does not believe these define or limit the scope of the referral.

With respect to information gathering, information from the SSRO's own sources could, for example, include relevant decisions from previous referrals or relevant research. The SSRO agrees that where it relies on such data, it should be provided to parties and has amended paragraph 7.2.

The SSRO has considered the comment that information should not be shared with parties to the contract who are not parties to the referral and has amended the guidance at paragraph 7.5 to improve clarity on who the SSRO may contact with requests for information.

The SSRO has also considered the suggestion that it only takes into account information available to both parties. Paragraph 7.11 makes it clear that the SSRO will generally only rely on information that has been made available to both parties and that the SSRO will be guided by fairness in deciding whether to accept or consider information that has not been made available to all parties.

The SSRO has also considered the suggestion that a party making a submission should make a simultaneous submission to the other party. However, as set out in paragraph 7.10, parties may not agree to share data. At the present time, the SSRO does not wish to mandate a simultaneous exchange of information.

The SSRO has also reflected on the suggestions that the obligation should rest with the SSRO to seek approval to share information and that it should seek approval from the parties if it wished to publish for any information which was not in the public domain. The SSRO has amended its guidance in paragraph 7.10 to set out its presumption that parties are content for the information they provide to be shared with the other party or parties participating in the referral, unless the opposite is made known. The SSRO will also confirm this presumption in its process letter to parties after a referral is accepted and in information requests. The SSRO believe this provides adequate safeguards to parties to express a view if they do not wish information to be shared.

The guidance in paragraph 8.7 (opinion guidance) and 9.7 (determination guidance) also provides an opportunity for parties to make representations on a draft publication version of the opinion or determination. This enables parties to inform the SSRO of information that would be likely to cause significant prejudice to the commercial interest of one or more parties engaged in the opinion or determination which should not be published.

With regard to the suggestion that the SSRO should not share all information, the SSRO believes that its guidance in paragraphs 7.10 and 7.11 provides clarity on the processes applied where a party does not wish to share information.

In respect of replacing reference to “target cost incentive fee adjustment” at paragraph 7.2 of the determination guidance, the matters listed are those to which the SSRO must have regard in making a determination on Allowable Costs. As these are prescribed by the Regulations, it is considered that they are an appropriate example to refer to and no change is therefore considered necessary.

The SSRO agrees with the comments that both parties should be invited to attend oral hearings and site visits together where possible and considers the guidance in paragraphs 7.16 and 7.17 set out this expectation. However, it is not always practical or necessary for general meetings during the course of the referral to include both parties. Where a meeting involving only one party identifies information which is relevant to the referral, the SSRO would request written representation which would be shared with the other party in accordance with the process set out at paragraph 7.9.

In response to the MOD’s suggestion that the oral hearing should be held at a neutral venue, the SSRO recognises that circumstances may arise where a neutral venue may not be practical, for example, in response to a request for a speedy decision. The SSRO has also reflected on the comment that parties should not use a site visit as an opportunity to present their case. The SSRO believes paragraph 7.14 appropriately reflects this point. The SSRO has also considered the suggestion that it circulates a pack of information for use at an oral hearing. The SSRO’s practice, as set out in the guidance, is to share information throughout the referral process and as such, the parties will already have access to the information the SSRO is considering in advance of an oral hearing. In the interests of time and cost, SSRO considers it is sufficient to provide references to any data to be used in an oral hearing rather than to reproduce it in a pack to circulate.

The SSRO has reflected on the request for examples of interested or third parties. As a result, the SSRO has amended its guidance in paragraph 7.5 to change an interested party or relevant third party to “another party to the contract participating in the referral or an interested third party”. An example of a third party has also been added. The SSRO has clarified that its guidance in respect of commercially sensitive information equally applies to such parties.

In response to the request to differentiate between a joint statement of facts agreed between the parties and the statement of facts issued by the SSRO, the SSRO has clarified that the statement of facts in paragraph 7.12 is the SSRO’s own statement. In issuing this statement, the SSRO is requesting representations from parties on factual accuracy.

Provisional determination

- 3.24 One industry respondent commented that there was no need for a provisional determination. They also suggest that all parties should be present at any oral hearing.

The SSRO has reflected on the suggestion that a provisional determination is unnecessary. As a determination has potential legal consequences, the SSRO considers that giving parties an opportunity to comment on the provisional decision is an important part of a fair process. The process as described in paragraph 8.5 demonstrates that the SSRO will consider responses from the parties to the provisional determination and that these will be taken into account in the final determination.

The SSRO agrees that all parties should be invited to an oral hearing and considers the process as set out in paragraphs 7.17 to 7.19 are applicable to the oral hearing in a provisional determination.

Making and publishing a final opinion/determination

- 3.25 One industry respondent queried whether opinions were always specific to a QDC or proposed QDC. The respondent also asked whether there could be a referral regarding allowable indirect costs that are included in the contractors "pricing rates" used across all their QDCs/QSCs (section 20 of the Act). The respondent further asked whether an opinion may also lead to a change in statutory guidance.
- 3.26 One industry respondent commented that there could not be a determination in respect of a proposed QSC (paragraph 9.3 determinations guidance).
- 3.27 An industry respondent commented in relation to paragraph 8.3 (opinion guidance) that a contract or subcontract would not be in place if an opinion was being sought and further commented that having confidence that seeking an opinion will not lead to its commercial interests being prejudiced is vital for industry.
- 3.28 One interested party made a representation that publication should not name parties, whilst one industry respondent commented that naming should be considered if in the public interest. In addition, the respondent commented that naming parties, including MOD delivery teams, in a published document would be unhelpful.
- 3.29 Comments were received from both industry and an interested party about the payment of costs. Suggestions included that costs could be a proportion of the costs; costs should normally lay where they fall; and payment of another party's costs should be restricted to exceptional circumstances where the actions of one party caused, by its behaviour, unnecessary and/or excessive costs to be incurred. There was also the suggestion that normal costs of the SSRO should not be recharged given that part of the SSRO's costs were paid by contractors through a reduction to the contract profit rate.
- 3.30 The MOD commented that it must conduct a security appraisal and authorise disclosure prior to SSRO publishing the determination on the SSRO website to ensure that UK operational security is not compromised.

Paragraph 8.3 of the opinion guidance refers to giving an opinion in relation to a QDC or proposed QDC, which reflects section 35 of the Act. An opinion is therefore specific to the circumstances of the contract. The guidance confirms that parties should therefore exercise care before applying any aspects of an opinion to other contractual arrangements.

The SSRO has noted the question asked as to whether allowable indirect costs that are included in the contractors "pricing rates" used across all their QDCs/QSCs could be the subject of a referral. Section 5 of the guidance addresses the process and considerations governing whether a referral can be accepted, and Appendix 1 sets out the grounds for opinions and determinations. The SSRO published a determination on 25 January 2019 on the subject of labour costs included in labour rates, which may assist with the respondent's specific question.

The SSRO continuously considers developing its guidance. Referrals may reveal matters on which the SSRO considers that further guidance is warranted. The SSRO's Corporate Planning process contains the SSRO's forward plan for updating guidance, and any issues arising from referrals will be considered as part of that process.

Paragraph 9.3 (determinations guidance) refers to "Where a determination relates to a QSC or proposed QSC". A request for a determination in respect of a proposed QSC is expressly provided for in the legislation, for example, the prescribed matters under section 35(1)(b) of the Act. The SSRO's guidance reflects the provisions of the legislation.

Paragraph 8.3 refers to giving an opinion in respect of a QDC/QSC or proposed QDC/QSC. Appendix 1 to the opinion guidance sets out the grounds upon which an opinion can be sought and these can relate to both a proposed and an actual contract.

The SSRO recognises the importance of preserving commercial interests of all parties within the referrals process. The SSRO believes its processes, set out in paragraphs 9.4 to 9.8, address these concerns and should give the necessary assurance to parties engaging in a referral.

The SSRO has considered amending its guidance to naming a party only where it is "in the public interest". The SSRO has decided against using the public interest test, as what may be considered to be in the public interest can vary in different contexts and it may not therefore provide the necessary certainty. The guidance states "unless there are exceptional circumstances that justify identifying a party" to address when it would disclose. Prior to doing so, it would provide the parties with its justification and seek representations. Although the SSRO received one response which supported parties not being named, the SSRO considers the safeguards currently set out in the guidance allows parties sufficient opportunity to engage and feedback prior to publication, for instance if commercially sensitive information was involved.

The SSRO notes the interest in how costs may be awarded and what such cost may cover. The SSRO's Corporate Plan 2019-2022 includes development of guidance on the award of costs during this period. The SSRO will consider comments made as part of the development of this guidance. In view of the future work planned, the SSRO has not made any change to the current guidance.

With regard to the MOD's comments on review of security considerations, the SSRO has amended the guidance to clarify that the SSRO will not publish information about an opinion or determination if doing so would compromise UK operational security. The SSRO will give due consideration to representations made in this regard.

Concluding the referral

- 3.31 The MOD asked for clarification on what was meant by the SSRO closing a referral if legislation permitted.
- 3.32 The MOD also questioned whether the SSRO's decision in respect of an opinion could also be subject to judicial review if the decision was not binding.
- 3.33 An industry respondent suggested adding "for example" to paragraph 9.1 (opinion guidance) and 10.1 (determinations guidance) before the bullet points.

The SSRO's guidance states that a request for a referral may be closed prior to a final decision being made in exceptional circumstances. In forming a decision as to closure in those circumstances, the SSRO will take into account whether giving an opinion or making a determination is discretionary and would, therefore, be permitted by legislation. Examples have been provided.

The SSRO's guidance states that it is open to parties to apply for a court to review the lawfulness of any SSRO decision by way of judicial review. Whether a court will accept such an application is not a matter upon which the SSRO can give a view and parties would need to seek their own legal advice in each case.

Paragraph 10.1 contains two bullet points which provide the factors the SSRO will consider in deciding whether to close a request for an opinion or determination. The SSRO has considered whether these two bullet points are illustrative examples but confirms that they are the only criteria the SSRO would be likely to apply.

Appendix 1

- 3.34 Two industry respondents made comments on the Appendix. One did not consider the content of the Appendix to be helpful and made alternative suggestions. The other suggested there was an omission from the Appendix in the opinion guidance.

The SSRO has reviewed the Appendix in light of the comments and considers that the tables provide an accessible and consolidated summary of the grounds under which a referral may be sought.

The SSRO agrees that there was an omission in the opinions guidance, which has been inserted.

Additionally, the SSRO has updated the Appendix in light of the amendments arising from the Single Source Contract (Amendment) (No. 2) Regulations 2018, the relevant parts of which came into force on 31 January 2019.

4. Changes to draft guidance

- 4.1 The table below describes the significant changes made between the draft guidance which the SSRO issued for consultation and the final guidance published on 1 February 2018.

Guidance paragraph reference	Explanation of changes
2.1	In respect of Independent Members, footnotes have been added to provide a link to the SSRO's Corporate Governance Framework and to explain that profiles of members can be found on the SSRO website.
2.2	This has been expanded to add that roles on the Case Team are allocated as appropriate to reflect the skills and requirements of each opinion/determination.
3.2	A cross-reference has been added to section 6 which explains circumstances which may affect the timescale for an opinion or determination.
4.1	Amendment to clarify that pre-engagement will increase the likelihood of the referral question being accepted and may prevent delays in making a decision.
4.2	Additional sentence added to confirm that where appropriate, the SSRO will encourage the parties to agree on the issues set out above.
4.5	Bullet point 1 has been shortened to cover only submission of the question. New bullet point 2 clarifies that the SSRO asks the party or parties to submit representations as to how the matter should be determined, together with reasons. Bullet point 3 has an added example to illustrate what is meant by the provision within the legislation under which the SSRO is asked to give an opinion/ make a determination, together with an additional cross-reference to Appendix 1 containing grounds for opinions/determinations.
4.9	The paragraph has been amended to clarify that the SSRO requires "sufficient" information, with a footnote to explain that information provided should be enough for the SSRO to understand the issue.
5.4	Additional text added to clarify that the SSRO encourages a party or parties to discuss and agree what information will support the decision to accept the request for an opinion.
5.5	New paragraph to confirm that the SSRO will notify the parties of its decision to accept or reject a referral, together with recourse if a party is dissatisfied.
5.9	Text added to show that if parties wish to significantly amend the question for an opinion or a determination, the SSRO will give consideration to re-setting or re-starting the timetable.

Guidance paragraph reference	Explanation of changes
7.2	Text has been added to clarify that if the SSRO is using its own data, it will make this available to parties.
7.5	Text has been amended to clarify the parties from whom the SSRO may request information as being the referring party, another party to the contract participating in the referral or an interested third party. Text has also been added to show that the SSRO will take the approach outlined in paragraph 2.4 to any commercially sensitive information provided by these parties.
7.10	Text has been amended to clarify the SSRO's presumption that parties are content to share information provided to the SSRO with the other party unless clearly otherwise stated.
7.11	Clarification that the SSRO will generally only rely on information that has been made available to both parties.
7.17	Text amended to recognise that more than one oral hearing could take place.
8.2 (determinations guidance)	Text added to clarify that a provisional determination is not published.
8.5 (determinations guidance)	Amended to show that a party wishing to make oral representations on a provisional determination must make a request. Clarification that an oral hearing will use the same arrangements for recording and making a transcription of the hearing as at any oral hearing earlier in the process.
8.4 (opinions guidance) & 9.4 (determinations guidance)	Text amended to clarify that the SSRO's general approach is to publish a summary or redacted version of the opinion or determination on the SSRO's website.
8.5 (opinions guidance) & 9.5 (determinations guidance)	New paragraph to clarify that the SSRO would not publish information about an opinion/determination if doing so would compromise UK operational security. The SSRO will give due consideration to representations made in this regard.
9.2 (opinions guidance) & 10.2 (determinations guidance)	Additional text added to explain that closure of a case may be in cases where a suspended process (referred to in paragraph 6.6) becomes frustrated and the SSRO has a discretionary power as to whether to give the opinion.
Appendix 1 (determinations guidance)	The time limits in the determination guidance for QDCs by virtue of section 14(3) and 14(4) or 14(5) have been amended to reflect the position from 31 January 2019, as amended by the Single Source Contract (Amendment) (No. 2) Regulations 2018.

