Bird & Bird

Lexology: Panoramic: Defence & Security Procurement

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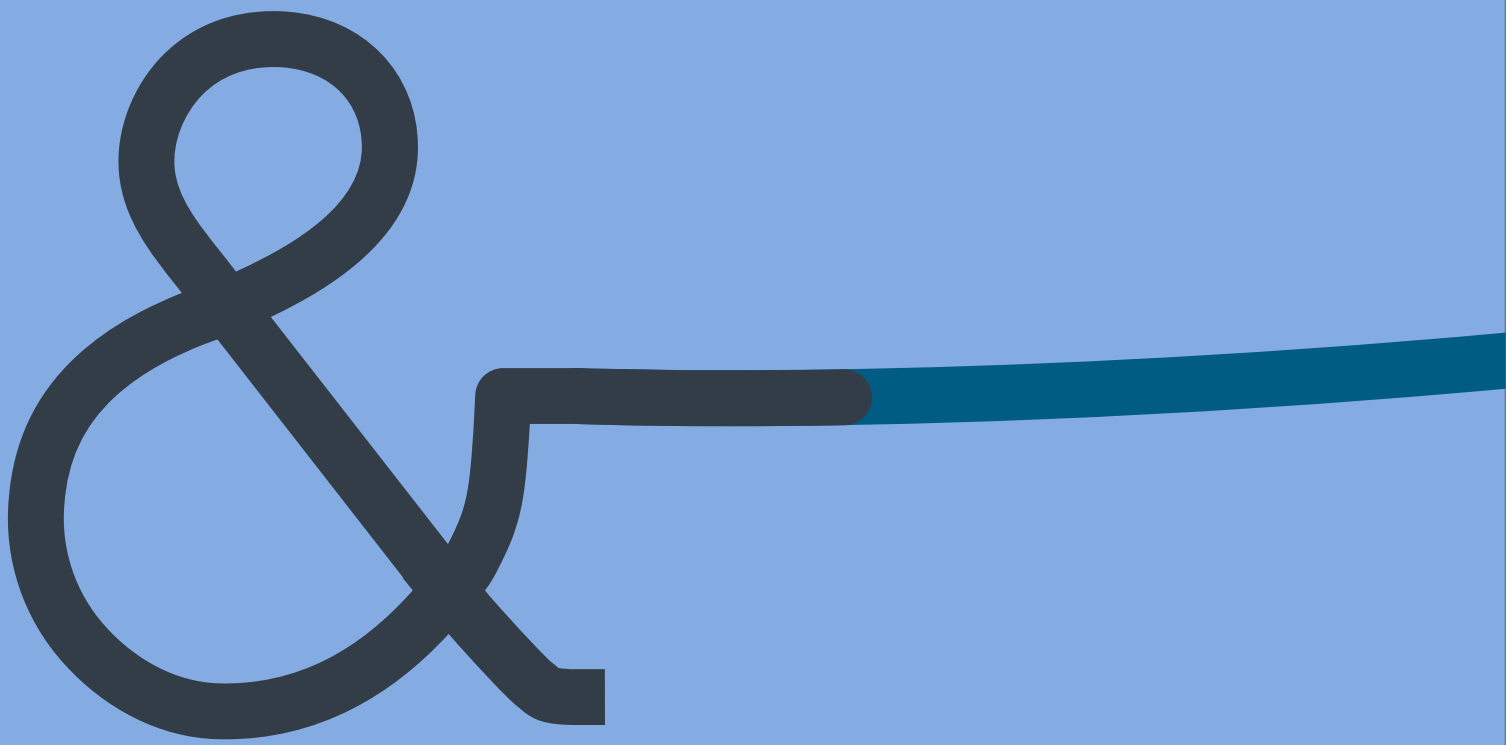

Introduction

Bird & Bird's International Defence & Security team are delighted to have contributed to the global 2024 edition of 'Lexology Panoramic: Defence & Security Procurement'.

Our team has written the Global Overview and the UK, Germany, Poland, Italy, France, Denmark, Sweden, Hungary and Australia chapters. Mark Leach and Will Bryson are contributing editors for the publication.

This annual publication provides excellent expert analysis on how to navigate defence procurement, including the regulatory environment, hot topics on contracting, export control, dispute resolution, anti-corruption, employment law and more. It is an ideal tool for in-house counsel and commercial practitioners.

Our experts analyse all the hot topics affecting the industry, including emerging developments in technology, climate change, budgetary pressures and more.

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

Defence & Security Procurement: Global overview

Mark Leach and Will Bryson
Bird & Bird LLP

Global Overview

Against the backdrop of increased geopolitical instability over the past year, we now look ahead to the shifts and changes 2024 may bring. Our thoughts remain with all those caught up in conflict around the world, and we hope that a peaceful end to the violence will be reached quickly and that current geopolitical tensions subside.

The war in Ukraine has continued into its second year, but with Ukraine's counteroffensive failing to achieve any significant breakthrough, uncertainty remains as to how the conflict will come to an end. Conflict in the Middle East has once again come to a head following the Hamas attacks on Israel on 7 October 2023 and with Gaza facing a humanitarian crisis as a result of the ongoing war. Further east, China's 'grey zone' tactics in Taiwan are causing mounting concern, with the growing risk that the United States and its Asian allies, such as Japan and South Korea, may be drawn into a wider conflict.

The backdrop to these global conflicts remains one of economic uncertainty as global recovery remains slow in the wake of the pandemic and the sanctions levied against Russia following its invasion of Ukraine. While we saw signs of resilience in early 2023, a global attempt to curb inflation has stalled economic activity and vastly diluted the risk appetite of developing economies. Regional divergences are also growing, leading to concerns about geo-economic fragmentation, and leaving little margin for error at the hands of policymakers across all jurisdictions, particularly those of advanced economies.

At the same time, we have seen rapid advances in technology – AI in particular – over the past 12 months, which has fuelled some growth within key markets. By reaching the mass market with applications such as ChatGPT, this new age of generative AI is expected to open the door to greater investment and innovation. It comes with a word of caution, however, as the world prepares to face a historic year of elections in 2024 that could be impacted by AI. Lastly, the focus on ESG and climate change remains at the top of almost all agendas. The record-breaking COP28 in 2023 resulted in countries agreeing for the first time on the need to transition away from the use of fossil fuels in energy systems. However, the agreed deal fails to compel states to take any particular action, and no timescale for this green transition has been specified.

Notwithstanding these challenges, the defence industry has remained fairly well insulated with indexed and cost-plus government contracts largely mitigating the continuing high

inflation environment, and persistent geopolitical tensions continuing to drive increases in national defence budgets**.** The sector's commitment to net zero also remains on track, with progress being made to decarbonise military production and processes, as well as calls to introduce mandatory carbon reporting requirements at both EU and UN levels.

ESG and climate change

The defence sector, like most others, has seen shifting expectations that require more diversity, inclusion and awareness of social and governance changes needed to fully support an increasingly diverse workforce. Commitment to this change has been solidified on a global scale, with one example being the European Commission's strategy to reach social protection KPIs as set out in its Action Plan towards a stronger social Europe by 2030.

In relation to climate change, although defence is tasked to protect and operate on a vast scale and under the most sensitive of conditions, key players both at state level and in industry have created roadmaps to achieving net zero by 2050, with many smaller members of the industry aiming to do so even sooner. Further changes in legal reporting requirements are also being called for. The Greens-European Free Alliance notes that military emissions reporting to the United Nations Framework Convention on Climate Change (UNFCCC) is currently voluntary, and is calling for the EU to be active in changing this to a mandatory regime, to fully implement the Climate Change and Defence Roadmap in the EU.

Increasingly, industrial defence contractors are seeking legal advice concerning their net zero goals for projects such as on-site renewable energy for heat and electricity, and sleeved corporate power purchase agreements to reduce energy costs, increase sustainability and improve the sector's resilience to energy disruption and market volatility.

Technology and AI

Emerging technologies are creating new opportunities and risks for defence and security actors. Industry players are having to invest heavily in research and development, acquire and integrate new systems, and cope with the associated ethical and legal implications, particularly around the use of AI. Historically, the defence industry was in the vanguard of technological development, which then trickled down to civilian applications. However, we are now increasingly seeing this technological proliferation happen in reverse, with rapid advances in technology from the civil world being adopted in the defence industry. This civil to military transfer brings about some issues.

Big technology-led companies and new startups entering the sector may have limited prior experience of defence contracting, meaning they will either need to adapt to how the sector traditionally operates or disrupt it. They also need to understand the regulatory and national security environment they are now operating in. We are seeing these new entrants to the defence sector seeking to understand the risks involved in selling their technology-led products and services for military end use, rather than the public consumer market. Some of the best examples of this are in the space sector. This is expected to create increased competition in 2024 from new entrants and non-traditional players in the defence market, and with an expanded market in this sensitive sector, eyes will be on leaders, governments

and regulators alike to ensure that defence at its core remains focused on response, defence and protection.

The rapid advances in AI, and generative AI in particular, over the past year is one of the stand-out technological developments of the twenty-first century. AI is likely to be pivotal in the defence sector, through both its use in defensive applications and the need to counter its use by bad actors (who may be able to put it to nefarious uses in ways and on a scale not possible with previous technologies). One key concern for 2024 is that we have entered into the biggest global election year on record, with the United Kingdom, United States and India – three of the world's largest democracies – all set to hold elections. These nations are part of up to 50 countries holding elections in 2024, with over two billion people being in a position to vote. This will all be taking place for the first time with powerful generative AI being widely accessible through applications like ChatGPT and Midjourney. The risk of AI-driven misinformation and the use of deepfakes distorting the democratic process is therefore a significant concern in all states heading to the polls in 2024.

Regulation

In the AI space, governments are moving at different speeds to meet the growing calls for firm regulation on generative AI ahead of 2024's elections. In the United States, President Biden unveiled proposals this October to protect workers and citizens from the threats posed by technology. This included a requirement for firms working on potentially dangerous models to share safety data with the government prior to release, while also addressing concerns that AI may lead to models that are trained in a way that exacerbates existing social biases and untruths.

The EU has reached a deal on how it plans to regulate AI, having signed a political agreement for the Artificial Intelligence Act. However, this will not find its way into law until 2025 at the earliest, thereby missing the bumper year of elections and failing to play a role in pacifying growing concerns over the damaging potential impact of AI on these elections. Similarly, while the United Kingdom in 2023 enacted the Online Safety Act and introduced the Artificial Intelligence (Regulation) Bill, the government has been cautious of the risk of over-regulating, claiming that this would stifle innovation.

The Online Safety Act has expanded the UK government's powers by creating requirements on social platforms to swiftly remove illegal misinformation as soon as they become aware of it, including that generated by AI. The Act does not, however, tackle the risk of digitally manipulated content from being created at its source and leaves the defence sector on high alert for potential unrest and risk of conflict at a time when geopolitical tensions are at their highest.

The Foreign Subsidies Regulation (FSR) is a new EU regulation on control of foreign subsidies distorting the EU internal market, which could well impact many defence (and dual-use) businesses operating across the EU and other countries. While there are some exemptions for defence, the FSR states that foreign subsidies in public procurement procedures in the defence sector can be examined ex officio by the European Commission. Businesses are also seeking to understand the tightening national security landscape (eg, the National Security Act and National Security Investment Act in the United Kingdom) and broader risks around potential weaponisation of their products.

Geopolitics

The current geopolitical situation, with ongoing wars in Europe and the Middle East and growing tensions in the Indo-Pacific region, is leading to increased defence spending in many countries around the world. It is also driving a continued focus on international collaborations and alliances.

The trilateral AUKUS defence and security partnership was entered into between the United Kingdom, the United States and Australia in September 2021. Pillar 1 of the pact paves the way for an Australian conventionally armed, nuclear-powered submarine capability. It was announced in March 2023 that this would take the form of SSN-AUKUS – a trilaterally developed submarine based on the United Kingdom's next-generation design that incorporates technology from all three nations, including cutting-edge US submarine technologies. Australia and the United Kingdom will operate SSN-AUKUS as their submarine of the future. The programme is expected to contribute vastly to the defence sector, with BAE Systems winning a £3.95 billion contract to build the new generation of submarines as part of the AUKUS pact. The past year has also seen further progress on AUKUS Pillar 2: advanced capabilities – including the first AUKUS AI and autonomy trial.

There was further cementing of international collaboration in December 2023 when Japan, Britain and Italy entered into a treaty on the establishment of a joint organisation to develop a new advanced jet fighter (known as the Global Combat Air Programme), with these countries pushing to strengthen cooperation in the face of growing threats. Meanwhile, the Future Combat Air System programme has seen Germany, France and Spain form a collaboration centred around the development of a core Next Generation Weapon System and a 'system of systems' web of connected platforms.

Finally, the Nordic region is focusing on its own scale-up of defence agreements, with Denmark, Finland and Sweden all signing agreements in late 2023 that will allow US soldiers and military equipment to be based on their respective soil to improve defence systems while the war in Ukraine continues and the threat from bordering Russia persists. Finland also joined NATO in 2023, and while Sweden's application stalled, it too may soon become a NATO member. Continued expansion in NATO's membership underlines its role as the foundation of collective security in the Euro-Atlantic region.

The above are just some examples of the substantial growth in international alliances, reflecting an emerging new world order in defence and geopolitics. Even in a post-Brexit and more polarised, factious world, countries are aware that global threats cannot be dealt with, nor the storm of conflicts weathered, alone.

Against the backdrop of these shifts in the global economic and geopolitical landscape, we present the eighth annual edition of Lexology Panoramic: Defence & Security Procurement.

Australia

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LEGAL FRAMEWORK

Relevant legislation

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

The Commonwealth Procurement Rules (CPRs), which were updated on 13 June 2023, are the foundation of how the Australian government engages and contracts with industry, including on defence and security matters. They form part of the Commonwealth Procurement Framework. As a Commonwealth entity, the Department of Defence (Defence), and other security agencies including the Department of Home Affairs, Australian Signal Directorate, Australian Secret Intelligence Service, Australian Security Intelligence Organisation and Australian Submarine Agency, are subject to the Public Governance, Performance and Accountability Act 2013 (PGPA Act), under which the CPRs are issued, and the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule). Key principles of the procurement process under the CPRs are value for money, ethics and efficiency, competition and equitability, and transparency and accountability.

The CPRs are supported by a range of tools, guidance material and templates developed and maintained by the Department of Finance to provide assurance, accountability and transparency in Australian government procurement activities. These processes and practices make it easier for businesses to participate in the economy and grow their business through contracting to the Australian government.

There is also a range of mandatory government procurement-connected policies that may impact on procurement over specified threshold values, including initiatives such as the Indigenous Procurement Policy, workplace gender equality, Australian industry participation and payment time requirements for contractors' suppliers.

Defence is the largest procuring agency in the Australian government and is subject to a range of Defence-specific procurement requirements. The Defence Procurement Policy Manual (DPPM) is the principal compliance document for Defence officials conducting procurement. Defence uses several tendering and contracting templates, including the Commonwealth Contracting Suite, the Australian Standard for Defence Contracting (ASDEFCON) suite, and the Defence Facilities and Infrastructure Suite of Contracts. The templates are tailored to meet different procurement needs and profiles, depending on the size, complexity and nature of the procurement activity.

Identification

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

Defence procurements will generally be carried out by the Department of Defence. Procurements by other security agencies will indicate the agency responsible for the procurement. Defence procurements may also be carried out by Australian Government Business Entities (GBEs), which may be incorporated or unincorporated government business entities formed subject to the PGPA Act. The main defence-related GBEs include

Defence Housing Australia, ASC (formerly the Australian Submarine Corporation) and Australian Naval Infrastructure.

As the largest Australian government procurer, Defence has in place a range of Defence-specific policies including the DPPM. Specific instructions may be set out in the relevant tender documents.

Conduct

3 | How are defence and security procurements typically conducted?

Procurements may be run through a range of procurement methods including:

- open tender by publishing an open approach to market and inviting submissions;
- multi-stage tender involving an initial approach to market followed by one or more subsequent approaches to market (for example, inviting expressions of interest followed by a request for tender);
- limited tender by approaching one or more potential suppliers to make submissions when the process does not meet, or is exempt from, the rules for open tender; or
- procurements from an existing standing offer or panel.

For some military-related procurements, Defence may issue request documentation for a commercial procurement and a letter of request for a Foreign Military Sale case in parallel to meet the capability requirement.

In Defence, the award of a contract will occur once all internal approvals have been undertaken. The process for awarding a contract and entering into an arrangement varies depending on the procurement process undertaken. A contract may be as simple as issuing a purchase order with standard terms and conditions, an order under a standing offer, or a comprehensive contract developed using a Defence contracting template such as ASDEFCON. At any time during the procurement process, Defence can determine that awarding a contract is not in the public interest.

The Aus Tender procurement information website publishes Australian government business opportunities, annual procurement plans and contracts awarded.

Procurements for non-corporate Commonwealth entities must comply with the 'rules for all procurements' at Division 1 of the CPRs. 'Additional rules' listed in Division 2 apply when the estimated value of the procurement is at or above relevant thresholds. Procurements by corporate Commonwealth entities must also comply with the rules if prescribed in the PGPA Rule.

The procurement thresholds for when Division 2 rules apply are A$80,000 for non-corporate Commonwealth entities, other than for procurements of construction services, A$400,000 for prescribed corporate Commonwealth entities, other than for procurements of construction services, and A$7.5 million for procurements of construction services.

Proposed changes

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

As part of the Defence Strategic Review 2023, the government stated that it would release a defence industry development strategy towards the end of 2023. As at the date of writing, the strategy has not been released. The strategy will aim to build the defence industry by reducing barriers to acquisitions, streamlining strategically important projects and low-complexity procurements, expediting decision-making in Defence project delivery and developing practical solutions in close consultation with the defence industry.

In September 2021, leaders of Australia, the United Kingdom and the United States announced the creation of AUKUS, an enhanced trilateral security partnership, to promote deeper information and technology sharing between the three nations and foster deeper integration of security- and defence-related science, technology, industrial bases and supply chains. Several bills supporting the partnerships were introduced to Parliament in 2023, including the Defence Trade Controls Amendment Bill 2023, which will amend the export controls regime.

Information technology

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

There are no different or additional procurement rules for information technology (IT) versus non-IT goods. However, the ASDEFCON contract suite includes terms that are specific to IT goods and services including technical data, software and commercial software. For complex, high-risk procurement of IT services for military purposes, the ASDEFCON Strategic Material suite of contracts are generally used by the Department of Defence (Defence). For procurement of commercial off-the-shelf IT goods or services, one of the simpler ASDEFCON templates may be used as a base.

Relevant treaties

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

The Agreement on Government Procurement (GPA) came into force in Australia on 5 May 2019. Australia negotiated a range of exemptions to the GPA including for the protection of essential security, such as Defence military procurement, and defence services relating to support of military forces overseas or military systems and equipment. Australia has also entered into free-trade agreements with a range of other countries including the Australia–US Free Trade Agreement. Relevant international obligations have been incorporated in the CPRs. Defence may rely on national security or similar exemptions

under GPA and other free trade agreements. Grounds for exemption are reflected in the CPRs, and additional defence specific exemptions are set out in the DPPM.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Disputes between the government and contractors arising from a contract will be resolved in accordance with the contract's dispute resolution procedure.

Defence contracts will often incorporate the Australian Standard for Defence Contracting (ASDEFCON) suite of tendering and contracting templates. These documents often include conditions providing for disputes to be resolved by arbitration in accordance with the rules of the Australian Centre for International Commercial Arbitration.

Where a dispute concerns the award of a contract regulated by the Commonwealth Procurement Rules, a supplier may be able to seek relief under the Government Procurement (Judicial Review) Act 2018. Suppliers may have standing under this Act to make formal complaints and to seek injunctions and compensation in certain circumstances. The Secretary of Defence (or a delegate) can issue a Public Interest Certificate (PIC) to state that it is not in the public interest for a particular procurement process to be suspended while applications for injunctions are being considered or complaints are being investigated.

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

ASDEFCON templates require disputing parties to attempt, in good faith, to resolve disputes as quickly as practicable before commencing arbitration. The most appropriate and useful form of alternative dispute resolution (ADR) depends on the size and substance of the dispute. However, the most common form of ADR in Australia is mediation.

In 2022–2023, the Australian government entered into more than 21,500 defence procurement contracts valued at A$38.7 billion with contractors – representing over half of the Australian government's total procurement spending. Despite the size of this industry, since 2001 there have been no reported court cases concerning a dispute about a defence procurement contract. The extremely low number of reported court cases comparative to the size of the industry demonstrates that most defence disputes in Australia are resolved out of court using ADR.

The fact of very high-value contracts, and that there are a relatively small number of participants in the industry, also means that all parties' commercial interests are aligned in keeping contracts on foot, rather than terminating valuable contracts and litigating against potential future business partners.

Indemnification

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

The Australian government will generally not provide an indemnity in favour of a contractor except in exceptional circumstances and subject to rigorous risk assessment. The Public Governance, Performance and Accountability Act 2013 (PGPA Act) gives the Finance Minister the power to grant an indemnity, guarantee or warranty on behalf of the government. This power has been delegated, with directions limiting its exercise, to the relevant Defence authority. The delegate may grant an indemnity, guarantee or warranty involving a contingent liability in relation to an event if the delegate is satisfied that the likelihood of the event occurring is remote (less than 5 per cent chance) and the most probable expenditure if the event occurred would not be significant (less than A$30 million).

There is no general statutory requirement for the contractor to indemnify the government in a defence procurement. However, contractor indemnities in favour of the government are included in core ASDEFCON clauses including indemnities for death, personal injury of government employees, third-party claims relating to infringement of intellectual property, death, personal injury and third-party property damage. Indemnities are reduced to the extent the indemnified loss was caused by the government. Any changes to the core provisions in the ASDEFCON templates will be subject to specialist legal review and risk analysis.

Limits on liability

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

The government can agree to limit a contractor's liability under the contract. Defence, in consultation with defence industry, has developed a set of liability principles that underpin the liability-related provisions in the ASDEFCON templates and can be use by Defence to guide any liability negotiations. The principles include that risk is generally allocated to the party best placed to manage those risks, the liability should be borne by the party at 'fault' and generally common law and statutory rights of the parties are preserved (except to the extent expressly limited by the contract).

There are no general statutory or regulatory limits to the contractor's ability to recover against the Australian government for breach. However, the Australian government has some statutory rights to use material incorporating intellectual property rights (including copyright, patents, trademarks and circuit layout rights) for certain government purposes without the rights owner's consent, subject to payments determined by statutory rules. These could limit the ability to recover for breach of licence terms.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

In practice, there is not a significant risk of non-payment of amounts that the Australian government must pay under contract. The Defence budget provides for commitments under existing contracts and planned procurements and is guided by the Defence Corporate Plan. The Australian government passes annual appropriation or supply acts to provide annual funding for government entities such as Defence to undertake ongoing activities and programmes. In addition, special appropriations provisions may be included in an act to provide authority to spend money for a particular project. Delegations under the PGPA Act allow Defence officials to approve the commitment of money, which is required before entry in contracts or arrangements.

Defence may occasionally make a contract subject to appropriation of funds if the contract is due to commence in a later year and funds are yet to be allocated. Defence contracts will generally include termination or reduction for convenience clauses, which may be exercised if budget priorities change.

Parent guarantee

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

Whether a parent guarantee or bank guarantee is required is determined during negotiations based on the risk profile of the contractor. A parent guarantee will often be required for high-risk or high-value procurements when the contractor is a subsidiary. A template deed of guarantee and indemnity is included in the ASDEFCON contract document suites. Defence prime contractors may join the Master Guarantee Program, which allows a signed master deed of guarantee and indemnity to apply to multiple contracts with Defence.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

Although not strictly mandatory, the more complex Australian Standard for Defence Contracting (ASDEFCON) contracts include 'core' clauses that are intended to be retained, and the Department of Defence (Defence) will generally only agree to the deletion of or changes to these clauses with specialist legal or contracting advice. Core clauses include the right of Defence to terminate for convenience, contractor indemnities and liability caps.

Legislative consumer guarantees under the Australian Consumer Law may apply to contracts with a value of A$100,000 or less, or if the goods or services are of a type normally

used for personal or household use (subject to exceptions). Consumer guarantees include that:

- goods are of acceptable quality, are fit for purpose and match any sample or description;
- repairs and spare parts will be available for a reasonable time; and
- services will be provided with due care and skill, be fit for purpose and be provided within a reasonable time if no time frame is agreed.

In addition, under general contract law, terms may be implied into a contract in certain circumstances.

Cost allocation

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

Allocation of costs under a contract is generally determined by the commercial agreement between the parties. A range of cost allocation options may be agreed depending on the risk and complexity of the project, such as fixed fee (which may be subject to certain variations in the contract), firm (defined but subject to escalation) or cost-plus (which may be subject to an overall contract price cap). Adjustments due to currency variations or based on indices such as a consumer price index may be agreed. For non-competitive or single source procurements, the Defence Capability Acquisition and Sustainment Group (CASG) has issued profit principles that are used as guidance for negotiating profits commensurate with risk. Contracts may include incentive payments for meeting key performance indicators and requirements to pay liquidated damages for failure to meet milestones.

Disclosures

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

CASG issues cost principles that are mandatory for procurements over A$2 million and provide guidance for other procurements unless an exemption applies. Under the standard ASDEFCON conditions of tender for more complex projects, the tenderer may be required to assist the Australian government in conducting a costs investigation, required by the cost principles, to determine if the price is reasonable. This is less likely to occur where there has been a competitive open tender. Contractors may also be required to differentiate Australian and imported costs to help support Defence policies for Australian industry participation. Costs details may be required for variations, services (including subcontractor costs) or supplies provided on a cost reimbursement basis or if advance payment is requested for upfront costs.

Audits

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

The Auditor-General (AG) has the power under the Auditor Act 1997 to conduct audits (including performance audits) of contractors and suppliers in relation to contracts with the Australian government. Contracts typically provide wide powers for the Australian government and its nominees (such as the AG) to access records, personnel and premises. The AG may give a copy or extract from an audit to the relevant Minister or any person who has a special interest in the report.

In addition, the Australian National Audit Office (ANAO) provides audit and assurance services to public sector entities and statutory bodies. The ANAO conducts annual reviews against the Defence Strategic Review and audits of Defence portfolio risks, including in relation to its procurement activity.

IP rights

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

Ownership of intellectual property created during the performance of a contract is subject to agreement between the parties. The default position under more complex ASDEFCON contract templates is that the contractor owns intellectual property (IP) that is created in the performance of contract, as the contractor will be in a better position to commercially exploit the IP, unless ownership of IP is required to protect the Australian government's interests or for national security reasons. The more complex ASDEFCON contract templates categorise items of technical data and software depending on whether they are commercial or military off-the-shelf, or are highly sensitive; and whether government ownership is sought with licences tailored to each type of item.

The government generally obtains a broad worldwide perpetual licence to use, reproduce, adapt and modify the IP for defence purposes (not including the right to commercially exploit the IP), including sublicensing it to third parties for the purpose of providing services to the government and for integration or maintenance purposes. More restrictive licences can be agreed on a case-by-case basis if the IP is commercial or military off-the shelf, or is highly sensitive.

Some simpler Defence contract templates still provide that the government owns developed IP, subject to the contractor retaining IP in pre-existing material.

Economic zones

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

Programmes developed for the benefit of certain categories of contractors are not generally available to foreign defence and security contractors.

Forming legal entities

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

A joint venture (JV) is an agreement between two or more parties to work together for the purpose of completing a specific task or project. A JV may be incorporated or unincorporated. There is no specific legislation applying to JVs in Australia. For an incorporated JV, the parties generally set up a separate legal entity, often a proprietary company, with each party holding shares and the respective roles and responsibilities of the participants set out in JV documentation such as a shareholder agreement. An overseas supplier may also wish to incorporate an Australian subsidiary, often as a proprietary limited company. Australian proprietary companies are formed under the Corporations Act 2001 by an application to the Australian Securities and Investment Commission (ASIC) and payment of the relevant fees. Australian proprietary companies must have a registered office in Australia and at least one Australian resident director and public officer for tax purposes. Directors of Australian companies are required to verify their identity and obtain a director identification number. Additional requirements apply to public companies. Unincorporated JVs do not involve a separate legal entity and the parties contractually agree on their respective roles and responsibilities.

For large projects of national significance, Defence may request suppliers to carry out the project via a separate legal entity in which the Australian government retains a 'sovereign share', which does not entitle the government to profits but gives the government certain rights such as limiting the transfer or sale of, or acquiring, shares and removing or appointing directors for national security purposes.

Access to government records

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

The Freedom of Information Act 1982 (FOI Act) gives a right to access information held by the Australian government (including contracts). FOI requests can be made by using an online form, or by submitting a request in writing. A decision on the request is normally provided within 30 days, although this time may be extended. Information may be redacted, or denied in full, where it is exempt from release under the FOI act. This includes documents affecting national security, defence or international relations, if the information would disclose trade secrets or commercially valuable information or if it relates to business information and access would be contrary to the public interest. A person to whom commercially valuable or business information relates will generally be given the opportunity to contend that the information should not be released. A limited number of Defence bodies relating to security are exempt from the requirements of the FOI Act. A disclosure log listing information released in response to FOI requests is maintained on the Defence website.

The Commonwealth Procurement Rules also requires Australian government agencies, including Defence, to publish information about contracts valued at or above A$10,000 (including goods and service tax) on the Aus Tender website, unless an exemption applies under the FOI Act.

Supply chain management

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

There are no specific rules regarding anti-counterfeit parts for defence and security procurements. However, procurement requirements may require bidders to submit details on how they address such issues.

The Modern Slavery Act 2018 establishes a supply-chain reporting regime requiring the Australian government, a non-corporate Commonwealth entity or a Commonwealth company to prepare a modern slavery statement for each financial year and submit it to the Minister for Home Affairs. The modern slavery statement must describe the structure, operations and supply chains of the reporting entity, any risks of modern slavery in the reporting entity's operations and supply chains, and actions taken by the reporting entity to assess and address those risks. The Minister must maintain an online publicly available register of modern slavery statements. Contracts may impose modern slavery obligations on contractors.

Australian government policy requires large businesses that are awarded Australian government procurement contracts valued over A$4 million to pay their subcontracts valued up to A$1 million within 20 calendar days.

The Global Supply Chain (GSC) Program is a key export initiative that provides Australian suppliers with opportunities in the international supply chains of multinational defence companies (Primes). In partnership with GSC Primes, the programme aims to find, advocate for and provide contract opportunities to competitive Australian suppliers, to enter and persist in the Primes' global supply chains.

INTERNATIONAL TRADE RULES

Export controls

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

The physical and intangible (such as by email or remote access) export of military and dual-use goods and technology is controlled under the Customs (Prohibited Export) Regulations 1958. Defence Export Controls in the Department of Defence (Defence) is the relevant export regulator. The Defence and Strategic Goods List (DSGL) identifies controlled items that must not be exported without a permit unless exempt under the regulations. Exemptions include medical equipment, and technology that is in the public domain, is for basic scientific research or is used for making patent applications. Exemption

from the requirements for permits also applies to exports to certain countries under some treaties.

The Minister for Defence is also authorised under the Customs Act 1901 to prohibit non-DSGL-listed goods that may contribute to a military end use that would prejudice Australia's security, defence or international relations. Defence notifies exporters by issuing a prohibition notice.

Domestic preferences

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

Australia is a party to the Agreement for Government Procurement and various free-trade agreements that allow foreign contractors to directly bid on defence and security procurements and require foreign contractors to be treated no less favourably than domestic contractors for covered procurements unless an exemption in the relevant agreement applies. Exemptions that may apply include procurement of certain goods and services by Defence and that preferences may be given to small and medium-sized enterprises and Indigenous businesses.

For procurements above A$4 million, foreign and domestic contractors are required to participate in the Australian Industry Capability (AIC) programme, which aims to strengthen Australian industry involvement and transfer knowledge. Specific requirements are set out in the relevant procurement terms. Additional requirements, including preparation of AIC plans, are required for Defence procurements exceeding A$20 million or where the procurement will impact a sovereign industrial capability priority. The AIC commitments offered by tenderers forms part of the procurement assessment.

If a project requires access to security classified information, a foreign contractor may face additional challenges in meeting security and clearance criteria.

Favourable treatment

24 Are certain treaty partners treated more favourably?

Australia and the United States are parties to the Defence Trade Cooperation Treaty, which permits trade of certain controlled goods without a licence. The treaty also allows for contractors to be vetted for inclusion in approved communities, simplifying the fulfilment of security requirements for particular contracts.

The AUKUS trilateral security partnership is intended to promote information and technology sharing between Australia, the United Kingdom and the United States and to integrate security and defence-related science, technology, industrial bases and supply chains. The Defence Trade Control Amendments Bill 2023, if passed, will create an export licence-free environment between the three partner nations, which is likely to benefit United Kingdom and United States contractors when contracting with the Australian government.

Sanctions

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

Australia implements United Nations Security Council (UNSC) sanctions regimes and Australian autonomous sanctions regimes. UNSC sanctions regimes are imposed by the UNSC and Australia is obliged to implement them as a matter of international law. These are primarily implemented under theCharter of the United Nations Act 1945 and its sets of regulations. Australian autonomous sanctions regimes are primarily implemented under the Autonomous Sanctions Act 2011 and the Australian Autonomous Sanctions Regulations 2011. The Australian Sanctions Office in the Department of Foreign Affairs and Trade is the sanctions regulator. The Minister for Foreign Affairs, or the Minister's delegate, may grant a sanctions permit authorising an activity that would otherwise contravene Australian sanctions laws.

As at the time of writing, sanctions apply in relation to Central African Republic, Democratic Republic of Congo, Guinea-Bissau, ISIL (Da'esh) and Al Qaida, Lebanon, Mali, Somalia, South Sudan, Sudan, The Taliban, Yemen, Democratic People's Republic of Korea, Iran, Libya, Syria, Former Republic of Yugoslavia, Myanmar, Russia/Ukraine and Zimbabwe. They also apply in relation to counter-terrorism.

Sanctions may include general prohibitions on supply or importation of sanctioned goods, providing a sanctioned service, engaging in a sanctioned commercial activity, dealing with a designated person or entity, or dealing with a controlled asset. Where sanctions apply, sanctioned goods frequently include arms or related military materials and services. While each case will be considered individually, goods on the Defence and Strategic Goods List are likely to be considered sanctioned items.

Trade offsets

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

The Australian government does not use trade offsets in its defence and security procurement.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

Former government employees are not generally restrained from commencing employment in the private sector, or vice versa. However, they will usually have ongoing

post-employment obligations that restrict their use of confidential information obtained in the course of any prior employment. The Department of Defence (Defence) also maintains integrity-related policy documents that give formal guidance on its expectations as to how former personnel are to manage post-separation conflicts of interest.

Where conflicts of interest have been the subject of intense media focus over the course of 2023, the question of whether a potential employee may have an actual, potential or perceived conflict of interest on the basis of their prior employment is likely to be front of mind for both government and private sector employers in making hiring decisions and in managing tender and procurement processes – particularly in the near future.

A proposed amendment to the Defence Act 1903, known as the Safeguarding Australia's Military Secrets Bill 2023, has been introduced to Parliament. If passed into law, it will require certain former Defence personnel to obtain authorisation if they intend to work for a foreign military, foreign government or foreign government entity.

Addressing corruption

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

The Criminal Code in the Criminal Code Act 1995 contains offences for bribing a public official and for accepting a bribe. There are separate offences for bribing domestic and foreign public officials. Penalties include fines, imprisonment, or both. The code makes it an offence to offer or provide to a person an inducement that is not legitimately due with the intention of influencing a public official in their official duties to retain business or obtain a business advantage not properly due to the recipient of the benefit.

The definition of 'Commonwealth public official' refers to an individual who holds an office or is employed by the Australian government, including government agencies, departments or authorities. This definition extends to cover individuals providing services under an Australian government contract, whether directly or indirectly related to the objectives of that contract.

The Foreign Influence Transparency Scheme Act 2018 (FITS Act) is designed to increase transparency and oversight regarding foreign influence in Australian governmental and political processes. The FITS Act requires individuals and entities engaged in certain activities on behalf of foreign principals to register with the Australian government. This includes activities aimed at influencing governmental and political processes.

Lobbyists

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

Third-party lobbyists are required to be on the Register of Lobbyists, which is administered by the Attorney-General's Department under the Lobbying Code of Conduct (the Code). The Code does not apply to lobbyists who conduct lobbying activity on behalf of their employer as 'in-house' lobbyists (eg, a government affairs professional at a defence

industry contractor) because the interests that these lobbyists represent will be sufficiently transparent and evident to Australian government representatives.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

There is no general prohibition on the use in Australian government procurement of agents or representatives that earn a commission. However, procurement terms may require disclosure of the use of such agents or representatives and any commissions paid. Such a disclosure requirement is contained in some of the Defence template procurement terms (eg, the Tenderer's Deed of Undertaking sets out several acknowledgments and undertakings to be given by tenderers, including in relation to probity, conflict of interest and bribery).

AVIATION

Conversion of aircraft

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

The Defence Disposal Services is responsible for the disposal of major Department of Defence (Defence) equipment. The role of the directorate is to plan and facilitate disposals of major items. The Commonwealth Procurement Rules require Defence officials undertaking a procurement of goods to consider how the goods will be disposed of at the end of life (including any potential costs) as part of the decision about whether and how to proceed with the procurement.

Decommissioning of aircraft for sale for civilian use would generally need to be undertaken or contracted by Defence. For example, the US government imposes strict regulations on the demilitarisation of planes it sells to allies under the International Traffic in Arms Regulations. Contracts for decommissioning aircraft would be subject to the Defence procurement process.

Ex-military aircraft for civil use in Australia would need to be certified by the Civil Aviation Safety Authority (CASA) or its delegate. For example, the Australian Warbirds Association Limited issues certificates of airworthiness for ex-military aircraft for adventure flights.

Aircraft used for military purposes are usually procured for that purpose, and not converted from a civilian aircraft.

Drones

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

The manufacture of unmanned aircraft systems or drones is permitted in Australia. A company must request an export permit from the Defence Export Controls unit within Defence for any items on the Defence and Strategic Goods List, including some controlled unmanned aerial vehicles. Australia has regulations in place for the operation of drones (including testing as part of the manufacturing process), which are enforced by CASA.

MISCELLANEOUS

Employment law

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

The rules that apply to foreign defence contractors will depend on various factors, including where the foreign contractor is based, the nature of the services that they provide and the geographic locations where the services will be provided, and whether any part of the services will be subcontracted.

Where a foreign defence contractor is providing services in Australia, federal and state legislation will often concurrently apply to their activities, including, for example, state and federal work, health and safety legislation and anti-discrimination legislation.

The terms of a contractor's engagement may also require them to meet certain standards of behaviour in the provision of services, including in accordance with one or more Department of Defence (Defence) policies.

Defence contract rules

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

The obligations that a foreign or domestic contractor has will typically be set out in the contract recording the terms and conditions of their engagement. Where a foreign or domestic contractor is engaged to provide services to the Australian government, it is also not unusual for it to be a condition of their engagement that they will comply with various policy or legislative standards, particularly while providing services in Australia or while present on travelling vehicles and vessels.

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

A foreign contractor will typically only comply with specific Australian legislative or policy requirements where they are required to do so as a condition of their engagement by Defence.

Personal information

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

Directors, officers or employees of the contractor must provide personal information when they apply for security clearance to access protected defence information. There is no general requirement that contractors cannot be engaged if they have a criminal record; however, it may be a requirement in a tender process that an applicant disclose any relevant criminal convictions.

Licensing requirements

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

There are no specific licensing or registration requirements to operate in the defence and security sector in Australia. Security clearances or other vetting through the Australian Security Vetting Agency may be required to access certain procurements.

Foreign companies cannot be a DISP member but may still pursue opportunities to work with Defence on Australian classified contracts if certain conditions are met. The country from where the foreign company originates must be party to a Security of Information Agreement or Arrangement (SIA) with Australia. If an SIA is in place, the foreign company's security practices and clearances then need to be verified. Typically, foreign company security practices verification is achieved through recognition of a Facility Security Clearance at the government-to-government level.

Environmental legislation

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

Contractors supplying goods or services or importing them into Australia may be subject to various environmental legislation depending on the nature of the goods or services. The Environment Protection and Biodiversity Conservation Act 1999 is the Australian government's environmental legislation. It covers environmental assessment and approvals, protects significant biodiversity and integrates the management of important natural and cultural places. The Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 and related acts may be relevant to some procurements.

State-specific environmental legislation covers subjects including protection of the environment, environmental planning, control of pollution, access and use of water, dealing with contamination, protection of aboriginal heritage sites and obligations to manage the environmental impacts of packaging waste.

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

There are no specific environmental targets set by Defence. However, consideration of environmental sustainability of proposed goods and services must form part of the assessment of value-for-money pursuant to the Commonwealth Procurement Rules (CPRs). Specific requirements may be set out in the procurement documents.

General environment initiatives that could apply to contractors include the Australian Packaging Covenant, which sets out responsibilities for managing the environmental impacts of packaging. Some large corporations have committed to environmental targets and ESG initiatives, but these are currently not mandatory.

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

Under the CPRs, when assessing value-for-money, officials must consider environmental sustainability of the proposed goods and services (such as energy efficiency, environmental and climate change impact, and the use of recycled products), and must consult the Australian government's Sustainable Procurement Guide where there is opportunity for sustainability or use of recycled content. Procurement documentation may specifically request that information about sustainable procurement benefits be provided in the response.

UPDATE AND TRENDS

Key developments of the past year

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

The government stated that it would release a defence industry development strategy in 2023 to remove unnecessary barriers to acquisitions and streamline strategically important projects and low complexity procurements, making faster decisions in the delivery of Department of Defence projects and developing practical solutions in close consultation with defence industry.

On 13 March 2023, the leaders of Australia, the United Kingdom, and the United States announced an arrangement for Australia to acquire a conventionally armed nuclear-powered submarine capability through the AUKUS partnership. Several acts and bills supporting the initiative were introduced in 2023 including the Defence Legislation Amendment (Naval Nuclear Propulsion) Act 2023, the Australian Naval Nuclear Power Safety Bill 2023 and the Defence Trade Controls AmendmentBill 2023.

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Key developments of the past year

LEGAL FRAMEWORK

Relevant legislation

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

Directive 2009/81/EC of the European Parliament and of the Council of 13 July on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC was implemented in Denmark by Notice No. 892 of 17 August 2011, and the newest version is No. 1077 of 29 June 2022. In Denmark, it is called the Defence and Security Directive.

Further to the Defence and Security Directive, purchases not covered by the Defence and Security Directive, will be covered by the Danish Procurement Act.

As per the Danish Procurement Act paragraph 28 (1), it is possible to award separate contracts for the distinct parts of the procurement covered by the Defence and Security Directive if the procurement can be objectively separated.

Identification

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

The Defence and Security Directive applies to the procurement of military and sensitive equipment when the following requirements are met (article 1 (6)).
The item (equipment, parts, components, subassemblies) is:

- specially designed or adapted for military purposes, and intended for use as weapons, ammunition or military material; or
- it is material for security purposes and the material involves, requires and/or includes sensitive (classified) information.

The Defence and Security Directive also applies to goods, services and construction works when:

- the item, service or construction work is directly related to military or sensitive equipment; or
- the service or construction work itself has a specific military purpose.

If a procurement is covered by the directive, several elements are different compared to, if the procurement is covered by the Danish Procurement Act. As an example, it is possible to award a framework agreement lasting up to seven years compared to four years as per the Danish Procurement Act.

Conduct

3 How are defence and security procurements typically conducted?

As opposed to the Danish Procurement Act, the contracting authority may, firstly, award contracts by a negotiated procedure without prior publication of a contract notice.

Second, there is free access to the procurement procedure 'negotiated procedure with publication of a contract notice' but it is not possible to use an open procedure.

The Danish defence often uses negotiated procedure with publication of a contract notice due to a need of specifications and to a need of limit the number of economic entities getting the typically sensitive information.

Proposed changes

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

There are no significant proposals pending to change the defence and security procurement process.

Information technology

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

There are no specific or additional rules that relate to IT procurements.

Relevant treaties

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

Most of the defence and security procurements in Denmark are conducted in accordance with the GPA, the Danish Procurement Act or EU Directive 2009/81/EC on contracts in the fields of defence and security.

However, the national security exemption and the arms exemption under article 346 of the Treaty on the Functioning of the European Union (TFEU) are still applied in some cases, most notably in the field of arms procurement.

The value of the contracts awarded based on the national security exemption under article 346 TFEU is usually substantial, and the number of contracts is very limited.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Disputes are solved either by arbitration, by the court or the Danish Complaints Board for Public Procurement depending on what is stated in the agreement with the contracting authority.

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

Normally the government uses the above-mentioned methods. Otherwise, mediation is an alternative.

Indemnification

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

The legal limits on the government's ability to indemnify a contractor apply to any business-to-business contract; they are not defence-specific. Defence procurement contracts under the Defence and Security Directive is governed by the general rules of Danish contract law, which does not include any obligations of neither the government nor a contractor to indemnify a counterparty.

Contractual negotiations can, however, result in a liability scheme, which states that either party must indemnify the other in a certain regard. Examples could be a contractor obligation to indemnify the government regarding any damage incurred on government property by the contractor.

Limits on liability

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

As stated above, it is possible for the government to limit a contractor's liability. No statutory limits are stated in Danish law, and a general rule or policy on the issue is not used. Any contractual clauses that limit a contractor's liability can, however, be voided by a court ruling, if it is deemed unreasonable. As a general rule, any such clauses must not create unfair conditions for either contracting party. Furthermore, a contracting party cannot renounce liability regarding gross negligence or deliberate actions.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

There is very limited risk of non-payment when the government enters a contract. The government provides the Danish Defence with a budget, and it will not enter a contract without the funds allocated. If necessary, the government can provide extra funds if necessary to fulfil contractual requirements.

Parent guarantee

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

There are no specific circumstances in which the contractor must provide a parent guarantee. If the contracting authority chose to set up a parent guarantee as a requirement under the contract, it will be stated in the tender material and the contract and it will be necessary to provide such a parent guarantee if the contract is awarded.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

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

Cost allocation

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

Cost allocations between the contractor and the government within a contract is defined by the contract itself. Usually through a fixed or firm price mechanism.

However, under public procurement rules, the contracting authority may conclude a framework agreement and then issue individual purchase orders for each required service.

Where contracts are awarded on the basis of a competitive procedure, the contracts in question generally contain fixed prices or a mix of fixed and variable price elements. Cost accounting elements can also be included. In the case of contracts that have been awarded without competitive procedures, most contracts contain cost-oriented fixed prices or extra cost prices, and the distribution of costs between the contractor and the state depends

on individual agreements. The actual distribution of costs between the contractor and the state in these cases depends on the individual agreement.

Disclosures

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

During the procurement procedure, a contractor may be required to disclose costs and pricing, particularly in the case of complex procurements. Such disclosure will usually be in the form a spreadsheet indicating elements of prices and how offered services are priced.

During the evaluation process, the contractor may be required to disclose costs and pricing information in the event that the contracting authority suspect that the offered price is abnormally low or if the contracting authority has doubts as to the possibility of performing the subject of the contract in accordance with the requirements.

During the course of the procurement process and the contract phase, the contracting authority may be required to pass on costs and pricing information under an access to document request. However, all costs and pricing information will normally be deemed as trade secrets and will be omitted from the access to file.

Audits

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

The Internal Audit of the Ministry of Defence is an independent department within the Ministry of Defence, which is responsible for the overall internal audit efforts within the Ministry of Defence.

Furthermore, the Danish National Audit Office is the independent government body responsible for auditing all governmental bodies and is therefore responsible for any larger investigations of the Ministry of Defence.

The Danish National Audit Office can choose to begin an investigation following a request from Parliament, or by its own initiative if it suspects misuse of government funds.

IP rights

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

The ownership of intellectual property rights is individually governed by the contracts.

In the description of the subject of a contract in the tender material, the contracting authority may require the transfer of intellectual property rights or the granting of a licence.

However, the usual policy on the ownership of intellectual property rights under public contracts is that intellectual property rights that was created before the signing of the contract will normally vest with the contractor generating the intellectual property rights. The contracting authority will expect to be granted a licence so it is granted the right to disclose and use the IP for the contracting authorities' purposes.

There are no statutory rules allocating intellectual property rights created during the performance of a defence and security procurement contract. If the intellectual property is the result of contracted research and development activity it will be owned by the contracting authority. Otherwise, unless there are specific provisions in the contract, it will be owned by the contractor.

Economic zones

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

We are not aware of any such economic zones or programmes in Denmark.

Forming legal entities

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

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

A corporate joint venture would involve the joint venture parties setting up a new legal entity (likely, a limited company registered in Denmark) that would be an independent legal entity able to contract in its own right, and that is liable for its own debts. It is relatively straightforward and inexpensive to establish a company in Denmark. The shareholders (joint venture parties) would likely agree in a shareholders' agreement, the roles and responsibilities of each shareholder and their respective obligations to invest capital and resources into the company.

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

Access to government records

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

The rules on access to information are governed by the Danish Administration Act and the Freedom of Information Act. The applicable law depends on whether or not an individual is a party to a case. If that is the case, they are subject to the Danish Administration

Act. Both laws contain provisions that allow for the exemption of certain information or documents from disclosure. However, a Danish authority must always observe the principle of increased transparency.

Supply chain management

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

The Danish procurement act oblige an authority to reject tenders from bidders who have been convicted of certain serious offences (eg, bribery, corruption or fraud). They also give the authority discretion to exclude bidders on other grounds, such as insolvency or gross professional misconduct. The rules expressly permit authorities to consider the same exclusion grounds for sub-contractors. The same rules apply for defence and security procurements.

INTERNATIONAL TRADE RULES

Export controls

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

The EU Dual-Use Regulation 428/2009 controls the export, transfer, transit and brokering of dual-use items. The regulation is implemented in Denmark and is administrated by the Danish Business Authority, Export Control.

Domestic preferences

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

There are no preferences applied to the Defence and Security Directive. However, TFEU article 346 makes it possible to discriminate regarding nationality, at thereby it is possible to awarded to national suppliers.

Favourable treatment

24 Are certain treaty partners treated more favourably?

Only contractors who are established in member states of the European Union and signatories of the Agreement on Government Procurement or a free-trade agreement with Denmark are able to benefit from the full protection of the public procurement regulation.

Contractors from other countries may be less favourably treated, including facing total exclusion from bidding in procurement proceedings.

Sanctions

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

Denmark implements embargoes and sanctions imposed by the United Nations and EU embargoes and sanctions. All of these embargoes and sanctions are implemented through sanctions regulations, which are based on the Sanctions and Anti-Money Laundering Act 2018 (the Sanctions Act).

Currently, the EU, and Denmark has imposed a wide variety of sanctions on the Russian state, in response to the war of aggression against Ukraine. The restrictions include a ban on import of Russian iron- and steel products as well as a general ban on products, which generate a significant income for Russia. Furthermore, a string of financial sanctions is imposed, including sanctions against banks and the exclusion of Russia from SWIFT.

Trade offsets

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

The Danish Ministry of Defence does not use offsets in its defence and security procurement.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

Such information is not publicly available in order to protect government employees – both current and former.

Addressing corruption

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

Giving, offering or agreeing to give a bribe is an offence, as is accepting, asking for or agreeing to accept a bribe. The bribe may be anything of value, whether monetary or

otherwise, provided it is intended to influence or reward improper behaviour where the recipient performs public or business functions and is subject to a duty of trust or good faith. When the recipient is a foreign public official, the impropriety requirement does not apply.

The Danish Ministry of Defence has internal polices to prevent any sort of corruption.

Lobbyists

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

There are no formal registration requirements for lobbyists and commercial agents.

Limitations on agents

30 | Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Public sector procurement in Denmark is based on free and open competition designed to achieve value for money for the taxpayer, with a high level of transparency of the procurement process and tender terms. Part of the objective is to discourage the perceived benefit of using intermediaries to liaise with government procurement officials and thereby put a given supplier at an advantage.

As a result, it is uncommon to use success-fee-based agents and intermediaries in the way that happens in certain other markets, although some suppliers do use external assistance to help them understand the procurement process.

There is no general prohibition on the use of agents or their levels of remuneration, although individual tenders may include specific disclosure requirements.

AVIATION

Conversion of aircraft

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

Civil aircraft may not fly in Denmark unless they comply with the airworthiness regime established pursuant to Regulation (EU) 2018/1139. Regulation (EU) 2018/1139 ordinarily requires a certification process in accordance with specifications originally promulgated by the European Union Aviation Safety Agency (EASA).

Annex I to Regulation (EU) 2018/1139 permits EU member states to approve ex-military aircraft unless EASA has adopted a design standard for the type in question.

Most military aircraft are designed in accordance with a certification basis that is very different from the civil requirements, so the process of civil certification is often prohibitive.

In that event, the Danish Civil Aviation and Railway Authority may issue a 'permit to fly' if satisfied that the aircraft is fit to fly with regard to its overall design, construction and maintenance.

The Danish Military on occasion rent civilian aircraft, as they are able to transport a larger cargo. The planes are not permitted to land at certain airports or fly for other purposes than transport. If the Danish military wants to use civilian planes for all military use, certain requirements need to be met, much stricter than the above mentioned for civilian use. The requirements are set by the Danish Ministry of Defence and include strict safety requirements and very high technical standards.

Drones

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

In September 2018, the new Basic Regulation (EU) 2018/1139 of 4 July 2018 gave EASA greater control over the manufacture and operation of light unmanned aircraft systems (UAS). Until then, EASA regulation over UAS had been limited to those over 150 kilograms. Those under 150 kilograms were subject to regulation by EU member states. In June 2019, under powers contained in the Basic Regulation, the European Commission adopted implementing and delegated regulations for design, production, operation and maintenance of UAS. These regulations disapply the normal provisions on certification and the role of EASA in the case of certain UAS.

The Commission Implementing Regulation and Delegated Regulation applied fully, as a package, from 31 December 2020.

MISCELLANEOUS

Employment law

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

There are no specific statutory or common employment law rules that apply exclusively to foreign defence contractors, and the parties can choose the governing law that applies to the employment contract.

However, regardless of the parties' choice of governing law, certain mandatory laws will apply if the employee habitually works in Denmark to the extent that they give greater protection than the governing law of the employment contract. These mandatory laws include (but are not limited to):

- the right not to be unfairly dismissed;
- protection from discrimination and from suffering detriments or being dismissed for whistle-blowing;
- certain maternity and parental rights; and

- rules relating to working hours.

Defence contract rules

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

There are no specific rules other than what is stated in the tender material, tender notice and in the contract.

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

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

Personal information

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

Companies will be asked to provide information about their directors and certain other employees as part of the pre-qualification questionnaire process and will usually be required to sign a 'Statement Relating to Good Standing' certifying that directors and certain other personnel have not been convicted of particular offences.

An awarded contract may require directors or employees to submit to security clearance – so employees' personal information would need to be provided to the Danish Ministry of Defence in that scenario so that relevant checks could be carried out.

Licensing requirements

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

There are no specific licensing or registration requirements to operate in the defence and security sector in Denmark.

The Danish Ministry of Defence may impose security requirements, but this is done by treating projects on a case-by-case basis and stipulating certain requirements depending on the nature of the particular project and its degree of sensitivity.

Environmental legislation

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

Contractors producing or supplying goods and services in, or importing them into, Denmark will face different environmental regulation depending on their operations, product or service. Contractors could face regulations encompassing, inter alia, air emissions, water discharges, water pollution, noise and waste disposal, including responsibility for electrical waste, electronic equipment and restrictions on hazardous substances in such equipment.

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

Companies must comply with the Danish Environmental Protection Act and the Climate Act.

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

In general, there is a strategy to improve and enlarge green initiatives and procurement in the Danish government. Regarding requirements in a specific procurement, only environmental issues relevant to the contract itself can be considered – not the supplier's wider efforts.

UPDATE AND TRENDS

Key developments of the past year

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

In Denmark, a new defence agreement has been reached, which provides the Danish defence with significantly more funding than it has been allocated in recent years. As a result, it is now possible for the defence to make more and larger purchases. In addition to the defence agreement, it has also been decided to allocate even more funds to the defence.

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LEGAL FRAMEWORK

Relevant legislation

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

Contracts for defence and sensitive security equipment and services (MPDS) are public procurement contracts. Three public procurement codes have been successfully implemented since 2001. Furthermore, the French government has recently integrated public procurement rules into a single code, the Public Procurement Code (PPC). MPDS are public procurement contracts (PPC, article L. 2) and therefore governed, since 1 April 2019, by articles L. 1113–1, L. 2300–1 to L. 2397–3, and R. 2300–1 to R. 2397–4 of the PPC.

The EU Defence and Security Directive (DSPCR) (2009/81/EC) has been incorporated into French law and has resulted in the development of a series of legislative acts governing defence procurement (dated 2004, 2011 and finally 2016).

Other laws, regulations and policies are applicable to defence contracts, most notably:

- the standard administrative clauses (CAC Armement) that are specific to the French Defence Procurement Agency; and
- the technical note of the Legal Affairs Department of the Ministry of Finance dated 1 January 2020.

General principles derived from the EU Treaty also apply to defence procurements, including the principles of equal treatment, non-discrimination, transparency, proportionality and mutual recognition. However, due to the strategic nature of some defence procurement, many MPDS are subject to classification measures in accordance with the regulations governing the protection of secrecy (arising in particular from the Criminal Code and the Defence Code). Such contracts are, as a result, excluded from the public procurement rules (subject to certain exclusions).

Identification

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

Article L. 1113–1 of the PPC defines MPDS as contracts concluded by the state or one of its public institutions that have one of the following activities:

- the supply of military equipment, including any parts, components or subassemblies thereof;
- the supply of sensitive equipment, including any parts, components or subassemblies thereof;
- works, goods and services directly related to military or sensitive equipment for any and all elements of its life cycle; and

- works and services for specifically military purposes or sensitive works and sensitive services.

However, some defence procurement is excluded from the application of the PPC. According to article 2515-1 of the PPC modified in 2023 (article 55, Law No. 2023-703 of 1 August 2023), this is the case in particular for:

- public procurement of financial services, excluding insurance services;
- public procurement of arms, ammunition or war materiel where the protection of the essential security interests of the state so requires; and
- public contracts for which the application of the regulation would require the disclosure of information contrary to the essential security interests of the state.

Conduct

3 | How are defence and security procurements typically conducted?

The PPC provides three main procedures for awarding MPDS.

First, those that are not subject to the PPC and can be directly awarded without the use of competitive procedures. These are expressly listed in article L. 2515-1 of the PPC.

Second, for MPDS falling within the scope of the PPC, a distinction is made between those that can be subject to a negotiated procedure and those that are subject to a formalised procedure.

For MPDS covered by a negotiated procedure, the availability of the negotiated procedure without prior publication or competition is greater than for public procurement in the traditional sector (articles R. 2322-1 to R. 2322-14 of the PPC). In such cases, the public entity is free to organise this procedure but must proceed in accordance with the normal principles of public procurement law. In 2021, the availability threshold for such procedure increased from €40,000 before tax to €100,000 before tax for MPDS.

Above certain specific thresholds (up to €431,000 before tax for supplies and services and €5,382,000 before tax for works contracts), the contracting authority may freely choose one of the following formalised procedures with publication and competition: restricted invitation to tender, competitive procedure with negotiation, or competitive dialogue.

Finally, for MPDS not expressly falling into these two categories and when the estimated value of the needs of the contracting authority is below the thresholds of a formalised procedure, the contracts will be subject to an adapted procedure that enables the public entity to award their contracts according to a transparent competitive tendering procedure freely determined according to the subject matter and special features of the contract.

Framework agreement remains another procedure for awarding several MPDS to a defence contractor. Legal provisions applying to these contracts were modified in 2021 (Decree No. 2021-1111 of 25 August 2021) to comply with a decision from the European Court of Justice (ECJ, 17 June 2021, *Simonsen & Weel A/S*, C-23/20). Henceforth, the contract notice or the tender specifications for defence and security framework agreements shall

indicate the maximum quantity of the products that can be acquired under the framework agreement or the total maximum value of that agreement, whereas prior legal provisions allowed not mentioning any maximum.

Proposed changes

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

The European Commission reviewed the MPDS regime in 2016 and determined that no legislative changes were necessary. However, it has indicated that it will take a stricter approach to enforcing compliance with the rules, as it found too many MPDS contracts were awarded without any competition.

Information technology

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

There are specific rules that relate to IT procurement. Most IT procurement will be undertaken under the general administrative clauses (CCAG) applicable to IT procurement (IT procurement CCAG), which was published on 1 April 2021 by a ministerial order of 30 March 2021. In many instances, the IT procurement CCAG will only apply to contracts that expressly refer to these clauses.

If the contracting authority chooses to refer to the IT procurement CCAG, it will have to adapt the provisions of the contract to reflect the specific features of IT procurement. This will be done through a set of special administrative clauses (CCAP), either to supplement or to derogate from the IT procurement CCAG (article R. 2112–3 of the PPC). If the contracting authority chooses not to refer to the IT procurement CCAG, it will have to include the provisions necessary for the management of these kinds of contracts in its CCAP.

It should be noted that the IT procurement CCAG was not adapted to the provisions of the ordinance of 23 July 2015 on public procurement and its two implementing decrees of 25 March 2016, which entered into force on 1 April 2016. The first decree relates to public procurement contracts in general, and the second, the MPDS Decree, to public procurement in the defence sector. However, this mechanism is still enforceable if the contracting authority chooses to refer to the IT procurement CCAG (see article 151 of the MPDS Decree).

Relevant treaties

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

The majority (70 per cent) of defence and security procurements in France are negotiated by mutual agreement. The predominance of this mode of contract award is explained by the complexity of the transactions at stake, the necessity for comprehensive exchange of information prior to the contract award, and the willingness of public authorities to support the industrial defence sector (Jean-Michel Oudot, *Choix du type de contrat et performance: le cas des marchés publics de défense*, Économie publique/Public economics). However, the French Ministry of Defence does not provide for specific percentages regarding the use of the national security exemption. The Observatory of European Defence and Security Procurement published an eight-year review of the application of the DSPCR in June 2019. This review does not mention the number of contracts that are exempt from the normal requirement to compete openly. However, it does show that 24 per cent of French defence contracts use a procedure without prior publication.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

There are traditionally two types of dispute settlement; either a conciliation procedure or a procedure before a French administrative judge. However, most defence and security contracts provide for an amicable settlement of disputes before the case is referred to the competent court. In France, amicable settlements of defence and security disputes are referred to the National Committee for the Amicable Settlement of Disputes in Public Procurement (CCNRA). This committee is neither a court of law nor an arbitration body. Its mission is to seek legal and factual elements with a view to proposing an amicable and equitable solution (articles R. 2197-1 of the Public Procurement Code (PPC)). The CCNRA then issues opinions, which the parties are free to follow or to disregard.

Where a dispute is referred to a conciliator, the referral suspends the limitation period, which resumes if the solution proposed by the conciliator is rejected by the contracting authority. If the conciliation fails, the party who initiated it can refer the matter to the administrative court within the time limit that runs from notification of the administration's decision to refuse to follow the opinion of the conciliation committee. If a party prefers to bring the dispute before the administrative court, it must do so within two months of the rejection of its prior administrative complaint.

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

The conciliation procedure or a procedure before a French administrative judge only concern disputes between the administration and the contractor or the defence consortium and security contractor. If the dispute is between members of the defence consortium holding the contract or the contractor with a Tier 1 subcontractor or a Tier 1 subcontractor with a Tier 2 subcontractor, referral to the CCNRA by one of them is not possible. This referral is only possible for the administration and the contractor. On the other hand, there is nothing preventing any of the former parties from trying to reach an out-of-court settlement.

Otherwise (if these procurement participants choose the litigation route), their litigation can only be brought before the judicial and not the administrative judge.

Indemnification

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

Public procurement is subject to an extensive system of law characterised by a balance of power that gives the public contracting party the means to enable it to impose its will on its contracting partner. The government has the right (even if there is no contractual clause stipulating it) to terminate the contract unilaterally for public policy reasons, subject to the total indemnification of the operator for the damage suffered (which is composed of the loss incurred and the lost profit). The government also has extensive power to impose uni lateral modifications on the contract. The use of this prerogative must, however, not lead to the economic disruption of the contract. A judicial tool – unpredictability theory – provides an essential guarantee for the contractor against the risk of economic uncertainties. It provides that if certain conditions are met (in the case of an event that is unpredictable, independent from the will of the parties and that leads to the economic disruption of the public contract) the operator is obliged to continue to perform the contract. However, the government is required to pay a fee to the operator relative to any increased cost of performing the contract. In general, French administrative jurisprudence has set this percentage at 90 per cent of the losses caused by the unforeseen event. Furthermore, the French administrative courts provide compensation in a situation where the contractor carries out, under its own initiative and outside the scope of the contract, work that it considers necessary for the proper performance of the contract.

The government may request indemnification from the contractor in case of third-party claims for loss or damage to property, personal injury, death, or damage to government property. The standard administrative clauses contain specific indemnities relating to damages resulting from aircraft, missiles and ammunition.

Limits on liability

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

It is very usual for the government to limit its own liability under the contract. The public entity may stipulate in the CCAP a clause specifically limiting the contractor's right to compensation in the event of unilateral termination of the contract on grounds of public interest (see CAA Versailles, 7 March 2006, No. 04VE01381, *Cne Draveil* and CE, 4 May 2011, No. 334280, *CCI of Nîmes, Uzès, Bagnols, Le Vigan*). Furthermore, there is nothing to prevent contractual provisions from entirely excluding any right to compensation in the event of unilateral termination on grounds of public interest (CE, 19 Dec. 2012, No. 350341, *AB Trans*).

With regard to the reciprocal limitation of the contractor's liability, the contract may also provide that the public body's right to compensation for direct damage is limited in the case of a single contract to the total amount of the contract or in the case of a split contract to the minimum amount of the contract with a purchase order. The contract award procedure will determine the extent to which this limit is negotiable.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

The risk of non-payment for an undisputed, valid invoice by the French Defence Procurement Agency is perceived to be very low. The government's commitment to incur expenditure is subject to the availability of credit payment provided by the finance laws and the amending finance laws.

Parent guarantee

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

If a bidder is a special purpose vehicle set up specifically for a contract, the terms and conditions of the initial tender documentation usually require that the contractor must execute a parent guarantee for the benefit of the public entity and in accordance with a specific template. In such a case, failure to provide this guarantee will result in the disqualification of the contractor from the procurement process. Under French law, the granting by a company, in whatever form, of a guarantee to secure the obligations of an affiliated company must comply with its corporate purpose and corporate interest. If the contractor wishes to transfer its contracts to a special purpose vehicle after it is awarded, the Ministry of Defence usually requests that the shareholders of the special purpose vehicle execute a parent guarantee.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

The standard administrative clause (CAC Armement) is part of the procurement contract and is common to all defence services. The Directorate General of Armaments (DGA) will typically seek to include certain standard clauses in its contracts. Primarily, these are the DGA standard clauses of 2022 that constitute a collection of standard contractual clauses relating to the most frequent cases encountered in defence or security contracts.

Cost allocation

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

The CAC Armement does not provide any pricing methods. The allocation of costs will, therefore, be contained in a commercial agreement between the parties. Fixed or firm prices are the most common pricing methods for Contracts for defence and sensitive security equipment and services (MPDS). However, under public procurement rules, the procuring entity may conclude a framework agreement and then issue individual purchase orders for each required service. This volume-driven pricing is common in long-term MPDS contracts.

In order to take into account particular circumstances, such as urgency or the technical, functional or economic characteristics of defence equipment or service, a joint decision of the minister responsible for defence and the minister responsible for the budget may authorise the insertion of a clause providing for a deferred payment (article L. 2391–5 and article R. 2391–18 of the Public Procurement Code (PPC)).

Disclosures

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

According to article 7.2 of the CAC Armement, a contractor is required to report on the costs that it will incur or has incurred in performing the contract. It must keep all accounting documents and data for at least five years from the date of completion of the contract. When it is subject to a cost control, it is required to provide, at the request of the procuring entity, cost statements showing a breakdown of the cost components, including volume of hours, hourly rates, procurement expenses and overhead costs.

Audits

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

Under the CAC Armement, the contract and related records shall be accessible to the contracting authority or its designated representative. The right of audit can be exercised at any time.

IP rights

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

In France, in general, the private contracting party obtains the intellectual property resulting from a contract. Contractual relationships between public and private entities are governed

by the French PPC and Chapter VII of the CAC Armement relating to IP. The main difference regarding contractual relationships concerns the use of the services produced, rather than their property rights. In return for the ownership of IP rights, the Ministry of Defence expects the right to disclose and use the IP for government purposes (including security and civil protection). By way of derogation from article 62 of the CAC Armament, the clauses of the contract may provide for certain scenarios where IP rights will be granted to the public entity.

Economic zones

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

In France, there are no special defence units located in special economic zones benefiting foreign defence and security contractors.

Forming legal entities

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

Under French law, the term 'joint venture' does not correspond to any specific legal situation. It refers, in fact, to any form of cooperation between companies that have in common their contractual and associative natures. The structure of a joint venture can be either purely contractual (collaboration agreement), or both contractual and corporate (collaboration agreement and a joint subsidiary). When this cooperation is expected to last, partners may wish to set up a new legal structure (usually a simplified joint-stock company or a company with limited responsibility structure is used for this). To establish a company, the parties must carry out the formalities of constituting a company required by the legislation applicable to the specific type of legal entity.

Access to government records

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

Under the French Code of Relations Between the Public and the Administrations (CRPA), there is a general right for the public to access information held by public bodies. As the Ministry of Defence is a public body, its contracts and records may, in principle, be requested by any involved entity. With regard to the rules of public procurement, a signed contract may be disclosed. However, this right of access must be exercised in compliance with industrial and commercial confidentiality protected by the provisions of article L. 311–6 of this Code. In addition to the information protected by industrial and commercial secrecy, the secrecy of documents classified as national defence secrets pursuant to article 413–9

of the Criminal Code are also protected by law. In addition, national defence secrets are considered to be heavily classified by article L311–5 of the CRPA, which provides that 'other administrative documents whose consultation or disclosure would prejudice . . . national defence secrecy . . . shall not be disclosed'.

Compliance with the principle of access to administrative documents is monitored by the Commission for Access to Administrative Documents, which has developed a doctrine on access to the various documents that may be involved in the award, conclusion and performance of public contracts.

Supply chain management

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

There are no specific rules regarding eligibility for MPDS contracts. Suppliers are generally considered eligible for public contracts if they meet the standard requirements of public procurements (both on the professional and the financial and economic side). Subject to limited exceptions, the defence procurement rules oblige an authority to reject tenders from bidders who have been convicted of certain serious offences.

Regarding supply chain management, the PPC and the CAC Armement include specific commitments by the contractor to ensure the security of supply. Furthermore, the first paragraph of article L. 2393–1 of the PPC defines the legal regime applicable to subcontracts for defence or security contracts. It provides that:

> [The] holder of a defence or security contract may, under his responsibility, entrust another economic operator, referred to as a subcontractor, with the performance of part of his contract, including a supply contract, without this consisting in an assignment of the contract.

The concept of a subcontractor used by the EU Defence and Security Directive is broader than in French national law, which excludes from its scope standardised contracts for goods or services that are not specifically designed to meet the needs of the public entity. The rules expressly permit authorities to consider the same exclusion grounds for subcontractors, as well as giving them broad rights (eg, to require a supplier to openly compete on some of the subcontracts or to flow down obligations regarding information security (article 2393–3 of the PPC)).

There are no specific rules regarding anti-counterfeit parts.

INTERNATIONAL TRADE RULES

Export controls

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

The French regulation implementing Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (the Common Position) and the Arms Trade Treaty, are contained within the French Defence Code (articles L2331–1 and seq).

The production and trade of defence items are subject to a specific authorisation. An 'export licence' is necessary to export defence articles outside the EU and a 'transfer licence' is necessary to export such items within the EU. The licences are delivered by the Prime Minister after advice from the Commission for Export of Defence Goods, which assesses each project taking into account, primarily, their consequences on peace and regional security, the respect by the country of destination of human rights, the protection of sensitive technologies and the risk of use by non-authorised final users.

A specific regulation applies to dual-use items (ie, goods, software and technology that can be used for both civilian and military applications). On the basis of EU Regulation 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, the export of controlled items is subject to the grant of a licence. Annex I of this regulation lists the controlled items and is updated annually by Commission Delegated Regulation to reflect changes in control regimes.

Domestic preferences

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

The Minister of Defence has stated that contracts awarded by the ministry must comply with the procurement rules described in the legislation on public procurement. The latest legislative text prohibits the introduction of a criterion based on national preference. In fact, so long as the foreign contractor undertakes to comply with the protocols, in particular that of the International Labour Organisation, nothing prevents it from bidding on a French procurement directly, even if the activity is located in its territory. Moreover, reserving contracts for national suppliers can lead to a non-competitive situation, or even to a monopoly situation (Parliamentary Question No. 84337, Rep. Min of 16 September 2010).

Favourable treatment

24 Are certain treaty partners treated more favourably?

The principle of European preference is stated in article L. 2353–1 of the Public Procurement Code (PPC) for defence and security contracts. This principle permits the exclusion of economic operators that are not EU member states or who do not belong to the European Economic Area (article L. 2342–7 of the PPC).

Sanctions

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

The EU implements embargoes and sanctions directed by the UN and also imposes its own autonomous embargoes and sanctions. The French government also has the power to impose national sanctions.

Embargoes and sanctions, depending on their type and ultimate aim, are targeted at individuals, entities, sectors or countries.

The map of all countries affected by embargoes and sanctions and a consolidated list of all persons subject to financial sanctions can be found on the French government website.

Trade offsets

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

Offsets are not part of France's defence and security procurement. Indeed, according to the interpretation set forth in the Guidance Note on offsets issued by the European Commission, 'offset requirements are restrictive measures that go against the basic principles of the Treaty [on the Functioning of the European Union] because they discriminate against economic operators, goods and services from other member states and impede the free movement of goods and services'. Although the Guidance Note mentions that offset requirements could, in certain strictly limited circumstances, be justified on the basis of article 346 of the Treaty, provided that the relevant member state can 'demonstrate that these requirements are necessary to protect its essential security interests', France has not, to our knowledge, relied on these provisions.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

The High Authority for Transparency in Public Life (HATVP) is responsible for controlling the new private activities of former ministers, former presidents of local executive authorities, and former members of independent administrative authorities. For a period of three years, any person who has held one of these positions must refer the matter to HATVP for consideration as to whether the new private activities are compatible with their former functions.

HATVP checks whether the planned activity raises criminal or ethical challenges.

On a criminal level, it examines whether the proposed activity exposes the person concerned to a criminal risk (ie, article 432–13 of the Penal Code prohibits a former public official from working for an undertaking that was subject to the supervisory or control

powers of that former official when they still performed public functions, with which it has concluded contracts or in respect of which it has taken or proposed decisions).

On an ethical level, HATVP ensures that the activity envisaged does not undermine the dignity, probity and integrity of functions previously held, and examines whether the activity would lead the person involved to fail to comply with the requirement to prevent conflicts of interest enforced on them during their former public service, in particular when that activity is carried out in the same economic sector. Finally, it checks that the activity does not jeopardise the independent, impartial and objective functioning of the public institution in which they have carried out their duties.

Depending on the risks identified, HATVP may declare the activity as incompatible or formulate necessary reservations. The law provides that the HATVP may make public the opinions it issues after having received the comments of the person concerned and after having removed any information that infringes a secret protected by law.

Employees of the private sector who wish to join a public office are not subject to any specific regulation. They should, however, be mindful of any potential conflict of interest.

Addressing corruption

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

Corruption consists of two main actions – passive and active corruption – each constituting a separate offence, made up of different elements.

The offence of passive corruption as conceived in the field of public procurement is punishable by article 432–11 of the Criminal Code. This article states that the offending conduct is divided into two distinct, but similar, offences: passive corruption and influence peddling. These offences have in common the quality of the person likely to commit them, that of the corrupt.

Active corruption is provided for under French law by article 433–1 of the Criminal Code. The persons likely to commit active corruption are the same as those concerned by passive corruption. Furthermore, to comply with France's international commitments, the offences of foreign and international public corruption are provided for by articles 435–1 and seq of the Criminal Code.

With regard to related offences relevant to public procurement – such as bribery, embezzlement and misappropriation of public property and funds, revolving doors between public office and the private sector (pantouflage), forgery and use of forgeries, fraud, concealment, and money laundering – French law has fairly similar definitions, even if the sanctions regime is more or less severe. In particular, bribery is provided for by article 432–10 of the Criminal Code and is punishable by five years' imprisonment and a fine of €75,000.

The Sapin II Law broadened the protection afforded to whistle-blowers. However, whistle-blowers are required first to inform their managers, then a public authority and, only as a last resort, the public media. Any abusive reports (ie, reports made in bad faith)

will incur civil liability. Moreover, the French Anti-Corruption Agency (AFA) has developed recommendations to assist public and private entities in the corruption prevention process (Act No. 2016–1691 of 9 December 2016 on transparency (Sapin II Law, article 3–2°). The AFA published its Best Practice Guidelines on the prevention and detection of breaches of the duty of probity online in 2017. It particularly insists on the need for contractors to set up an 'internal alert system'.

Lobbyists

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

Regulation of interest representation and lobbying, and of the professionals who undertake these activities was first introduced into French law by Sapin Law II. This law entrusts responsibility for the implementation and management of a monitoring system to a specially created authority, the HATVP.

Since 1 July 2017, it is mandatory for interest representatives to be registered in a detailed numerical list overseen by the HATVP, in which they must provide information on their organisation, lobbying activities and the resources allocated to them. A ministerial order of 4 July 2017 established the list of ranges relating to the detailed numerical list of interest representatives.

Limitations on agents

30 | Are there limitations on the use of agents or representatives that earn a commission on the transaction?

In the public procurement sector, it is uncommon to use success-fee-based agents and intermediaries in a way that is comparable to other markets. In practise, some contractors use external assistance to help them understand the procurement process. They should, however, be mindful of any specific disclosure requirements. Registration may also be required where the agent's activity falls within activities listed in French law by Sapin Law II such as interest representation and lobbying.

AVIATION

Conversion of aircraft

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

As military aircraft are designed with a certification basis that is very different from civil requirements, obtaining a civil certificate for military aircraft would often be too difficult and costly. Certificates of airworthiness can nevertheless be granted for specific use on a case-by-case basis. The process for obtaining a certificate of airworthiness is delegated to the Overseas Security Advisory Council.

Conversions of civil aircraft for military purposes would need to meet the certification specifications set by military standards.

Drones

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

Drones designed or modified for military use require a licence to be exported from France.

Civil drones will often be considered as dual use goods and therefore be also subject to export control. Indeed, civil drones often contain items covered by Category 6 of Annex I of EU Regulation 2021/821, such as infrared video cameras, lasers and other regulated parts.

MISCELLANEOUS

Employment law

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

There are no specific statutory employment rules that apply exclusively to foreign defence contractors in France. The parties can choose the governing law that applies to the employment contract. Nevertheless, to ensure maximum protection for the worker, the employee could not be deprived of certain mandatory provisions if he or she habitually works in France (including working time provisions, days off, paid holidays, minimum salary, overtime, and rules relating to health and safety). Foreign employees temporarily seconded to France will also benefit from certain French labour legal requirements during the secondment. This will ensure that the secondment will not deprive the seconded employee of the rights they would have been granted under a French employment contract.

Defence contract rules

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

The answers above provide the details of the laws, regulations and policies applicable to defence contracts, most notably the standard administrative clause (CAC Armement) and the technical note of the Legal Affairs Department of the Ministry of Finance dated 1 January 2020.

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

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

Personal information

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

Companies will be asked to provide information about their directors and certain other employees as part of the pre-qualification questionnaire process, and will usually be required to sign different statements certifying that directors and certain other personnel have not been convicted of certain offences and that the contractor, or each member of the defence consortium, is not subject to the categories of exclusion provided for in articles L. 2341-1 to L. 2341-3 or articles L. 2141-7 to L. 2141-10 of the Public Procurement Code (PPC). Moreover, any candidate for contracts where national defence secrecy is at stake must submit a file allowing his or her company to be authorised at the various levels of defence secrecy. In such case, employees' personal information would need to be provided to the Ministry of Defence so that relevant checks could be carried out.

Licensing requirements

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

There are no specific licensing or registration requirements to operate in the defence and security sector in France. However, depending on the nature of the particular project and its degree of sensitivity, there are specific rules governing security clearances. In addition, under the terms of article L. 2331–1 of the Defence Code, war materiel, weapons and ammunition are classified into four categories (A to D). In this respect, the Internal Security Code provide for a specific regime for the detention of each category. Finally, the production and trade of defence items are subject to the grant of a specific authorisation.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

In France, defence contractors will face different environmental legislation depending on their operations, or products or services they provide. They could be subject to regulatory restrictions in relation to as air emissions, water discharge, water pollution, noise and waste disposal, and face responsibility for electrical waste and electronic equipment, and restrictions on hazardous substances within such equipment. Applicable requirements may also incorporate energy efficiency, carbon emissions and energy consumption.

Contractors involved with nuclear substances are subject to a separate and additional set of environmental obligations, as well as strict nuclear waste disposal restrictions.

Furthermore, France has a fairly elaborate framework for extra-financial transparency and declaration on corporate social and environmental responsibility. Several laws have introduced mandatory non-financial reporting for listed companies (2010 NRE Law, 2012, 2015 energy transition law and 2017). Defence contractors will also have to comply with social and environmental soft law rules governing their strategies and activities (article 1833 of the Civil Code as amended by the Action Plan for Business Growth and Transformation, PACTE Law). In addition, France looks set to deepen its legislative framework in this area by adopting a bill that will create a process for public certification of social performance and environmental issues.

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

In France, companies do not have mandatory environmental targets to meet. Meeting a standard of environmental and social responsibility is voluntary. Yet the harmonisation of methodologies, making the reporting exercise more streamlined, and working on accompanying guides are essential to ensure that the environmental impacts of companies' activities are better taken into account.

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

French public procurement law takes into account sustainable development and environmental protection. In particular, the PPC allows environmental considerations as award criteria, provided they are related to the subject matter of the contract or to its conditions of execution (article R2152–7 of the PPC). The special conditions for the performance of a contract for defence and sensitive security equipment and services may, in particular, include elements of a social or environmental nature that take into account the objectives of sustainable development by reconciling economic development, protection and enhancement of the environment and social progress' (article R2312–4 of the PPC).

UPDATE AND TRENDS

Key developments of the past year

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

Legal provisions applying to framework agreements were modified in 2021 (Decree No. 2021-1111 of 25 August 2021) to comply with a decision from the European Court of Justice (ECJ, 17 June 2021, *Simonsen & Weel A/S*, C-23/20).

On 12 July 2023, Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (the Foreign Subsidies

Regulation or FSR) officially entered into force. This regulation sets an obligation applying to MPDS subject to Directive 2009/81/EC of the European Parliament, but applying to combined procurement contracts covering partly defence and security matters (*Marchés mixtes*).

Companies that bid in public procurement contracts in the EU are obliged to submit a notification to the contracting authority or entity (public procurement) provided the following thresholds are met:

- the value of the public procurement (not defence and sensitive security equipment and services) is at least €250 million; and
- the bidder, including its subsidiaries, its holding companies and, under certain conditions, its main contractors and suppliers were granted foreign financial contributions (FFCs) > €4 million per third country in the past three years. In a public procurement procedure, a notification may be required or, if the FFC threshold is not met, a declaration listing all FFCs received and confirming that foreign subsidies are not notifiable. In addition, two types of notification are possible, a detailed notification or a lighter notification consisting of an overview of FFC of at least €1 million.

In relation to relevant public procurement procedures regardless of the existence of subsidies triggering a notification requirement, a declaration concerning any foreign subsidies received by economic operators – or lack thereof – shall be submitted to contracting authorities or entities for each tender procedure.

The contracting authority or entity is also obliged to notify and send the notification or the declaration to the European Commission, which will examine the effects of the foreign subsidy.

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Summary

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MISCELLANEOUS

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UPDATE AND TRENDS

Key developments of the past year

LEGAL FRAMEWORK

Relevant legislation

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

Above the EU thresholds, public procurement for defence and security goods, services or construction works in Germany is governed by:

- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 concerning the coordination of procedures for the award of certain works contracts, supply contracts and public services contracts in the fields of defence and security;
- the German Act Against Restraints for Competition;
- Federal Armed Forces Procurement Acceleration Act (BwBBG);
- the Procurement Regulation for Defence and Security; and
- the Procurement Regulation for Construction Works (VOB/A).

Below the EU thresholds, public procurement for defence and security goods, services or construction works is governed by:

- the corresponding federal or state budgetary law;
- the Procurement Regulation for Contracts Below the EU Thresholds;
- VOB/A; and
- possibly corresponding state procurement law.

Identification

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

Defence and security procurement is defined in Directive 2009/81/EC as procurement of military equipment, including:

- any parts, components or subassemblies thereof;
- sensitive equipment, including any parts, components or subassemblies thereof;
- works, goods and services directly related to military or sensitive equipment; and
- works and services for specifically military purposes or sensitive works and sensitive services.

As with other procurement directives, the value of the relevant contracts must be above the EU financial threshold to fall within the scope of EU and national procurement law. The applicable thresholds are, as of 1 January 2024, €443,000 for goods and service contracts

and €5,388,000 for works contracts. Contracts whose value is below these thresholds are not covered by the Defence and Security Directive.

It is with regard to the structure and basic principles that the system is similar to the general rules on public procurement. Nevertheless, there are some differences, such as the fact that the contracting authority is free to choose between a restricted procedure and a negotiated procedure, while the possibility of an open procedure does not exist. Another special rule is that, in addition to the traditional grounds for exclusion and the lack of ability, there are further grounds for exclusion for bidders from public procurement procedures. They may also be excluded because they lack reliability and because exclusion is justified on grounds of national security. Specific rules also apply to protect classified information and to safeguard information and there may also be specific rules on the security of supply.

Conduct

3 | How are defence and security procurements typically conducted?

Defence and security procurement for the German military can be divided into three groups. The first group comprises the procurement process for operational products, the scope for which is defined by the German military's customer product management process. This is an internal framework guideline for the capability-based determination of requirements, the cost-efficient and timely procurement of operational products and services and their efficient use in the business area of the Federal Ministry of Defence of the Federal Republic of Germany.

The industry is involved in all phases of the process, within the limits set by public procurement law. The second area of German military procurement involves the procurement of standard and military goods and services for military missions. The third area of procurement involves the procurement of complex services. The Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support as well as the Federal Office for Infrastructure, Environmental Protection and Services of the Bundeswehr are ultimately responsible for central military procurement.

The Procurement Authority of the Federal Ministry of the Interior is in charge of non-military security procurement for federal institutions. This applies in particular to security procurement for the Federal Police, Customs and the Federal Administration in general. As far as security procurement at state level is concerned, the procurement office or the requesting body is generally responsible.

The restricted procedure and the negotiated procedure with the publication of a contract notice are the standard procedures for defence and security contracts. In these two constellations, the contracting authority publishes a call for competition in the course of an EU call for tenders. Where the procedure is restricted, the contracting authority shall invite a limited number of candidates taking part to submit tenders. The corresponding bids are not subject to any further negotiation. A limited number of candidates shall be invited by the contracting authority to submit tenders in the negotiated procedure. These tenders then become the subject of negotiations.

Exceptionally, a negotiated procedure without publication of a contract notice is also permitted. The contracting entity may choose such a procedure in the following scenarios.

In the case of supply and service contracts

If, in a restricted procedure, in a negotiated procedure with a call for competition or in a competitive dialogue:

- no tenders or no suitable tenders or no applications have been submitted, provided that the original terms of the contract are not fundamentally altered; and
- no proper tenders have been submitted or only tenders that are unacceptable under the applicable procurement law or under the legal provisions to be observed in the procurement procedure have been submitted, provided that the original terms of the contract are not fundamentally altered and if all and only those tenderers are included who meet the eligibility criteria and have submitted tenders in the course of the previous procurement procedure that meet the formal requirements for the procurement procedure.

If the time limits, including the shortened time limits pursuant to section 20 (2), second sentence, and (3), second sentence of the Procurement Regulation for Defence and Security, prescribed for the restricted procedure and the negotiated procedure with a competitive bidding process cannot be complied with because of:

- urgent reasons in connection with a crisis do not permit it; an urgent reason is generally present if:
    - mandated foreign missions or obligations of the Bundeswehr equivalent to missions;
    - peacekeeping operations;
    - defence against terrorist attacks; or
    - major emergencies that have occurred or are imminent, require new procurements at short notice or increase existing procurement requirements; or
- urgent, compelling reasons in connection with events that the contracting authorities could not foresee do not permit this. Circumstances justifying the compelling urgency must not be attributable to the conduct of the contracting authorities.

If, at the time of the invitation to submit tenders, the contract can be performed only by a certain company due to its technical peculiarities or due to the protection of exclusive rights, such as patent or copyright;

- if research and development services are involved;
- if the goods in question are manufactured exclusively for the purpose of research and development; this shall not apply to series production for the purpose of demonstrating marketability or covering research and development costs;

In the case of supply contracts

- For additional supplies by a contractor intended either for the partial replacement of marketable goods supplied or for the extension of supplies or existing facilities, if a change of contractor would result in the contracting authority having to purchase goods with different technical characteristics and this would lead to technical incompatibility or disproportionate technical difficulties in use and maintenance. The term of such contracts or standing orders shall not exceed five years, except in exceptional cases determined by taking into account the expected useful life of delivered goods, equipment or systems and the technical difficulties created by a change of contractor;
- in the case of goods quoted and purchased on a commodity exchange; and
- where goods are purchased on particularly advantageous terms from suppliers who are definitively winding up their business activities or from liquidators under insolvency proceedings or similar proceedings provided for in the legislation of another member state.

In the case of service contracts

- For additional services not provided for in the design underlying the award or in the contract initially concluded but which, owing to an unforeseen event, are necessary for the performance of the service described therein, provided that the contract is awarded to the contractor performing such service, if the aggregate value of the orders for the additional services does not exceed 50 per cent of the value of the original contract; and

    1. such additional services cannot be technically and economically separated from the original contract without substantial disadvantage to the contracting authority; or
    2. such services, although separable from the performance of the original contract, are strictly necessary for its completion;

- in the case of new service contracts that repeat services awarded by the same contracting entity to the same contractor, provided that they conform to a basic design and that this design was the subject of the original contract awarded by restricted procedure, negotiated procedure with a call for competition or competitive dialogue. The contracting entity shall indicate the possibility of applying this procedure already at the call for competition for the first project; the total contract value envisaged for the continuation of the services shall be taken into account by the contracting entity when applying section 106(2)(3) of the Act against Restraints of Competition. This procedure may be applied only within five years of the date of completion of the initial contract, except in exceptional cases determined by taking into account the expected useful life of delivered goods, equipment or systems and the technical difficulties arising from a change of the company.

For contracts related to the provision of air and maritime transport services for the armed forces or security forces deployed or to be deployed abroad, if the contracting entity has to procure such services from undertakings that guarantee the validity of their tenders only for such a short period of time that even the shortened time limit for the restricted procedure or the negotiated procedure with competitive bidding, including the shortened time limits pursuant to section 20(2), second sentence and (3), second sentence of the Procurement Regulation for Defence and Security cannot be observed.

In general, military and civil security goods or services may be procured without a public call for competition where the exemption of national security from EU or GPA procurement rules applies, or for intelligence purposes. Instead, these contracts are awarded through restricted negotiated procedures in accordance with the specific security requirements for the goods and services concerned.

Proposed changes

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

On 19 July 2022, the Act on the Acceleration of Procurement Measures for the German Armed Forces (BwBBG) came into force.

The modifications to procurement law contained therein are intended to support a rapid strengthening of the Bundeswehr's operational capability.

Under section 9, the BwBBG is initially limited in time to 31 December 2026 and, under section 8, also covers all procurement procedures already commenced but not yet completed prior to its coming into force on 19 July 2022.

At the content level, the following aspects, among others, are worth highlighting.

Joint procurement of individual specialist or area lots if justified by economic, technical or time-related reasons.

At the request of the contracting authority, a contract may nevertheless not be declared invalid despite a determination in a review procedure that the contracting authority has violated restrictions on competition if, taking into account all relevant aspects and the purpose of protecting the special defence and security interests and directly strengthening the operational capability of the German Armed Forces, compelling reasons of general interest exceptionally justify preserving the effect of the contract.

The proceedings before the Public Procurement Tribunals and the Public Procurement Senate for the review of alleged violations of public procurement law are to be expedited. In the review and appeal proceedings, the oral proceedings may be held by means of video and audio transmission. It is envisaged that the Public Procurement Tribunals may decide according to the state of the files, insofar as this serves to accelerate the proceedings. In exceptional cases, this option is also available for the second (and final) instance before the appeal court (public procurement panel at the Higher Regional Court).

It should be possible to conduct cooperative procurements with other EU member states in a simplified manner. Contracting authorities may restrict participation in a procurement

procedure to bidders located in a member state of the EU if the public contract is awarded within the framework of a cooperation programme conducted with at least one other member state of the EU.

Increased consideration of security interests in the award procedure may justify the exclusion of candidates or bidders from countries outside the EU.

It is clarified that not only procurements for classic institutional intelligence services such as the Military Counter-Intelligence Service are exempt from procurement law, but now also explicitly all contracts serving the purposes of military intelligence activities, in line with the functional concept of 'intelligence activities'.

Information technology

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

There are no specific procurement rules, but there are nuances to the procurement of IT goods at a contractual level. Contracting authorities generally use standardised contract templates called EVB–IT contracts. The EVB–IT contracts are specifically standardised for the purchase of IT goods and services. To prevent the contractor from being subject to foreign laws, obliging the contractor to pass on confidential information to foreign government or security authorities, these contracts generally contain corresponding 'no spy' clauses. This confidential information may have been made available to the contractor in the course of the tendering procedure or the performance of the contract. In addition, to ensure that unauthorised third parties (eg, foreign governments or security authorities) do not have access to the system or the software, there are contractual conditions that guarantee that IT products are free of secret access points.

Relevant treaties

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

In addition to EU procurement rules, Germany is bound by the GPA procurement rules. German contractors have generally applied these regulations to military and non-military security contracts following the implementation of EU Directive 2009/81/EC on contracts in the fields of defence and security into German law. Nevertheless, the national security exemption and the arms exemption under article 346 of the Treaty on the Functioning of the European Union (TFEU) are still applied in many cases, especially in the field of arms procurement.

However, the use of these exemptions has declined in the past, largely due to strict judicial interpretation and a changed political climate.

Recently, however, the application of article 346 TFEU has come back into focus insofar as a strategy paper adopted by the German cabinet to strengthen the security and defence

industry has extended the list of relevant key technologies to include surface shipbuilding, among others, thus preventing a Europe-wide tendering obligation in this area.

In addition, developments in the current security situation in various regions (including Eastern Europe) have led to an increased application of article 346.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

There are no arbitration clauses contained in either the standard contractual terms of the German military or in those of other German security authorities. Therefore, the civil courts usually deal with the disputes between the government and the contractors. For disputes during the procurement procedures, special public procurement tribunals exist.

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

The agreement of an alternative dispute resolution with the German military is only considered on an ad hoc basis due to the fact that the German military will not deviate from its standard terms for smaller contracts. On the other hand, for larger contracts, the German military may agree arbitration clauses on a case-by-case basis.

Indemnification

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

If the state breaches the contract with the contractor, German law requires the state, like any private client, to indemnify the contractor for the damage reasonably and foreseeably caused by the breach. On the other hand, if damages result from a breach by the contractor, the contractor has the obligation to indemnify the state for any damages.

Limits on liability

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

Limitation of the contractor's contractual liability can be agreed upon. However, in recent years the procurement authorities have been very strict on enforcing unlimited contractual liability clauses.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

Generally speaking, there is no legal risk of non-payment. German contracting authorities are bound by their contracts, as is the case for any private undertaking. Moreover, sufficient funds have to be achieved available before the contract is awarded.

Parent guarantee

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

The cases in which a contractor is required to provide a parent guarantee are generally those in which the contractor itself does not meet the financial and economical requirements set out in the procedural documents. A parent guarantee might, therefore, be presented as an alternative. However, the adequacy of such parent guarantee as a way of attaining the financial requirements will be for the contracting authority to decide.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

There are no procurement clauses that must be included in a defence contract or that will be necessarily implied. However, there are a great number of varying standard terms and conditions and legal regulations that are commonly included in the contract by the contracting authority. In any case, the Defence and Security Procurement Regulations refer to the obligation to take into account the rules on prices in public contracts. Thus, the contracts are also subject to the price control provisions of Price Regulation No. 30/53, which contains binding rules for the pricing of public contracts. This regulation was amended with effect from 1 April 2022.

Among other things, it now contains provisions on the definition of marketable performance and the market price as well as clearer requirements for the proof of a market price. If there is no market price on the market, it is assumed that a price established under competitive conditions (at least two valuable offers) is to be regarded as usual in the market. Other changes include an extension of the minimum retention period for documents from public contractors to a total of 10 years, the requirement that the decision to carry out a price review is at the discretion of the price review authority, an estimation power for the price review authority and the fact that price reviewers are now explicitly permitted to make photocopies, printouts, photographic images, electronic data and files included.

Cost allocation

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

Where contracts are awarded on the basis of a competitive procedure, the contracts in question generally contain fixed prices or a mix of fixed and variable price elements. Cost accounting elements can also be included. In the case of contracts that have been awarded without competitive procedures, most contracts contain cost-oriented fixed prices or extra cost prices, and the distribution of costs between the contractor and the state depends on individual agreements. The actual distribution of costs between the contractor and the state in these cases depends on the individual agreement.

Disclosures

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

To verify that prices are reasonable, contracting authorities may require tenderers to explain their prices during the award procedure and during price controls and sometimes many years after the contract has been fulfilled.

In the case that during the bid evaluation there is a deviation of more than 20 per cent between the price of the best bidder and that of the second-best bidder in terms of price, the contracting authority shall provide price clarification. This clarification concerns not only arithmetical ambiguities, but also all price-relevant aspects of the offer. The bidder shall be obliged to prove accordingly:

- whether its offer is adequate in the light of the prices stated by it in the offer;
- whether and how reliable performance of the contract can be expected at the offered prices;
- whether the applicable environmental, social and labour law regulations are complied with;
- that its bid has not been submitted specifically with the intention of displacing the market and
- whether state aid has been granted to the company.

Audits

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

The Ministry of Defence reviews procurements for the military. On the other hand, in the case of non-military procurements, audits are the responsibility of the supervisory authority, which is usually the Ministry of the Interior. The relevant ministry also reviews procurements at the ministerial level in internal audits. In other situations, the Federal Audit Office or the competent State Audit Office is responsible for audits.

IP rights

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

The ownership of intellectual property rights is individually governed by the contracts.

Economic zones

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

We are not aware of any such economic zones or programmes in Germany.

Forming legal entities

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

The limited liability company (GmbH) represents the most common form of commercial legal personality. A notarial shareholder agreement is a prerequisite for the formation of a GmbH, whereby the notary must verify the identity of the shareholders by means of valid identification documents at the time the agreement is notarised. In addition, the minimum share capital of a GmbH is €25,000 and the company must be registered in the commercial register. The entry in the commercial register requires the confirmation of the managing director to the effect that the share capital to be contributed by the shareholders is available to the company. This is usually combined with an account statement as proof. A list of shareholders signed by the managing director must also be submitted with the application for registration.

The Civil Code Partnership is a simple partnership based on the provisions of the German Civil Code and the simplest form of company under German law. It can be described as a simple and practical instrument suitable for temporary joint ventures, in particular for tenders or as an intermediate step in the formation of a permanent joint venture structure. There are no formal prerequisites for its formation. Furthermore, neither capital nor registration is required.

Access to government records

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

As a rule, government contracts are not published or passed on to third parties. However, everyone (including foreigners) has the right to access official information held by public authorities under the Freedom of Information Act of the Federation and the states. In addition to the right to information, there may also be a right to inspect files held by the authorities. It is generally believed that this should include records of previous procedures for awarding public contracts, including previous contracts. However, access may be denied, among other things, in cases where disclosure could prejudice international relations, the military, public safety or other security interests, or in order to protect classified information and other official secrets or trade secrets (including confidential information and intellectual property rights of third parties). The disclosure of past government contracts will often be barred by one of these exemptions.

Supply chain management

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

There are no special defence and security procurement-related rules regarding eligible suppliers, supply chain management and anti-counterfeit parts.

Economic operators will be considered eligible to participate in public procurement procedures if they meet the eligibility criteria named by the tendering authority in the tender notice. Eligibility criteria in accordance with EU and national regulations may include requirements of professional suitability, financial and economic standing and technical or professional ability and certain compliance self-declarations. All criteria must be connected with the tendered goods, services or construction work. If the tendering procedure or the contract requires access to classified information in accordance with the German Security Clearance Act bidders must also fulfil certain security requirements.

Regulations on supply chain management (especially commitments by the contractor to ensure the security of supply for the duration of the contract and even in the event of a crisis or war) are included on a case-by-case basis in the tendering authorities' standard terms and conditions.

In Germany, the Supply Chain Duty of Care Act, or Supply Chain Act for short, also came into force with effect from 1 January 2023. This is intended to regulate corporate responsibility for compliance with human rights in global supply chains, including protection against child labor, forced labour and discrimination, the right to fair payment of wages and the right to form trade unions, as well as environmental protection.

An entrepreneur is responsible both for its own business area and for the activities of its contractual partners and other indirect contractual partners and must implement appropriate preventive and remedial measures, set up complaint channels for people in the supply chains and report on supply chain management at regular intervals.

Since 1 January 2023, companies with at least 3,000 employees in Germany have been affected by the personal scope of application. As of 1 January 2024, companies with at least 1,000 employees in Germany will also be affected.

INTERNATIONAL TRADE RULES

Export controls

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

Germany has very strict export control regulations, especially the German Foreign Trade Act, the Foreign Trade Regulation and the Military Weapons Control Act (KrWaffKontrG). These regulations govern the terms and procedures for the export of military equipment and dual-use products. The Foreign Trade and Payments Ordinance contains an export list containing all military equipment for which licences are required. This list is based on the Wassenaar Arrangement. The manufacture, trade, brokering and transport of military weapons and equipment as well as certain dual-use goods are subject to government permission. In the case of war weapons (according to the annex of the War Weapons List attached to the War Weapons Control Act), companies are generally not entitled to an export licence. For other military equipment (eg, pistols and revolvers as well as hunting and sporting rifles, radar and radio technology), however, there is a general entitlement to a licence, which can only be denied if Germany's security interests are endangered, the peaceful coexistence of peoples is disturbed or a significant disruption of Germany's foreign relations is to be expected. In accordance with the Agreement on Export Controls in the Defence Sector between the Federal Republic of Germany, the French Republic and the Kingdom of Spain signed on 17 October 2021, deliveries of military equipment to France or Spain are subject to special regulations if the requirements for a General Licence are also met. The licence under the KrWaffKontrG is issued by the Ministry of Economic Affairs, upon consultation with the Ministry of Defence and the Foreign Office. Export licences for weapons, military equipment and certain dual-use goods are issued by the Federal Office for Economic Affairs and Export Control. Due to Germany’s history, decisions to grant or withhold licences are often highly political. The German government pays particular attention to ensuring that the goods will not be misused to commit human rights violations or to exacerbate a crisis. Decisions on licences for exports of military equipment are primarily based on foreign and security policy considerations, and not on commercial or labour-market interests. These strict German rules also apply to parts of military equipment and often means that common European defence products cannot be exported to third parties, even if the contracting parties are not German. On 16 October 2019, Germany and France agreed on new common export regulations for common defence products.

Regulation (EU) 2022/328 of 25 February 2022, in the context of Russia’s actions destabilising the situation in Ukraine, strengthened the prohibition framework of article 2 Regulation (EU) 833/2014.

The export, sale and transfer of all dual-use items and technologies listed in Annex I of the EU Dual-Use Regulation to Russia or for use in Russia is now prohibited in principle, regardless of the recipient or end user (article 2, paragraph 1).

Domestic preferences

23

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

European and national public procurement regulations prohibit discrimination against economic operators purely on the grounds of their nationality. Therefore in general, German public procurement procedures are open to all economic operators from the EU, the European Economic Area (EEA) and Agreement on Government Procurement member states. However, on a case-by-case basis and due to the prominence of security and confidentiality concerns in defence and security matters, bidders from non-EU, non-EEA or non-Nato countries might be excluded from the tendering procedures.

For this purpose, a contracting authority's tender documents must state that it reserves the right to reject tenders on defence and security grounds.

The following measures may also be taken to protect specific security interests:

- contracting authorities may require proof of a national security audit and accept its result only if this audit is recognised as equivalent on the basis of intelligence cooperation between the countries concerned;
- they may require the presentation of a certificate ensuring the permissibility of the transport of equipment, including additional supplies in crisis situations;
- they may require an undertaking regarding access to and confidentiality of classified information;
- they may require an undertaking regarding access to and confidentiality of classified information; and
- they may require the fulfilment of additional requirements set out in certain security regulations, such as the measures formulated in the Directive on network and information security to ensure a common high level of protection of network and information systems.

Favourable treatment

24 Are certain treaty partners treated more favourably?

European and national public procurement regulations prohibit favourable treatment due to certain national or treaty statutes.

Sanctions

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

Germany adheres to United Nations and EU boycotts, embargoes and other trade sanctions. A list of country and personal related weapon embargoes can be found here.

As at 16 November 2023, embargoed countries include:

- Armenia;
- Azerbaijan
- Belarus;
- Bosnia;
- Burundi;
- China;
- Democratic Republic of the Congo;
- Democratic People's Republic of Korea;
- Haiti;
- Iraq;
- Iran;
- Republic of Yemen;
- Lebanon;
- Libya;
- Mali;
- Moldovia/Transnistria;
- Myanmar (previously Burma);
- Nicaragua;
- Republic of Guinea;
- Republic of Guinea-Bissau;
- Russia;
- Zimbabwe;
- Somalia;
- Sudan;
- South Sudan;
- Syria;
- Tunisia;
- Turkey;
- Ukraine (Restrictive measures in view of the situation in Ukraine);
- Venezuela; and
- Central African Republic.

Trade offsets

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

Offset deals are not part of the EU and German defence procurement regulations, since they are generally incompatible with the procurement law principles of equal treatment and transparency.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

According to the Federal Civil Servants Act, retired civil servants and former civil servants with pension benefits are obliged to report any gainful employment or other employment that is connected with their official activity in the last five years before the termination of the civil service and that could be detrimental to official interests.

If officials retire at the normal retirement age, the obligation to notify the Commission ends three years after the end of their service. In other cases after five years.

The administrative authority must prohibit the activity if it will prejudice the service's interests. Such prohibition is effective until the end of the obligation to notify.

Addressing corruption

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

Corruption is punishable under different sections of the German Criminal Code. Criminal offences include bribery of German and EU public officials and German soldiers, of members of parliament, commercial bribery and bribery of non-EU foreign officials. Though there is no true enterprise criminal law in Germany, economic operators may be subject to fines if their employees commit corruption offences on behalf of the company. Economic operators whose employees have been found guilty of corruption in a court of law are excluded from participation in public procurement procedures for a period of up to five years. However, before the bidder can be excluded from the procedure, it must be permitted to present its case and have the opportunity to set out measures it will take to prevent any further wrongdoing. The competition register set up and maintained by the Federal Cartel Office provides contracting authorities with information on grounds for exclusion within the meaning of competition law. Since 1 June 2022, it has been mandatory for contracting authorities to make a query before concluding the award procedure by awarding a contract if the contract value is above the relevant threshold value. In the area below the threshold, there is a voluntary query option. Prior to registration, the company concerned has the opportunity to comment on the data collected within two weeks and to point out any incorrectness.

Lobbyists

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

There are no formal registration requirements for lobbyists and commercial agents.

Limitations on agents

30 | Are there limitations on the use of agents or representatives that earn a commission on the transaction?

There are no formal limitations on the use of agents or representatives. However, contracts issued by the Federal Ministry of Defence or its subordinates usually include standard terms requiring the approval of intermediaries or brokers. Approval will only be granted if it is commercially appropriate and there are no disadvantages for the contracting authority.

AVIATION

Conversion of aircraft

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

Military aircraft may be converted to civil use if the armed services give up control of the aircraft and the aircraft is fully demilitarised. For civil use, the former military aircraft has to obtain or retain all necessary certificates and permits generally required for civil aircraft. The use of a civil aircraft for military purposes requires that the aircraft is under control of the armed services and certified by the German Military Aviation Authority.

Drones

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

In general, the aviation laws and regulations governing the inspection and certification of aircraft also apply to unmanned air systems, both autonomous and remotely piloted. Systems that do not exceed a certain weight, use a type of special propulsion and are not or only used in certain areas are excluded from certain regulations.

EU drone regulations 2019/947 and 2020/746 must be observed.

At the national level, the legal requirements have been adapted by the corresponding law on the adaptation of national regulations to the Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aerial vehicles.

MISCELLANEOUS

Employment law

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

Foreign defence contractors must adhere to German labour and employment regulations if they permanently operated in Germany or post employees in Germany. These regulations included provisions on equal treatment and non-discrimination, hiring and laying off employees, minimum wages, working conditions, health and safety measures and protective measures for pregnant women. Violations of these labour and employment laws may, besides other punishments, lead to an exclusion from further public contracting procedures.

Defence contract rules

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

Foreign and domestic defence contractors must adhere to all applicable regulations on the production, handling, transport, export and use of weapons and other relevant military goods. In addition, if the contract involves access to classified information, contractors must observe all applicable regulations regarding the security of such information. However, foreign security clearances from EU and Nato member states might be accepted on a case-by-case basis.

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

With the possible exclusion of labour and employment regulations, a contractor is usually bound by all applicable regulations, even if they perform work exclusively outside Germany. This applies in particular to the price control requirements and the requirements for security checks.

Personal information

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

Economic operators participating in a public procurement procedure must generally declare, and possibly certify, that their directors, officers and leading employees have not been convicted of certain criminal offences. Usually, a self-declaration by the bidder is sufficient. If the contract involves access to classified information, personal security

clearances are required for all personnel who might be involved with the contract or have access to classified information.

More detailed information on individual employees generally relates more to the specific contract and is requested as part of the suitability test and there under technical and professional capability.

Licensing requirements

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

Aside from the regulations governing access to classified information and manufacturing, trade, brokering and transport of military weapons and equipment as well as certain dual-use goods, there are no additional general registration or licensing requirements to operate in the defence and security sector in Germany.

Environmental legislation

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

There are no specific environmental statutes or regulations for defence and security contractors. On a case-by-case basis, exemptions might be available from general environmental statutes or regulations for defence goods or services.

The contracting authority may require tenderers to comply with certain standards for environmental management and prove this by presenting certificates issued by independent organisations. The contracting authorities refer either to the Community eco-management and audit scheme or environmental management standards based on the relevant European or international standards and certified by bodies conforming to Community legislation or European or international certification standards.

Equivalent certificates issued by organisations in other member states shall also be recognised.

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

There are no specific environmental targets for defence and security contractors. However, the contracting authority may decide to include environmental objectives in a public procurement procedure either as performance requirements in the form of technical specifications, at the suitability test level as a requirement to meet specific environmental management standards relevant to the specific contract, or as an award criterion. In addition, it is also possible to include such criteria in the additional conditions for the performance of the contract. The use of these requirements and criteria in the defence and security sector is currently very rare.

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

The contracting authority might choose to include environmental issues and requirements either as performance requirements or as evaluation criteria in a public procurement procedure.

UPDATE AND TRENDS

Key developments of the past year

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

As a result of global political developments in connection with the start of the Russian war of aggression, the establishment of a special fund for the Bundeswehr was announced, which is intended to supplement the defence budget of the federal budget. It was approved by the German Bundestag on 3 June 2022 and by the Bundesrat on 10 June 2022.

In this context, the Act to amend the Basic Law (aArticle 87a) was announced in the Federal Law Gazette on 30 June 2022 and came into force on 1 July 2022 and the Act to finance the Bundeswehr and to establish a 'Special Fund for the Bundeswehr' and to amend the Federal Budget Code was announced in the Federal Law Gazette on 6 July 2022 and came into force on 7 July 2022.

It authorises the federal government to set up a special fund with its own credit authorisation in the amount of €100 billion on a one-off basis, which is intended to increase the alliance and defence capability. This specific earmarking of the special fund will be constitutionally secured by an amendment to the Basic Law.

The following paragraph 1a was added to article 87a of the Basic Law by the Law Amending the Basic Law (article 87a): in order to strengthen its alliance and defence capabilities, the federal government may establish a special fund for the Bundeswehr with its own credit authorisation of up to €100 billion on a one-time basis. Articles 109(3) and 115(2) shall not apply to the credit authorisation. The details shall be regulated by a federal law.

In addition, all income and expenses must be estimated in a business plan for the respective year. For example, the economic plan for 2023 lists specific procurements for the dimensions 'clothing and personal equipment', 'command and control capability and digitalisation', 'land', 'sea' and 'air', among others. The corresponding funds for various procurements were released by the Budget Committee at individual meetings. The following are examples:

- Meeting on 14 December 2022: including the procurement of 35 F-35A weapon systems with an initial operational requirement for armament via Foreign Military Sales (FMS) procedures and the procurement of 476 command and control equipment for 14 platoon systems;
- Meeting on 25 January 2023: The procurement of eight mobile medical service facilities (complete systems airborne rescue center, light (LLRZ, le) including medical equipment for regeneration purposes;
- Meeting on 8 February 2023: Release of €52.8 million for the continued regular flight operations of the Bundeswehr satellites COMSATBw1 and 2, with an already ongoing contract providing an extension option;
- Meeting on 1 March 2023: The procurement of 3,000 handheld radios and 500 radios for vehicles in the amount of €33.2 million (including accessories and licences) as the first part of a framework agreement for the purchase of a total of 15,227 digital radios, which the Budget Committee had already approved at an earlier meeting.

OLG Düsseldorf, decision dated 22 June 2022 – VII-Verg 36/21

The Public Procurement Senate of the Düsseldorf Higher Regional Court has dismissed the immediate appeal filed by weapons manufacturer CG Haenel. The Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support may award a contract for the supply of new assault rifles to Heckler & Koch from Oberndorf am Neckar.

The decision is based on an award procedure for the procurement of new assault rifles.

The review request submitted by C.G. Haenel was already rejected by the Procurement Chamber in a decision dated 10 June 2021. The Public Procurement Tribunal has now confirmed this decision by rejecting the immediate appeal. The respondent was right to exclude the applicant on the grounds of serious professional misconduct in the form of a reproachable patent infringement.

On 7 July 2022, the Bundestag passed the draft Acceleration Act. This was approved by the Bundesrat on 8 July. The Act entered into force on 19 July and expires at the end of 31 December 2026.

On 25 July 2022, the German Federal Cartel Office approved the merger of three major defence and security companies (Airbus Defence and Space GmbH, German FCMS GbR and MBDA Deutschland GmbH) and cleared the formation of a joint venture. The companies are working together as part of the Franco-German-Spanish initiative to develop the Future Combat Air System (FCAS) as part of the so-called National R&T Project. FCAS is a programme to develop a system consisting of a sixth-generation manned multi-role

combat aircraft (New Generation Fighter), unmanned escort aircraft (Remote Carrier) and new weapons and communications systems.

Decision of the Federal Public Procurement Chamber of 19 September 2022 – VK 2-80/22

Here, the Federal Public Procurement Chamber ruled that a negotiated procedure without a call for competition and thus a direct award without prior EU-wide contract notice is exceptionally permissible for service contracts, specifically in the field of defence and security, if, at the time of the invitation to tender, the contract can only be carried out by a specific company due to its special technical features, among other things. The contract must be characterised by special technical features for which there is objectively and without reasonable doubt no alternative to commissioning a specific company. This lack of alternatives must be proven by a corresponding examination of alternatives.

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LEGAL FRAMEWORK

Relevant legislation

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

Directive 2009/81/EC of the European Parliament and of the Council (Directive) governs certain contracts by contracting authorities or entities in the fields of defence and security, which can take effect in member states through implementation. As a permissive rule, article 346 of the Treaty on the Functioning of the European Union (TFEU) allows the member states to take necessary measures for the protection of the essential interests of their security that are connected with the production of or trade in arms, munitions and war material.

Given the legal context provided by EU legislation, Hungary adopted Act XXX of 2016 on Defence and Security Procurements (DSP), implementing the Directive. Categories of military equipment and services subject to procurements under the DSP are listed in Annex 1, which are further specified with detailed parameters in Government Decree 226/2016 (VII.29). Notices applicable to defence and security procurements are governed by the Ministry of Defence Decree 19/2016 (IX. 14).

Civil public procurements are governed by Act CXLIII of 2015 on Public Procurement (APP) as amended by Government Decree 330/2023 (VII. 19) during the state of emergency related to the military conflict and humanitarian crisis in Ukraine. Procurements under the DSP are exempt from the APP, and the exemption of procurements affecting essential security interests or requiring special security measures can be initiated under Government Decree 492/2015 (XII. 30).

Identification

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

Under the DSP, a procurement can only be recognised as defence or security procurement if the contracting authority awarding the contract is a government body or other organisation controlled by a government body, or an organisation carrying out an activity in the public interest.

The DSP defines defence and security procurement separately:

- defence procurement means the procurement of military equipment and services and procurement for the development of military systems and capabilities. Defence procurement also means the procurement for military construction works (ie, works related to buildings of organisations administered by the Ministry of Defence, and buildings used by military departments of the Hungarian Armed Forces).
- Security procurements are those that do not qualify as defence procurements but are directly related to the internal and external security of Hungary, (in particular those related to law enforcement, border protection, immigration), and

procurements directly related to critical infrastructure protection that generate, contain or require the processing of classified data.

Moreover, according to the DSP, procurements for services that are specifically for military purposes, or for security purposes involving, containing or requiring classified data also constitute defence or security procurement. However, only a specific group of services, listed in Annexes 2 and 3 of the DSP, fall under this provision.

Certain procurements, despite meeting the criteria above, do not constitute defence or security procurement. Examples of such procurements are: (1) those subject to special procedural rules under an international treaty; (2) procurement for intelligence and counter-intelligence activities; or (3) procurement of arbitration and conciliation services.

Key differences between defence and security procurements and civil procurements are that the DSP:

- is subject to different data protection rules in the interest of national security;
- allows contracting authorities to set out strict security of supply requirements in the call for participation, the invitation to tender, the contract documents, the descriptive document or the additional documents;
- provides for a wider range of grounds for exclusion from procurement;
- imposes more rigorous rules for tenderers in terms of eligibility requirements; and
- sets out detailed rules for, among others, the conclusion, content, performance and validity of procurement contracts.

Conduct

3 | How are defence and security procurements typically conducted?

Defence and security procurements are carried out under the DSP. However, different terms of the procurement contract, if it is possible, should be separated according to whether they are covered by the APP or the DSP. If the terms are not separable, they will all be governed by the DSP, unless there are clauses that would otherwise not be covered by either the APP or the DSP.

The DSP provides for a regime with detailed rules for procurements with a value up to the threshold set out by EU legislation. The same rules apply to procurements with a value under the EU threshold, unless they are regulated otherwise in section III of the DSP. Section III of the DSP therefore creates a distinct regime for procurements with a value under the EU threshold. The DSP also has a separate regime under section VI solely for security procurements.

In general, it is the obligation of the contracting authority to lay down the rules and principles governing the preparation, conduct and internal control of the procurement. To evaluate the tenderers, the contracting authority has to set up a three-member evaluation committee, whose conduct is drawn up in a record.

Section IX of the DSP describes a closed catalogue of procedures with specific rules, which are the following:

- restricted procedure;
- negotiated procedure with prior publication of a contract notice;
- negotiated procedure without prior publication of a contract notice; and
- competitive dialogue.

Competitive dialogue and negotiated procedure without prior publication of a contract notice can only be carried out, according to the DSP, in limited circumstances. Most procedures involve a pre-qualification assessment where the contracting authority decides on the financial stability and technical capability of the tenderers. Besides, the contracting authority may also use a framework agreement for procurements, where the parties can specify the contractual terms later.

The administrational body responsible for, among others, the supervision of defence and security procurements is the Defence Procurement Agency, regulated under Government Decree 329/2019 (XII. 20).

Proposed changes

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

There are no legislative amendments pending before Parliament that would significantly change the defence procurement process. Furthermore, there are no amendments to the law that have already been adopted but are not yet in force that would make fundamental changes in the process.

Information technology

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

The relevant Hungarian defence procurement regulation regime does not differentiate between the procurement and procedural rules for IT products and those for non-IT goods.

Relevant treaties

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

Since the EU is a signatory to the GPA, it has adopted the necessary legislation in line with the treaty. This legislation is binding upon Hungary as an EU member state. The permissive rule of article 346 of the TFEU is to be narrowly interpreted, therefore national security exemption is only possible in a limited number of cases.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Under the Hungarian legal regime for defence procurement, there are two main fora for the resolution of disputes between the government and the defence contractor: the proceedings of the Public Procurement Arbitration Board and the ordinary court proceedings.

Certain disputes, such as claims connected to the modification or performance of a contract concluded in defence procurement proceedings and the modification or performance of a contract concluded in security procurement proceedings that is contrary to the relevant legislation fall under the jurisdiction of the Public Procurement Arbitration Board. The applicable law for the proceedings of the Public Procurement Arbitration Board is Act CL of 2016 on the General Public Administration Procedures. The decision of the Public Procurement Arbitration Board may be appealed before administrative courts.

However, civil claims in connection with a defence procurement procedure, security procurement procedure, and civil claims regarding the modification or performance of a contract are subject to the exclusive jurisdiction of the judicial system.

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

The possibility for arbitration is limited in this sector. According to the Arbitration Code, in proceedings governed by the Administrative Litigation Code arbitration is not allowed. Therefore, arbitration and mediation are less common in the defence and security sector, as the main fora for dispute resolution in this regard are the Public Procurement Arbitration Board and the courts.

Indemnification

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

In the absence of specific rules, Act V of 2013 on the Civil Code (Civil Code) applies in this regard. Under the Civil Code, as a general rule, a contractor must indemnify the other party for caused damages.

Limits on liability

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

The limitation of the contractor's liability and potential recovery, in the absence of specific rules in the DSP, is generally governed by the Civil Code.

The parties entering into a contract have the liberty to mutually limit the contractor's contractual liability, with the following exceptions:

- any contract term limiting or excluding liability for intentional tort or for causing damages resulting in loss of life, or harm to physical integrity or health shall be null and void; and
- any contract term limiting or excluding liability for premeditated non-performance of an obligation, or where non-performance results in loss of life, or harm to physical integrity or health shall be null and void.

Within this framework, the government can agree to limit the contractor's liability.

Regarding the contractor's potential recovery against the government for breach, the DSP sets out that any provision that excludes or limits the application of the legal consequences otherwise applicable to the contracting authority in the event of a breach of contract shall be null and void. Thus, it is not possible to limit the contractor's potential recovery against the government for breach.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

The risk of non-payment for an undisputed, valid invoice by the Hungarian government is considered to be very low. The government's commitment to incur expenditure is subject to the extent provided by the finance laws and the amending finance laws.

Parent guarantee

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

The contracting authority may require security in respect of performance of the contract. The public procurement regulations contain a list of forms in which such security may be provided. As a general rule, security may be provided in the following forms:

- by payment or transfer of the required amount of money to the account of the contracting authority or entity as security deposit (as defined in the Hungarian Civil

Code) the essence of which is that the contracting authority directly enforce its claim against the amount at its disposal);

- by a guarantee or direct suretyship given by a financial institution or insurer; or
- by a guarantee bond issued under an insurance contract.

The tenderer is always entitled to choose between the above forms (ie, the contracting authority may not require the use of one or other form of security), but it is possible for the contracting authority to allow other means of providing security in addition to the above forms.

This may include the provision of a parent company guarantee, but one of the most common alternatives to a guarantee for claims for defective performance is for the contracting authority to allow in the contract that the guarantee or a specified part of it is to be secured by the retention of the consideration for the performance or part-performance (eg, the contracting authority may retain a part of the consideration – up to a maximum of 5 per cent – until the end of the guarantee period).

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

There are no mandatory clauses in defence or security procurement contracts or any other term deemed to be incorporated in the absence of explicit inclusion. However, according to the Act on Defence and Security Procurements (DSP), certain information must be included in the contract (eg, the evaluated elements of the successful tender and the estimated price).

Cost allocation

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

Cost allocations are usually defined in the contract itself, but the price offered must not be unreasonably low. To this end, the DSP sets forth that the contracting authority is obliged to request in writing the information supporting the content of the tender. Failure to do so invalidates the contract.

Disclosures

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

The contractor shall submit a detailed quotation that shall be included in the documentation (in the form of excel and pdf file as well). In the detailed quotation the contractor shall disclose the cost and pricing information indicating the total amount of the budget estimated by the contractor. Costs specified in the technical specifications and the draft agreement, and all costs incurred regarding the performance of the agreement must be included in the tender price. The tender price shall be indicated in Hungarian forint (HUF), in net value, in positive integers.

Audits

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

According to Act C of 2000 on Accounting, the auditing of accounting documents is statutory for all companies keeping double-entry books. Since there are no specific rules for the audits of defence and security procurements, the general rules for auditing apply.

IP rights

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

There are no statutory provisions related to the transfer and licensing of intellectual property rights created during the performance of the contract. Hence, ownership rights and licensing terms are defined by the specific subject of the procurement and the interests of the parties and thereby individually governed by each contract. By way of example, if the contract is concluded for the purpose of creating intellectual property in the course of research and development activity, it is likely that intellectual property will be owned by the government as being funder of the project. Whereas if procurement is for the purchasing of products already developed by the contractor, the government is likely to acquire exclusive or non-exclusive licence of the intellectual property vested in the product.

Economic zones

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

There are no economic zones or other special programmes dedicated to defence contractors in Hungary.

Forming legal entities

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

The process of establishing joint ventures is the same as of forming any other company. The main document of establishment is the company's deed of foundation, which every founding member must execute. Once executed, the deed of foundation will need to be countersigned by an attorney at law (or be transferred into a notarial deed by a notary).

The request for registration, along with all corporate documents (including the deed of foundation) need to be submitted to the court of registry within 30 days of the date of countersignature. After the submission is made, the company may commence commercial activities as a 'pre-company'. The 'pre-company' form is temporary, it only lasts until the final decision of the court of registry on the registration request is issued.

The deadline for the court of registry to issue its decision is shorter if a 'simple-form' deed of foundation is used. 'Simple form' deed of foundation is a Hungarian standardised contract form of which is set out by the law and therefore, may not be modified, only filled in with the relevant corporate data of the company.

If the court of registry rejects the registration request, all declarations made by the 'pre-company' will be deemed to be the joint declaration of the founding members. The company is established once the court of registry has issued its decision to register the company in the corporate registry.

Once the company is established, a bank account needs to be opened, and the registered capital of the company will need to be paid pursuant to the deed of foundation.

Access to government records

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

According to Act CXII of 2011 on the Right to Information, a body or person performing governmental, local governmental or other public task must grant anyone access to the public information and information of public interest that it holds, upon request.

Given the fact that contracting authorities are performing governmental tasks and that the information and knowledge they hold is in connection with the performance of their public tasks, in particular the data they hold relating to contracts concluded by them, is considered to be public information, and everyone has the right to access it.

This right, however, may be restricted on the basis of the DSP for reasons of national security or defence, taking into account the public interest served by the disclosure of the data, for a period not exceeding 10 years from the date on which the data was created.

Supply chain management

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

There are no special rules for the eligibility of suppliers in terms of defence and security procurements. However, they need to meet the financial and technical requirements set out by the contracting authorities. Furthermore, suppliers who have committed certain criminal offences (eg, negligence or fraud) are excluded from procurements. Similar rules apply to subcontractors. There are no specific rules regarding anti-counterfeit part.

INTERNATIONAL TRADE RULES

Export controls

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

On the basis of EU Regulation 2021/821, the export of controlled items is subject to the grant of a licence. The list of dual-use items (ie, goods, software and technology that can be used for both civilian and military applications) subject to authorisation is set out in Annex I to Regulation (EU) No. 2021/821. Furthermore, Hungary has implemented the Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (the Common Position) mainly in Government Decrees 13/2011 (II. 22) and 156/2017 (VI. 16).

In line with the EU legislation, in Hungary the production and trade of defence items are subject to a specific authorisation. The licences are issued by the Capital Budapest Government Office after mandatory consultation with the relevant authorities (eg, person appointed by minister for home defence, the minister for industries or the National Tax and Customs Administration). The export activities of registered firms may be carried out under EU General Export Authorisations, Individual Export Licences and Global Export Authorisations.

Regulation (EU) 2022/328 of 25 February 2022, in the context of Russia's actions destabilising the situation in Ukraine, strengthened the prohibition framework of article 2 Regulation (EU) 833/2014. The export, sale and transfer of all dual-use items and technologies listed in Annex I of the EU Dual-Use Regulation to Russia or for use in Russia is prohibited.

Domestic preferences

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

The DSP does not provide for any national preference rules and it is explicitly regulated that economic operators established in the European Union and goods of Community origin should be granted national treatment in the procurement procedure.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

In general, only member states of the European Union, signatories of the GPA and other free-trade agreement with Hungary can benefit from the full protection of the Act on Defence and Security Procurements (DSP). Contractors from other countries may be less favourably treated.

Sanctions

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

Hungary has not adopted any boycott, embargo or any trade sanction in the field of defence and security other than those imposed by the EU, implementing the United Nations Secretary Council resolutions. The Hungarian administrational body responsible for the policy measures is the Budapest Capital Government Office.

Information on the implementation of the sanctions imposed by the UN and the EU can be found on the website of the Hungarian Ministry of Foreign Affairs and Trade.

Trade offsets

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

Offset deals are generally incompatible with EU law (eg, due to transparency concerns) and are therefore not part of the Hungarian defence and security procurement regulation.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

Certain legislation regulates so-called 'job placement restrictions' for public administration employees, that is similar to the functioning of non-competition agreements in the private sector.

Pursuant to section 117 of Act CXXV of 2018 on Government Administration, the government may determine the sectors and the posts within the sectors for which the government official may not establish an employment relationship with the company performing the sectoral activity as its main activity after the termination or cessation of his or her government service. The duration of the restriction shall be the period of time corresponding to the period of service in the restricted post, up to a maximum of two years.

Information acquired during the period of government employment may not be used for commercial purposes beyond that period.

Pursuant to section 11 of Act XXXII of 2021 on the Authority for the Supervision of Regulated Activities, the chairman and the deputy chairman of the Authority for the Supervision of Regulated Activities shall, for a period of one year after the termination of their term of office:

- not enter into an employment relationship or any other employment-related relationship with a company; and
- not acquire any interest in an undertaking the rights or legitimate interests of which have been affected by a decision of the authority in the three years preceding the termination of their term of office, excluding undertakings in which the state has a majority holding. Where the chairman or vice-chairman has held office for less than three years, the ban shall apply for a period of six months from the date of termination of office.

Pursuant to section 45 of Act CVII of 2019 on Special Status Bodies and the Status of Their Employees, a civil servant may not, by agreement between the parties, engage in conduct that would harm or endanger the legitimate interests of the special status body that previously employed him or her for a period of two years after the termination of his or her civil service.

Addressing corruption

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

Corruption offences are covered by Chapter XXVII of Act C of 2012 on the Penal Code (Penal Code). The main forms of corrupt offences are bribery and influence peddling and purchase of influence. Apart from the criminal law consequences, contractors having committed corruption offences are excluded from procurements.

Lobbyists

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

There are no regulations in force regarding lobbyists or commercial agents.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

There are no formal limitations on the use of agents or representatives. However, their use on a success fee basis is not common in the public procurement sector.

AVIATION

Conversion of aircraft

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

Military aircraft have very different certification requirements. Converting a military aircraft to civil use or vice versa may end up in a difficult and costly transformation, given the substantial differences between the two set of requirements. For instance, a risk assessment shall be carried out for the risks associated with the intended operation of special equipment and systems (armament, pyrotechnic devices, ejection seats, disposable accessories) of aircrafts with a military history exceeding a maximum horizontal flight speed of 250 knots. The construction process of these aircrafts must be monitored and documented, including, among others, the description of the parts, the process used, the material used, the date and place, the name and signature of the person who carried out the work, the method of compliance or verification. Pursuant to Government Decree 392/2016 (XII. 5), the military aviation authority, who is responsible in this field, is the Minister of Defence.

Drones

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

In 2019, the EU carried out a comprehensive regulatory reform of the regulation of unmanned aircraft systems (UAS) (ie, drones).

The European Commission has adopted two regulations as part of the regulatory reform:

- Regulation 2019/945 (EU) on unmanned aircraft systems and third-country operators of unmanned aircraft systems contains rules on drone systems, requirements for the design and manufacture of remote identification accessories, requirements for the marketing of drones, conformity assessment procedures and operators outside the EU.
- Regulation 2019/947 (EU) on rules and procedures applicable to unmanned aerial vehicle operations lays down detailed rules for drone flights and certain categories of drone operations.

These regulations impose requirements on the manufacturing and trading of UASs and drones (eg, due to data protection concerns), some of which can be relevant in the course of defence or security procurements.

Under Hungarian law, Government Decree 38/2021 (II.2) provides detailed rules related to state-owned unmanned aircraft. For example, the manufacture, repair and maintenance

of UASs exceeding 25kg are subject to an operating licence issued by the aviation authority. These UASs are subject to a type-certification procedure and a valid certificate of airworthiness.

MISCELLANEOUS

Employment law

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

There are no specific statutory employment rules that apply exclusively to foreign defence contractors. The rules set out in Act I of 2012 on the Hungarian Labour Code apply.

Defence contract rules

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

Both foreign and domestic contractors are bound by the Act on Defence and Security Procurements (DSP). Different laws may apply depending on the specificities of each case, the DSP is considered the principal legal source.

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

If a contractor provides goods or services falling under the scope of the DSP to a contracting authority that is required to carry out a procurement procedure under the DSP, the DSP applies, irrespective of the place of performance.

Personal information

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

Under the DSP, the tenderers are obliged to declare in their tender that they will not use subcontractors for the performance of the contract who are excluded from public procurements due to having committed certain criminal offences. Furthermore, they usually need to declare that their directors, officers or leading employees have not been convicted of criminal offences.

Licensing requirements

I

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

According to Act CIX of 2005, a licence is required to carry out military activities. Detailed rules regarding the types of licences and the conditions for issuing a licence are laid down in Government Decree 156/2017 (VI. 16).

The decree provides for a closed but broad list of entities that can obtain a licence, including individual and business companies not in liquidation, administrative bodies with a public service mission, and universities maintained by public trusts with a public-service mission. The licence must be refused in specific cases, for example, if the requested activity is contrary to Hungary's foreign and security policy interests, international obligations or security of supply interests. Licences are issued by the Budapest Capital Government Office.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

The main Hungarian legislative instrument on environment protection is the Act LIII of 1995 on General Rules for the Protection of the Environment (Environment Protection Act) that outlines general requirements applicable for all activity affecting the environment. Besides – but in harmony with – the Environment Protection Act, separate laws govern environmental issues – among others – in the following areas: energy sector, forestry, built environment, agriculture, fisheries, transport, disaster prevention and management, wildlife management, waste management and plant and animal protection. On a case-by-case basis, exemptions from these general-scoped laws may apply to the defence and security industry for goals of national security. In the defence and security sectors, contracting authorities must also comply with Ministry of Defence Decree 8/2017. (VI. 30) on the use of the environment related to home defence tasks.

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

There are no specific environmental targets regarding companies in the defence and security industry. In Hungary, compliance with environmental law requirements (eg, prohibition of the operation in the course of an economic activity of technology or equipment that causes air pollution affecting the population, or the prohibition of release of hazardous substances into surface water) is ensured by the relevant departments of the government units. There is no independent authority dedicated to environment protection.

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

The DSP considers 'green' solutions when regulating defence procurements. According to the DSP, in the case of works and services contracts, contracting authorities may

require in the contract notice that tenderers must be aware of their environmental obligations. The contracting authority may also require environmental certifications from the tenderers. In that case, EU or other member states' certifications must be accepted equally. Environmental conditions of the tender might also be award criteria if the contracting authority chooses the most advantageous offer through an evaluation method. However, the provisions of the DSP are not direct obligations, actual advantage may only be set out in the procurement tender and contract.

UPDATE AND TRENDS

Key developments of the past year

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

There were no major changes in the past year in the field of defence and security procurement regulation. However, the Ministry of Defence announced the 'Zrínyi 2026 Defence and Military Development Programme' aiming to modernise Hungarian forces. Under the programme, new military equipment is procured in addition to the refurbishment of the existing ones. In 2023, among others, air tanks, helicopters and ground-launched air defence missiles were procured.

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Key developments of the past year

LEGAL FRAMEWORK

Relevant legislation

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

Procurement of defence and security works, equipment and services by contracting authorities in Italy is regulated by Legislative Decree of 31 March 2023, No. 36, sections 136 to 139, (the Public Procurement Code (PPC)), enacting European Union public procurement directives 2014/23, 2014/24 and 2014/25/EU. The PPC, in principle, applies to all public procurement contracts but carves out defence and security procurement that falls under special legislation. Legislative Decree 15 November 2011, No. 208, the Military Procurement Code (MPC), which enacted EU Directive 2009/81/EC, is considered a special set of procurement rules applicable to certain defence and security contracts that prevails over the general PPC rules. The MPC, however, mostly makes selective references to the general PPC rules, introducing minor deviations. There are defence and security contracts that may fall outside the scope of both the PPC and MPC and are only subject to general EU Treaty principles. The Italian Ministry of Defence has published two enactment regulations, one for contracts under MPC (Presidential Decree 13 March 2013, No. 49) and one for contracts under the PPC (Presidential Decree 15 November 2012, No. 236) whose provisions now apply as long as they are compatible with the rules set forth by Annex II.20 to the PPC.

Identification

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

The subject matter of the contract (ie, military/classified items; works, supply and services related to military/classified items; works and services aimed at specific military purposes) determines the application of the MPC to contracts above EU special thresholds (currently €443,000 for supply and services and €5,538,000 for works). The MPC introduces several exceptions to general PPC rules. Such exceptions are mostly aimed at guaranteeing the necessary level of protection for security and defence interests involved in defence and security contracts by ensuring that sensitive information is not divulged and is not handled by economic operators who have not obtained the necessary security clearances.

Conduct

3 | How are defence and security procurements typically conducted?

General principles of the Treaty on the Functioning of the European Union (TFEU) apply to all defence and security procurement. Three of the five types of tender procedures envisioned by the civil procurement rules – restricted, negotiated with or without a prior notice and competitive dialogue – are provided for by the MPC.

The publication of a notice or a request for offers is the usual start of the procedure, followed by the submission of documents showing the financial standing, technical capability and (where required) possession of security clearances by the candidates or tenderers. Such a pre-qualification phase may or may not be run jointly with the submission of technical and economic bids, with the most economically advantageous tender being the more frequent award criterion. However, contract terms and conditions are unilaterally drafted by contracting authorities and are almost invariably non-negotiable. As such, terms and conditions are advertised when soliciting requests for participation and bids, and often economic operators can only decide whether they are willing to accept them and submit an offer or whether they would rather not participate in the tender.

The assessment of bids is based on objective, transparent and non-discriminatory criteria. In particular, when the award follows a competitive bidding procedure, equality of treatment and transparency principles require that no substantial modification of the contract is permitted without a retender.

Proposed changes

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

Article 8, paragraph 11 of Law Decree 16 July 2020, No. 76 (the Simplifications Decree), converted with amendments by Law 11 September 2020 No. 120, provides that the Italian government has to approve an enactment regulation relating to defence and security procurements. No such regulation has been approved yet.

Information technology

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

No. Information technology goods and services may fall under the PPC or MPC, depending on the subject matter of the contract.

Relevant treaties

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

The MPC is based on TFEU principles and the number of contracts that do not fall under either the MPC or the PPC is limited. Italian courts consider the general exception provided by article 346 TFEU as an exception to be narrowly interpreted and affirm the applicability of TFEU principles to all defence and security procurement.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Disputes concerning the award procedure are reserved for administrative courts, which have general jurisdiction on the award of public procurement contracts. Disputes concerning contractual obligations are reserved for civil courts. Arbitration and out-of-court settlement procedures are permitted only in relation to contractual obligations.

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

There is no specific rule on the use of alternative dispute resolution (ADR) in the Military Procurement Code (MPC). ADR models (eg, arbitration and amicable settlement) are provided by the Public Procurement Code (PPC) and are applicable to defence and security contracts. The use of arbitration – which is only admissible if it is provided for in the initial tender notice or invitation and is authorised by the governing body of the contracting authority – is very common in works and long-term supply-and-service contracts, and is used more frequently in disputes between contractors and subcontractors than between contracting authorities and prime contractors.

Arbitrators have to be registered with the Arbitration Chamber managed by the Italian National Anti-Corruption Authority, which acts as a regulator of public procurement.

Indemnification

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

General rules on limitation of liability set out by the Italian Civil Code render invalid any limitations covering grossly negligent or wilful conduct. Contracting authorities are liable for non-performance, but normally do not provide any indemnity for contractors. Contractors are usually required to indemnify the contracting authority in relation to several issues that may cause liability during contract performance, mainly resorting to insurance policies (eg, third-party claims, product liability and personnel protection).

Limits on liability

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

Public contracts awarded by contracting authorities – including military and defence contracts – generally do not provide limitations on liability, and such limitations cannot be negotiated once the contract is awarded, as they would amount to an impermissible modification of the contract.

There is no statutory limitation on the ability of the contractor to recover against a contracting authority for breach of contract, and, in general, the burden of proof when asserting government liability is less strict than the one applicable to private parties.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

The risk of non-payment exists as in any other public contract. However, normally defence and security procurement procedures are launched only after the necessary funds are secured by the relevant administration. There is no specific rule prioritising payments to prime contractors, while general procurement contracts rules make it possible for subcontractors to obtain payment directly from the contracting authority if the prime contractor fails to fulfil its obligations.

Parent guarantee

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

The only guarantees that are required in relation to the performance of a public procurement contract are bank guarantees or insurance guarantees. The requirement of a parent company guarantee is not envisioned by PPC or MPC rules.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

The standard draft contract, which is set forth as an attachment to the contract notice, or the invitation to tender, is non-negotiable, but, pursuant to a general Civil Code principle, clauses declared mandatory by a statute have to be read into a contract regardless of their actual inclusion. There are no defence- or security-specific clauses, the inclusion of which is required or automatic. In public procurement contracts in general, the most well-known mandatory clauses provided by national legislation are those concerning the traceability of payments (aimed at making every transfer of monies paid from the contracting authority traceable through the chain of subcontractors and suppliers of the prime contractor) and

the clauses making it mandatory for successful tenderers to ensure employment continuity for personnel of past contractors (also known as 'social' clauses).

Cost allocation

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

Cost allocations between the government and contractor is usually defined by the contract itself, preferably through a fixed or firm price mechanism.

Disclosures

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

Cost and price assessments are common, with at least three main purposes.

Within a competitive tender procedure, they may be aimed at verifying whether a price/offer by a tenderer is reliable and sustainable, and has not been the result of optimistic assumptions or underestimated costs (abnormally low tenders). Such an assessment is also aimed at verifying whether mandatory costs have been factored into the price offered by a potential supplier (eg, minimum wages for the workforce, or costs that cannot be subject to rebates as those necessary to ensure compliance with rules on health and safety on the workplace).

Within a non-competitive negotiated procedure, a cost analysis based on information disclosed by the prospective contractor according to Ministry of Defence guidelines is aimed at establishing the price for the goods and services to be purchased.

During the execution of a procurement contract, they may be aimed at establishing new prices for unforeseen additional goods and services required by the contracting authority and price adjustments required by unforeseen circumstances.

Audits

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

General Public Procurement Code (PPC) rules afford contracting authorities with wide powers to audit and inspect contractors' activities to verify their performance. Cost and price assessments are also routinely carried out, especially in long-term contracts associated with military programmes. There is no limitation or timeline that can predict when audits or assessments will be carried out. The Italian National Anti-Corruption Authority (ANAC) – the anti-bribery independent authority, which also acts as the public procurement sector regulator and enforcer – also has supervisory powers and may request information and conduct inspections in relation to tender procedures and procurement contracts performance.

IP rights

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

There are no statutory rules allocating intellectual property rights created during the performance of a defence and security procurement contract differently from any other procurement contract. If the intellectual property is the result of contracted research and development activity it will be owned by the contracting authority. Otherwise, unless there are specific provisions in the contract, it will be owned by the contractor.

Economic zones

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

We are not aware of any such economic zones or programmes in Italy.

Forming legal entities

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

Joint ventures can be formed by mere contractual agreements, without creating a new entity, when parties enter into cooperation agreements. Corporate joint ventures can be created by incorporating a company pursuant to the Civil Code. In general, while contractual joint ventures can be created by the parties without resorting to a public notary, corporate joint ventures require the assistance of a public notary. The public notary takes care of validating the articles of association and the company by-laws, registering the new entity with the Company Register.

Access to government records

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

Access to public administration documents is generally allowed for interested parties by national legislation on transparency and on administrative procedures (Law 7 August 1990, No. 241 and Legislative Decree 25 May 2016, No. 97). The PPC also provides specific rules granting access to public procurement procedures documents. Restrictions apply during the tender procedure, but after the award, any information that is not covered by trade or commercial secrets, or is not classified, can be disclosed upon request, including versions of previous contracts. A trend towards enhanced transparency in public contracts

is underway, with recent legislation stating that most information on public contracts has to be published on contracting authorities' websites and that any citizen may obtain information on public contracts without providing any specific reason or interest.

Supply chain management

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

Eligibility of suppliers in defence and procurement is subject to the same criteria provided by the PPC and EU procurement directives, with limited deviations. Contractors having people convicted of particular crimes, including terrorism, fraud, bribery and money laundering cannot participate in public tenders. Furthermore, financial, technical and professional requirements proportionate to the public tender subject matter can be set by the contracting authority to select eligible suppliers. Similar rules apply also to subcontractors. Technical and professional requirements may also refer to the supply chain characteristics.

INTERNATIONAL TRADE RULES

Export controls

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

Pursuant to EU general rules on the export of military and dual-use items, national enactment legislation (Law 9 July 1990, No. 185 for military items and Legislative Decree 15 December 2017, No. 221 for dual-use items) provides a licensing framework for exports and, in certain cases, for intra-EU transfer of controlled items and technology. Separate directorates of the Ministry of Foreign Affairs are responsible for the issue of export licences, while Italy's customs and law enforcement agencies are responsible for policing and enforcement.

Italy does not maintain national controlled items lists that differ from the EU Military list and the Annexes to the EU dual-use regulation (No. 821/2021).

Domestic preferences

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

The Public Procurement Code (PPC) and the Military Procurement Code (MPC) do not provide any domestic preference rules, but, as in other countries, when such rules do not apply, it is not uncommon that contracts are directly awarded to national contractors.

Favourable treatment

24 | Are certain treaty partners treated more favourably?

Agreement on Government Procurement signatories, EU members and countries that have bilateral treaties with Italy granting reciprocity of treatment are the only partners who may participate in defence and security procurement procedures launched by Italian contracting authorities.

Sanctions

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

Italy has no boycott, embargo or trade sanctions in place other than those imposed by the EU, pursuant to UN general positions. The responsibility for related policy measures lies with the Ministry of Foreign Affairs, while the Ministry of Economy is responsible for financial measures and enforcement.

Trade offsets

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

Trade offsets are part of the Italian defence and security procurement regime and were regulated by two Ministry of Defence directives of 2002 and 2012. Industrial compensation is, however, currently less frequent due to their inherent limited compatibility with EU rules.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

National civil service regulation (Legislative Decree 30 March 2001, No. 165) forbids employees leaving public service from accepting private employment in industries that are subject to the regulatory or supervisory powers of their former office for three years after termination of their employment (the anti-pantouflage rule). In the event of an infringement, both the former civil servant and the private employer risk serious penalties. There is no reverse prohibition, save for general rules aimed at preventing conflicts of interest.

Addressing corruption

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

Bribery and international bribery are punished as criminal offences with incarceration and financial penalties by the Italian criminal code. Bribes can take the form of monetary payments or any other advantage. Giving, offering or agreeing to give a bribe is an offence, as is accepting, asking for or agreeing to accept a bribe.

Public administrations are bound to adopt procedures, ethics codes and organisation models specifically aimed at preventing corruption, pursuant to law 6 November 2012, No. 190. The Italian National Anti-Corruption Authority has anti-bribery enforcement powers and regulates the public procurement sector.

Lobbyists

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

Italy does not have specific legislation on lobbying. Minimal measures have been introduced in parliament regulations for lobbyists active in the rulemaking process, but a broader set of rules on lobbyists is being discussed by the current political majority and might be the subject of special legislation.

Limitations on agents

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

There is no specific statutory limitation on the use of paid intermediaries, but the defence and security procurement system is devised to foster direct participation of undertakings in transparent and non-discriminatory tender procedures. As a result, resorting to local agents, especially for foreign bidders, is not as common as it might be in other jurisdictions, especially because intermediaries not possessing the necessary participation requirements would not be in a position to place bids or participate in tenders.

AVIATION

Conversion of aircraft

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

While civil aircraft airworthiness is harmonised throughout the EU, subject to EU regulations and European Union Aviation Safety Agency policing, regulating the airworthiness of military aircraft is largely left to each state. It is, therefore, complicated to convert military aircraft to civil use, but it has been done several times. An example is the EH–101 helicopter (which is now known as the AW101), which was originally designed

as a military helicopter but was subsequently certified for civil use. For the same reasons, it might be easier to convert a civil aircraft to military use, even though the higher military requirements have to be met.

Drones

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

Italy's national rules on drones complement EU regulations on unmanned aerial systems (UAS) entered into force in July 2020 (EU Regulation 2019/45 on unmanned aircraft systems and on third-country operators of UAS EU Regulation 2019/947 on the rules and procedures for the operation of unmanned aircraft). The use of drones is regulated by ENAC – the national civil aviation authority – which has adopted its own implementing regulation that entered into force on 31 December 2020. Military UAS systems are subject to military items restrictions (ie, a government licence is required to manufacture, sell, hold, maintain, import and export such equipment). Military UAS systems are considered strategic assets, therefore entities manufacturing or developing military UAS systems are subject to foreign direct investment restriction provisions set forth by Law Decree 12 January 2012, No. 21. Such provisions afford the government broad special powers to impose conditions or to veto transactions or corporate decisions affecting entities developing UAS technology or manufacturing UAS systems.

MISCELLANEOUS

Employment law

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

No specific rule applies only to foreign defence contractors. Italian labour legislation applies to any worker habitually working in Italy, irrespective of any choice of law made in the employment contract.

Defence contract rules

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

The replies in other questions describe the specific rules applicable to foreign and domestic defence contractors.

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

Rules on defence contracts still apply even if the contractor performs its work outside the jurisdiction.

Personal information

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

Yes. When participating in a tender or submitting a bid for entering into a public contract, directors, officers, sole shareholders or majority shareholders and even certain employees have to provide personal information, such as name, date and place of birth of themselves and of persons of legal age living in the same household, for the purpose of allowing anti-organised crime infiltration background checks. Furthermore, the same director, officers, employees, sole or majority shareholders have to file declarations attesting that they have not been convicted of crimes such as bribery, fraud, money laundering or terrorism. Finally, if contracts entail handling of classified information or items, security clearances need to be obtained through a process that requires disclosing personal information and provided to the contracting authority.

Licensing requirements

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

To hold, manufacture, store, maintain, sell military items and technology in Italy, a licence issued by a provincial government office is required. Importing and exporting military items requires that an economic operator is registered in the national register of undertakings operating in the defence sector and that export licences are obtained prior to any import, export or intra-EU transfer transaction. Harsh criminal penalties, including incarceration, can be incurred in the case of infringement.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

The Italian environmental code (Legislative Decree 3 April 2006, No. 152) sets forth emissions limits, licensing requirements and rules on waste disposal that apply to any works, or production or manufacturing processes. Procurement contracts and tender selection rules can incorporate environmental purposes or require economic operators to meet minimal environmental criteria set out by ministerial decrees.

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

There are no special environmental targets set out by defence and security procurement rules. However, environmental targets and criteria can be part of the procurement process. Furthermore, broader environmental targets may derive from general policies (eg, greenhouse gas reduction or renewable energy production increase) or by specific provisions of environmental authorisations, licences and management systems applying to the specific operations of an economic operator involved in the performance of defence and security procurement contracts.

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

Recent legislation on minimal environmental criteria in public procurement contracts allows contracting authorities to award premium points to bids containing environmental-friendly solutions with respect to the production of goods and services and life cycle management. Minimal environmental criteria are set out in the Public Procurement Code's enactment legislation and are updated by the Ministry of Environment, with reference to activity and product categories. Only contract-specific green solutions may grant advantages in the procurement process.

UPDATE AND TRENDS

Key developments of the past year

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

There have been no major developments concerning procurement in the defence and security sector over the past 12 months.

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LEGAL FRAMEWORK

Relevant legislation

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

The procurement of defence and security equipment in Poland is governed in principle by the Act of 11 September 2019 – the Public Procurement Law Act (PPL), which incorporates the EU Defence and Security Directive (2009/81/EC) into Polish law, and by section VI of the PPL in particular.

In the case of the procurement of arms, munitions or war material referred to in article 346 of the Treaty on the Functioning of the European Union (TFEU), if the essential interests of national security so require, the PPL does not apply. Instead, the Decision of the Minister of National Defence No. 367/MON of 14 September 2015 will apply. This decision regulates the principles and procedures of awarding contracts to which the provisions of the PPL do not apply. The decision is supplemented by a number of additional regulations on planning, preparation, justification and approval procedures regarding defence procurement to which Decision No. 367/MON applies.

The use of such an exemption from the PPL rules can require the application of the Act on Certain Agreements Concluded in Connection with Contracts Essential for National Security of 26 June 2014 (the Offset Act). The Act sets out the rules for concluding agreements in connection with the performance of contracts related to the production and trade in arms, munitions and war materiel, commonly called offset contracts.

The public procurement rules also do not apply to the procurement of defence and security equipment in the situations described in article 13 of the PPL, which include but are not limited to the following:

- the procurement is subject to a special procedure: (1) under an international agreement if Poland is a procurement party; (2) in cases of government-to-government procurement if Poland is a procurement party; (3) of an international organisation purchasing for its purposes, or to contracts that must be awarded by Poland in accordance with this procedure;
- the application of the provisions of the PPL would oblige the contracting authority to supply information the disclosure of which would be contrary to the essential security interests of Poland; and
- in the event of contracts provided for intelligence or counter-intelligence activities.

Notwithstanding the exemption of the PPL, general principles derived from the TFEU apply to such excluded procurements, including the principles of equal treatment, non-discrimination, transparency, proportionality and mutual recognition.

Identification

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

A procurement by a Polish contracting authority falls within the scope of the PPL when the contract has a value equal to or greater than the EU financial thresholds for goods and services and for works (from 1 January 2023, €431,000 for goods and services and €5.38 million for works), and if the procurement covers:

- the supply of military equipment, including any parts, components, subassemblies or software;
- the supply of sensitive equipment, including any parts, components, subassemblies or software;
- works, supplies and services directly related to the security of the facilities at the disposal of entities performing contracts in the fields of defence and security, or related to the equipment referred to above and all parts, components, and subassemblies of the life cycle of that product or service; and
- works and services for specifically military purposes or sensitive works and sensitive services.

Notification of a procurement procedure will be provided in the Official Journal of the European Union.

The key differences between procurement procedures carried out under the specific defence rules and under general procurement rules are:

- the mechanisms put in place to protect sensitive information and to ensure defence and security interests are protected (eg, restrictions on the range of contractors authorised to obtain classified information);
- a broader catalogue of the circumstances justifying the exclusion of economic operators from the procurement procedure;
- the power of the contracting authority to restrict the involvement of subcontractors in certain situations;
- the limitation of the number of contract award procedures that may be used;
- a wider range of tender assessment criteria (other than standard criteria such as viability, security of supply, interoperability and operational characteristics indicated in the terms of reference);
- additional rights for the contracting authority to reject an offer or cancel the procedure; and
- differences in the content of contract notices or terms of reference.

Decision 367/MON (applicable if the application of the provisions of the PPL is excluded because of the existence of an essential state security interest) imposes more stringent requirements regarding procurement. It limits the scope of procurement procedures to just three:

- negotiations with one supplier;
- negotiations with several suppliers;
- exceptionally negotiated procedure with prior publication.

In addition, Decision 367/MON does not provide a mechanism for lodging appeals against decisions of a contracting entity with the National Appeals Chamber. This Chamber can only consider procurement disputes regulated by the PPL. In the case of procurements under Decision 367/MON, contractors can only file claims with civil courts.

Conduct

3 | How are defence and security procurements typically conducted?

The procurement of standard defence and security equipment is usually conducted as public procurement procedure regulated by the PPL. The strategic procurement, or any other procurement that is related with protecting the essential security interests of the state, is typically conducted on the basis of Decision 367/MON or a government-to-government arrangement (eg, contracting by Polish government with the US government based on a Foreign Military Sales programme).

Under the PPL, there are two procedures available for all defence and security procurement:

- restricted procedure; or
- negotiated procedure with the publication of a contract notice.

In addition, four more procedures may be applied in certain cases:

- competitive dialogue;
- negotiated procedure without the publication of a contract notice;
- single-source procurement; or
- electronic auction (in the case of the restricted procedure or the negotiated procedure with the publication of a contract notice).

Most procurement procedures involve a pre-qualification process in which bidders must demonstrate their financial stability and technical capability, including experience in performing similar contracts. The way that the procurement procedure proceeds depends on whether the authority has chosen a procedure that permits contracts and requirements to be negotiated with bidders. The negotiations phase is usually limited, with many of the contract terms being identified as non-negotiable. The evaluation process is undertaken using transparent award criteria, which are provided to bidders in advance in the tender documents. Once the winning bidder is selected, there is relatively little scope for further negotiation.

Decision 367/MON states that the procurement procedure may take the form of negotiations with one or several suppliers and, in exceptional cases, if it is not possible to define a closed catalogue of potential contractors, in a negotiated procedure with prior publication.

Proposed changes

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

Currently, there are no significant proposals pending to change the defence and security procurement process under Polish law.

Information technology

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

There are no specific or additional rules that relate to IT procurement.

Relevant treaties

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

The majority of defence and security procurements in Poland are conducted in accordance with the Agreement on Government Procurement, EU treaties or relevant EU directives. The number of contracts awarded based on the national security exemptions (ie, related to armaments) is limited, but the value of these contracts is usually substantial.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

The PPL provides a legal remedy framework which may be used by the contractors who have, or who had, an interest in winning a contract or have suffered, or may suffer, damage due to the contracting entity's violation of the provisions of the PPL. Disputes between the contracting authority and a contractor are adjudicated by the National Appeals Chamber (NAC) in Warsaw as a state entity (quasi-court) specialising in such disputes.

Disputes are adjudicated very quickly – usually within 14 days of submitting an appeal and usually after 1 hearing. Disputes are resolved by the NAC in accordance with the dispute procedure, which is regulated mainly by the PPL and partially by the Polish Civil Procedure Code.

A ruling issued by the NAC can be appealed before the Regional Court in Warsaw, which acts as a public procurement court. The judgment of the Regional Court in Warsaw may be contested by way of a cassation appeal filed with the Supreme Court.

The NAC has the power to adjudicate disputes related to procedures for awarding public contracts while other disputes regarding, for example, the performance of public contracts are adjudicated by the common courts.

In most procurement procedures conducted on the basis of an exemption from the PPL (eg, where Minister of National Defence Decision No. 367/MON of 14 September 2015 applies), the disputes are adjudicated by the common courts. In practice, it means that the dispute may last a very long time and may be completed many months after the contract was awarded to a competitor. This is a significant difference compared with procurements under the PPL.

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

The PPL contains provisions concerning formal alternative dispute resolution used to resolve conflicts between a contracting authority and a contractor.

The mediation (or another amicable dispute resolution method) is initiated with each party submitting a request for mediation with the Court of Arbitration at the General Counsel to the Republic of Poland, a selected mediator, or the person affecting another amicable dispute resolution method. It should be noted that mediation is mandatory in certain cases. If the estimated value of the contract is determined as equal to or greater than the zloty equivalent of €10 million for supplies or services and of €20 million for works, and the value of the subject of the dispute exceeds 100,000 zlotys, the court will refer the parties to mediation or to another amicable dispute resolution method at the Court of Arbitration at the General Counsel to the Republic of Poland, unless the parties have already indicated a choice of mediator or other person with regard to another amicable dispute resolution method. The legislation indicates that, as a rule, mediation should be conducted by the Court of Arbitration at the General Counsel to the Republic of Poland. The mediation procedures conducted by this court are resolved under the rules of the Court of Arbitration.

Indemnification

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

There are no specific rules governing liability under a defence procurement contract. During the contract performance phase, the contractual liability of the parties is governed by the contract and the general rules of Polish civil law. The PPL does not modify these principles, except with regard to cooperation with subcontractors in construction works contracts. There are no statutory or legal obligations requiring a contractor to indemnify the government, although contractual indemnities may result from negotiation (subject to a negotiated procedure being undertaken).

The PPL does not regulate the liability of the awarding entity for a breach of law during the award procedure. It only provides that in the event of cancellation of the procurement procedure for reasons attributable to the contracting authority, contractors who have submitted valid tenders shall be entitled to claim reimbursement of the reasonable costs of participating in the procedure, in particular, the costs of preparing the tender.

However, the Supreme Court on 25 February 2021 adopted a resolution (III CZP 16/20), according to which the recovery of damages by a contractor whose bid was not selected as a result of the violation by the contracting authority of the provisions of the PPL, does not require a prior finding of a violation of the provisions of the PPL by a final ruling of the NAC or a final court ruling issued after recognising a complaint against a ruling of the NAS. As a result, the contractors have the right to make a claim for damages against the contracting authority in certain situations, including violations of the PPL.

Limits on liability

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

The contracting authority can agree to limit a contractor's contractual liability. However, the usual policy of awarding entities is to not accept a limit unless it is reasonable or is common market practice. It is common practice in Poland that a contracting entity's liability towards contractors is limited to the amount of a contract's value. The contract award procedure used by the contracting authority will determine the extent to which the limitation of liability is negotiable.

The PPL introduces a list of prohibited contractual provisions on the basis of which certain kinds of contractor liability are excluded. The proposed provisions that a contract may not envisage are:

- the contractor's liability for delay, unless it is justified by the circumstances or the scope of procurement;
- the imposition of contractual penalties on the contractor that are not directly or indirectly linked to the subject of the contract or proper performance thereof; and
- the contractor's liability for the circumstances for which sole liability rests with the contracting authority.

Public contracts usually include provisions on the payment of liquidated damages. According to the Polish Civil Code, the result of introducing such a clause is the elimination of further liability by the payment of an amount stipulated in advance in a contract. However, the public contract usually explicitly outlines the possibility of claiming damages for the amount exceeding the amount of the contractually stipulated liquidated damages.

Risk of non-payment

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Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

In theory, there is a risk of non-payment, as with all customers. However, according to the Act on Public Finances, the awarding entities can only undertake obligations that are within their budgets. Therefore, in practice, the practical risk of non-payment for an undisputed, valid invoice by the awarding entity is very low. Additionally, major defence procurements are conducted in line with the Polish Armed Forces development programmes. These programmes are financed from a special Armed Forces modernisation fund or a state budget. Currently, purchases of equipment by the Ministry of Defence for defence needs are carried out on the basis of the updated Plan for the Technical Modernisation of the Polish Armed Forces for the years 2021–2035. Under it, the ministry is permitted to conclude multi-year contracts with flexible budgets. The ministry assumes that 524 billion zlotys will be spent from 2021 to 2035.

In addition, in connection with the war in Ukraine and increasing military spending needs, the Polish Parliament introduced the Homeland Defence Act in 2022. Defence spending is expected to increase to 3 per cent of GDP from 2023 (compared with 2.4 per cent of GDP in 2022). The new legislation also established the Armed Forces Support Fund, the launching of which opens up new avenues for raising finance for the modernisation of the Polish Armed Forces. In 2024, 118.1 billion zlotys is to be allocated to national defence as well as additional funding for the modernisation from the Armed Forces Support Fund.

Parent guarantee

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

The contracting authority should specify in its initial tender documentation its requirements concerning the guarantees to be provided by the contractor. Under the PPL, there is no obligation to provide a parent guarantee. The contracting entity may require security in respect of performance of the contract. This is customary for large contracts. The procurement regulations contain a list of forms in which such security can be provided. These include, in the main, bank guarantees and insurance guarantees (performance bonds). The presentation of a performance bond is only mandatory in the case of offset agreements.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

There are mandatory clauses that must be included in a defence procurement contract based on the Public Procurement Law Act (PPL) (eg, indexation clause in the event of

changes in the prices of materials or costs linked to the performance of the contract if the works contract, the supply contract or the service contract was concluded for a period of more than six months.

There are also numerous provisions contained in the Polish Civil Code and other legal acts that will apply regardless of whether they are included in a defence procurement contract or not.

The most important are mandatory provisions that cannot be modified by the parties to a contract (eg, the scope of the public contract, termination and duration). Other provisions (non-mandatory) stem from, in the main, the Polish Civil Code (regarding payments, liability, warranty, etc) and will be applicable unless otherwise agreed by the parties.

Cost allocation

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

There is no allocation of costs in the case of public contracts. The consideration due to the contractor is indicated in a contract, usually as a fixed price for all contractual consideration. All costs incurred or estimated by the contractor plus an agreed profit margin would need to be included in the price. The only exception is the indexation clause indicated in the PPL. Under it, a contracting authority is obliged to modify remuneration in the event of changes in the prices of materials or costs linked to the performance of the contract, if the works contracts, a supply contract or a service contract was concluded for a period of more than six months.

Disclosures

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

The contractor may be required to disclose cost and pricing information in the case of complex procurements (typically in the form of a spreadsheet indicating the elements of the price and how they have been calculated). Additionally, if there is concern that the price offered is abnormally low or doubts are raised by the contracting authority as to the possibility of performing the subject of the contract in accordance with the requirements, the awarding entity has a right to require more detailed information regarding cost and pricing. In the case of works contracts or service contracts, the contracting authority is obliged to request such explanations regarding abnormally low prices.

Audits

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

Audits of defence and security procurements are conducted by:

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the Armament Agency – the Agency regularly conducts audits by internal audit and control units;

- the Supreme Audit Office – temporarily, from the perspective of general compliance with the law and with the Act on Public Finances in particular; and
- the Ministry of Defence's Office of Anticorruption Procedures and the Public Procurement Office, during the stage of procurement proceedings.

If the procurement is financed from EU funds, there an additional audit regarding the spending of EU funds might have to be performed.

IP rights

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

In the description of the subject of a contract, the contracting authority may require the transfer of intellectual property rights or the granting of a licence. The usual policy on the ownership of IP under public contracts is that IP that was created before the signing of the contract will normally vest with the contractor generating the IP, in exchange for which the awarding entity will expect to have the right to disclose and use the IP for the contracting authorities' purposes (licence). However, the awarding entities will expect that any IP that is created by the contractor exclusively for the awarding entity in or during performance of the contract to be transferred to the awarding entity.

Economic zones

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

There are no economic zones or programmes dedicated exclusively to defence contractors in Poland. In general, economic zones or similar special programmes exist in Poland for the benefit of businesses. Defence contractors may not only benefit from undertaking economic activity in economic zones, but also in areas where there are a lot of companies active in specific sectors; sometimes they are grouped in clusters, such as the Aviation Valley Association in southern Poland.

Forming legal entities

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

There are various types of legal entities that may be formed in Poland, including limited liability companies, general partnerships, limited liability partnerships, limited partnerships,

limited joint stock partnerships, simple joint-stock company and joint stock companies. Business activities may also be conducted in the form of individual business activity, civil partnerships (under a contract) or by the branch office of a foreign company.

Joint ventures can be corporate or commercial. A corporate joint venture would involve the joint venture's parties setting up a new legal entity (likely, a limited liability company registered in Poland), which would be an independent legal entity able to contract in its own right and where the joint venture parties are the shareholders. It is relatively straightforward and inexpensive to establish a company (the required share capital for a limited liability company is 5,000 zlotys). The parties must file a motion together with respective attachments (eg, articles of association and so on) with a registry court and pay the applicable filing fee. The company will gain legal personality once entered in the National Court Register. The joint venture's parties would also likely agree in a shareholders' agreement the roles and responsibilities of each shareholder and their respective obligations to invest capital and resources in the company. A commercial joint venture does not involve any separate legal entity, and the parties contractually agree each party's roles and responsibilities based on various types of agreements such as cooperation agreements, consortium agreements and agreements on a common understanding. In public procurement, the most popular type of joint venture is a commercial consortium based on a consortium agreement.

Access to government records

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

Under the Access to Public Information Act 2001, there is a general right for the public to access information held by public bodies. As the Ministry of Defence is a public body, this right would, on the face of it, extend to contracts and records held by the ministry, allowing anyone to request documents related to both the procurement and the contract performance phase. The PPL also allows procedure records and annexes to be accessed. Such records are public and made available upon request. Annexes to the procedure record (such as tenders) are available after the selection of the most advantageous tender or cancellation of the procedure.

However, Polish law indicates a few exemptions from disclosure of information related to a contract award procedure that primarily covers classified information at the levels of restricted, confidential, secret and top secret, and information that is regarded as a business secret of the contractor. In such cases, a contractor is entitled to request that information of a technical, technological, organisational or other nature, which is of economic value should not be disclosed by that contracting entity. Procedures conducted under Decision 367/MON, which are aimed at securing the essential security interests of the state, are commonly set at the 'restricted' level. Therefore, public access to documents under such procedures is limited.

Supply chain management

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

Subject to limited exceptions, the PPL obliges an authority to reject tenders from bidders who have been convicted of certain serious offences. They also give the contracting authority discretion to exclude bidders on other grounds, such as insolvency or gross professional misconduct. The rules expressly permit contracting authorities to consider the same exclusion grounds for sub-contractors, as well as giving them broad rights, for example, to require a supplier to disclose all sub-contracts or to flow down obligations regarding information security.

In the case of procurements based on Decision 367/MON, the contracting authority may also limit the use of subcontractors or may require specific conditions to be met by subcontractors.

Under the PPL, contracts for defence and security equipment may be applied for by operators established in one of the states belonging to the European Union or to the European Economic Area, or in a state with which the European Union or the Republic of Poland has entered into an international agreement concerning such contracts. The contracting authority may specify in the contract notice that a defence and security contract may also be applied for by contractors from states other than those listed above. In the case of defence and security procurements, the contracting entities may shape the management of the supply chain of the contractor.

Despite general permission for contractors to use subcontractors under the PPL, the contracting entity has the right to:

- limit the scope of the contract that may be subcontracted;
- request that the contractor specify in their offer which part or parts of the contract it intends to subcontract to fulfil the subcontracting requirement;
- request the contractor to subcontract a share of the contract in a non-discriminatory manner; or
- refuse to consent to a subcontract with a third party if that party does not comply with the conditions for participation or if there are grounds for exclusion.

INTERNATIONAL TRADE RULES

Export controls

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

Polish legislation implements EU regulations regarding export controls such as Council Regulation No. 428/2009 of 5 May 2009. The strategic goods (including dual-use items) captured by the regulation are known as 'controlled goods' as trading in them is permitted if, where appropriate, authorisation is obtained. On the basis of the Act of 29 November 2000 on International Trade in Goods, Technologies and Services of Strategic Importance for National Security and for the Maintenance of International Peace and Security, businesses

are obliged to obtain a permit for the export of goods of strategic importance. The EU has adopted the Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (the Common Position) and an accompanying list of military equipment covered by such a Common Position (the Common Military List) in the EU. The Common Position and Common Military List have been incorporated by Poland into its own national legislation.

Domestic preferences

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

If the Public Procurement Law Act (PPL) applies, there is no scope for domestic preferences. Foreign contractors can bid on a procurement directly without any local partner or without any local presence.

However, where article 346 of the Treaty on the Functioning of the European Union (TFEU) is relied upon to exclude the application of the PPL, defence procurement procedures are conducted according to Decision 367/MON. The contracting entity may then request that the prime contractor be a domestic company if it can be demonstrated that the essential security interests of the state justify that. Furthermore, on the basis of Decision 367/MON, the contracting entity may demand from the foreign contractor additional obligations such as offset obligations or the establishment of production or maintenance capacity in Poland. The result is that domestic contractors may be given a more favourable position compared with foreign contractors.

Favourable treatment

24 Are certain treaty partners treated more favourably?

Only member states of the European Union and signatories of the Agreement on Government Procurement or a free-trade agreement with Poland are able to benefit from the full protection of the PPL. Contractors from other countries may be less favourably treated, including total exclusion from bidding in procurement procedures.

Sanctions

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

Poland complies with all EU-implemented embargoes and (financial) sanctions imposed by the United Nations or the EU. All of these embargoes and sanctions are implemented through EU regulations, which have direct legal effect in each member state. Poland also complies with the economic and trade sanctions imposed by organisations such as

the Organization for Security and Cooperation in Europe and the North Atlantic Treaty Organization.

Currently, the most important trade sanctions imposed by the Polish Parliament are those imposed on Russia on the basis of the Act of 13 April 2022 on Special Solutions to Prevent Support for Aggression against Ukraine and to Protect National Security. This regulation (based on EU law) introduces an EU-wide ban on the participation of Russian contractors in public contracts and concessions.

Trade offsets

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

Defence trade offsets are part of Poland's defence and security procurement regime. However, the use of offsets is limited to specific cases. They may be required only if both the procurement itself and the related offset are justified by the existence of an essential state security interest. Offset requirements apply only to foreign contractors so they can be used as a form of domestic preferential treatment.

The Offset Act is the governing regulation regarding offset agreements and was harmonised with the EU approach to offsets. The requirement for an offset can be justified on the basis of article 346, paragraph 1 (b) TFEU if it is necessary for the protection of the essential security interests of the state. Offsets are not performed in public procurement procedures under the PPL. They are admissible only in procedures governed by Decision 367/MON or in other procurements that are exempted from the PPL (eg, G2G agreements).

Offsets are negotiated by the Ministry of Defence. Signing an offset contract occurs after a procedure that consists of supplying the contractor with offset assumptions drafted by the ministry and a submission by the foreign contractor of an offset offer that responds to the assumptions.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

The employment of former government employees in the private sector and vice versa is subject to restrictions stipulated in:

- the Act of 11 September 2019 Public Procurement Law (PPL);
- Minister of National Defence Decision No. 367/MON of 14 September 2015;
- the Act of 21 August 1997 regarding Limitation of Conducting Business by Persons Exercising Public Functions; and
- the Homeland Defence Act of 11 March 2022.

Both the PPL as well as Decision 367/MON state that an economic operator that was involved in the preparation of a given contract award procedure, or whose employee was involved in the preparation of such a procedure, must be excluded from such procedure. Under the PPL, the exclusion is not mandatory if the distortion of competition caused can be remedied by another method than excluding the operator from participating in a procedure.

According to the Act regarding Limitation of Conducting Business by Persons Exercising Public Functions, governmental employees specified in this Act may not be employed or perform other activities for an entrepreneur within one year of the date of leaving their position or function if they participated in the issuance of a decision in individual cases concerning that entrepreneur.

Under the Homeland Defence Act, members of the Polish Armed Forces cannot before the expiry of three years from the date of discharge from military service:

- be employed nor undertake employment on the basis of another title or perform another occupation;
- be a member of the management board, supervisory board or audit committee of a commercial law company,
- hold more than 10 per cent of shares representing more than 10 per cent of the share capital in a commercial law company, if, within the three years prior to being discharged from professional military service, he participated in a procurement or task order procedure, which was subsequently awarded or commissioned to such an entrepreneur or its subsidiary.

Additionally, a professional soldier may not, within three years of being discharged from professional military service, engage in business consisting in the production or marketing of defence products included in the list referred to in article 346, paragraph 2 of the Treaty on the Functioning of the European Union or conduct such business jointly with other persons or manage such business or be a representative or agent in the conduct of such business.

Addressing corruption

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

Polish law criminalises domestic and foreign corruption practices. Moreover, the PPL provides for sanctions for contractors who (or whose management or supervisory board members) have been found guilty of corruption by a final court judgment. Such contractors must be excluded from procurement procedures. Moreover, on the basis of Decision 367/MON, when a contract is being signed, the contractor is obliged to sign a clause under which the contractor will pay liquidated damages in the amount of 5 per cent of the gross value of the contract in the event of corruption within the procurement procedure involving the contractor or its representatives.

Lobbyists

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

The Lobbying Act 2005 requires that anyone active in the business of lobbying should be registered with the register of entities conducting lobbying activities held by the minister relevant for administrative affairs. The rules governing professional lobbying activity in the Sejm and Senate are set out in the Sejm's and Senate's regulations. Persons performing intermediary services in connection with contracts concerning military equipment need to possess the relevant licence in accordance with the Act of 13 July 2019 on Conducting the Business of Manufacture and Sale of Explosives, Weapons, Ammunition and Technology for the Military or Police.

Limitations on agents

30 | Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Polish law does not provide for such limitations.

AVIATION

Conversion of aircraft

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

Civil aircraft may not fly in Europe unless they comply with the airworthiness regime established pursuant to Regulation (EC) 2018/1139 or, if they fall within Annex I of the Regulation, are approved by individual member states. Regulation 2018/1139 requires a type of certification process in accordance with certification specifications promulgated by the European Aviation Safety Agency (EASA). Annex I permits EU member states to approve ex-military aircraft, unless EASA has adopted a design standard for the type in question.

Moreover, there are separate registers for military and civil aircraft at the national level of legislation. The implementation of the registers of civil aircraft tasks results from the Aviation Law 2002 and the Minister of Infrastructure Regulation of 25 March 2021 on the register of civil aircraft, signs and inscriptions placed on aircraft and the list of distinguishing marks used for flight by aircraft not entered in the register of civil aircraft.

The register for military aircraft is maintained by the Ministry of Defence and is mainly based on the regulation adopted in Order No. 3/MON of the Ministry of Defence dated 11 February 2004 on the keeping of a register of military aircraft. The order contains provisions that suggest that an aircraft cannot be included in both registers at the same time. For example, to include an aircraft in the military register, the application should be accompanied by a certificate of removal from a foreign aircraft register if the aircraft was previously registered.

Until a military aircraft is removed from the military register, it cannot be entered into another aircraft register.

Drones

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

The manufacturing of and trading in unmanned aircraft systems or drones for military purposes requires a licence issued in accordance with the Act of 13 June 2019 on conducting business activity within the scope of manufacturing and trade in explosives, weapons, ammunition and products and technology for military or police purposes.

At the EU level, two regulations on drones were published to harmonise the law in the EU in this field: the Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 and Commission Implementing Regulation (EU) 2019/947 of 24 May 2019.

From 31 December 2020, the registration of drone operators who use equipment equal to or greater than 250 grams, or less than 250 grams if the drone is equipped with a sensor capable of collecting data, is mandatory. Under these regulations, drone manufacturing and trading is subject to several exploitation requirements and requires classification using one of the categories proposed by the EU.

MISCELLANEOUS

Employment law

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

There are no specific statutory employment rules that apply exclusively to foreign defence contractors. If the work is to be performed by a Polish worker or in Poland, the employment contract with the foreign contractor cannot be less favourable to the employee than the rules stipulated in Polish labour law. Thus, the choice of a foreign law may only result in the implementation of more favourable obligations (eg, longer holiday periods). Foreign contractors should also consider tax and insurance-related consequences in relation to the performance of work by employees in Poland.

Defence contract rules

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

The laws, regulations and decisions applicable to defence contracting authorities and contractors are, most notably, the Public Procurement Law Act, Decision 367/MON and the Act on Certain Agreements Concluded in Connection with Contracts Essential for National Security of 26 June 2014 (the Offset Act). Apart from that, there are other mandatory

provisions of Polish law with respect to defence contracts provided by acts such as the Industrial Property Law of 30 June 2000, the Act on Copyright and Related Rights of 4 February 1994, and other legislation governing supervision of military equipment or assessment of conformity of goods.

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

If a contractor provides goods, services or works to a Polish awarding entity, the regulations detailed above will apply generally to all activities of the contractor related to the performance of the contract. If the work is performed outside Poland, Polish rules will apply only to the delivery of the results of such works to a Polish awarding entity unless the contract provides otherwise. A Polish awarding entity may, for instance, request the right to audit the production units of the contractor located abroad.

Personal information

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

Companies will be asked to provide information about their management and supervisory board members as part of the pre-qualification process and will usually be required to provide official certificates stating that management and supervisory board members have not been convicted of certain offences. In addition, the name, place of residence and the information from the criminal records of these persons must be disclosed to the contracting authority. On the basis of this information, the contracting authority makes a decision concerning a contractor's potential exclusion.

Licensing requirements

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

The Act of 13 June 2019 on conducting business activity within the scope of manufacturing and trade in explosives, weapons, ammunition and products and technology for military or police purposes provides for specific licensing requirements to operate in the defence and security sector in Poland.

These requirements relate to various areas of business activity. For example, one of the criteria is that two members of the management board of the company need to be citizens of Poland or an EU or European Economic Area member state.

The licensing authority is the Minister of Internal Affairs. In addition, a contractor may be obliged to meet additional procurement requirements such as obtaining the licence necessary to operate in the defence and security sector issued by the country of the

contractor's residence. The contracting authority publishes specific conditions in the procurement documentation (typically in the terms of reference). The defence contractor may be also required to meet other procurement conditions, such as military quality control systems.

Environmental legislation

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

Contractors producing or supplying goods and services or importing them into Poland will face different environmental legislation depending on their operations, product or service. The most important act in this area is the Polish Environmental Law. Contractors could face regulations encompassing, among other things, air emissions, water discharges, water pollution, noise and waste disposal, and face responsibility for electrical waste and electronic equipment and restrictions on hazardous substances in such equipment. Applicable requirements may also involve energy efficiency, carbon emissions and energy consumption. In some circumstances, there are exemptions, derogations or exemptions from environmental legislation for defence and military operations. One of them is derogation in respect to military aircraft from Regulation (EC) No. 2018/1139 of 4 July 2018 on common rules in the field of civil aviation and establishing the European Union Aviation Safety Agency.

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

The companies may need to meet environmental targets under respective environmental legislation. The contractors may be required to meet environmental targets if their activity has a negative impact on the environment. These requirements are the most important for manufacturers. However, in general, any activity that influences the environment may require relevant environmental permits. In Poland, the main authorities conducting inspections and issuing permits are the Ministry of Environment and local government administration bodies.

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

The contracting authorities may include 'environmental' parameters in procurements, such as life-cycle costs of a product or non-price environmental criteria for the evaluation of tenders. If such a requirement is included in the terms of reference, then the contractor offering products compatible with such requirement may obtain an advantage. The use of the environmental parameters is recommended by the government, but it is not obligatory.

UPDATE AND TRENDS

Key developments of the past year

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

The continuation of the Russian invasion of Ukraine, the parliamentary elections and the takeover of power by the opposition parties in Poland, and the situation in the Middle East related to the Israeli-Palestinian conflict, are among the major events in 2023 that will determine defence policy in Poland. The main and long-term objective of Poland's defence policy is to strengthen the country's military potential and the security of its citizens. Accordingly, the Polish authorities intend to strengthen the Polish Army and maintain a high level of defence spending. According to the draft budget law, defence spending in 2024 should reach 118.1 billion zloty (3.1 per cent of GDP) and, taking into account funds from the extra-budgetary Armed Forces Support Fund managed by Bank Gospodarstwa Krajowego, could reach 157.7 billion zloty (4.1 per cent of GDP) – 30 billion zloty more than planned for 2023. We cannot predict whether this spending will be maintained by the newly elected opposition parties in Poland, but Poland's geopolitical position is unlikely to allow for significant cuts in this area.

The Polish procurement for 2023 and beyond contains plans related to the further implementation of the concluded framework agreements. Every part of the Polish Armed Forces is being modernised. The land forces are receiving Abrams, K2 tanks, KRAB and K9 self-propelled howitzers, Borsuk transporters and mija reconnaissance vehicles. The Navy has received, and in the long term will receive, new Miecznik and Kormoran ships and submarines as part of the ORKA project – this year also saw the start of construction of the first of two reconnaissance ships ordered as part of the DELFIN programme. Further purchases include F35 aircraft and Apache helicopters. Poland has also purchased such aviation equipment as FA 50 aircraft, AW 101, AW 149, Black Hawk helicopters and two Saab 340 AEW&C early warning and command aircraft, among others. In parallel, the WIS- A and mala NAREW multilayered air and missile defence system is being built. Poland has also been receiving deliveries of elements of the Patriot kit integrated with the IBCS system since 2022. In 2023, companies from South Korea became one of the most important suppliers of defence equipment for the Polish army. These supplies included, among others, the purchase of FA 50 aircraft, K2 tanks and K9 self-propelled howitzers.

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LEGAL FRAMEWORK

Relevant legislation

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

Public procurement for defence and security goods, services or works contracts in Sweden is governed by:

- the Swedish Public Procurement Act (LOU), which incorporates the EU Public Procurement Directive (2014/24/EU) into Swedish law;
- the Swedish Act on Procurement in the Water, Energy, Transport and Postal Services Sectors, which incorporates the EU Directive (2014/25/EU) into Swedish law; and
- the Swedish Defence and Security Procurement Act (LUFS), which incorporates the EU Defence and Security Directive (DSPCR) (2009/81/EC) into Swedish law.

Furthermore, the Swedish Act on Procurement of Concessions, incorporating the EU Directive on the award of concession contracts (2014/23/EU), applies to concessions in the area of defence and security.

Where procurement of defence and security articles involves security-sensitive activities or information, the Swedish Protective Security Act provides for additional rules regarding, for instance, security clearance of the involved persons.

Identification

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

A defence and security procurement is defined in the LUFS as:

- military equipment, including any parts, components or subassemblies thereof;
- sensitive equipment, including any parts, components or subassemblies thereof;
- works, goods and services directly related to military or sensitive equipment; and
- works and services for specifically military purposes or sensitive works and sensitive services.

The value of the relevant contract must be equal to or greater than the EU financial threshold for goods and services and for works to fall within the scope of EU and national procurement law. The applicable thresholds, as at 1 January 2024, are €443,000 for goods and service contracts and €5,538,000 for works contracts. Contracts whose value is below these thresholds are not covered by the LUFS and the EU Defence and Security Directive.

The key differences between the defence and security procurement rules and the general procurement rules are the following.

- The procurement procedures. Only three of the five types of tender procedures as provided by LOU, are provided for by LUFS. The possible tender procedures under LUFS are restricted procedure, negotiated procedure (with or without a prior publication of a contract notice) and competitive dialogue.
- Setting of requirements by contracting authorities. LUFS contains specific provisions on the content of technical specifications, including the security of supply and information security. LUFS allows the contracting authority to set requirements for the security of supply and delivery to ensure the supply of essential products both during peace and in the event of a crisis such as war.
- Subcontracting. Pursuant to LUFS, contracting authorities may require contractors to subcontract a maximum of 30 per cent of the contract. Contracting authorities must then require the successful contractor to elect any subcontractors in an equal and non-discriminatory manner. Such successful contractors may have to expose the election of subcontractors to competition through the publication of a contract notice.
- Grounds for exclusion. The grounds for exclusion from a procurement procedure in LUFS has a slightly different wording compared to the grounds for exclusion in LOU. Further, LUFS does not specify any time limits for judgements or other events that constitute such misconduct that there are grounds for exclusion. Such time limits exist in LOU when a contracting authority wants to use a judgment or misconduct as a basis for exclusion of a contractor in a procurement procedure.

Conduct

3 | How are defence and security procurements typically conducted?

Three of the five types of tender procedures envisioned by the general public procurement rules, as laid down in the LOU, are provided for by LUFS. Under LUFS the following procedures are available for defence and security procurements:

- restricted procedure;
- negotiated procedure with or without a prior publication of a contract notice; and
- competitive dialogue.

The publication of a notice or a request for tenders is the usual start of the procedure, followed by the submission of documents showing the financial standing, technical capability and (where required) possession of security clearances by the candidates or tenderers. Such a pre-qualification phase may or may not be run jointly with the submission of technical and economic bids, with the most economically advantageous tender being the more frequent award criterion. However, contract terms and conditions are unilaterally drafted by contracting authorities and are almost invariably non-negotiable. As such, terms and conditions are advertised when soliciting requests for participation and bids, and often economic operators can only decide whether they are willing to accept them and submit an offer or whether they would rather not participate in the tender.

The evaluation process is undertaken on the basis of objective, transparent and non-discriminatory criteria. In particular, when the award follows a competitive bidding procedure, equality of treatment and transparency principles require that no substantial modification of the contract is permitted without a retender.

The Swedish Armed Forces, the Swedish Defence Materiel Administration, and the Swedish Fortifications Agency are responsible for central military procurement in Sweden.

Proposed changes

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

To date, there are no specific proposals to change the defence and security procurement process in Sweden.

Information technology

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

There are no specific or additional rules that relate to information technology goods and services. The procurement of information technology goods and services may fall under LUFS or LOU, depending on the subject matter of the contract.

Relevant treaties

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

The majority of defence and security procurements are conducted in accordance with the Agreement on Government Procurement, EU treaties or relevant EU directives. The number of contracts awarded based on the national security exemption is more limited, but it is not uncommon.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Disputes between the government and a defence contractor concerning the award procedure are reserved for administrative courts. Disputes between the government and a

successful defence contractor regarding matters of contract performance will be resolved in accordance with the dispute resolution procedure contained in the contract. Depending on the conditions, contracts can provide for a judicial or extrajudicial dispute resolution procedure (such as arbitration).

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

In publicly procured contracts, the main principle is generally that a judicial procedure in the general courts is selected to resolve disputes regarding matters of contract performance. However, as procurement in the defence and security sector often involves sensitive information, exemptions are sometimes made where alternative dispute resolution instead is agreed upon.

Indemnification

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

Under Swedish contract law, parties in B2B relationships are basically free to agree on the provisions of the contract as they see fit (the principle of freedom of contract). On the basis of this, any indemnification undertaking by the parties is included in the provisions of the contract.

Limits on liability

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

According to the Swedish principle of freedom of contract, parties are basically free to agree as they see fit in B2B relationships. As such, Swedish law will generally accept and uphold B2B/public sector contracts providing for exclusion or limitation of liability. However, it is generally held that a party may not contractually exclude or limit its liability for damage caused by its own wilful misconduct or gross negligence. There are no statutory or regulatory limits to the contractor's potential recovery against the government for breach. In accordance with the principle of freedom of contract, any limitation of liability is included in the provisions of the contract.

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

Generally speaking, there is no legal risk of non-payment. Swedish contracting authorities are bound by their contracts, as is the case for any private undertaking. Moreover, sufficient funds have to be achieved available before the contract is awarded.

Parent guarantee

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

According to the Swedish Defence and Security Procurement Act (LUFS), a contractor has a far-reaching right to rely on the capacity of other suppliers to show that it fulfils the financial requirements set by the contracting authority. This is, however, not a must for a contractor but rather a possibility. Pursuant to LUFS, a contractor may, where necessary and for a specific contract, rely on, for example, a parent company guarantee, provided that the parent company guarantee demonstrates that the contractor will dispose of the required resources when the contract shall be fulfilled.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

No. Under Swedish contract law, parties in B2B relationships are basically free to agree on the provisions of the contract as they see fit (the principle of freedom of contract). Consequently, there are no mandatory clauses that must be included in a defence procurement contract, and no clauses that will be implied specifically within defence procurement contracts. With that said, contracting authorities will often use standard draft contracts, which are set forth as an attachment to the contract notice, or the invitation to tender, which in practice often is non-negotiable.

Cost allocation

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

Cost allocation between the government and a contractor is usually defined by the contract itself, preferably through a fixed or firm price mechanism.

Disclosures

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

Cost and price assessments are common, with at least three main purposes.

Within a competitive tender procedure, they may be aimed at verifying whether a price or offer by a contractor is reliable and sustainable, and has not been the result of optimistic assumptions or underestimated costs (abnormally low tenders).

Within a non-competitive tender procedure, a cost analysis based on information disclosed by the prospective contractor is aimed at establishing the price for the works, goods and services to be purchased.

During the execution of a procurement contract, they may be aimed at establishing new prices for, for example, unforeseen additional goods and services required by the contracting authority and price adjustments required by unforeseen circumstances.

Audits

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

The Swedish Competition Authority is the supervisory authority for public procurement in Sweden, which means that it is responsible for monitoring that contracting authorities comply with the public procurement laws. The Swedish Competition Authority may initiate a supervisory case of contracting authorities in relation to their tender procedures and procurement contracts performance.

Additionally, contracting authorities should follow up on the requirements set during the procurement procedure and in the contract to verify the contractor's performance. This is not an explicit requirement for contracting authorities under Swedish law, but not verifying that the set requirements are complied with may be contrary to the principle of equal treatment and a transparent and objective procurement procedure.

IP rights

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

There are no statutory rules allocating intellectual property rights created during the performance of a defence and security procurement contract differently from any other procurement contract. The allocation of ownership rights to intellectual property is regulated by the contract. Unless there are specific provisions in the contract allocating the ownership rights to the contracting authority, the intellectual property will normally be owned by the contractor.

Economic zones

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

We are not aware of any such economic zones or programmes in Sweden.

Forming legal entities

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

There are various types of legal entities that may be formed in Sweden, of which the most common type is a limited company. To form a limited company in Sweden you must first draw up and issue a document referred to as the memorandum of association. The document must for instance state the share price, information about board members and a draft of the articles of association (which states the business activities, etc). Further, it is required that a payment for the shares is deposited (a minimum of 25,000 Swedish kronor for private limited companies and a minimum of 500,000 Swedish kronor for public limited companies). Lastly, you must apply to the Swedish Companies Registration Office for registration of a limited company. The application must be submitted no later than six months after the drawing up of the memorandum of association. Registration is usually completed within two weeks.

The use of the term joint venture in Sweden is consistent with its international definition. In Sweden, a joint venture can be set up and operated in different legal forms. It can also be formed by contractual agreement, without creating a new legal entity, where parties enter into a cooperation agreement.

Access to government records

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

As a rule, public contracts are not published or passed on to third parties. However, as a main principle, everyone has the right to request and obtain public information held by public authorities under the Swedish Act on Public Access to Information and Secrecy, in accordance with the Swedish principle of public access to official records. As an exemption from this principle, the Act contains rules according to which certain information in public contracts may be subject to secrecy. When receiving a request for access to public contracts, a contracting authority must therefore assess and decide on a case-by-case basis which information can and should be disclosed and which information cannot be disclosed as it is confidential. Where it is found that a public document contains confidential information, it should always be considered whether the document can still be disclosed, albeit in a redacted and masked format. As such, public defence and security contracts can be requested, but they will most likely be redacted if they are disclosed.

Supply chain management

21

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

Eligibility of suppliers in defence and procurement is subject to the criteria provided by the Swedish Defence and Security Procurement Act, Swedish Public Procurement Act and the EU procurement directives. Contractors convicted, or contractors having representatives which have been convicted, of particular crimes, including terrorism, fraud, bribery and money laundering will be excluded from the evaluation and can therefore generally not participate in public tenders. Each bidder must be suitable for the award. For this purpose, the contracting authority specifies so-called suitability criteria in each invitation to tender to select eligible suppliers, including financial, technical and professional requirements proportionate to the public tender subject matter. Similar rules apply also to subcontractors. Technical and professional requirements may also refer to the supply chain characteristics.

LUFS allows the contracting authority to impose requirements on a case-by-case basis to ensure the security of supply for the duration of the contract and in the event of a crisis such as war.

INTERNATIONAL TRADE RULES

Export controls

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

The Swedish export control framework consists of the Military Equipment Act and the Military Equipment Ordinance, according to which the production and trade of defence and security articles are subject to specific authorisation. Additionally, the export of defence and security articles are only allowed where it does not conflict with the Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (the Common Position), the accompanying list of military equipment covered by such a Common Position (the Common Military List) and the Arms Trade Treaty.

Pursuant to the EU Dual-Use Regulation ((EU) 2021/821) governing the export of military and dual-use items, Sweden has introduced the Swedish Dual-Use Items and Technical Assistance Control Act and the Swedish Regulation on the Control of Dual-Use Items and Technical Assistance. This national legislation relates to the provision of export licences and penalties in the event of non-compliance as well as specific Swedish licences and requirements relating to non-controlled items.

Sweden does not maintain national controlled items lists that differ from the Common Military List and the Annexes to the EU Dual-Use Regulation.

The Swedish Inspectorate of Strategic Products, which answers to the Swedish Ministry for Foreign Affairs, is the competent authority in Sweden for export control purposes and is responsible for the issuing of export licences. In practice, Sweden's customs and law enforcement agencies are responsible for policing and enforcement.

Domestic preferences

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

Swedish public procurement laws do not provide any domestic preferences rules. However, as in other countries where such rules do not apply, it is not uncommon that contracts are directly awarded to national contractors.

Yes, a foreign contractor can bid directly as any interested company can participate in a procurement procedure. This applies to Swedish companies and companies from other EU member states as well as companies from non-EU countries. However, on a case-by-case basis and due to the prominence of security and confidentiality concerns in defence and security matters, it may be more difficult for contractors from non-EU countries to win tendering procedures. Further, in the case of contracts awarded in the field of defence and security, the contracting authority may in certain cases restrict the group of bidders on the basis of security relevance.

Favourable treatment

24 Are certain treaty partners treated more favourably?

European and national public procurement laws prohibit favourable treatment due to certain national or treaty statutes.

Sanctions

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

Sweden adheres to the United Nations and EU boycotts, embargoes and other trade sanctions and does not have any of its own nationally adopted sanctions. In Sweden, the Act on Certain International Sanctions implements EU sanctions and provides for the relevant penalties in view of non-compliance with the relevant EU sanctions regimes.

The countries against which sanctions are currently in place are listed here. Alternatively, the current embargo measures are presented on the EU Sanctions Map, available here.

Trade offsets

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

Offsets are not part of Sweden's defence and security procurement regime, since they are generally incompatible with the procurement law principles of equal treatment and transparency.

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

In Sweden, there is a special Act on Public Officials Transitioning to Non-State Activities which concerns restrictions in the event of ministers and state secretaries transitioning to non-state activities. Where that is the case, the Act provides that a transitional restriction in the form of a waiting period can be issued for a maximum of 12 months. A similar Act is also in place for the Swedish national auditor general.

Other than set forth above, there are no specifically regulated waiting periods for transferring from the government service to the private sector. But the participation in procurement procedures of persons who change from a contracting authority to a bidder and who have prior knowledge of the specific award procedure could breach business secrets. The former government employee must comply with the confidentiality requirements, which in particular is a question of Swedish labour law.

In special cases, where decision-makers change its place of work from a bidder to the contracting authority and have a financial, economic or personal interest in the outcome of the procedure, a conflict of interest may arise for the contracting authority.

Addressing corruption

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

Corruption is punishable under different sections of the Swedish Penal Code. Bribery is a criminal offence punishable by fines and imprisonment. Bribes can take the form of monetary payments or any other undue advantage, which must be assessed on a case-by-case basis. Giving, promising or offering to give a bribe is an offence, as is receiving, accepting the promise of or requesting a bribe. Only natural persons can be convicted of bribery in Sweden, but a company can be liable to pay a penalty if the company cannot prove that it has taken sufficient measures to prevent bribery.

Under Swedish law there is no distinction between bribery of domestic or foreign public officials or between bribery of public officials and private bribery (ie, between actors in the private sector). However, case law in Sweden has demonstrated several times that employees or contractors in the public sector are subject to stricter requirements than private employees or contractors.

The Swedish Defence and Security Procurement Act and Swedish Public Procurement Act provide for sanctions for contractors who (or whose management or supervisory board members) have been found guilty of corruption by a final court judgement. Such contractors must be excluded from procurement procedures.

Lobbyists

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

There are no such registration requirements under Swedish law.

Limitations on agents

30 | Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Under Swedish law, there are no formal limitations on the use of agents or representatives. However, even if this is the case, the use of agents or representatives are at the same time not explicitly mentioned in the procurement legislation, which can lead to practical difficulties. In the public procurement sector, it is uncommon to use success-fee-based agents and intermediaries in a way that is comparable to other markets.

AVIATION

Conversion of aircraft

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

While civil aircraft airworthiness is harmonised throughout the EU, subject to the EU Regulation ((EC) 2018/1139) and the European Union Aviation Safety Agency policing, regulation of the airworthiness of military aircraft is largely left to each member state. To our knowledge, aircrafts for military or civil use are generally not converted in Sweden.

Drones

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

The manufacturing and trade of unmanned aircraft systems and drones has been harmonised at EU level by the EU Regulations ((EU) 2019/947) and ((EU) 2019/945). In addition to these regulations, there are currently no additional restrictions under Swedish law relating to the manufacture and trade of unmanned aircraft systems or drones. Under

Swedish law, there are currently only various restrictions relating to the usage of civil drones such as permit requirements and directions of where it is lawful to fly.

Civil drones will often be considered as dual-use goods and therefore also be subject to export control pursuant to the EU Dual-Use Regulation ((EU) 2021/821). Drones for military use is subject to export control rules and require a licence to be exported from Sweden.

MISCELLANEOUS

Employment law

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

Foreign defence contractors must adhere to Swedish labour and employment regulations if they permanently operate in Sweden, or post employees in Sweden. These regulations for instance include provisions regarding hiring and laying off employees, minimum wages, vacation, non-discrimination, working conditions, working environment, working safety measures etc. What rules will apply mainly depends on whether the employees are Swedish citizens or not, if the employees have residence permits or if they are only temporarily posted in Sweden.

Contracting authorities may, on a case-by-case basis, impose certain labour law requirements as part of the suitability criteria in the tendering procedure.

Defence contract rules

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

The answers above provide the details of the laws and regulations applicable to the defence contracting authorities and contractors, most notably the Swedish Defence and Security Procurement Act (LUFS).

For a secure transmission of data and the secrecy of sensitive procurement documents, increased requirements apply in the defence sector pursuant to LUFS. It may be necessary to exchange data or files with bidders or candidates that must be kept secret and therefore require a particularly high level of protection.

Additionally, in case of tenders in the security and defence sector, the security measures may also include that all persons involved in the project are subject to a security clearance in accordance with the Swedish Protective Security Act.

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

Rules on defence contracts still apply even if the contractor performs its work outside Sweden.

Personal information

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

Yes. When participating in a tender or submitting a bid for entering into a public contract, directors, officers, sole shareholders or majority shareholders and even certain employees have to provide personal information, such as name, date and place of birth. This is the case where the contracting authority has reasonable grounds to believe that the contractor should be excluded from the evaluation on the basis that the contractor's representatives have been convicted of particular crimes.

Furthermore, if contracts entail handling of or access to security-sensitive information or items, security clearances need to be obtained through a process that requires disclosing of personal information to the contracting authority.

Licensing requirements

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

There are no specific registration or licensing requirements to operate in the defence and security sector in Sweden.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

In Sweden, there are no specific environmental statutes or regulations for defence and security contractors. Defence contractors will face different general environmental statutes or regulations depending on their operations, or the products or services that they provide.

The contracting authority may require tenderers to comply with certain standards for environmental management and prove this by presenting certificates issued by independent organisations. The contracting authorities refer either to the Community eco-management and audit scheme (Emas) or environmental management standards based on the relevant European or international standards and certified by bodies conforming to Community legislation or European or international certification standards. Equivalent certificates issued by organisations in other member states shall also be recognised.

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

There are no specific environmental targets for defence and security contractors. However, the contracting authority may decide to include environmental objectives in a public procurement procedure either as performance requirements in the form of technical specifications, at the suitability test level as a requirement to meet specific environmental management standards relevant to the specific contract, or as an award criterion. In addition, it is also possible to include such criteria in the additional conditions for the performance of the contract.

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

The contracting authorities may include environmental parameters in the procurements for the evaluation of tenders, provided that they are related to the subject matter of the contract or to its conditions of execution. If such a requirement is included in the terms of reference, then the contractor offering, for example, products compatible with such requirement may obtain an advantage.

UPDATE AND TRENDS

Key developments of the past year

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

Sweden is currently carrying out a comprehensive upgrade of its defence. As such major investment in the defence and security sector is expected, including the procurement of defence equipment, defence real estate and other property required for expanding and upgrading the military defence of Sweden.

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UPDATE AND TRENDS

Key developments of the past year

LEGAL FRAMEWORK

Relevant legislation

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

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

The Procurement Act 2023 received Royal Assent on 26 October 2023. Once effective, it will introduce a new public procurement regime. Although the Act has been enacted, its substantive provisions are not yet in force and the new regime will be effective on the date the UK government specifies in secondary legislation. In a June 2023 consultation, the UK government stated that it expects the new regime to be implemented in October 2024 and there would be a minimum of six months' notice.

The Single Source Contract Regulations 2014 (SSCRs) apply when the Ministry of Defence (MoD) awards qualifying defence contracts with a value of over £5 million without any competition. They are intended to ensure value for money is achieved even in the absence of competitive procurement. The Procurement Act 2023 will implement some reforms to the SSCRs.

Identification

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

A procurement by a UK contracting authority (such as the MoD) falls within the scope of the DSPCR when the contract has a value above the financial threshold of £426,955 for goods and services or £5,336,937 for works, and is for:

- military equipment and directly related goods, services, work and works;
- sensitive equipment (ie, equipment for security purposes involving, requiring or containing classified information) and directly related goods, services, work and works;
- work, works and services for a specifically military purpose; or

- sensitive work or works and sensitive services.

The procurement will be advertised on Find a Tender (which has replaced the Official Journal of the European Union in the United Kingdom for procurements launched after 31 December 2020) as a procurement under the DSPCR. The MoD also uses the Defence Sourcing Portal to advertise its contract opportunities.

The key differences for procurements carried out under the specific defence rules are the mechanisms put in place to protect sensitive information and to ensure defence and security interests are protected. For example, there are specific provisions that are intended to protect sensitive information throughout the supply chain, to ensure security of supply and to give the courts flexibility to consider defence and security interests when considering remedies.

Where a procurement falls outside the scope of the DSPCR, it will be governed by the usual civil procurement rules, with a lower threshold of about £138,760 for goods and services contracts procured by central government departments (or £213,477 for sub-central authorities) and £5,336,937 for works contracts.

Conduct

3 | How are defence and security procurements typically conducted?

There are three different procurement procedures under the DSPCR and five different procedures under the normal civil rules. Where the rules are triggered, a formal procurement process is initiated by the publication of a Contract Notice on Find a Tender. Most procurement procedures involve a pre-qualification process, as part of which bidders must demonstrate their financial stability and technical capability, including experience in similar contracts. The way that the procurement proceeds will depend on whether the authority has chosen a procedure that permits them to discuss the contract and requirements with the bidders (negotiated procedure with an advert, the competitive dialogue procedure or, under the civil rules only, innovation partnership) or not (restricted procedure or, under the civil rules only, the open procedure). It is increasingly common for negotiations on a contract to be limited, with many of the contract terms being identified as non-negotiable.

The evaluation process is undertaken on the basis of transparent award criteria and weightings, which are provided to bidders in advance within the tender documents. Once the winning bidder is selected, there is relatively little scope for further negotiation (although, in practice, some negotiation is common).

Proposed changes

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

The Procurement Act 2023 received Royal Assent on 26 October 2023. Once effective, it will introduce a new public procurement regime. Although the Act has been enacted, its substantive provisions are not yet in force and the new regime will be effective on the date the UK government specifies in secondary legislation. In a June 2023 consultation, the UK government stated that it expects the new regime to be implemented in October 2024 and there would be a minimum of six months' notice.

With respect to the SSCRs, the government published a Command Paper on 4 April 2022 (Defence and Security Industrial Strategy: Reform of the Single Source Contract Regulations), which sets out various proposed changes. These include greater choice and flexibility in procurement, a quicker and simpler procurement process, the promotion of innovation and various technical changes to address problems encountered with the SSCRs in the past eight years. Primary legislation has been enacted through the Procurement Act 2023, which amends the Defence Reform Act 2014. A consultation has recently taken place on amendments to the SSCRs that states that the MOD proposes two tranches of secondary legislation to amend the SSCRs. The first tranche is expected to bring in reforms to support the delivery of the Defence and Security Industrial Strategy, including more flexibility in the pricing of contracts. The expected time frame is for this first tranche to come into force in April 2024. The second tranche will likely focus on reporting and technical changes proposed in the Command Paper.

Information technology

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

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

Relevant treaties

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

The majority of defence and security procurements are conducted in accordance with the Government Procurement Agreement or European Union treaties, but a minority of contracts are still awarded in the context of national security and other exemptions. The MoD published a five-year review of the application of the DSPCR in December 2016. It shows that 25 per cent of its contracts were considered exempt from the normal requirement to compete openly, mostly in reliance on the national security exemption contained in article 346 of the Treaty on the Functioning of the European Union (the terms of which have been imported into the DSPCR through amendments to the regulations). However, it highlighted that there were also other exemptions relied upon, for example, an exemption relating to government-to-government sales. It also shows that since the

introduction of the DSPCR there has been a decline in reliance on these exemptions – from 55 per cent to 25 per cent.

DISPUTES AND RISK ALLOCATION

Dispute resolution

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

Disputes between the government and a defence contractor regarding matters of contract performance will be resolved in accordance with the dispute resolution procedure contained in the contract. It is common for a defence contract to incorporate MoD defence condition (DEFCON) 530, which provides for disputes to be resolved by way of confidential arbitration in accordance with the Arbitration Act 1996.

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

Where the Single Source Contract Regulations 2014 apply, either of the disputing parties may request that the Single Source Regulations Office makes a binding determination in certain circumstances. This determination will take precedence over any contractual dispute resolution procedure. The Procurement Act 2023 looks to reform the SSCRs by widening the range of subjects possible to refer to the SSRO for binding determination.

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

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

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

Indemnification

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

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

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

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

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

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

Some DEFCONs contain indemnities relating to these issues.

Limits on liability

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

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

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

Risk of non-payment

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

There is a risk of non-payment, as with all customers. However, the MoD's policy, even if procuring under the DSPCR, is to comply with Regulation 113 of the Public Contracts Regulations 2015, which requires public-sector buyers to pay prime contractors (Tier 1 suppliers) undisputed, valid invoices within 30 days. Generally, the risk of non-payment of a valid undisputed invoice by the MoD is perceived to be very low.

Parent guarantee

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

The government should specify in its initial tender documentation whether it may require a parent company guarantee (PCG). If it is not specified in that documentation, the government should not, in theory, be able to ask for one later in the contract-award process. The government will assess a bidder's financial position during the qualification stage and determine whether it believes the company has the economic and financial capacity to deliver and perform the contract. If it does not believe that this is the case (eg, if a bidder is a special purpose vehicle set up specifically for a contract) then when the successful bidder is chosen, the government will determine whether a PCG is required. The MoD's standard-form PCG is set out in Defence Form (DEFFORM) 24.

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

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

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

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

a particular DEFCON is relevant to the subject matter of a contract, the MoD will typically seek to include that DEFCON.

The Procurement Act 2023 contains various terms that would be implied into public contracts, for example, on payment terms and rights to terminate. Although the Act has been enacted, its substantive provisions are not yet in force and the new regime will be effective on the date the UK government specifies in secondary legislation.

Cost allocation

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

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

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

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

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

The Procurement Act 2023 will implement some reform to the pricing methods in the SSCRs, including new ways of determining a fair price for goods and services instead of the pricing formula, simplifying the six-step profit process and broadening the scope of the cost risk adjustment.

Disclosures

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

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

single source contracts above £1 million that are not qualifying contracts under the SSCR, then the MoD will seek to incorporate DEFCON 812 (single source open book) into the contract.

Under the SSCRs, there are statutory reporting requirements where the contractor is required to report on the costs that it will incur or has incurred in performing the contract. Particularly relevant to contract cost and pricing is the 'contract pricing statement', which is settled on contract signature and sets out the cost information on which the price is agreed. Other reports are also required to be delivered regularly throughout the term of the contract (and at the end), which provide information on the costs actually incurred as the contract progresses.

The Procurement Act 2023 will look to simplify reporting requirements in the SSCRs, focusing only on the information MoD needs.

Audits

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

Where the SSCRs do not apply, the MoD will not have a statutory audit right but will be reliant on the open book or audit contractual provisions negotiated into the contract.

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

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

IP rights

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

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

This is achieved through the inclusion of IP-related DEFCONs in the contract. A new IP DEFCON 707 was published on 1 April 2022 and applies to technical data generated or delivered under the contract. While the contractor still owns the IP generated, the licence rights granted to MoD are broader in order to enable MoD to competitively procure future modification and upgrade work.

MoD policy does specify certain scenarios when it expects that it should own the new IP created by the contractor but, in such cases, the MoD will not unreasonably prevent the contractor from using the skills and expertise developed in carrying out the work, only requiring a charge for its internal business purposes.

Economic zones

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

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

Forming legal entities

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

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

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

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

Access to government records

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

Under the Freedom of Information Act 2000, there is a general right for the public to access information held by public bodies. As the MoD is a public body, on the face of it this right

would extend to contracts and records held by the MoD allowing people to request these documents.

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

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

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

The UK government has a policy around transparency in public service that drives a general presumption in favour of disclosing information. The document 'The Transparency of Suppliers and Government to the Public' provides a statement of the expectations on government and its suppliers in meeting these aims.

Copies of contracts are therefore frequently made publicly available on UK Gov website with certain categories of information redacted on grounds of commercial confidentiality (pricing, IP, business plans).

Supply chain management

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

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

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

INTERNATIONAL TRADE RULES

Export controls

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

The fundamental UK legislation implementing export controls is the Export Control Act 2002. The Act provides authority for the UK government to extend the export controls set forth in the Act through secondary legislation. The main piece of secondary legislation under the Act is Export Control Order 2008, as amended from time to time, and the EU Dual-Use Regulation 428/2009 having been transposed by the Trade etc in Dual-Use Items and Firearms etc (Amendment) (EU Exit) Regulations 2019 into national UK law as a 'retained' EU regulation that controls the trade and exports of listed military and dual-use items (ie, goods, software and technology that can be used for both civilian and military applications). The military and dual-use items captured by the Order are known as 'controlled goods' as trading in them is permitted as long as, where appropriate, a licence has been obtained. Licences are administered by the UK Export Control Joint Unit (ECJU) within the Department for International Trade (DIT). The UK's HM Revenue & Customs, Border Force and Crown Prosecution Service are responsible for enforcing the legislation.

Domestic preferences

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

If the Defence and Security Public Contracts Regulations 2011 (DSPCR) applies, there is no scope for domestic preferences. However, where article 346 of the Treaty on the Functioning of the European Union (the terms of which have been imported into the DSPCR through amendments to the regulations) has been relied upon to disapply the DSPCR, contracts were commonly awarded to national suppliers.

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

The Procurement Act 2023 includes arrangements for the direct award of contracts (without competition). This includes exemption from the procurement regime where there are national security grounds to do so.

Favourable treatment

24 Are certain treaty partners treated more favourably?

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

Sanctions

25

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

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

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

Trade offsets

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

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

ETHICS AND ANTI-CORRUPTION

Private sector appointments

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

Civil servants, including those employed by the Ministry of Defence (MoD), wishing to take up an appointment in the private sector are bound by the Business Appointment Rules (the Rules). The purpose of the Rules is to prevent former civil servants and ministers from profiting from their knowledge and contacts, prevent employers from making improper use of official information to which a former civil servant or minister has had access to, and to prevent any perception of wrongdoing. The Rules are administered by the Advisory Committee on Business Appointments (ACoBA).

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

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

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

In December 2022, the Public Administration and Constitutional Affairs Select Committee (PACAC) recommended that ACoBA should be put on a statutory basis and that the Rules should become legally enforceable.

The government published their plans for reform of the Rules on 20 July 2023. The Rules have not yet changed but consultations will take place and the government has agreed to make 'fundamental reforms'. For instance, one government proposal includes introducing clauses in the contracts of employment for civil servants stating clearly what can and cannot be done on leaving public office. This is intended to provide more scope for sanctions in the event of breaches of the Rules.

Private sector employees are not subject to any specific regulations governing the commencement of employment by the government. They may, however, be subject to specific restrictions detailed in their employment contracts and should be mindful of any potential conflict of interest.

In addition, persons wishing to take up a role as a senior civil servant (whether public or private sector employees at the time) will need to comply with the Civil Service Nationality Rules, which place restrictions on which nationals may take up particular roles. Only UK nationals may be employed in 'reserved posts'; these being posts involving sensitive work that is deemed to require special allegiance to the Crown. Candidates for senior civil service roles may also need to undergo enhanced national security vetting.

Addressing corruption

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

The Bribery Act 2010 criminalises domestic and overseas bribery in the private and public sectors. It also provides for the corporate offence of failing to prevent bribery.

Giving, offering or agreeing to give a bribe is an offence, as is accepting, asking for or agreeing to accept a bribe. The bribe may be anything of value, whether monetary or otherwise, provided it is intended to influence or reward improper behaviour where the recipient performs public or business functions and is subject to a duty of trust or good faith. When the recipient is a foreign public official, the impropriety requirement does not apply.

Commercial organisations are strictly liable for any primary bribery offences (except receipt of a bribe) committed by anyone performing services on behalf of the organisation. This almost invariably includes employees, agents, intermediaries and other service providers. The organisation has a defence if it has ‘adequate procedures’ in place to prevent bribery.

The Ministry of Justice has issued guidance on what is 'adequate', identifying six principles of bribery prevention:

- risk assessment;
- proportionate procedures;
- due diligence;
- communication and training;
- top-level commitment; and
- monitoring and review.

Prosecution of bribery offences is handled by the Director of Public Prosecutions (DPP) or the Serious Fraud Office in line with the joint prosecution guidance on the Bribery Act 2010, issued in 2019 by the Director of the Serious Fraud Office and the DPP.

The Economic Crime and Corporate Transparency Act 2023 became law on 26 October 2023. This Act will introduce, at a date to be determined, a new criminal offence for 'large organisations' that fail to prevent employees or agents committing fraud to the benefit of the organisation, unless the organisation can prove that it had 'reasonable procedures' in place to prevent fraud. Guidance on what is 'reasonable' must be issued before the offence comes into force.

This offence only applies to commercial organisations that meet two of the three following criteria: (1) the number of employees exceeds 250; (2) annual turnover exceeds £36 million; or (3) balance sheet total exceeds £18 million.

Lobbyists

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

The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 requires that anyone in the business of consultant lobbying be registered with the Registrar of Consultant Lobbyists. Consultant lobbying includes any personal oral or written communication to a Minister of the Crown or permanent secretary relating to any contract or other agreement or the exercise of any other function of the government, including proposals to amend legislation, where such communications are made in the course of business and in return for payment from the person(s) for whom the lobbyist is acting. Such a business must then record details of the company and its directors, of any code of conduct that it adopts and, on a quarterly basis, the names of any entities on whose behalf it has actually submitted any communications, or from whom it has received payment for consultant lobbying activity.

Limitations on agents

30 | Are there limitations on the use of agents or representatives that earn a commission on the transaction?

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

A supplier who appoints an agent within the terms of the Commercial Agents' (Council Directive) Regulations 1993 to develop its presence in a given market may be obliged to pay additional compensation on termination. Otherwise, the 1993 Regulations do not prescribe any maximum or minimum level of remuneration.

AVIATION

Conversion of aircraft

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

Civil aircraft may not fly in the United Kingdom unless they comply with the airworthiness regime established pursuant to Regulation (EU) 2018/1139 and now followed in the United Kingdom as assimilated law (known, prior to the end of 2023, as retained EU law). Regulation (EU) 2018/1139 ordinarily requires a certification process in accordance with specifications originally promulgated by the European Union Aviation Safety Agency (EASA). Annex I to Regulation (EU) 2018/1139 does not apply to ex-military aircraft unless the Civil Aviation Authority (CAA) has adopted a design standard for the type in question. Most military aircraft are designed in accordance with a certification basis that is very different from the civil requirements, so the process of civil certification is often prohibitive. In that event, the CAA may issue a 'permit to fly' under the Air Navigation Order 2016 if satisfied that the aircraft is fit to fly with regard to its overall design, construction and maintenance. Ordinarily, such aircraft are unable to conduct commercial air transport operations or to fly outside the United Kingdom. Details governing operations are contained in Civil Aviation Publication 632 and maintenance standards in British Civil Airworthiness Requirements Chapters A8-23 and A8-25, all available from the CAA.

The UK Military Aviation Authority regulates the certification and maintenance of military aircraft. Since 2010, military processes have been more closely based on the civil airworthiness philosophy than previously, but this is documented and administered separately from the civil process. Accordingly, a similar process is necessary if someone wishes to convert a civilian aircraft for military purposes, whereby the original certification must be revalidated in accordance with military standards.

Drones

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

For all practical purposes, the UK has always had full jurisdiction over civil drones, except those over 150 kilograms, which were subject to EASA control. Since 31 December 2020, the Commission implementing Regulation and Delegated Regulation governing design, production, operation and maintenance adopted by the European Commission have applied, as a package, in the UK subject to various amendments from the EASA form they now apply in the United Kingdom as assimilated law.

These regulations establish three categories of UAS operation: open, specific and certified. They concentrate on the details applicable to the open and specific categories. The Implementing Regulation contains rules and procedures for the operation of unmanned aircraft, including an Annex on UAS operations in the 'open' and 'specific' categories. The Delegated Regulation prescribes product criteria for UAS for open category use, limits marketing of UAS that do not meet those criteria, and governs third-country operators of UAS.

In the United Kingdom, the normal provisions of the Air Navigation Order on certification and the role of the CAA are disapplied for UAS operated within the open or specific categories. The United Kingdom had already introduced registration and competency requirements in a manner designed to comply with the anticipated EU regulations, and these have now been superseded by the requirements in the assimilated Implementing Regulation.

The process for the certified category is expected to borrow heavily from existing manned aircraft standards. Published regulations relating to the certified category are still awaited in the UK.

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

MISCELLANEOUS

Employment law

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

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

-

the right not to be unfairly dismissed (provided that the employee has two years of service);

- protection from discrimination and from suffering detriments or being dismissed for whistle-blowing (from day one of employment);
- rights to the national minimum wage, a minimum amount of paid holiday and statutory redundancy payment, where applicable;
- certain maternity and parental rights; and
- rules relating to working hours.

Much UK employment law is EU derived. The Retained EU Law (Revocation and Reform Act) 2023 received Royal Assent on 29 June 2023 and comes into effect on 1 January 2024. This offers some clarity on the status of such laws as it preserves all EU-derived domestic legislation into 'assimilated EU law'. There is new legislation in the pipeline relating to UK employment laws and reform is expected in 2024/2025.

Defence contract rules

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

The answers above provide the detail of the laws, regulations and policies applicable to the Ministry of Defence (MoD) and defence contractors, most notably the Defence and Security Public Contracts Regulations 2011 (DSPCR) (soon to be replaced by the Procurement Act 2023) and the Single Source Contract Regulations 2014.

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

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

Personal information

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

Companies will be asked to provide information about their directors and certain other employees as part of the pre-qualification questionnaire process, and will usually be required to sign a 'Statement Relating to Good Standing' certifying that directors and certain other personnel have not been convicted of particular offences.

An awarded contract (or security aspects letter) may require directors or employees to submit to security clearance – so employees' personal information would need to be provided to the MoD in that scenario so that relevant checks could be carried out.

Licensing requirements

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

There are no specific licensing or registration requirements to operate in the defence and security sector in the United Kingdom.

The MoD may impose security requirements, but this is done by treating projects on a case-by-case basis and stipulating certain requirements depending on the nature of the particular project and its degree of sensitivity. Those requirements will typically be included in a security aspects letter that will bind the contractor upon contract award. For contracts that require a contractor to hold government information classified at 'secret' level or above, the contractor may be required to obtain a facility security clearance, previously known as a 'List X' clearance and now known as 'FSC clearance'.

Environmental legislation

38 What environmental statutes or regulations must contractors comply with?

Contractors producing or supplying goods and services in, or importing them into, the United Kingdom will face different environmental legislation depending on their operations, product or service. Contractors could face regulations encompassing, inter alia, air emissions, water discharges, water pollution, noise and waste disposal, including responsibility for electrical waste, electronic equipment and restrictions on hazardous substances in such equipment. Applicable requirements may also cover energy efficiency, carbon emissions and energy consumption targets and reporting obligations (eg, the Energy Savings and Opportunity Scheme and the Streamlined Energy and Carbon Reporting Regime). Contractors involved with nuclear substances are subject to a separate or additional set of environmental obligations as well as strict nuclear waste disposal restrictions. In addition, from April 2022, the largest UK-listed companies and private companies above a certain threshold in terms of numbers of employees and financial turnover will be required to report on climate-related risks and opportunities under the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022. Finally, in some circumstances, there are exemptions, and derogations from, or disapplications of, environmental legislation for defence and military operations.

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

of preservation of all EU-derived domestic legislation into ‘assimilated EU law’. While this offers some clarity around the status of EU law in the UK post-Brexit, we still expect some uncertainty to remain given it ends the supremacy of EU law on 31 December 2023 and removes all directly effective EU rights unless active steps are taken. It also encourages the Court of Appeal and Supreme Court to depart from EU-based case law.

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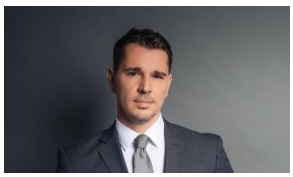

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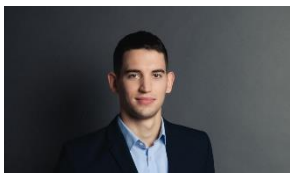

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Thank you

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