

# Single Source Contract Regulations 2014

## Chapter 2 Qualifying Defence Contracts

### Purpose

1. The guidance in this chapter explains what makes a contract a Qualifying Defence Contract (QDC) subject to the Defence Reform Act 2014 (DRA) and Single Source Contract Regulations 2014 (SSCR). It also explains how the DRA and SSCR apply when a prime contractor with a QDC places a Qualifying Sub-Contract (QSC).
2. This guidance explains:
  - a. what defines a contract as a QDC;
  - b. the specific types of contract that are excluded from being a QDC;
  - c. how the Secretary of State for Defence (SofS) can exempt a contract from being a QDC;
  - d. how an existing contract that is not a QDC can become a QDC when it is amended;
  - e. what defines a contract as a QSC; and
  - f. what to do when QDC status is disputed.
3. This chapter is written as definitive guidance for MOD Commercial Officers so "you" indicates an action on the Commercial Officer.
4. To assess whether you have a prospective or actual QDC you must read this chapter 2. If you assess that your contract is not a QDC then you must read the [Pricing of Single Source Non-qualifying contracts](#) Commercial Policy Statement.

### What is the Legal Framework?

5. The primary legislation applicable to QDCs is the [Defence Reform Act 2014 \(DRA\)](#). Section 14 of the DRA provides a legal definition of a QDC and Section 28 of the DRA defines a QSC.
6. The secondary legislation applicable to QDCs is the [Single Source Contract Regulations 2014 \(SSCR\)](#). Part 2 of the SSCR covers the detail in this chapter.

### What is a QDC?

7. A QDC is a contract that falls within the scope of the DRA and the SSCR, and that the MOD has not exempted from being a QDC.

8. A contract is a QDC if it meets the following criteria:
- a. the contract is placed on behalf of the Secretary of State for Defence<sup>1</sup> with a prime contractor for goods, works or services<sup>2</sup> for defence purposes<sup>3</sup>;
  - b. the contract was entered into either:
    - (i) after 18 December 2014 but before 31 March 2015 and the contract value<sup>4</sup> is £500,000,000 (£500M) (ex VAT) or above; or
    - (ii) on or after 31 March 2015 and the contract value is £5M (ex VAT) or above;
  - c. the contract is to be placed on a single source basis (see Annex B); and
  - d. the contract is not excluded from being a QDC (see paragraph 17).
9. If the contract meets the criteria of a QDC then it is a QDC as a matter of law - you cannot agree with your contractor to contract as if it is not a QDC. If you proceed as if the DRA does not apply, you will be in breach of the Act and put the MOD at serious commercial, financial and reputational risk. Your contractor will also be subject to the Compliance and Penalty Notice provisions of the legislation applied by the internal MOD Single Source Advisory Team (SSAT).
10. In exceptional circumstances a contract that meets the criteria of a QDC may be exempted from the legislation if there is compelling justification. An exemption can only be authorised by the Secretary of State for Defence; the process is described at paragraphs 18 and 19 below.
11. When a contract is a QDC the legislation gives both parties certain rights, obligations and remedies (pre and post contract award) which are explained in other chapters of this SSCR guidance. It is important that you recognise that all of these rights and obligations are enforceable in law. This is the case even if you and / or the other contracting party fail to recognise the contract as a QDC, or act as if the contract is not a QDC.
12. You must use the criteria at paragraph 8 above, and guidance within this chapter, to assess if your contract is a potential QDC. You must make this assessment at an early stage of the acquisition process and be aware that you may need to review it later if the facts of your procurement change (e.g. the value increases). Your review can be conducted up to contract let.
13. You must keep a record of your assessment(s), to explain why you assess the contract to be a QDC, or not. You must include details of your assessment in the Procurement Strategy (see paragraph 41).
14. When you have assessed that your proposed contract will be a QDC you must inform the prospective contractor using the template letter at Annex C. You

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<sup>1</sup> This includes all trading funds and executive Non-Departmental Public Bodies (eNDPBs) which contract on behalf of the Secretary of State for Defence.

<sup>2</sup> As defined in Defence and Security Public Contracts Regulations (DSPCR) 2011 Part 1, Interpretations.

<sup>3</sup> Defence purposes means the purposes of defence (whether or not of the United Kingdom) or related purposes.

<sup>4</sup> See Annex A on how to assess the contract value

must also notify the internal MOD Single Source Advisory Team ([SSAT](#)) that you expect to place a QDC, using the EXCEL template [SSAT Notification Form](#).

## Framework Agreements

15. Where you have an existing framework agreement you should note that individual tasks or call-offs placed under that agreement may be regarded as new contracts that meet the criteria of a QDC. You must seek advice from [Central Legal Services \(CLS\)](#) who will assess if the task or call-off is a QDC.

16. Where you are placing a new framework agreement you must consider if the framework agreement itself, or any subsequent tasks or call-offs, will meet the criteria for a QDC. You must seek CLS assistance to ensure that your framework terms and conditions are drafted to be consistent with the DRA/SSCR. This will prevent future conflict between the provisions of your framework agreement and the provisions of legislation (in the event of such conflict, the legislation will prevail).

## Contracts Excluded From Being a QDC

17. SSCR Regulation 7 specifies that certain types of contract are not QDCs. Other than those specified by Regulation 7 there are no other exclusions from the legislation. If you believe your proposed contract falls under one of the specified exclusions then you must obtain written agreement from CLS. You must also advise the MOD SSAT of the exclusion. The following types of contract are excluded:

- a. contracts with a foreign government, for example Foreign Military Sales (FMS) with the United States of America (USA);
- b. contracts made within the framework of a cooperative international defence programme, for example North Atlantic Treaty Organisation (NATO) Eurofighter and Tornado Management Agency (NETMA).
- c. any contract the purpose of which is wholly for one or more of the following:
  - (1) the acquisition of land (including existing buildings and other structures, land covered with water), and any estate, interest, easement, servitude or right in or over land;
  - (2) management or maintenance of any land, buildings or other structures; or
  - (3) intelligence activities, which could include the collection, communication and processing of information required to maintain and defend the security and resilience of the procurer's activities, infrastructure, and economic well-being, and influence and deter those who are hostile to that requirement.

## Exemption from QDC Status

18. A contract is a QDC if it meets the criteria at paragraph 8 above. In exceptional circumstances Section 14(7) of the DRA enables the Secretary of

State for Defence (SofS) to exempt a contract from being a QDC, a power that SofS has not delegated to any other person.

19. If you assess your contract is a QDC but you believe there is an exceptional reason for SofS to exempt it from the legislation you must consult the MOD SSAT immediately. You must **not** undertake conversations with your contractor about an exemption without first seeking advice and approval from MOD SSAT.

## Contract Amendments

20. A contract that is not a QDC may become a QDC on amendment, in certain circumstances. Where the amended contract has a value of £5M (ex VAT)<sup>5</sup> or above and meets the criteria at paragraph 8.a, 8.c and 8.d above, you can agree with the prime contractor that the amended contract will be a QDC in the following circumstances:

- a. if you amend a contract that was entered into on a single source basis before 18 Dec 2014 (see paras 25 below); or
- b. if you amend a contract on a single source basis where that contract was originally competed (see paras 27 below).

## Decision to Amend a Contract and Convert to a QDC

21. The decision to convert an existing contract to a QDC on amendment is subject to the agreement of both parties to the contract. You must complete a 'comparison' exercise, to evaluate your existing contract provisions against the protections you would obtain under the new legislative framework, to assess whether it is in the MOD's best interest to seek a conversion. You must use the [QDC Comparison Spreadsheet Appendix 1](#) as a basis for this exercise; the spreadsheet may be modified to include other factors relevant to your contract.

22. If your overall assessment is positive or neutral you must seek your contractor's agreement to convert the contract to a QDC. You must inform the MOD SSAT by email of your decision to seek or not seek conversion to a QDC. You should summarise the reasons for your decision and include a copy of the comparison exercise you have conducted. This will inform and justify your decision and provide an audit trail for any approvals / due diligence process you may have to complete.

23. If you are seeking to amend a Cat A or Cat B project, the Investment Approvals Committee (IAC) will not approve any decision to proceed as either a QDC or not a QDC, unless your submission confirms that your strategy has been considered and approved by the MOD SSAT. Annex D provides draft text for use in any approvals documents.

24. Paras 21-23 above clearly indicate it is MOD's preference to seek a contractor's agreement to make a contract a QDC upon amendment where it is

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<sup>5</sup> The £5M threshold applies to the value of the amended contract, not the value of the amendment.

eligible to become a QDC, unless it is clearly not in MOD's interest to do so. The spreadsheet referenced at para 21 above should help you consider the following factors to decide whether you should seek conversion to a QDC:

- a. does your current contract provide the same rights as a QDC, i.e. to see all information relevant to the price build of the current proposal and all future amendments, for example, evidence in support of all quoted labour and overhead recovery rates and all allowable costs including escalations and risk contingencies?
- b. what is the profit rate in the existing contract and what might it be if the contract was converted to a QDC?
- c. what is the contract reporting regime such as frequency, scope and timeliness of reports, and would this be improved under the statutory QDC reporting requirement?
- d. what are the existing obligations on the contractor to retain contract records and give MOD access to them? Would these be improved if the contract was converted to a QDC?
- e. under the existing contract, is the contractor obliged to give you early warning of any likely or actual event that may affect the contract price and / or performance? If the contract becomes a QDC the contractor will have a legal obligation to notify the MOD of any event, or likely event, that will materially impact time, cost or performance.
- f. is there a potential impact on any existing performance regime?
- g. how much time is left on contract?
- h. what internal resource is required to amend the contract to a QDC?
- i. what is the expected impact on the contract price?
- j. are there any other factors relevant to your specific contract?

## **Amendment of a Single Source Contract Originally Placed Before 18 December 2014**

25. If you and your contractor agree that a contract is to become a QDC on amendment you should note the following:

- a. the extent to which the price for the entire amended contract needs to comply with the pricing provisions of the SSCR, will be considered on a case-by-case basis. Costs already incurred by the contractor (known as 'sunk costs') can be left undisturbed, which should make it easier for your contractor to agree to an amended contract becoming a QDC. You can find guidance on pricing contract amendments in [Chapter 3 Pricing a QDC: The Cost Element](#) and [Chapter 4 Pricing a QDC: The Profit Element](#); and
- b. once the contract becomes a QDC the statutory Contract Reporting requirements will apply. These contract reports are required from the date of the amendment, not the original contract start date. When amending a contract to a QDC you should review your existing contract specific reporting requirements and amend them if necessary, to avoid duplicating

information that will now be supplied under the QDC reporting regime. See [Chapter 5 Contract Reporting](#) for more details.

## **Amendment of a Single Source Contract Originally Placed After the 18 December 2014**

26. A single source contract placed after 18 December 2014, assessed as being a non-QDC at the time it was placed, cannot currently be converted to a QDC on contract amendment.

## **Single Source Amendment of a Contract Originally Let on a Competitive Basis**

27. You may seek to agree with a prime contractor that a contract originally let under a competitive process will become a QDC following single source amendment. This applies at any time when making a single source amendment of a contract placed under a competitive process, whatever the date the original contract was let. You should follow the process as outlined at paras 21-24 above to consider whether conversion to QDC is practical and desirable for the MOD, recognising that the contractor's agreement will be required.

## **Can a Contract Amendment be Treated as a New Contract?**

28. As previously explained, for a contract to become a QDC upon amendment, the agreement of both parties to the contract is required. This raises an important question of whether the parties' agreement could be deemed to be a new contract, for the purposes of interpreting the DRA / SSCR, even though it is purported to be a contract amendment. In other words, could a contract amendment be deemed to be a new QDC in its own right?

29. CLS have advised that in some circumstances there is a risk that a court might find that the parties' agreement amounts to a new contract under the DRA / SSCR, and hence in law is deemed a QDC (assuming it meets the other criteria set out in the DRA / SSCR), even though it has been entered into as a contract amendment. The highest risk is where a service contract is due to expire and the parties agree that services (the value of which equals or is more than £5m) will be provided for a further period of time, after the end of the previously agreed contract term. A risk also exists where contracts are 'amended' so as to add one or more further requirements (equal to or more than £5m) which are standalone in nature and where there is no compelling rationale to contract for the requirement(s) by way of contract amendment rather than as a new contract.

30. You should seek CLS advice whenever you are dealing with a contract amendment that you believe may have the potential to be deemed to be a new contract, for the reasons stated at para 29 above, or any other reason you identify. If CLS subsequently advise your amendment is at high risk of being seen as a new contract for the purposes of the DRA / SSCR, you must contact the MOD SSAT for further advice.

## What is a Qualifying Sub-Contract (QSC)?

31. A QSC is created where a prime contractor or qualifying sub-contractor (i.e. a sub-contractor that already has a QSC) proposes to enter into a sub-contract which involves the provision of anything for the purposes of a QDC or QSC. A legal definition of a QSC is provided in Section 28 of the DRA.

32. A sub-contract will be a QSC when:

- a. it is a contract placed by a prime contractor or qualifying sub-contractor where 50% or more of the value of the contract to be placed is required either for the performance of the QDC / QSC immediately above it in the contractual chain, or to enable the combined performance of that QDC / QSC and any other QDCs / QSCs (or prospective QDCs / QSCs) which the contracting counterparty<sup>6</sup> (or associated undertakings) is party to (or might become party to);
- b. it is placed on a single source basis;
- c. it has a contract value of £25M (ex VAT) or more;
- d. it is assessed to be a QSC by the contracting counterparty and that assessment is properly notified in writing to the relevant parties<sup>7</sup>; and
- e. the contract is not excluded (see paragraph 17).

33. The contracting counterparty is responsible for assessing whether a prospective sub-contract is a QSC and this assessment must take place before entering into the sub-contract. They must keep a record of their assessment and under Regulation 61(3) of the SSCR they are obliged to give written notice to the MOD that they expect to place a QSC.

34. In the event there is a disagreement between two or more parties over whether or not a sub-contract is a QSC, the sub-contractor may appeal the matter to the external Single Source Regulations Office. However, there have been instances where no referral is made, instead the parties continue to dispute QSC status, which may result in delays in placing the QDC. If you become aware of QSC assessment disputes related to your QDC, you should notify the MOD SSAT.

35. As with a QDC there may be exceptional circumstances where a contract that would otherwise be a QSC may be exempted from the provisions of the DRA. Where a prime contractor seeks an exemption from QSC status on behalf of a sub-contractor they must liaise with the MOD Commercial Officer who must follow the process described for QDC exemptions at paragraphs 18 and 19 above. As with QDCs, a QSC exemption can only be authorised by the MOD (SofS).

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<sup>6</sup> Contracting counterparty is the prime contractor or qualifying sub-contractor depending on the contractual chain.

<sup>7</sup> Where the prime makes this assessment the relevant parties will be the prospective sub-contractor and SSAT, where a qualifying sub-contractor makes the assessment the relevant parties will be the prospective sub-contractor, prime contractor and SSAT

36. Where a contract becomes a QDC by amendment, any existing sub-contracts which the prime contractor has already entered into, which enable the performance of that contract, can never become a QSC. However, a new sub-contract set up to enable the performance of the prime contract when it becomes a QDC, and which meets the criteria, may be a QSC.

37. Where a prime contractor intends to use one of their existing sub-contracts to enable the performance of a new QDC, the existing contract can never become a QSC. However, where a prime contractor enters into a new sub-contract(s) which is conditional on the MOD placing a QDC with the prime contractor, the sub-contract may be a QSC.

## Cessation of QSC

38. Where a qualifying sub-contractor believes that the requirement for 50% of the sub-contract to be in support of a QDC or QSC no longer applies, they can notify the SSRO in writing that they believe their contract has ceased, or will cease, to be a QSC. The notice must:

- a. be received by the SSRO no later than the QSC completion date;
- b. state the date at which the qualifying sub-contractor believes the contract ceased, or will cease, to be a QSC;
- c. explain why the qualifying sub-contractor has come to that view; and
- d. be copied to the other party to the QSC and to the MOD at the same time that the SSRO is notified.

39. If you receive such a notice you should contact the MOD SSAT. They may seek your view in relation to the cessation of the QSC and, within ten working days of receipt of the notice, may advise the SSRO in writing of any matters they consider the SSRO should take into account when deciding whether to overrule the qualifying sub-contractor's notice. You must not contact the SSRO directly, all contact must be via the MOD SSAT.

40. The SSRO must decide if the QSC has ceased to be a QSC or not, and notify its decision in writing to the sub-contractor, the other party to the QSC and to the MOD SSAT. The MOD SSAT will inform the Commercial Officer of the SSRO's decision.

## Placing a Qualifying Defence Contract

### Pre-contract Award

41. You must assess whether you expect your prime contract to be a QDC and record this assessment. You must also take the following steps leading to contract award.

- a. Procurement Strategy – you must refer to your assessment and the outcome in the Procurement Strategy. Where you have assessed the contract will not be a QDC you must explain why you have reached this conclusion. If the contract is expected to be a QDC but you are considering an exemption, you must state this and follow the guidance at paragraphs 18 and 19 above.

- b. Commercial Strategy - a QDC has specific requirements, for example for pricing and contract reporting, and you should refer to these in your Commercial Strategy (e.g. the pricing method you intend to use, what frequency of Interim Contract Reporting you require from the contractor).
- c. Record Keeping – contractors are obligated to keep relevant records and allow the MOD access rights to examine those records for the purposes set out in the DRA and SSCR. The commencement of this obligation will generally be the earliest of:
- (1) the date the prime contractor received written notice from the MOD that contract negotiations had commenced;
  - (2) the date the MOD published a voluntary transparency notice in relation to the contract;
  - (3) the date the prime contractor was invited to provide an offer;
  - (4) the date the prime contractor made an offer; or
  - (5) the date the QDC was entered into.
- d. Tender Documentation – you must include the QDC DEFCONs 800, 801, 802 and 804 in your tender documentation. The inclusion of DEFCON 803 needs your closer attention – you must not include it in contracts over £50m but you may consider its use in QDCs under £50m. In most cases you should not include DEFCON 803 in contracts under £50m but you may do so if you have actively considered the matter and decided that is appropriate. The [MOD Defence Conditions Guide](#) provides guidance on the use of these DEFCONs.
- e. Evaluating a Tender – in addition to following the guidance in the Tender Evaluation Commercial Policy Statement (CPS) when evaluating a tender for a QDC, you should also refer to the following guidance to ensure the tender complies with the requirements of the DRA and SSCR:
- (1) [Chapter 3 Pricing a Qualifying Defence Contract: The Cost Element](#) and [Chapter 4 Pricing a Qualifying Defence Contract: The Profit Element](#), which provide detail on the legal obligations of both parties during the price negotiation;
  - (2) [Chapter 5 Contract Reporting](#); and
  - (3) [Chapter 6 Open Book and MOD Audit Rights](#).

## Post Contract Award

42. Following contract placement you must notify the MOD SSAT immediately your QDC is placed. They are responsible for notifying the SSRO when a QDC is placed; this is important as it is the SSRO who advise the contractor how to upload QDC contract reports onto the SSRO secure database. You must notify the SSAT of a QDC by email, using the EXCEL template [SSAT Notification Form](#)–. Although you will have completed the same template when you first assessed the contract as a QDC, many of the data inputs fields may have changed by the time you place the contract, so you need to notify the SSAT of the revised data.

43. The DRA and SSCR place specific obligations on the MOD and contractors in terms of reporting and contract management. You must follow the guidance in Chapter 5 Contract Reporting during the life of the contract, which should be read in conjunction with the [Contract Management CPS](#).

### **Disputes Over QDC / QSC Status**

44. If the parties cannot agree on whether a contract will be a QDC or QSC you should refer the matter to the MOD SSAT at [DESComrcl-SSAT-1\(Multiuser\)](#), clearly stating the reasons why each party takes a different view.

45. You should not contact the SSRO directly on any matter, including a dispute over whether a contract is a QDC. If you are in dispute about a contract's status which is holding up progress towards contract award, you should engage with the MOD SSAT for assistance in resolving the matter. SSCR Regulation 51 specifies what matters may be unilaterally referred to the SSRO for an opinion, this does not include disputes over the QDC status. Whether a contract is a QDC or a QSC is a legal matter; so if there is a dispute about QDC / QSC status the MOD SSAT will help you engage with your contractor, drawing on legal resources if necessary.

46. If a prospective sub-contractor disagrees with the QSC assessment by the prime contractor then under Regulation 62 of the SSCR they may, before the sub-contract is entered into, appeal in writing to the SSRO to determine whether or not the assessment was correct. They must send a copy of the notice of appeal to the prime contractor and the MOD.

### **Contacts, Training and Further Information**

47. The [Web Access Page](#) for the DRA and SSCR contains a summary of the legislation, details of who you can speak to for advice, and what training is available. It also contains links to other chapters in the SSCR guidance and other relevant topics and information.

## What are the key points to remember?

1. You must assess if your proposed contract is a QDC. Where you assess a proposed contract will be a QDC, you must notify the MOD SSAT promptly using the EXCEL template [SSAT Notification Form](#).
2. You must price a QDC and contract in compliance with the DRA and SSCR. If your contract is a QDC but you proceed as if the legislation does not apply, you will be in breach of the Act and put the MOD at serious commercial, financial and reputational risk.
3. The MOD will only grant an exemption from QDC or QSC status in exceptional circumstances. Only the Secretary of State for Defence can approve exemptions.
4. It is the prime contractor's responsibility to assess whether any sub-contract(s) they place in connection with a QDC or QSC is itself a QSC. It is also the prime contractor's responsibility to inform the MOD and the sub-contractor of a positive QSC assessment.
5. In some circumstances a non-QDC may become a QDC on amendment, providing both parties agree. You must use the [QDC Comparison Spreadsheet Appendix 1](#)] to assess whether you should seek to make a contract a QDC on amendment. You should always notify the MOD SSAT of your decision.
6. If there is a dispute about matters which determine whether a contract is a QDC or QSC (e.g. the contract value), you may refer this to the MOD SSAT at [DESComrcl-SSAT-1\(Multiuser\)](#). You must not contact the SSRO direct.

## Annex A

# How to Estimate a Contract Value for the Purposes of Establishing QDC Status

1. The contract value for the purposes of establishing QDC status is the total value of the proposed contract (ex VAT) which the MOD expects to pay under the contract. This will be:
  - a. the value at the time you enter into the contract; or
  - b. where a contract becomes a QDC by amendment, the total contract value at the date of that amendment.
2. You are responsible for determining the value of the proposed contract in accordance with this guidance. In assessing the total contract value you must, where appropriate, take account of the following:
  - a. any form of option. For this purpose you must take account of the likelihood that any given option will be exercised. If you consider it likely that an option will be exercised, you should include the value of that option in the total contract value; and
  - b. any inflationary / deflationary effects on Allowable Costs likely to be included in the contract price.
3. You must also:
  - a. exclude the value of any land, buildings, equipment, information, personnel or other resource to be provided by the MOD; and
  - b. convert any foreign currency amounts payable under the contract to pounds sterling.
4. You must estimate your contract price as accurately as possible as this will determine if your contract meets the threshold for a QDC.

## A Series of Single Source Related Contracts

5. Where the contract is one of a series of contracts entered into, or to be entered into, for the purpose of a requirement for goods, works or services over a period, you may determine the value by either:
  - a. taking the aggregate value payable under the contract and all other contracts for that requirement which:
    - (1) have similar characteristics to the contract; and
    - (2) have been entered into in the 12 months immediately before the time of agreement,and adjusting the amount to take account of any expected changes in quantity and cost of the goods, works or services to be provided in the 12 months starting at the time of the agreement; or

b. estimating the aggregate value of the contract and all other contracts, or proposed contracts which:

- (1) have similar characteristics to the contract; and
- (2) will be entered into in the 12 months starting at the time of the agreement.

6. Where the contract is for goods, works or services which are required for the sole purposes of a discrete operating unit within the contracting authority<sup>8</sup>, and that unit has the necessary delegation and authority to independently take a procurement decision, the aggregate value will only include contracts entered into, or proposed to be entered into, for the sole purposes of that unit.

7. You must not choose a valuation method described above, or any decision to enter into separate contracts, with the intention of excluding a contract from QDC status.

## Small Lots

8. If the requirement is divided into several lots, each one the subject of a single source contract with the same contractor, and their aggregated price is above the threshold<sup>9</sup>, each single source contract will be subject to QDC status, irrespective of whether its individual price is less than the threshold.

9. You may choose not to apply QDC status to any lot(s) with an estimated price of less than £1M (ex VAT) but only if the aggregate price of the excluded lot(s) is less than 20% of the total price of all the lots.

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<sup>8</sup> Contracting authority means a party to the contract which is or would be liable to pay the contract price.

<sup>9</sup> The QDC threshold is £500,000,000 (£500M) for contracts placed on or after 18 December 2014 to 30 March 2015, and £5M for contracts placed on or after 31 March 2015.

## Annex B

### Single Source Contracts

1. The SSCR provide specific guidance on what is considered to be a competitive process for a contract:
  - a. you have either:
    - (1) published a Contract Notice for the proposed contract in the Official Journal of the European Union (or elsewhere); or
    - (2) invited one or more potential contractors, other than the prime contractor (and not associated with the prime contractor), to negotiate or provide offers in relation to a proposed contract;
  - b. the material terms of the contract are wholly / substantially the same as those offered by the prime contractor in its tender or in negotiations relating to that proposed contract; and
  - c. at the time of making its offer in respect of the contract, the prime contractor did not, or could not have, reasonably considered it likely that its tender would be the only compliant tender.
2. Where you have a contract with a prime contractor which was the result of a competitive process, any amendment to that contract is considered the result of competition if an equivalent test to that above is satisfied.
3. In relation to a framework agreement if you have:
  - a. either:
    - (1) published a Contract Notice in the Official Journal of the European Union (or elsewhere) to seek offers in relation to a proposed framework agreement; or
    - (2) invited two or more potential contractors to negotiate or provide offers in relation to a proposed framework agreement;
  - b. entered into a framework agreement with one or more framework contractors; and
  - c. entered into a contract with a prime contractor.

The award of a contract is considered to be the result of a competitive process if:

- a. the terms governing the price payable under the contract are in accordance with a framework agreement;
- b. the material terms of the framework agreement are wholly / substantially the same as offered by the framework contractor in their tender or negotiations in accordance with paragraph 3.a or 3.b above;
- c. at the time of making its offer for the framework agreement the framework contractor did not, or could not have, reasonably considered it likely that its tender would be the only compliant tender; and

d. where two or more potential contractors were invited to provide offers or negotiate for the framework agreement at least one contractor was not the prime contractor or associated with the prime contractor.

Or:

e. the terms governing the price payable under the contract are determined by a competition at the call-off stage between two or more framework contractors;

f. at least one of the framework contractors was not the prime contractor, or associated with the prime contractor;

g. the terms governing the price payable under the contract are wholly / substantially the same as offered by the prime contractor in the call-off competition; and

h. the prime contractor did not, or could not have, reasonably considered it likely that its tender would be the only compliant tender.

4. If paragraphs 1, 2 or 3 above apply to your contract or amendment, it is considered to be a competitive process and the SSCR will not apply.

## **Failure of competition**

5. When there has been a 'failure of competition' (as defined by the Public Contracts Regulations (PCR) / DSPCR) and you effectively place the contract on a single source basis it may not be immediately obvious whether the resultant contract can be considered a QDC.

6. If there is sufficient evidence that the successful contractor did not consider, or could not reasonably have considered, it likely that it would be the only offer acceptable by the MOD, the contract should not be a QDC.

7. If the opposite is true and there is sufficient evidence that the contractor, at the time of making their offer, did know they were likely to be the only offer capable of acceptance by the MOD, and therefore the offer was not subject to competitive pressure, the resulting contract could be a QDC.

8. If you decide your potential contract should be a QDC you must re-issue the Invitation to Tender and include terms and conditions relevant to a QDC (see paragraph 41.e).

9. There may be times when you believe the contract should be a QDC but the contractor does not. You should refer such cases to the MOD SSAT after discussing it with your senior commercial line manager.

## Annex C

### Template letter to a contractor, to notify them that MOD assesses the prospective contract will be a QDC

Dear XXXX,

**[Insert heading giving details of requirement subject to contract and/or draft contract number] (“the Proposed Contract”)**

**The parties have commenced negotiations in relation to the Proposed Contract** *[retain or delete this statement as appropriate]*<sup>10</sup>

This letter is to notify you that the Authority has assessed that the Proposed Contract will be a Qualifying Defence Contract subject to the provisions of the Defence Reform Act 2014 (DRA) and the Single Source Contract Regulations 2014 (SSCR). The DRA is primary legislation and the SSCR is secondary legislation, both can be accessed at [www.legislation.gov.uk](http://www.legislation.gov.uk).

Regulations 20 and 21 of the SSCR require you to keep relevant records in relation to a QDC and allow the Authority access to those records. It is important that you appreciate this obligation encompasses a period prior to contract award.

Sections 28-30 of the DRA and Regulations 57-65 of the SSCR describe how any sub-contract that you place may be a Qualifying Sub-Contract (QSC). Regulation 61 of the SSCR places an obligation on you to assess whether any sub-contracts you place in connection with the Proposed Contract will be QSCs and to keep a record of that assessment. Where you assess that a sub-contract will be a QSC you must notify the Authority and the prospective contractor of your assessment.

When pricing a QDC you have very important obligations relating to the agreement of costs used to calculate the contract price. Section 20 of the DRA states that you, as the primary contractor, have an obligation to be satisfied that all your proposed costs are allowable costs, in that they meet the requirement to be “appropriate, attributable and reasonable”, in accordance with the statutory guidance on allowable costs issued by the Single Source Regulations Office, an independent non-departmental public body established by the DRA.

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<sup>10</sup> The merit of making this statement is it then obliges the contractor to keep records from this point, if no such obligation has yet been created (see para 38 of this Chapter2). However, if you decide it is not yet appropriate to make such a statement, then delete this sentence.

Section 20 of the DRA also places an obligation on you to demonstrate to the Authority, where required, that all your costs are allowable costs. This letter is to notify you that the Authority does require you to demonstrate that all your proposed costs are allowable. This is to enable the Authority to fulfil its own obligation under Section 20 of the DRA to be satisfied that your costs are allowable costs.

The Contract Profit Rate for a QDC must be negotiated between the parties in accordance with the procedure set out in Regulation 11 of the SSCR.

Once a QDC has been awarded, the legislation requires you to submit a number of contract reports at various times through the life of the contract. In some circumstances you (or your ultimate parent undertaking) may also be required to submit supplier level reports.

You can find the current "Single Source Cost Standards: statutory guidance on allowable costs" and "Statutory Guidance on Adjustments to the Baseline Profit Rate" on the [SSRO website](#). You can also find QDC and Supplier Reporting Templates and associated reporting User Guides on this website.

Please note the above is intended to alert you to some of the key aspects of the legislation that will apply to the Proposed Contract. It should not be relied on as a comprehensive or definitive statement of your obligations and rights under the legislation and you are strongly advised to seek legal advice in respect of the application of the legislation.

Yours etc.

## Annex D

### DRAFT TEXT FOR CONSIDERATION IN ANY APPROVAL SUBMISSION DOCUMENTS

[*date*]

[*distribution*]

#### [*contract reference & title*] – CONSIDERATION OF SINGLE SOURCE CONTRACT REGULATIONS 2014 (SSCR)

##### ISSUE

1. The purpose of this document is to identify the key principles and features of the Single Source Contract Regulations 2014 (SSCR) to determine to what extent such features are addressed or would be beneficial to pursue in the forthcoming amendment of [*contract title*]. This document is intended to be a source of reference in support of any mutual (MOD-[*insert contractor name*]) decision to implement and apply the said regulations to the existing contract.

##### RECOMMENDATION

2. Invited to:
- a. **Note** the analysis at Appendix 1(attached) of the current provisions of the contract with those that might be expected if it were to become a QDC by agreement with the prime contractor;
  - b. **Note** the conclusions which have been drawn at paragraphs [\*] to [\*].
  - c. **Approve** the recommended next step, which at this stage is to [*delete as appropriate*] [defer making the contract a Qualifying Defence Contract (QDC)] **OR** [seek the contractor's agreement to convert the contract to a QDC on amendment].

##### TIMING

3. Routine. [*insert any time requirements relating to the decision making process this has to meet*].

##### BACKGROUND

4. *[insert background to the Project / contract such as: Defence Industrial Strategy considerations; retention of capability / Design Authority; plan for future capability requirements; contract start date; period of contract; current pricing arrangements; transparency and contract reporting]*

## **DEFENCE REFORM ACT 2014 AND SINGLE SOURCE CONTRACT REGULATIONS 2014**

5. The DRA / SSCR 2014 enables certain specified contracts to become QDCs when they are amended on a single source basis. The proviso is that both parties to the contract must agree to the contract becoming a QDC on amendment. The above-mentioned contract could become a QDC on amendment, provided that both parties agree. This paper assesses whether or not it would be in MOD's interest to pursue agreement with *[insert prime contractor name]* to convert the contract to a QDC.

## **COMPARISION ANALYSIS**

6. The following provides a synopsis of the assessed advantages and disadvantages of converting the contract to a QDC. [Further analysis can be noted at Appendix 1].

*[insert a summary of all the perceived advantages and disadvantages, drawing on your analysis with the 'comparator tool' at Appendix 1]*

## **CONCLUSIONS**

7. *[include your overall assessment of the above comparison and your final recommendation]*

## **NEXT STEPS**

8. *[provide details of what action(s) you propose to take next, for example pursue conversion to a QDC]*